

Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project

KHRP

Celebrating 15 Years 1992-2007

(2008) 14 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
COE	Council of Europe
Convention (The)	The European Convention for the Protection of Human Rights and Fundamental Freedoms
Court (The)	The European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The European Court of Justice
ECtHR	The European Court of Human Rights
EU	The European Union
HRA	Human Rights Act 1998
ICJ	International Court of Justice
UN	United Nations
UNCAT	United Nations Convention Against Torture
UNFICYP	United Nations Peacekeeping Force in Cyprus

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

Special 15th Anniversary Feature

Looking Back on a Decade and a Half of KHRP Litigation

Since its founding in 1992, KHRP has been working as an advocate for individuals who have suffered human rights violations in the Kurdish regions, as well as their vehicle for justice. By drawing on the expertise of our Legal Team, we have provided individuals who have been neglected by their own governments with a voice at the international level. This has included working with local human rights organizations, bar associations, journalists, activists and politicians, who often put themselves at legal and physical risk to provide the information necessary in order to utilize international legal mechanisms. KHRP's independence has allowed it to establish itself as a neutral, fair organization, highly regarded for its successful advocacy for the protection of human rights.

Beyond helping individual applicants to secure justice, KHRP's work in relation to international legal mechanisms such as the European Court of Human Rights (ECtHR) has also served to effect systematic change. Cases mounted by the organization have often impacted how the ECtHR interprets international law and have set new precedents, resulting in greater protection not only for those living in the Kurdish regions, but also for all individuals who are affected by the Court's findings. KHRP has had substantial impact on human rights laws relating to the death penalty¹, disappearances², unfair trial³, and the rights of citizens to fair and free elections.⁴

The first KHRP-assisted cases brought before the ECtHR in 1996 reached successful judgments. In *Akdivar v. Turkey*, KHRP exposed the trend of forced displacement and disappearances conducted by, or with the permission of, the Turkish Government. In addition, by finding the government responsible for violations of the right to family and private life and the right to the protection of property, the Court drew the line between acceptable and unacceptable counter-terrorism responses. Also importantly, the case marked the first time that the Turkish authorities were forced to allow the Kurdish language to be spoken in a courtroom.

Aksoy v. Turkey represented a landmark judgment in the prohibition of torture. The case focused on Zeki Aksoy, who was shot dead in April 1994, after receiving death threats for submitting his application to the European Commission on Human Rights complaining of torture while in detention in 1992. His father, with the help of KHRP, then took his case to the ECtHR. The Court found that Turkish security forces were responsible for the torture of Zeki Aksoy while he was in detention in 1992. He had been subjected to 'Palestinian hangings,' beatings at regular intervals

1 In *Öcalan v. Turkey*, the ECtHR found that the death penalty constitutes cruel and inhuman treatment. This judgment is widely regarded as the main catalyst in Turkey's abolition of the death penalty.

2 In *İpek v. Turkey*, the Court found Turkey responsible for violating the right to life (Article 2) by failing to investigate the disappearance of the applicant's sons, and for being involved in their death, as they were last seen with the police.

3 In *Çaplık v. Turkey*, the Court found that the presence of military personnel on the panel of judges constituted a violation of Çaplık's right to a fair trial.

4 In *Sadak and Others v. Turkey*, the Court ruled that the imprisonment of Leyla Zana and other pro-Kurdish members of Parliament and the closure of the pro-Kurdish DEP and HEP political parties violated the right to free and fair elections under Article 3 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms (ECHR).

over four days, electric shocks and being hosed with pressurized water. As a result, he had lost the use of both his arms.

Another groundbreaking case in the prohibition of torture was *Aydın v. Turkey*. The Court found Turkey in breach of Articles 3 and 13 of the European Convention, thereby establishing for the first time that rape amounted to a form of torture. Prior to this judgment, rape was categorized as merely a criminal act in many countries, despite its systematic use in times of conflict. The European Commission on Human Rights stated that, 'rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim's physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering.'⁵

In the case of *Özgür Gündem v. Turkey* in 2000, the Court stated for the first time that the State has an obligation to protect freedom of expression itself. *Özgür Gündem* was a successful newspaper published in Istanbul between 1990 and 1992 that, because of its pro-Kurdish leaning, was the target of attacks and harassment by the government and by non-state actors, to which the government turned a blind eye. These incidents included arson attacks, a disappearance, threats and intimidation, and seven cases of 'unknown perpetrator killings' of the newspaper's staff and distributors. The Court found that the prosecutions against the newspaper staff and restrictions on the newspaper's content were not necessary in a democratic society and therefore represented a breach of Article 10. Significantly, KHRP was able to promote a culture of human rights by fortifying the role of the media as well as reducing State impunity by ensuring that the media would be able to continue calling attention to the government's failures.

KHRP-assisted cases have also helped to foster examination of the procedures of the European Court of Human Rights itself and have helped to bring about concrete reform in this regard. In the 2001 case of *Akman v. Turkey*, the Court for the first time 'struck out' a right to life case against the will of the applicant. The case was at the forefront of the debate over the Court's use of the controversial 'strike out' procedure. Later on, in the KHRP case of *Acar v. Turkey*, a Grand Chamber of the Court set limits on the use of the 'strike out' procedure and held that the State, in a disappearance case, must admit to an inadequate investigation and undertake a new one.

In the 2003 case of *Öcalan v. Turkey*, the ECtHR accepted KHRP's argument that the arrest and detention conditions of Abdullah Öcalan were unlawful and that the death penalty represented an unjust punishment. The death sentence against Öcalan was subsequently commuted to life imprisonment. The ECtHR judgment represented a major step forward in the advancement towards the abolition of capital punishment and is widely considered to have been the catalyst in Turkey's abolition of the death penalty.

In 2004, *Issa and Others v. Turkey* and *İpek v. Turkey* again represented important rulings by the Court in cases brought by KHRP. In *Issa and Others v. Turkey*, the Court's ruling had major

5 *Aydın v. Turkey*. 57/1996/676/866. Council of Europe: European Court of Human Rights. 25 September 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b7228.html> (last accessed 5 December 2008).

significance for the interpretation and application of the ECHR, particularly where issues of extra-territorial jurisdiction arose. In *İpek v. Turkey*, the Court found that there had been procedural and substantive breaches of the right to life (Article 2) since the applicant had not heard anything from or about his sons for over nine years. It concluded that since the government had no explanation for what happened to the sons after their apprehension by security forces, it was liable for their deaths. The Court also emphasized that when a State has not conducted a sufficient investigation, the burden is on it to disprove the applicant's allegations. *İpek v. Turkey* set the legal standard in the cluster of disappearances cases arising from events in the mid-1990s.

Meltex Ltd. and Mesrop Movsesyan v. Armenia represents another ground breaking KHRP-assisted case. Meltex, which operated Armenia's first independent television company A1+, alleged that Armenia was in breach of Article 10 for continually rejecting its bid for a broadcasting license. Given the failure to provide reasons for the decision to reject the applicant's bid, the Court ruled that there had been interference with the company's freedom to impart information and ideas. This decision has widespread repercussions for freedom of expression throughout the Council of Europe and beyond.

Most recently, the ECtHR found Armenia in violation of Articles 3, 6(1) and 6(3) of the European Convention on Human Rights, as well as Article 2 of Protocol No. 7 with respect to the cases of *Lavrent Kirakosyan v. Armenia*, *Arman Mkhitryan v. Armenia* and *Myasnik Tadevosan v. Armenia*. All three applicants are members of opposition parties and were arrested in 2003. KHRP and its partners asserted that the conditions in which the applicants were held constituted inhuman or degrading treatment and that they had not been afforded a fair trial. The Court agreed and the judgment represents an important victory for human rights in Armenia.

As these examples illustrate, KHRP has led the charge in fighting for human rights within the Kurdish regions by bringing cases before the European Court of Human Rights that not only help victims to find justice but which also establish groundbreaking judgments with far-reaching implications. KHRP has represented over 500 applicants since its inception in 1992 and has brought a great amount of attention to the Kurdish regions, underscoring the severe repression that states in the region undertake against their own populations. It was KHRP that revealed the individual application process as a useful means of obtaining collective justice. KHRP's ECtHR cases comprise a comprehensive legal history of human rights violations by governments. Additionally, KHRP has conducted many trainings within the Kurdish regions which have made it possible for local lawyers to now bring cases before the ECtHR themselves. The outcome of these cases will undoubtedly bring about change in the Kurdish regions, but will also have a profound effect on human rights law throughout the Council of Europe member states.

In the last month, KHRP has celebrated its anniversary as well as its groundbreaking litigation work with two successful fundraising events. The first, on 19 November, brought together some of London's finest lawyers and human rights litigators and sought to raise emergency funds for KHRP's cases concerning cross-border operations by the Turkish military in northern Iraq. The next evening, KHRP held an exhibition and auction of prints from the book *Kurds: Through the Photographer's Lens*, which was commissioned by the Delfina Foundation in honour of our 15th anniversary. The book celebrates the life and times of the Kurdish people as seen through the eyes

of some of the most prominent photographers and photo journalists who have worked across the Kurdish regions—including Susan Meiselas, Jan Grarup, Ed Kashi, and Patrick Robert.

After more than 15 years, KHRP is just as committed now as it ever has been to fighting for human rights in the Kurdish regions. The cases currently being brought before the ECtHR on behalf of more than 70 applicants affected by Turkish military activities in northern Iraq offer a strategic and potentially groundbreaking opportunity to push the boundaries of extra-territorial jurisdiction regarding the human rights obligations of Council of Europe member states when operating in countries not party to the European Convention on Human Rights. Recent cases before the ECtHR have established that the Court has jurisdiction over state agents operating outside a state's territory under certain circumstances, in particular when the state in question has 'effective control' over the area in which its agents are operating. But despite this recognition of extra-territorial jurisdiction in principle, in practice it remains challenging for applicants to prove that the necessary conditions apply.

KHRP's litigation before the ECtHR has created a historical record of human rights violations and has brought about an understanding and appreciation of human rights and related international mechanisms which did not exist prior to the deluge of cases brought by the organisation. It is our hope that, moving forward into the next 15 years, KHRP will continue to assist victims in finding justice and will continue to push the boundaries of international law, effecting change and fostering an appreciation of human rights in the Kurdish regions and beyond.

Section 1: Legal Developments and News

Turkey's Justice Minister issues first ever apology for torture

In October 2008, leftist activist Engin Çeber died in hospital from a brain haemorrhage after allegedly being severely beaten by police officers whilst in custody.

Shortly after, the Turkish Justice Minister Ali Şahin apologised for his ill-treatment, stating that 19 prison personnel had been suspended as a result of the allegations. The minister also added that an investigation into Çeber's death had determined that he had suffered ill-treatment by personnel at Istanbul's Metris Prison, and that those responsible would be punished.

Such an apology is the first of its kind to be made in Turkey.

Çeber was detained in September 2008, after protesting that police officers had not been brought to justice for allegedly shooting and paralysing a youth selling a left-wing publication last year. Despite the Turkish Government's pledge to 'zero tolerance of torture,' torture and maltreatment by the country's security forces have once again come under the spotlight in Turkey after the death of Çeber.

Turkey's Constitutional Court upholds headscarf ban

On 5 June 2008, Turkey's Constitutional Court overturned amendments which would have paved the way for women to wear headscarves on university campuses. The court ruled that the Turkish parliament had violated the constitutionally enshrined principle of secularism when it passed these amendments in early February.

The court, traditionally a stronghold of Kemalists, voted 9-2 to reverse the lifting of restrictions on the headscarf, an issue which remains central to the contest between the ruling Justice and Development Party (AKP) and the secularist establishment. The Turkish state has traditionally banned women who wear headscarves from working in public spaces, including schools and universities (both public and private), courts of law, government offices and other official institutions. In the interest of improving women's access to education and employment, Turkish MPs had voted by 411 votes to 103 in February in favour of lifting the ban.

The decision of the court has been met with much discontent by proponents of human rights. On 23 September 2008, the European Court of Human Rights (ECtHR) found Turkey in breach of Article 6 of the European Convention on Human Rights, the right to fair trial, in the KHRP-assisted case of *Emine Araç v. Turkey*. The ECtHR ruled in favour of Araç, whose university application had been rejected due to her wearing a headscarf, finding that the judicial review regarding her application had been unfair and considering her right of access to an institution of higher education a civil right. A summary of this case can be found at page 153.

Turkey launches campaign against human trafficking

In June 2008, Turkey launched a national awareness-raising campaign as part of its efforts to combat human trafficking, an international crime which is often described as modern-day slavery.

The two-year project in Turkey, implemented in cooperation with the International Organisation for Migration, aims to provide support to Turkish institutions in their fight against human trafficking and protecting victims in line with EU directives.

Turkey is not yet party to the Council of Europe Convention on Action against Trafficking in Human Beings, which came into force in February 2008 and has now been ratified by 19 states. A recent counter-trafficking report on Turkey revealed that 148 human trafficking victims were identified by Turkish law enforcement forces in 2007.

Members of children's choir acquitted after performing Kurdish song

Six members of the children's choir of Diyarbakır's Yenişehir district were acquitted in July after being charged with 'making propaganda in favour of an illegal organisation' under Turkish counter terrorism laws for performing a Kurdish song. All were under the age of 18 at the time of their supposed crime.

The children's choir, run by the pro-Kurdish Democratic Party, had performed at an International Music Festival in San Francisco in 2007. The choir had been called back on to the stage for an encore and it was at this time that they sang the accepted national anthem of the northern Iraq Kurdish administration, which prosecutors claimed was also associated with the Kurdistan Workers' Party (PKK).

It was argued by the minors' lawyer that the encore was not planned and that the performance was at the behest of the audience. The minors were subsequently acquitted.

Turkey's DTP faces possible ban

The pro-Kurdish Democratic Society Party (DTP) currently faces closure under Turkish anti-terrorism laws. In a case which is in the process of being considered by Turkey's Constitutional Court, the party faces being shut down due to its alleged links to the Kurdistan Workers' Party (PKK) and unwillingness to denounce violence and terrorism in the south-east of the country.

The DTP entered parliament last year – the first Kurdish party to do so – and currently has 21 deputies. It has been accused of propagating separatism and of supporting the PKK's activities. The DTP maintains that it seeks a just outcome to the Kurdish question within the context of a unified Turkish political system. The party's campaigns for minority rights for Kurds set it on a collision course with the Turkish establishment, which values unity and the Turkish identity.

Closure of political parties in Turkey is not uncommon. The DTP is a successor to a number of previous pro-Kurdish parties banned by the courts. The ruling Justice and Development Party (AKP) only narrowly escaped closure itself earlier this year, after it was accused of Islamist tendencies. Turkey's secular constitution formally prohibits religious influences in politics.

Should the DTP be closed, it would create further difficulties for Turkey in gaining entry to the European Union, which already has reservations about Turkey's standards of political freedom. The DTP's parliamentary opponents are also undecided as to the usefulness of banning another Kurdish party, fearing that it may simply stoke tension in the region. This is particularly pressing given Turkey's raids into Kurdish areas in Iraq, and recent PKK attacks on Turkish bases.

Iraqi provincial elections now set for early 2009 although further delays for Kirkuk

On 3 October 2008, the Iraqi Presidency Council, consisting of President Jalal Talabani and Vice Presidents Adel Abdel Mahdi and Tareq al-Hashemi, approved the provincial election laws allowing for long-awaited elections to be held early next year in most Iraqi provinces. These laws were passed by the Iraqi parliament on 24 September 2008.

The provincial elections for 14 of Iraq's 18 provinces are scheduled to take place by 31 January 2009. The parliament has agreed to delay the election for the Kirkuk Governorate until after March. The elections were originally scheduled for 1 October 2008.

However, in a controversial move, the parliament, in passing the provincial election laws, removed a clause which had sought to protect minority rights. Article 50 of the laws had reserved a designated number of council seats for Iraq's minorities, including Christians. This omission has attracted considerable criticism, not least because Article 50 indicated that Iraq might be ready to protect the political rights of minorities as founded in the constitution. The Presidency Council has since called for parliament to reinstate Article 50 into the provincial election laws.

The delaying of the Kirkuk election follows a series of events which have caused raised tensions within the Kirkuk Governate. In July, Kurdish members of parliament conducted a walkout in protest against the 'unconstitutionality' of the Bill. On 28 July, a civilian protest held in the city of Kirkuk was targeted by a suicide bombing. This erupted into a riot, leading to a total death toll of 28 people and more than 200 wounded.

Kirkuk situation unresolved

The status of Kirkuk remains undecided, even as Iraq passed a new provincial election law in September 2008. Prior negotiations regarding the law in early August had broken down over the politically explosive issue of who controls the oil-rich northern city, dominated by Kurds, but inhabited by Arabs and Turkmens alike. The Kurds have continually rejected proposals to cede some of their power in Kirkuk, believing it should ultimately be annexed by Kurdistan.

Calling Kirkuk 'the hottest issue in Iraq these days', the UN has announced that it will present a list of proposals to resolve the conflict in northern Iraq, even as there is little immediate possibility of holding a referendum to decide the matter as had earlier been hoped. Staffan de Mistura, the UN's special representative for Iraq, has suggested that instead, a political compromise between affected parties might be reached, which will later be 'confirmed' in a referendum of the respective populations.

The unresolved situation has come as a blow to proponents of human rights in the region, especially as simmering ethnic tensions have erupted into spates of considerable violence in recent months. The number of such outbreaks in Kirkuk has dropped by two-thirds since the summer of 2007, arguably due to the presence of the Asaish, a Kurd-controlled undercover security service. Nonetheless, the potential for bloodshed has led some to suggest the idea of putting Kirkuk and its environs under UN administration, as was done with Brcko after the Balkan wars.

Kurdish prisoners of conscience in Iran launch hunger strike against ill-treatment

On 25 August 2008, more than 200 Kurdish prisoners of conscience launched an 'unlimited' hunger strike to protest against the Iranian authorities' ill-treatment of prisoners, use of torture, death sentence, discrimination against women, Kurds and other ethnic and religious minorities, and numerous other human rights breaches.

The prisoners called for an end to the use of torture and ill-treatment, an end to the death penalty, better prison conditions, independent inspections of Iranian prisons and an end to the discrimination against Kurds and other minority groups.

Those taking part in the hunger strike have suffered grave human rights violations. These include being subjected to torture, arbitrary arrest, being denied the right to an attorney and any contact with the outside world, being forced to sign confessions under torture and being sentenced to death without a fair trial, whilst others were sentenced to long prison terms for supporting or being human rights or women's rights activists. Others have been in prison for months without being tried or given a reason for their imprisonment.

The Islamic regime in Iran is well known for its inhumane treatment of political prisoners in general and ethnic minorities in particular. In regards to Kurdish prisoners, reports show that most of them have been subjected to severe physical and psychological torture. These prisoners include civilians, journalists, writers, human rights activists, teachers, students, women's rights activists, civil rights activists and other intellectuals and professionals. Many of them have been sentenced to lengthy prison terms and some to death.

In October, it was reported that the hunger strike had come to an end after 47 days, following an agreement between the strikers and the authorities.

Iran passes draft law extending the death penalty to online crimes, despite calls to end execution

Following on from the UN General Assembly's groundbreaking December 2007 resolution calling a moratorium on the death penalty for all crimes, the Iranian authorities are being urged to immediately stop the practice of execution by hanging and stoning, and to commute the sentences of those on death row. Iran has one of the highest rates of executions in the world and serious failings in the justice system commonly result in unfair trials, including in capital cases.

Under Iranian law, whose penal code follows Islamic law, judges can impose the death penalty in 'capital' cases (cases where the crimes involved murder, adultery, rape, armed robbery, apostasy and drug trafficking) if the defendant has attained 'maturity', defined in Iranian law as 9 years for girls and 15 years for boys. The final say in such cases comes from the victim's family, who can pardon the perpetrator or accept compensation in lieu of execution.

The head of the Iranian judiciary imposed a moratorium on such executions in 2002, but two people were stoned to death in 2006 and one last year. Further, in July 2008, Iran hanged 29 people in a move that human rights groups suggested was intended to challenge international criticism of its death penalty policies. This is said to be a new drive against what the authorities call 'immoral behaviour' and a crackdown on crime by the government.

In this context, human rights groups are particularly alarmed by a draft law that would extend the death penalty to include crimes committed online. Passed by parliament on its first reading on 2 July 2008, the proposed law would for example apply the death penalty to bloggers and web site editors who 'promote corruption, prostitution or apostasy'. The bill consists of 13 articles with the declared aim of reinforcing the penalties for 'crime against society's moral security', and was passed on first reading by 180 votes in favour, 29 against and 10 abstentions. According to Article 3, judges will be able to decide whether the person found guilty of these crimes is a 'mohareb' (enemy of God) or 'corrupter on earth'. Article 190 of the criminal code stipulates that these crimes are punishable by hanging or by 'amputation of the right hand and left foot'. The passage of such a law, based on ill-defined concepts and giving judges significant room for interpretation, will have disastrous consequences for online freedom.

There are also grave concerns around the sentencing of juvenile offenders to death. The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both of which Iran has ratified, prohibit the death penalty for crime committed by people below the age of 18. The overwhelming majority of states that have ratified or acceded to these treaties – obliging them to ensure that juvenile offenders are never sentenced to death – comply with this obligation and in recent years have been moving to ban the death penalty and strengthen juvenile justice protections. However, in Iran, failures in law and practice have resulted in 26 executions of juvenile offenders since January 2005. This includes at least six juvenile offenders in 2008, several of whom are reported to have been just 15 or 16 when they allegedly committed their crimes. In June 2008, Iran executed a Kurdish-Iranian 16-year-old boy, Mohammad Hassanzadeh, for a crime he had allegedly committed two years earlier.

On 22 June 2008, a bill was proposed in Iran's parliament to outlaw juvenile executions but it has yet to be passed. However, it is said that the proposed legislation will still allow the death penalty for juvenile offenders if the judge decides that the defendant was 'mentally mature'. Some Iranian officials have attempted to justify killing juvenile offenders by terming these killings 'retribution' and not 'execution'. In ratifying the Convention on the Rights of the Child, Iran declared an extremely broad reservation, 'not to apply any provisions of articles of the Convention that are incompatible with Islamic Laws'.

Restraint on freedom of expression in Syria continues

A number of local internet bloggers have recently been imprisoned by Syrian domestic courts, as the country continues to restrict the right to freedom of expression under the government of President Bashar al-Assad.

On 29 June 2008, a member of the National Organization for Human Rights in Syria, Mr Muhammad Dekalbab, was sentenced by the Damascus Military Court to six months' imprisonment for 'spreading false or exaggerated information'. It had been reported that Mr Dekalbab's imprisonment was related to an article he wrote criticising the lack of freedom of expression in Syria.

Other prisoners of conscience include: journalist and president of the Syrian Centre for Media and Freedom of Expression, Mr Mazen Darwish, who was sentenced to ten days' imprisonment for reporting the violent January riots in Adra, Damascus; businessman Mr Tariq Bayassi, sentenced to three years' imprisonment for having 'posted an article on the shortcomings of the Syrian secret service'; poet Mr Firas Sa'ad, sentenced to four years' imprisonment for articles he wrote which were posted online, relating to the Hezbollah and Israel conflict; and imprisoned writer Mr Michel Kilo. Peace advocate Mr Kamal al-Labwani, who had previously been imprisoned for 12 years, was sentenced to a further three years' imprisonment for 'insulting the authorities' while in detention.

The Syrian government has in recent years demonstrated its willingness to infringe upon the right to freedom of expression over the internet. The country's main internet service provider is said to deny access to over 100 websites. It is also reported that social networking websites such as Facebook and YouTube have remained banned since last year.

Council of Europe Committee of Ministers promotes plurilingualism

On 2 July 2008, the Council of Europe's Committee of Ministers adopted a Recommendation (CM/Rec(2008)7) on the use of the Common European Framework of Reference for Languages¹ (CEFR) and the promotion of plurilingualism. The CEFR promotes language diversification in education and plurilingual education.

¹ Developed by a Council of Europe international working party set up by the Language Policy Division, published in 2001.

The Recommendation supports the language rights of the Kurds in Turkey, as a Council of Europe member state. The Turkish authorities have violated the language rights of the Kurds for many years, perceiving the demand for language rights as synonymous with demands for separatism. The Constitution prohibits any language other than Turkish from being taught as a mother tongue (Article 42), thus demand for education in Kurdish is consistently ignored. Although it is now legal for Kurdish to be taught as a foreign language in private schools,² numerous restrictions exist. As a result, children must have completed primary school education before learning Kurdish, thereby eliminating the optimum years for learning a language.

In August 2008, seven private language schools for adults were closed in the Kurdish regions of Turkey due to a lack of legislative and material support. By sending children whose command of Turkish is poor to schools where teaching in Kurdish is forbidden, their educational and employment prospects are irretrievably diminished, thus exacerbating poverty and curtailing democratic political influence. The ability to be taught and learn in Kurdish is vital for a child's intellectual and cultural development. Denying new generations their right to learn and communicate in their language is a threat to the cultural identity of an entire people, but also leads to generational alienation and lost heritage.

The Recommendation is significant in that it acknowledges that the right to quality language education is an essential part of the fundamental right to education. It requires the authorities responsible for language education at all levels to use the CEFR as a reference tool to effectively create plurilingual education in a manner that promotes democratic citizenship, social cohesion and intercultural dialogue. It also requires those involved with planning, supporting, teaching and assessing a particular language to help learners make connections with other languages including their mother tongue and the official language(s) of the state.³ Further, to address close state control of language text books and course materials and restrictions on the languages that can be taught, the Recommendation calls for the encouragement of other language text books and course materials of a high quality.⁴ This may address some of the severe restrictions on Kurdish literature in Turkey.

Further, the Turkish Constitution prohibits the use of Kurdish in the public and political realm,⁵ thus depriving non-Turkish speaking Kurds from information essential to make an informed decision when electing individuals to public office and from voicing their concerns to those that have the power to address them. The Recommendation acknowledges that by promoting minority languages, states can enhance social cohesion and intercultural dialogue by fostering communication between minority and majority communities and eliminating the mutual ignorance that renders both communities susceptible to political manipulation.⁶

2 Law on Foreign Language Education and Teaching and the Learning of Different Languages and Dialects of Turkish Citizens Law 2923 of 14 October 1983, as amended by Law No. 4771 of 3 August 2002.

3 CM/Rec(2008)7, paragraph 2.4.3.

4 CM/Rec(2008)7, paragraph 4.4.

5 Article 3 denoting the official language of the state as Turkish.

6 CM/Rec(2008)7, paragraphs 2.3 and 2.4.2.

In spite of these encouraging developments, the impact that the Recommendation will have on the language rights of the Kurds in Turkey remains to be seen. The Committee of Ministers stated that, ‘...the maintenance and development of a minority community’s language and culture is a fundamental human right... guaranteed by the Council of Europe’s European Charter for Regional or Minority Languages,’ failing to address the lack of protection in states that have not ratified the Charter, namely Turkey. A further flaw in the Recommendation is that it respects member states’ national constitutions, political and administrative arrangements and educational traditions and practices. Therefore the Constitutional prohibition on Kurdish mother-tongue education and the legal restrictions on learning Kurdish as a foreign language in private schools in Turkey may remain despite the Recommendation.

PACE considers further monitoring of Turkey

In July 2008, the Parliamentary Assembly of the Council of Europe (PACE) issued a draft report on Turkey which raised the possibility that Turkey may be put back on the list of states that it considers need monitoring to check whether they respect human rights and democratic principles.

The report focused on the functioning of democratic institutions in Turkey and called for a close inspection of efforts to prepare a new Turkish Constitution. Expressing great concern about the case against the ruling party, the prime minister and the president, the report urged the Council’s monitoring committee to re-consider launching the monitoring mechanism on the country if such a need arose.

European Commission annual report on Turkey’s progress towards EU accession confirms failure to introduce reforms

The European Commission’s latest annual report on Turkey’s progress towards accession to the European Union, published in November 2008, confirms the failure of the Turkish authorities to press ahead with earlier human rights reforms.

In almost every area of concern from the point of view of human rights, the Turkey 2008 Progress Report underlines that there has been limited or no improvement in the period covered. Even where mechanisms exist to protect human rights, there are widespread problems with implementation of these measures. The report also makes clear the lack of any clear, legitimate reasons for this impasse.

In particular, the Commission notes the failure of the Turkish government to develop a consistent, comprehensive programme of political and constitutional reforms. Despite the appointment of a group of academics with a mandate to revise the constitution, no draft has yet been made public and no timetable has been drawn up for discussion of such a document. Other specific areas of concern include the lack of impartiality of the judiciary, the prevalence of reports of torture and ill-treatment at the hands of the security forces, harassment of civil society organisations and restrictions on freedom of expression. The report makes it clear that the human rights situation is disproportionately bad in the east and south-east of the country.

Council of Europe Commissioner for Human Rights urges nations to make human rights a domestic policy issue

In July 2008, Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, published a report emphasising the need for European governments to re-examine their approach to human rights as a matter of policy. The report, 'Human Rights in Europe: no grounds for complacency',⁷ calls on governments to welcome independent monitors and listen carefully to their advice. It describes a factor present throughout the Kurdish regions, the 'implementation gap' – that is, the distance between pledges to act on human rights issues and the reality of inaction – and states that too many governments are 'less than serious' about human rights issues.

The report addresses, among other issues, penalties imposed on arriving asylum seekers, gender differences in remuneration for employment and in politics, the need to re-examine the use of life sentences, the independence of the judiciary, the use of racial and religious profiling in the drive to combat terrorism, and the obligation of states to protect their citizens' right to apply to the European Court of Human Rights.

UN Security Council elects five non-permanent members

On 17 October 2008, the General Assembly elected Austria, Japan, Mexico, Turkey and Uganda to serve as non-permanent members of the Security Council for two-year terms starting on 1 January 2009. The newly-elected countries will replace Belgium, Indonesia, Italy, Panama and South Africa when their terms on the 15-member body expire at the end of this year.

Council elections are held by secret ballot in the General Assembly, and a winning candidate requires a two-thirds majority of members present and voting. In the African category, Uganda received 181 votes from the 192 members of the General Assembly. Mexico, which was the only declared candidate in the Latin American and Caribbean grouping, picked up 185 votes. Japan and Iran competed in the Asian category, where Japan received 158 votes while Iran picked up 32. In the Western European and Others group, three countries contested for two seats. Turkey won 151 votes, Austria picked up 133 and Iceland received 87.

Turkey's membership of the Security Council is an interesting development given the country's poor human rights record. In addition, Turkey lags behind in complying with most of the international principles represented by the UN. For example, the Rome Statute of the UN International Criminal Court, as well as the Kyoto Protocol to the UN Framework Convention on Climate Change, have not been ratified, and there exist significant shortcomings in complying with the International Labour Organisation's Conventions on Union Rights.

⁷ Available at http://www.coe.int/t/commissioner/Viewpoints/publication_EN.pdf (last accessed 28 November 2008).

United Nations Human Rights Council adopts new Optional Protocol and extends Special Procedures mandates

During its eighth regular session in June 2008, the UN Human Rights Council achieved a new milestone in human rights machinery, adopting a text on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This will allow persons to petition an international human rights body about violations of their rights under that Covenant. The Council also recommended that the General Assembly adopts and opens the Optional Protocol for signature, ratification and accession at a signing ceremony in Geneva in March 2009.

During the session, the Council also appointed 13 new mandate holders and continued its review, rationalisation and improvement of mandates of its Special Procedures. As a result, it extended for three years the mandate of eight Special Procedures on extra-judicial executions, education, independence of judges, transactional corporations, torture, migrants, extreme poverty and trafficking in persons. The Council also adopted a resolution on the situation of human rights in Myanmar.

New UN High Commissioner for Human Rights takes office

Navanethem (Navi) Pillay replaced Louise Arbour as the UN High Commissioner for Human Rights, the leading UN human rights official, on 1 September 2008. She is the fifth UN High Commissioner for Human Rights to be appointed since the office was founded 15 years ago, and will be in office for four years.

Ms Pillay is a grassroots lawyer who acted as a defence attorney for many anti-apartheid campaigners and trade unionists in South Africa. She has also been very active in supporting women's rights, and was one of the co-founders of the international NGO Equality Now, which campaigns for women's rights. More recently, Ms Pillay served as a judge on two international criminal courts, spending eight years with the International Criminal Tribunal for Rwanda, including four years as its President, and then five years on the International Criminal Court in the Hague.

UN Security Council adopts resolution demanding the end of rape in conflict

On 19 June 2008, the UN Security Council unanimously adopted UN Resolution 1820, which demands an immediate and complete stop to acts of sexual violence against civilians in conflict zones.

The Security Council demanded the 'immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians', at the same time 'expressing its deep concern that, despite repeated condemnation, violence and sexual abuse of women and children trapped in war zones, was not only continuing, but, in some cases, had become so widespread and systematic as to reach appalling levels of brutality.'

The use of rape and other forms of sexual violence as a weapon of war occurs in conflict zones around the world. Rape victims who seek treatment are often not seen because doctors fear repercussions. Resolution 1820 is an encouraging development, especially against the background of the European Court's ruling in the KHRP case of *Aydm v. Turkey*, which held that rape falls within the definition of torture. The case concerned the rape of a Kurdish woman by Turkish security forces.

UNHCR seeks international support for Iraqi refugees

The United Nations High Commissioner for Refugees (UNHCR) has appealed to the international community to provide greater support for Iraqis who have fled the country. The High Commissioner also urged the Government of Iraq to be more active in supporting those who have been forced to flee.

The High Commissioner also asked Governments to increase the number of resettlement places for vulnerable refugees, which is of vital importance given that the UNHCR global criteria on the conditions needed for the voluntary return of refugees are not met by the current situation in Iraq. He received assurance from both the government of Syria and Jordan that Iraqi refugees would not be pushed back against their will and that the 'asylum space' would be preserved.

It is estimated that out of a total population of 26 million, some 4.4 million Iraqis are still uprooted, including 2.4 million displaced inside Iraq and 2 million outside. In addition, more than 41,000 non-Iraqi refugees are in Iraq.

Karadzic before the International Criminal Tribunal for the Former Yugoslavia

After spending 13 years as a fugitive, Radovan Karadzic, the former Bosnian Serb president, was arrested on 21 July 2008 in Serbia in connection with crimes including the massacre of nearly 8,000 Muslim men and boys in Srebrenica in 1995.

The arrest of Karadzic illustrates that no one is beyond the law and that perpetrators of the most heinous international crimes will be brought to justice. It demonstrates that the new pro-Western coalition government in Serbia is committed to international justice.

Karadzic is accused of engaging in a campaign of ethnic cleansing not dissimilar from the Anfal campaign suffered by the Kurds under Saddam Hussein's regime in Iraq in the 1980s. The aim of the campaign is said to have been to force non-Serbs to leave those areas of Bosnia and Herzegovina which had been proclaimed part of the 'Serbian Republic', including expelling those who were reluctant to leave and killing others.

Two indictments for international crimes were initiated against Karadzic in 1995 and one in 2000. He was transferred to the International Criminal Tribunal for the Former Yugoslavia (ICTY) on 30 July 2008 and charged with genocide, complicity in genocide, extermination, murder, wilful

killing, persecutions, deportation, inhumane acts, unlawfully inflicting terror upon civilians, taking of hostages amounting to war crimes and crimes against humanity. Karadzic postponed his plea for 30 days, after which a not guilty plea was entered on his behalf.

Serbian nationalists protested against Karadzic's arrest outside the war crimes court in Belgrade, illustrating that there is a long way to go before minorities are fully accepted in Serbian society. However, the trial before the ICTY is a warning to countries hosting minority ethnic groups, including the Kurds, that more action is required to encourage dialogue between majority and minority communities, promote diversity and tolerance, and dilute nationalism, in order to prevent such heinous acts from occurring in the future.

International complaints resulting from the Russia-Georgia conflict

On 7 August 2008, Georgia launched an overnight assault over the South Ossetian territory, a breakaway province supported by Russia. Following this attack, Russian troops entered Georgia and carried out bombings in South Ossetia and further into Georgia, destroying Georgian military facilities and inflicting civilian casualties in the process. After five days of heavy fighting, Georgian forces had to evacuate South Ossetia and Abkhazia whilst Russian troops invaded Georgian cities including Gori and Poti. Eventually, on 8 October, Russia withdrew from Georgia. However, there are still Russian troops remaining in Abkhazia and South Ossetia and armed conflict continues to subsist in the border areas.

Since the end of the war there have been several clashes. For example, 27 people were killed in cross-border fighting during September and October, and on 3 October a car bomb exploded near the Russian peacekeeping headquarters killing 13 people and wounding another eight.

The situation raised much concern amongst the international community and civil society organisations. It was widely reported that, at the start of the military conflict on 7 August 2008, Georgian military used indiscriminate and disproportionate force resulting in civilian deaths in South Ossetia, following which the Russian military used indiscriminate force in attacks in South Ossetia and in the Gori district.

According to Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, 'the conflict has had a devastating effect on the human rights of the population. Thousands of people are still displaced waiting for security and help to rebuild damaged houses.'⁸ A key concern was the right to voluntarily return of displaced persons, which was delayed due to the insufficient policing in the buffer zone. There was also the issue of mines and cluster bombs which threaten the civilian population.

8 Council of Europe Press Release 616(2008), 'Commissioner Hammarberg releases his special report on the human rights situation in the areas affected by the South Ossetia conflict', 8 September 2008, available at <https://wcd.coe.int/ViewDoc.jsp?id=1338437&Site=DC> (last accessed 28 November 2008).

International response:

Following mediation by the European Union (EU) chairman, French president Nicolas Sarkozy, a preliminary ceasefire agreement was reached on 12 August 2008 and was signed by Georgia and Russia on 15 and 16 August 2008.

Sarkozy presented a six-point peace plan for the Russian and Georgian Presidents, who both signed the agreement together with the South Ossetian president and the president of Abkhazia. The six points are as follows:

1. No recourse to the use of force.
2. Definitive cessation of hostilities.
3. Free access to humanitarian aid. (Addition rejected: 'and to allow the return of refugees').
4. The Armed Forces of Georgia must withdraw to their permanent positions.
5. The Armed Forces of the Russian Federation must withdraw to the line where they were stationed prior to the beginning of hostilities. Prior to the establishment of international mechanisms the Russian peacekeeping forces will take additional security measures. (Addition rejected: six months).
6. An international debate on the future status of South Ossetia and Abkhazia and ways to ensure their lasting security will take place. (Addition rejected: based on the decisions of the UN and the OSCE).

After the ceasefire was signed, Russia pulled most of its troops out from Georgia but also established 'buffer zones' around South Ossetia and Abkhazia and check points in Georgia's interior. Withdrawal from the 'buffer zones' ended when control was handed over to EU observer missions on 9 October 2008.

Beyond the European response, at a broader international level the North Atlantic Treaty Organisation (NATO) and the North Atlantic Council (NAC) denounced Russia's actions. The NAC urged Russia to reverse its recognition of the independence of two Georgian territories and denounced this decision as a violation of international law. According to the NAC, 'Russia's decision violates the many UN Security Council resolutions it has endorsed regarding Georgia's territorial integrity, and is inconsistent with the fundamental OSCE principles on which stability in Europe is based. Russia's actions have called into question its commitment to peace and security in the Caucasus.' Given the importance of Georgia's stability and security, NATO also called on Russia to respect Georgia's territorial integrity and to fulfil its commitments under the six-principle ceasefire agreement signed by the two states.

The recognition of Abkhazia and South Ossetia as independent states was not only condemned by NATO, but also the OSCE Chairman, the President of the European Union, the European Commission, Foreign Ministers of the G7 and the government of Ukraine due to alleged violation of Georgia's territorial integrity, as well as UN Security Council resolutions.

Complaints from Georgia and Russia:

The conflict has given rise to a vast array of complaints before international mechanisms, as follows:

The International Criminal Court (ICC)

Russia and Georgia have both filed complaints with the ICC as a result of the conflict. Georgia has accused Russia of ethnic cleansing of ethnic Georgians in the South Ossetia area. Equally, South Ossetians have brought over 300 lawsuits to the International Criminal Court seeking to bring Georgian authorities to justice for genocide. In addition, Russian prosecutors are gathering evidence to support the allegations of genocide committed by Georgians against the South Ossetians, though they have not given a detailed statement on the legal grounds for the accusation.

Russia's Foreign Ministry has also called for Georgian President Mikhail Saakashvili to resign and be tried for war crimes before the ICC. The Chairman of Russia's Prosecutor General's Office has stated that his staff is collecting evidence of war crimes allegedly committed by Georgian forces in South Ossetia.

In August 2008, Russian officials confirmed that Russia will file a complaint against Georgia with the ICC and that the government is considering filing another complaint with the ICJ. This is in relation to war crimes allegedly committed against ethnic Russians in South Ossetia.

The International Court of Justice (ICJ)

Applications to the International Court of Justice in The Hague have also been made with regards to the South Ossetia conflict. On 12 August 2008, the Republic of Georgia initiated proceedings against the Russian Federation for its actions on and around the territory of Georgia. The Republic of Georgia was concerned about the need to ensure that the individual rights provided by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of all persons on the territory of Georgia were fully protected.

Georgia alleged that the Russian Federation, acting through its own organs and through South Ossetian and Abkhaz separatist forces under Russia's direction and control, 'has practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia.' Georgia therefore asserted that the Russian Federation was responsible for violating fundamental obligations under CERD, including Articles 2, 3, 4, 5 and 6.

Georgia also contended that the Russian Federation sought to alter the ethnic composition of South Ossetia and Abkhazia, particularly through 'preventing the return to South Ossetia and Abkhazia of forcibly displaced ethnic Georgian citizens and by undermining Georgia's capacity to exercise jurisdiction in this part of its territory.' Georgia asserts that the alleged change in the demographic composition in South Ossetia and Abkhazia is intended to pave the way for a declaration of independence from Georgia by South Ossetian and Abkhaz authorities.

Georgia requested that the Court make an Order for provisional measures to protect its rights pending the determination of the case on the merits. These measures included requiring that Russia give full effect to its obligations under the CERD, that Russia immediately cease and desist from any and all conduct that could result in any form of ethnic discrimination, and that Russia immediately cease and desist from discriminatory violations of the human rights of ethnic Georgians.

Georgia further submitted to the ICJ that invading Russian troops engaged in murder, rape and mass displacement of civilians during the conflict. It is also seeking an ICJ order to compel Russia to pay compensation, withdraw its troops, and allow all displaced ethnic Georgians to return home. The case was accepted by the ICJ on 15 August 2008 and, in an 8-7 vote on 15 October 2008, it issued an Order for provisional measures applying to both parties.

The European Court of Human Rights

As a result of the conflict, the European Court of Human Rights has received over 2,500 applications from South Ossetians. These applicants allege that, in connection with the aforementioned intervention of Georgian armed forces, they have been the victims of violations of the rights guaranteed by Articles 2, 3, 8, 13 and 14 of the Convention, and by Article 1 of Protocol No. 1 to the Convention.

This very significant number of individual applications has increased the already considerable workload of the European Court of Human Rights, which has also received an inter-State application from Georgia against the Russian Federation. On 12 August 2008 the President of the Court, acting as President of Chamber, decided to apply Rule 39 of the Rules of Court and issued interim measures. With a view to preventing violations of the Conventions and pursuant to Rule 39, the President called upon both the High Contracting Parties concerned to comply with their engagements under the Convention, particularly in respect of Articles 2 and 3 of the Convention.

Section 2: Articles

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

Mark Muller QC*

Terrorism, Proscription and the Right to Resist in the Age of Conflict¹

Abstract

This paper focuses on the international community's response to the increased perceived threat of terrorism since 9/11 and how the so-called 'war on terror' has affected our understanding of what constitutes terrorism. It briefly details some of the major legislative changes that have been enacted and examines the impact of counter-terror strategies on certain unresolved legal issues that have historically dogged the international community's efforts to arrive at an internationally agreed definition of terror. This includes the relationship between terrorism and the right to self-determination, the emerging right to democracy, and the existence of a license to use force as a last resort against an oppressive regime. The paper explores how the failure to resolve the relationship between these international legal principles has seriously undermined the efficacy of certain proscription regimes adopted around the world. It examines whether proscription regimes are in danger of disproportionately interfering with certain fundamental freedoms thereby reducing the scope for conflict resolution between aggrieved parties engaged in violence around the world.

INTRODUCTION

Over the last six years the international community has witnessed a massive increase in both international and domestic legislation concerning terrorism. The catalyst for much of this legislation was of course the tragic events of 9/11 although the process of proscribing so-called terror movements was gathering pace before the attacks by Al Qaeda.

The engine powering this recent legislative onslaught is Security Council Resolution 1373 passed on 28 September 2001.² This Resolution imposed extensive obligations on States to prevent and counter terrorism and established a Committee of the Security Council to monitor its implementation. Significantly, the Resolution required States to ensure that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment

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1 This article was originally published in Denning Law Journal 2008 Vol. 20, pp 111-131. KHRP is grateful to the publishers, The University of Buckingham Press, for their kind permission to reproduce the article.

2 Press Release SC/7158 – Security Council unanimously adopts wide-ranging anti- terrorism resolution calls for suppressing financing, improving international cooperation resolution 1373 (2001) also creates committee to monitor implementation www.un.org/News/Press/docs/2001/sc7158.doc.htm

duly reflects the seriousness of such terrorist acts,³ irrespective of whether such acts are caught by ordinary existing criminal provisions. Resolution 1373 not only reflected the worldwide revulsion felt about the attack on the twin towers in New York, it also catapulted the issue of terrorism onto the international agenda in a way not seen before.

Just eight days earlier, on 20 September 2001 President Bush set the tone when he declared: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime.'⁴ This declaration had a huge impact on state practice towards countering terrorism. Hitherto the lack of any internationally agreed definition of terrorism was legally inconsequential as no international rights or duties hinged on the term 'terrorism'. All previous international conventions on terrorism were act-specific and did not generically define who was a terrorist and who was not. However, President Bush's clarion call changed all of that for good. It effectively required numerous States to define their position in relation to numerous dissident groups and armed struggles around the world by pressuring states to adopt various proscription regimes.

The question today is how has President Bush's so-called 'war on terror', together with the counter measures adopted by various states pursuant to Resolution 1373, affected the debate about what constitutes terrorism? Are we any forward in achieving an international consensus about what constitutes and what does not constitute terrorism? For example, what is the current status of the right to self-determination and other fundamental freedoms protected by international law in relation to the global fight against terrorism? How has the recent swathe of domestic state anti-terror legislation affected the status of any evolving right to democracy or to resist state oppression through violence as a last resort? What is the legal status of state-sponsored terrorism? The answers to these questions will have profound consequences for the global fight against terrorism in the future.

THE DEFINITION OF TERRORISM

What is perhaps most revealing about this global fight is that despite the plethora of domestic anti-terror legislation passed by Member States since Resolution 1373 the international community is still nowhere further in agreeing a definition of 'terrorism'. But whereas beforehand the consequence of failing to agree a definition of terrorism was largely academic, today it has profound legal, social and political consequences.

The inability to define terror has dogged the international community for 60 years. According to Kalliopi K Koufa, the UN Special Rapporteur on Terrorism and Human Rights, 109 definitions were put forward between 1936 and 1981.⁵ However, none were universally acceptable. The 1972 *ad hoc* committee of the UN General Assembly singularly failed to agree a Draft Comprehensive Convention or a definition of terrorism due to divisions over the status of national liberation

3 Acting under Chapter VII of the Charter of the United Nations 2 (e).

4 'Freedom at War with Fear' – Address to a Joint Session of Congress and the American People – <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

5 Working Paper, K K Koufa, 26 June 1997.

movements. The 1996 *ad hoc* committee which was established pursuant to General Assembly Resolution 51/210 attempted to build on a non-binding definition of the Assembly contained in its 1994 'Declaration on Measures to Eliminate International Terrorism'⁶ but also to little effect. This failure to agree on a comprehensive definition has led instead to the development of specific international conventions dealing with specific acts of terror. Thus, since 1963 there have been at least 12 international conventions dealing with aspects of 'terrorism' yet none contain an internationally agreed definition. Even the most recent 1999 UN International Convention for the Suppression of Terrorist Bombings⁷ fails to define 'terrorism.'

As noted above, such lack of clarity has continued even after 9/11. Both UN Security Council Resolutions 1368⁸ and 1373⁹ do not define 'terrorism.' Although 1373 states that any act of international terrorism constitutes a threat to international peace and security and requires member states to combat terrorism by all means, it does not clarify what it means by the term 'acts.' As Judge Gilbert Guillaume, former President of the ICJ, rightly observes: 'the international community has not been able to reach an agreement on such a definition of terrorism.'¹⁰ Such failure has moved Rosalyn Higgins, another Judge at the International Court of Justice, to comment that: 'terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, which States or individuals widely disapproved of.'¹¹ Yet, Rosalyn Higgins' dictum is, with respect, out of date given the post 9/11 'legislative environment'. The definition of terrorism may remain a term without legal significance insofar as its construction is uncertain from a strictly legal point of view, but there is nothing uncertain or legally insignificant about its consequences for those caught by new state anti-terror legislation.

In fact, the continued difficulty of formulating an objective definition of terrorism, and the resulting potential for arbitrary political decisions, was recently considered post 9/11 in the decision of *Suresh v. Canada* (January 11, 2002).¹² The Supreme Court of Canada considered an argument that the term 'terrorism' was so subjective in its meaning as to be 'void for vagueness.' Although the Court rejected the challenge, it emphasised the risk of abuse where a legal definition depended on an essentially political judgment:

One searches in vain for an authoritative definition of 'terrorism'...[T]here is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, 'the term is open to politicised manipulation, conjecture and polemical interpretation'... Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom

6 General Assembly A/RES/51/210 – 17 December 1996 – 88th plenary meeting, 51/210 measures to eliminate international terrorism recalling its resolution 49/60 of December 1994 – <http://www.un.org/documents/ga/res/51/a51r210.htm>.

7 Adopted 9 December 1999.

8 Adopted 12 September 2001.

9 Adopted 28 September 2001.

10 G Guillaume, 'Terrorism and International Law', *International and Comparative Law Quarterly* (2004), 53:537-548.

11 Professor Bill Bowring, http://mujahedin-e-khalq.org/MEK-MKO/index.php?option=com_content&task=view&id=29&Itemid=31

12 *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 SC R 3, 2002 SCC1.

the term should be attached...Perhaps the most striking example of the politicised nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organisation, not only by the South African government but by much of the international community.¹³

The Court considered that the essence of the term, as internationally understood, was reflected in Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism (UN General Assembly Resolution 54/109, 9 December 1999). This defines terrorism as any 'act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act.'¹⁴ In the Court's view, this definition 'catches the essence of what the world understands by "terrorism".'

The Supreme Court naturally recognised that it was open to a national Parliament to adopt a different or more detailed definition for the purposes of domestic legislation. However, it noted that the broader the definition becomes, the greater is the risk of arbitrary and 'manipulated' application. The question is how much does it matter if individual states adopt a broader definition? Is the failure to agree an internationally recognised definition really that important?

THE DANGERS OF OUTSOURCING OF THE DEFINITION OF TERROR TO MEMBER STATES

Many observers believe the failure to agree a definition since 9/11 has produced profoundly dangerous legal effects. This is because Security Council Resolution 1373 has effectively outsourced the definition of terrorism to member states to define 'terrorism' domestically without limitation. The hackneyed phrase 'one man's terrorist is another man's freedom fighter' has been replaced with the dictum 'one state's terrorist is another state's freedom fighter.' Whether a person or group is terrorist in nature is no longer a matter of personal political opinion or of international debate but of national law as defined by the particular law of the state in which one resides.

Since 2001 the UK, EU and the USA have enacted extensive terror legislation including new definitions of what constitutes 'terrorism'. Within two months of 9/11 the Bush Administration rushed through the USA Patriot Act.¹⁵ The UK enacted the Crime and Security Act 2001. While on 13 June 2002 the EU adopted its own Framework Decision that required member states to take legislative steps to implement its terms. Since then Australia, Belarus, China, Egypt, India, Israel, Jordan, Kyrgyzstan, Macedonia, Malaysia, Russia, Syria, Uzbekistan and Zimbabwe have all followed suit. Much of this legislation introduced proscription regimes. Moreover, this legislative frenzy has been conducted within the context of the Bush Administration's clarion call. This has led many states to proscribe groups that are an anathema to the United States as a matter of foreign

13 Para.94 – <http://csc.lexum.unmontreal.ca/en/2002/2002scc1.html>

14 Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism.

15 USA Patriot Act – March 9 2006 – <http://www.whitehouse.gov/infocus/patriotact/>

policy. This in turn has had a significant impact on the protection of fundamental freedoms and internationally recognised principles of international law such as the right to self-determination. For example the European Union's attempt to establish a common legal definition of terrorism is also linked to an attempt to abolish extradition between member states in favour of an expedited procedure. This mirrors the concerted effort on the part of a number of states over the last six years to eliminate the 'political offences' exception in relation to 'terrorism', which due to the absence of an internationally agreed definition, is now defined by each state. This has been coupled with measures to exclude 'terrorists' from asylum and refugee protection. It is therefore perhaps unsurprising that many states have responded in a way that best suit their interests, and have shown little hesitation in defining terrorism widely and proscribing various organisations without recourse to the international recognised legal norms, including the principle of self-determination.

THE EFFECT OF OUTSOURCING ON THE PRINCIPLE OF SELF-DETERMINATION

The right to self-determination is recognised under customary international law as *jus cogens*. It is also recognised in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which provide that:

All 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.¹⁶

It is unnecessary, for present purposes to summarise the emergence of the right to self-determination in international law. It is sufficient to note that it is now accepted that peoples have a right to self-determination in three situations: where they are under colonial domination; where they are subject to alien military occupation; and where they are a distinct racial group denied equal access to government (so-called 'racist regimes'). The rules of international law:

- (a) Forbid a state in such circumstances from taking military or other coercive action to suppress the lawful exercise of the right to self-determination;
- (b) Recognise that peoples exercising the right to self-determination have, in the last resort, a licence to engage in armed conflict to protect themselves, and to prevent the violent suppression of the exercise of the right to self-determination by the oppressor state;
- (c) Forbid third states from affording support to oppressive states so as to assist them in suppressing the exercise of the right to self-determination.

In *Self-Determination of Peoples* by Professor Antonio Cassese,¹⁷ former President of the International Criminal Tribunal for the Former Yugoslavia, the position in international law is summarised as follows:

16 United Nations International Covenant on Economic, Social and Cultural Rights Part 1 Article 1(1).

17 A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1998, Cambridge, Cambridge University Press).

[I]t now seems well established that international law bans not only the use of military force by states for the purpose of denying self-determination to a colonial or foreign or a racial group, but also other forms of forcible action designed to pursue the same goal. The first case occurs when a state uses armed violence to maintain or enforce its denial of self-determination. The second case is when a state wielding authority over a colonial people, besides failing to take all the necessary measures for enabling the people to exercise its rights to self-determination, also sets up institutional, coercive mechanisms designed to prevent the implementation of self-determination (or in the course of its military occupation of a foreign country establishes procedures and takes measures designed to thwart any attempt by the occupied people to exercise its right to self-determination; or alternatively sets up in its domestic legal system institutions which deny a racially discriminated group equal access to government).

In both classes of cases the denial of self-determination has a twofold legal relevance under international law: firstly, it constitutes a violation of international legal rules; secondly, as we shall shortly see, it legitimises the resort to military force by the organisation representing the oppressed people or group...

The importance of these normative developments should not be underestimated: the international community has gone so far in its protection of self-determination as to prohibit not only the use of military force by the oppressive state, but also what could be termed 'institutionalised violence', namely all those measures, mechanisms, and devices destined to prevent peoples or racial groups from exercising their right to self-determination...

The UN Charter neither authorises nor bans the use of force by dependent peoples (or rather, by liberation movements representative of those peoples) for the realisation of external self-determination...Although no legal right proper was thus bestowed on liberation movements to resort to force, gradually the view emerged among states that nevertheless resort to force by these movements was not in violation of the general ban on force that had meanwhile emerged in the world community...However, the attitude of the world community was qualified by a basic condition: that resort to force by liberation movements should only be effected as a response to the forcible denial of self-determination by the oppressive Power, that is by the refusal of the latter State, backed up by armed force, or even coercive measures short of military violence, to grant self-determination to colonial peoples (or to peoples subjected to foreign military occupation or to organised racial groups denied equal access to government). Furthermore, the world community did not go to the lengths of conferring a legal right proper on liberation movements, but only granted a licence to use force...

On the other hand, third states must refrain from assisting a state that forcibly opposes self-determination. 'Any substantial help to the oppressive state, be it military or economic in nature, is regarded as illegal under current international law.'¹⁸

These developments are reflected in two key UN resolutions:

- (a) The 1970 UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625); and
- (b) The 1974 UN General Assembly Definition of Aggression (Resolution 3314).

18 *Ibid.* p 200.

They are also reflected in the UN International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹⁹

Notwithstanding the status of the self-determination principle, however, the counter terrorist strategy deployed by many States since 9/11 has had a profoundly corrosive affect upon the operation of the principle of self-determination and, by implication, the international community's commitment to support groups struggling for democracy against oppressive regimes. It has certainly brought into sharp relief the international community's historically schizophrenic attitude towards the principle of self-determination and its deep distrust about its further application. As we know, there has always been an uneasy relationship between the principle of self-determination and the phenomenon of terrorism. There is a discernible tension between calls for a wider concept of terrorism and how that interplays with the recognition of the principle of self-determination, involving as it does a potential license to deploy force as a last resort in defence against an oppressive regime.

It is this tension that lay at the heart of the international community's inability to come to an agreed consensus about what constitutes terrorism before 9/11. It is why the Ad Hoc Committee on International Terrorism, established by the UN General Assembly to find a unanimously acceptable definition of terrorism, and which met from 1972 to 1979, was singularly unable to reach a consensus on a definition of the term terrorism. On the one hand many former colonised states were adamant that the legitimate actions of national liberation movements should not be confused with terrorism. On the other hand, many other states were deeply suspicious of extending the principle to situations unrelated to the decolonisation process. Such suspicion only increased after decolonisation. Thus, despite self-determination being recognised in UN treaties and attaining the status of a peremptory norm in international law there has been a concerted and consistent attempt to limit its external application.²⁰

It is for this reason that certain commentators argue that the outsourcing of the definition of terrorism to nation states since 2001 is a particularly dangerous development given the backdrop of these states' lack of respect of the right to self-determination. Too many states have a vested interest in downplaying the right or not legally protecting the right to self-determination - precisely because of their own concerns about their own minorities or indigenous peoples or those of their allies.

Underlying this entire approach is the desire to reinforce the supremacy of the nation state and its sovereignty at the expense of other principles of international law, which seek to limit such state authority. Far from seeking to protect the principle of self-determination or democracy, since

19 UN International Law Commission's Draft: Responsibility of State for Internationally Wrongful Acts 2001.

20 The ICJ has virtually denuded the right of practical effect by (1) equating the term 'peoples' with the 'government of a whole territory'; and (2) through (the '*uti possidetis*') rule that the exercise of self-determination must not involve changes to existing frontiers except where relevant nation states consent. This conflated territorial constraint has effectively disenfranchised minority peoples in a majority in a province or part of a state from invoking the right of external self-determination. (One need only take a cursory glance at the Namibia Case to understand just how far the principle has been neutered).

2001 member states have used the opportunity presented by the upsurge in terrorism to further relegate its practical effect. Time and again they have ignored these rights preferring instead to define terrorism in its broadest sense thereby giving governments the widest possible discretion to prohibit groups suspected of falling within that broad definition. This is because the right of self-determination, with its suggestion that peoples of a territory can determine by a free and genuine vote the political status of their homeland either through independence, autonomy or integration with another state, presents a threat to the power and authority of the nation state.

Over the last six years there has been a demonstrable effort on the part of numerous states to deny succour to any liberation or resistance movement claiming to act in the pursuit of the principle of democracy or self-determination in their purported fight against oppressive states. On the contrary, movements who seek to invoke the principle are now routinely criminalised through proscription. This has huge consequences for numerous struggles around the world and for those organisations involved in them, such as the Palestinian search for statehood. Thus, the continued failure of the international community to reach an agreed consensus about what constitutes terrorism assumes much greater importance than at any time before September 2001.

THE RIGHT TO DEMOCRACY AND/OR TO RESIST AN OPPRESSIVE REGIME

This attitude towards self-determination is replicated by many States' attitude towards those groups who seek to resist oppressive regimes in support of democratic change. Most domestic provisions concerning terrorism and proscription fail to recognise any right to resist, rebel, or take up arms as a last resort in support of democracy.

This is particularly ironic given the international community's commitment to the principle of democracy. Both the General Assembly and the UN Commission on Human Rights have described terrorism as aimed at the destruction of democracy or the destabilising of 'legitimately constituted Governments' and 'pluralistic civil society.' Other resolutions state that terrorism 'poses a severe challenge to democracy, civil society and the rule of law.' The 2002 EU Framework Decision, the 2002 Inter-American Convention, and the Draft Comprehensive Convention are similarly based on the premise that terrorism jeopardises democracy. While the jurisprudence of the European Court of Human Rights has consistently upheld the principles of democracy and pluralism as constituting the cornerstone of the Convention which all Members States are obliged to adhere.

Yet despite this political commitment to the principle of democracy most Members States have singularly failed to incorporate that commitment into domestic definitions of terrorism. Although there is no entrenched legal right of democratic governance in international law it is clear that since the end of the cold war this principle is evolving into such a right and that the international community has begun to take the idea of democratic rights seriously.

THE EXAMPLE OF THE UNITED KINGDOM

A paradigm example of state failure to fully incorporate recognition of the right of self-determination and/or a right to democracy in its definition is the UK and its enactment of the Terrorism Act 2000 (TA). Section 1(1) of the Terrorism Act defines terrorism as the use or threat of action falling within section 1(2) which is designed to influence the government or to intimidate the public or a section of the public for the purpose of advancing a political, religious or ideological cause. It has been held by the Court of Appeal that the word 'government' in s1(1)(b), as explained in s1(4)(d) in relation to foreign governments, is not limited to those countries which are governed by what may broadly be described as democratic or representative principles but includes a dictatorship, or a military junta or a usurping or invading power. Notwithstanding the European Convention's commitment to democracy the Court ruled that s1 did not specify that the ambit of its protection is limited to countries abroad with governments of any particular type. What was striking about the language of s1, read as a whole, 'is its breadth.'²¹

The action specified in section 1(2) is action which (a) involves serious violence against a person (b) involves serious damage to property (c) endangers a person's life, other than that of the person committing the action (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. The use of an action falling within section 1(2) which involves firearms or explosives, and which is carried out for a political, religious or ideological cause, is terrorism, whether or not it is designed to influence the government or to intimidate the public or a section of the public: section 1(3). Thus, the use of any firearm for a political purpose in a manner which endangers a person's life is terrorism. And the disruption of any electronic system for a political purpose is terrorism, whether or not it is done by violent means. Section 1(4) makes it clear that the action may be an action which takes place outside the United Kingdom, and the government whose actions it is sought to influence may be a foreign government.

The definition adopted in the TA is broader than that adopted in the International Convention (ICSTF). In particular:

- (a) The ICSTF definition is confined to the use of violence on civilians and non-combatants.
- (b) It does not include damage to property (other than by bombing).
- (c) It does not extend to action which creates a serious risk to health or safety.
- (d) It does not include the non-violent disruption of an electronic system.

It follows that the potential range of foreign organisations falling within the definition of terrorism under the TA 2000 is extremely wide. It potentially encompasses almost all organisations engaged in armed conflict around the world, whatever the circumstances, and is wide enough to include organisations which have the political support of the United Kingdom and which would, for that reason alone, not be proscribed (such as the Northern Alliance in Afghanistan).

21 See Court of Appeal Judgment dated 16/02/07 in *R v F*. Case No: 2007/00579/B5. [2007] EWCA Crim 243.

The power of proscription under section 3 is, however, discretionary. The Secretary of State is not required to proscribe any organisation merely because it meets the statutory test. The judgment which the Secretary of State is called upon to make is an essentially political one but one guided by principle, fairness and a proper examination of the surrounding context. It is plain that the definition of terrorism in section 1 was intentionally overbroad, so as to delegate to the Secretary of State the judgment as to which organisations would, and which would not, be proscribed.

In fact it is noteworthy that the scope of the Secretary of State's discretion is further enlarged by the criteria for proscription. Section 3(3) of the TA provides that the Secretary of State may exercise his power to add an organisation to the list of proscribed organisations in Schedule 2 'if he believes that it is *concerned* in terrorism.' Section 3(5) provides that an organisation is 'concerned' in terrorism if it (a) commits or participates in acts of terrorism, (b) prepares for terrorism (c) promotes or encourages terrorism or (d) is otherwise concerned in terrorism.

At first sight, it may appear that the Secretary of State must believe that the organisation is engaged, directly or indirectly, in acts of terrorism as defined in section 1 at the time he proscribes it, or at the very least that it is, at the relevant time, preparing for such acts or promoting or encouraging such acts by others. This appears to be the natural reading of section 3(3) which uses the present tense ('...is concerned in...'). However, section 3(5)(d) establishes an even broader basis for proscription. Even where an organisation is not committing, participating or preparing for terrorism, nor encouraging or promoting such acts by others, it may be proscribed if the Secretary of State believes that it is 'otherwise concerned' in terrorism. As regards de-proscription, the Secretary of State interprets this to include a situation in which an organisation is not currently engaged in any of the prohibited forms of conduct, provided he believes or fears that it has engaged in acts of terrorism in the past, and may possibly do so again in the future. This interpretation has recently been rejected by the Court of Appeal in the case of *The Secretary of State for the Home Department and Lord Alton of Liverpool and others* (Case No. 2007/9516).

What is clear is that the definition in the UK Terrorism Act 2000 is plainly capable of encompassing organisations that have engaged in lawful armed conflict in the exercise of the internationally recognised right to self-determination of peoples. As noted above, the United Kingdom is bound, in international law, to recognise that liberation movements representing certain peoples and organised racial groups have the right to engage in armed conflict in order to realise their legal right to self-determination. And it is bound, in international law, to refrain from offering material support to states engaged in the suppression of the exercise of this right by military or other coercive means. However, the definition of terrorism in section 1 of the Terrorism Act is plainly wide enough to include such movements and organisations. Those who support, or seek to elicit support for legitimate liberation movements, recognised as such under international law, are nonetheless at risk of proscription.

The same is true for any organisation that claims to be resisting an oppressive regime and taking up arms as a last resort in an attempt to establish democratic change. However, as the Court of Appeal made clear in *R. v. F* the Terrorism Act provides no cover in relation to those who take up arms against oppressive tyrannical regimes even as a legal defence rather than a claim. Take also for example the UK proscription of the People's Mujahedin of Iran (PMOI), an Iranian resistance

movement dedicated to the overthrow of the current regime in Tehran. The UK Secretary of State, in refusing the application to de-proscribe the PMOI, stated:

The Home Secretary has taken full account of the ...assertion that Mujahedin e Khalq is involved in a legitimate struggle against a repressive regime and has no choice but to resort to armed resistance. He notes too the claim that armed resistance is concentrated against military and security targets within Iran only. The Home Secretary does not, accept, however, any right to resort to acts of terrorism, whatever the motivation...²²

The reference to acts of terrorism means any use of force. It is simply impermissible for any movement to deploy force against another State in any circumstances including those provided for under international law. One might have reminded the Home Secretary of the preamble to the Universal Declaration of Human Rights (1948) (and its recognition of the rebellion as a last resort) that:

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Yet, the proscription of the PMOI continues despite Former Prime Minister Blair's recent admission on 8 February 2005 that Iran 'certainly does sponsor terrorism' and is a deeply repressive regime. Again, it matters not whether this is or is not in fact an accurate description of the Iranian regime. What is striking is the UK Government's desire to proscribe an organisation that does not have as its target any UK interests, and which, in the words of Mr Blair, is fighting a state sponsor of terrorism. The important point is not whether the UK Government was right to proscribe this particular organisation but its apparent determination to impose a total prohibition on the use of violence whatever the circumstances and however dire the oppression of the group taking up resistance. Given the potential breadth of the Home Secretary's discretion to proscribe surely one aspect of the exercise of this discretion is to have due regard for the principles of international law including the general principles of community law when deciding to proscribe an organisation that falls within the statutory criteria. Thus, even if the definition of terrorism under UK law is broad enough to encompass all organisations that deploy or threaten to deploy violence, the Home Secretary's discretion is likewise broad enough to make exceptions based upon compliance with international obligations.

PROSCRIPTION REGIMES AND THE REINFORCEMENT OF STATE SOVEREIGNTY

So why do democratic governments such as the UK Government feel it politically necessary to not just define but also strictly apply the definition of terrorism in such a way as to jettison any commitment to democracy or self-determination or make any allowance for those foreign movements fighting undemocratic or oppressive regimes or who were engaged in lawful armed conflict in the exercise of the internationally recognised right of the self determination of peoples?

22 M Muller, 'Right to resist oppressive regimes must be recognised in terrorism legislation,' <http://mujahedin-e-khalq.org/MEK-MKO/>

Especially in circumstances where the UK routinely expresses its support for the principle of democracy and is bound by international law to recognise the right and to refrain from offering material support to states engaged in the suppression of the exercise of the right by military or other coercive means.

Why, for example, in March 2001 did the UK Government feel compelled to proscribe 21 organisations together in a 'take it or leave it list' without providing parliament with an opportunity to properly consider the individual merits in respect of each group or examine the distinction between terrorist, separatist, resistance, and liberation movements? After all, the UK Terrorism Act 2000 prefigured 9/11 and the subsequent global rise of Islamic fundamentalist insurgency. The 2000 Act was not rushed through parliament as a consequence of any state of emergency. Nor was it enacted due to massive heightened public anxiety over terrorism. In fact the Terrorism Act came into force a full six months before 9/11 even occurred.

Some argue that the enactments like the UK's Terrorism Act 2000 form part of a politicised process that preceded 9/11 in which many states had effectively resolved between themselves to reinforce the supremacy of state sovereignty at the expense of international law. These states were already increasingly co-operating with each other on a bilateral and sometime multilateral basis to stop each other's territory from being used by foreign resistance movements, irrespective of whether such movements could be said to be terrorist in nature or merely legitimately defending themselves against attack by an oppressive or racist regime. In short, these states effectively failed to protect the principles of self-determination and democracy within their domestic definitions of 'terrorism' as both principles constitute a threat to the power and authority of the nation state and interfered with their respective foreign policies.

That is why many legal commentators have argued that whether a group is on or off a proscription list has more to do with geopolitics and diplomatic relations between states than with genuine threats to a particular country's national security and the strict application of law in relation to terrorism. The UN stricture to member states to co-operate in countering terrorism in practice has become intertwined with a whole set of other foreign, military and strategic objectives that govern relations between states. The temptation to offset any strict application of the law relating to fighting counter terrorism in favour of achieving other desirable foreign policy goals is huge. This temptation fundamentally affects the integrity of counter terror legislation and creates real resentment and further resistance within dissident groups who are caught by measures taken on broader policy grounds.

Classic examples include the PMOI, which according to official papers was only proscribed by the Clinton Administration and later by the EU as a 'good will gesture' towards Iran when the U.S. was seeking to court the newly elected moderate President Khatami. The European Council's decision to proscribe the PMOI was subsequently challenged in the European Court of Justice. In early 2006 the Court of First Instance declared the original proscription unlawful holding that the Council had breached the applicant's procedural rights to a fair hearing and had wholly failed to provide reasons for the proscription.²³

23 See Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II – 4665.

Back in the UK a group of prominent Lords and Members of Parliament challenged the failure of the Home Secretary to de-proscribe the PMOI on the grounds that it breached fundamental rights and was politically motivated. The application for de-proscription was filed in June 2006. By that time the PMOI had given up its armed struggle for five years, voluntarily disarmed its cadres in Iraq, and publicly pledged itself to overthrowing the regime in Tehran through peaceful non-violent means. On 30 November 2007 the Proscribed Organisation Appeals Commission (POAC) gave judgment and declared the proscription unlawful, characterising the position of the Home Secretary as legally ‘perverse’.²⁴

In April 2008 the Court of Appeal emphatically upheld that ruling. The Court referred to a two-stage test. The first test concerned whether the PMOI met the statutory provision of being ‘otherwise concerned in terrorism’ under s3(5)(d). The second test concerned whether, having come within the statutory provision, the Home Secretary lawfully exercised his discretion to proscribe or refuse to de-proscribe the PMOI. Both tests required an intense scrutiny of the Home Secretary’s belief that the PMOI was ‘otherwise concerned in terrorism’ because proscription interfered with fundamental human rights. In the event, the Court of Appeal upheld POAC’s findings as to the nature of the scrutiny to apply and as to the rulings of fact and law. In particular, it specifically rebutted the Home Secretary’s submission concerning the ambit of Section 3(5)(d) that it was enough for an organisation to be ‘otherwise concerned in terrorism’ even if it was not currently engaged in promoting, preparing or committing acts of terror, provided it maintained its organisational existence and the Home Secretary entertained a fear that it might use its resources to return to violence in certain unspecified circumstances. In fact what needed to be legally and evidentially demonstrated was that the PMOI was currently engaged in terrorism and/or continued to maintain its organisation for that specific intended purpose. There was no evidence to this effect and nothing less would do.²⁵

Another example of a less than perfect legal proscription process concerns the original EU proscription of the PKK²⁶, a radical Kurdish nationalist party advocating greater rights for Kurds in Turkey. That organisation found itself proscribed by the EU after repeated requests from Turkey despite having observed a six-year cease-fire during which no acts of violence occurred. In fact the European Council failed to proscribe the PKK in its first proscription list of November 2001 issued just after 9/11 despite having conducted a thorough review of all organisations potentially caught by EU terror provisions. Six months later the European Council proscribed the PKK but only after it had announced its own dissolution and created a successor organisation KADEK, whose alleged purpose was to foster a democratic settlement to the Kurdish Question. Yet quite remarkably the Council failed to proscribe the successor organisation despite regarding KADEK as an alias of the PKK. When the Council did subsequently proscribe the successor organisations KADEK and Kongra-Gel as an alias of the PKK in 2004 it provided no reason for doing so whatsoever.

24 See POAC Judgment of 30/11/07 in *Lord Alton of Liverpool & Others (in the Matter of the People’s Mojahadeen Organisation of Iran) v. Secretary of State for the Home Department*. Appeal No: PC/02/2006

25 See Times Law Report, 13/05/08 – Court of Appeal Judgment dated 07/05/08 in *Secretary of State for Home Department v. Lord Alton and Others*. Case no: 2007/9516.

26 Partiya Karkerên Kurdistan.

Many observers find it hard to understand the legal logic of this proscription process. No reasons were ever provided to justify any of these decisions at all. More significantly, there was no explanation as to explain why, even if the PKK technically came within EU terror provisions, the Council found it legally necessary to exercise its discretion to ban such an organisation at a time when it had given up armed conflict and was ostensibly in search of a non-violent solution. By 2004 the PKK had been on cease-fire for some six years. Some observers suggest the process had more to do with international politics and the need to appease Turkey than to do with the strict application of law. Apart from the UK, many EU countries initially appeared reluctant to act against the PKK precisely because it was on cease-fire. This state of affairs had substantially assisted the EU accession and reform process within Turkey. Observers suggest this was why the PKK was not banned in November 2001 and only banned in April 2002 after it had dissolved itself and had created a successor organisation.

The PKK subsequently returned to the use of violence after its offer of a non-violent settlement was rejected by Turkey and all of its allied and so called 'democratic' successor organisations, like Kongra-Gel, were proscribed by the European Union in 2004. Just whether the proscription regime deployed by the EU actually helped rather than hindered the international fight against terrorism remains a matter of real debate. The recent European Court of Justice's ruling of March 2008 annulling both the original and 2004 proscriptions of the PKK²⁷ and Kongra-Gel for breach of procedural rights and a failure to state reasons by the Council of the European Union merely exacerbates this debate.²⁸ What is clear is that the lack of procedural and substantive rights afforded to these organisations by the Council of the European Union hardly engendered within those organisations a respect for the rule of law or an acceptance that de-proscription procedures will be applied neutrally and fairly. If anything the manner by which the proscription regime was deployed merely fuelled the PKK's eventual return to violence as all avenues for dialogue were closed.

Thus, to many the circumstances of the PMOI proscriptions and other EU proscriptions, like the original PKK decision, often appear to have less to do with the strict application of anti-terror provisions and more to do with the need of certain states to get other states to root out unwanted exiled dissident groups. In this process proscribed organisation appear to be traded between states like carbon trading emissions quotas. Thus, in order for certain states to secure certain foreign policy goals, and/or the co-operation of other states in their own fight against indigenous opposition movements, it became necessary to ensure the widest degree of legal latitude and discretion when it came to the business of proscription. That is why little attempt is made by Western powers to protect the right of self-determination or ensure a right to democracy in terror legislation, despite their own avowed political support for the principle of democracy. Yet, while it might be necessary in terms of 'real politik' for western states to afford to themselves a wide legal discretion when deciding to proscribe an organisation or not, there should be no illusion about how the infusion of politics into law by this process has degraded the legal integrity of a number

27 See Case T-229/02 *PKK and KNK v. Council of the European Community* – Judgment of 15/02/05 of the European Court of Justice and 03/04/08 of the Court of First Instance of the European Communities.

28 See Case T-253/04 Judgment of 03/04/08 the Court of First Instance of Instance of the European Communities in *Kongra-Gel and Others v. Council of the European Union, United Kingdom of Great Britain and Northern Ireland, Intervener*.

of proscription regimes and actively hindered the ability of third parties and the international community to resolve certain conflicts through peaceful means.

PROSCRIPTION REGIMES AND THE FAILURE TO DEFINE TERRORISM INTERNATIONALLY

We know from bitter experience that how we label each other has a significant impact upon how we treat each other not just legally but also socially and politically. From US Senator McCarthy's anti-communist list in the 1950's onwards, we have seen time and again just how dramatic and draconian the consequences can be for a person or a group once they become designated on a proscribed list. These lists are not just designed to combat criminality. They are designed to delegitimise certain organisations and their attendant struggles. Proscription regimes are not simply legal tools against terror but ideological and political ones as well. They communicate societies disfavour on the most profound scale.

Accordingly, no one should be in the slightest doubt as to the legal, political and cultural significance of the development of comprehensive proscription 'terror lists' in the wake of 9/11. The consequences of proscription are profound and far-reaching. Whether it is the USA Patriot Act²⁹ or the EU Common Position on Combating Terrorism³⁰ or the UK Terrorism Act 2000,³¹ all use proscription terror lists as a condition precedent to invoking a regime of offences designed to stifle a group's ability to organise, meet and communicate. The purpose of the proscription lists are clear - it is to ostracise, censor, criminalise and silence all those groups that unfortunately find themselves on the list or who are associated with groups or persons on the list.

In conclusion, the failure to agree an international definition of terrorism has had a particularly dangerous impact in the field of domestic proscription regimes, the preferred method of combating terrorism around the world. The illegitimate or legally botched use of these proscription procedures is dangerous as it breeds long-term resentment among many exiled dissident groups and communities. The issue is not even whether on the relative merits any of the above named organisations deserve to be legally proscribed. It is the failure of Western states when deciding to proscribe an organisation or not to adhere to fair proscription procedures that are accessible,

29 The USA response to 9/11 and the UN Security Resolutions is to be found in the USA Patriot Act (United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) which was followed on 24 September 2001 by Presidential Executive Order (No. 13224) entitled 'Presidential Order Blocking Transactions with Terrorists', which proscribed 100 persons and entities suspected of being connected with terrorism.

30 The EU response to UNSC Resolution 1373 is to be found in Common Positions of 27 December 2001, 2001/930/CFSP on combating terrorism, and 2001/931/CFSP on the application of specific measures to combat terrorism ([2001] OJ L 344/90), followed by the Council Framework Decision of 13 June 2002, which includes a definition of terrorism ([2002] OJ L 164/3), the Framework Decision on the European Arrest Warrant ([2002] OJ L 190/1), and other measures designed to freeze assets through the blacklisting of suspected terror groups or persons. [In the EU proscription, although more symbolic, leads to the potential freezing of assets, and gives a powerful nod to member states to domestically proscribe the relevant organisation or person].

31 The UK's relevant anti-terror legislation is to be found in the Terrorism Act 2000, which provides for the proscription of terrorist organisations. On 29 March 2001 Parliament passed an Order formally proscribing 21 organisations in a take-all-of-it-or-leave-it list.

transparent and apply proportionate legal criteria that have due regard to international law and the protection of fundamental freedoms. The fact that Western States no longer accept that there are any circumstances where a group or unrecognised people might be forced to have recourse to violence in support of a political objective protected by international law has huge implications for global security and conflict resolution.

A DANGEROUS INTERNATIONAL LACUNA

Why does all this matter? It matters because, more often than not, the source of violence around the world occurs where there is no democratic outlet for dissent or credible protection for persecuted peoples and minorities. A dangerous political and human rights lacuna has been created in the international legal system. This lacuna consists of the international community's failure to address the position of stateless nations, peoples, and persecuted minorities, and those involved in the collective fight for democratic reform against authoritarian regimes. Instead, Member States within the United Nations have preferred to reinforce the virtual inviolability of the system of state sovereignty, save in the exceptional circumstances where the Security Council authorises use of force under Chapter Seven. This lacuna has led to numerous internal conflicts which could have been avoided had certain avenues of international political and legal redress been available. The failure to provide avenues of redress has led numerous groups to turn to more violent methods. The recent swathe of domestic terror legislation simply entrenches this process through its failure to distinguish between terrorism and true resistance in support of democratic change. The attempt to secure international harmony and cooperation through the enforcement of the supremacy of state sovereignty at all costs merely creates more adherents to non-peaceful strategies as dissident groups feel disenfranchised and unfairly punished.

As noted above, the root cause of this remains the continued failure of the international community to reach any agreed consensus about what constitutes terrorism and the outsourcing of the definition of terrorism to Member States. As Helena Kennedy QC, the former Chair of the British Council, perceptively notes:

Until there is an internationally recognised and sufficiently restrictive definition, it will be hard to have confidence that struggles for self-determination and other political activities will not be wrapped up in accusations of 'terrorism'.³²

Kennedy is surely right when she warns of the danger of 'the passing of anti-terrorist legislation against the backdrop of principle.'

The United Nations Human Rights Committee has expressed concern about the legislative measures taken by some countries and urged states to ensure that measures undertaken pursuant to resolution 1373 comply with the International Covenant on Civil and Political Rights. More recently, the Council of Europe issued *Guidelines of the Committee of Ministers on Human Rights*

32 'Suspect Communities: The Real 'War on Terror' in Europe' (London Metropolitan University) - <http://www.ejdm.de/Suspect%20Communitites%20Conference%20Report.pdf>

*and the Fight Against Terrorism*³³ stating that it is ‘absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international law.’ In fact Members States of the EU would be wise to recall that the EU note accompanying the draft of the European Framework decision circulated after 11 September 2001 stated that the definition of terrorism does not include ‘those who have acted in the interests of preserving or restoring democratic values.’ The Council of Europe Parliamentary Assembly 2008 Report and Resolution on the use of terror lists prepared by its Committee on Legal Affairs and Human Rights (CLAHR), written by Senator Dick Marty, rightly criticised the failure of the EU and its states to adhere to principles of legal fairness and international law when enforcing proscription regimes.³⁴

In short terror lists should not be used as mere instruments of foreign policy without a proper regard for the principles of due process and rights recognised in both national and international law. Certain persecuted groups allegedly forced to take up violence as a last resort must be given an avenue of redress or at the least, the possibility of raising a legal defence, both procedurally and substantively, to a charge of terrorism, so that any further resort to violence can be rightly condemned as extremist and unlawful by all right thinking nations. Otherwise the application of proscription regimes will hinder rather than help the fight against terrorism and the wider search for peace across the globe.

33 Appendix 3 to the Decisions of the Committee of Ministers, adopted at their 80th meeting on 11 July 2002 CM/Del/Dec (2002) 804 of 15 July 2002, <http://wcm.coe.int/ViewDoc.jsp?id=296009&lang=en>.

34 See Committee on legal Affairs Document 11454 and the Council of Europe Parliamentary Assembly Resolution 1597 (2008) on United Nations Security Council and European Union Blacklists.

Saniye Karakaş¹

Recognition and the Right to Political Participation of Minorities in Turkey: a Comparison with Bulgaria

Abstract

This article examines the right to political participation of minorities in Bulgaria and Turkey in relation to recognition. It explores how recognition creates a peaceful environment in a diverse society and how it gives power to minorities to ensure their rights, of which participation is an essential aspect. The article focuses on the situation of ethnic Turks in Bulgaria and Kurds in Turkey: the largest minority groups in these two states. In light of the current case aimed at closing down the pro-Kurdish Democratic Society Party (DTP) in Turkey, the article suggests that Turkey should learn from the experience of the inclusion of Turks within the democratisation process in Bulgaria.

INTRODUCTION

Political participation is a keystone of democracy which presupposes recognition of individuals, minority groups and formal institutions by the state, including their rights to be free to pursue their interests and ideals independently of the state in most spheres of life. Without these intermediate organisations and groups, democracy is restricted to the relatively small circle of professional politics, leaving the population few opportunities for political participation. Such independent organisations and groups provide people with opportunities to be active in society and political life, to become citizens and to engage actively in public life.²

This is particularly true of minority participation: members of minority groups are entitled to have the same rights as other members of society. Minorities have the right to influence public policy and to be represented by their own organisations and people. The value of a deliberative understanding of democracy for minorities does not necessarily require the sharing of political power with minorities, but it does require recognition of minorities as equals and their inclusion in the decision-making process. This will allow members of minority groups to bring issues onto the political agenda, to correct factual errors and to ensure that their interests and perspectives are recognised within the political process.³ It also allows minorities to be involved in the national, political and social process that leads to their integration in the state. Providing effective political participation to minorities helps to stop ethnic prejudice, promotes dialogue among multi-

1 Saniye Karakaş is KHRP's Legal Associate and a qualified criminal lawyer.

2 Giatzidis, Emil, *An Introduction to post-Communist Bulgaria: Political, Economic and Social Transformation*, Manchester University Press, Manchester and New York, 2002, p. 5

3 Wheatley, Steven, 'Deliberative Democracy and Minorities,' *EJIL* 14 (2003), 507-527.

ethnic populations and prevents possible ethnic conflicts by removing misunderstanding and ignorance.

This article will analyse the effective political participation of minorities in relation to recognition. The situation of minorities in Turkey and Bulgaria will be compared, in order to provide more evidence and information regarding the effects of recognition on a minority's political participation. The article will focus specifically on the situation of ethnic Turks in Bulgaria and Kurds in Turkey: the largest minority groups in these two states, who shared similar circumstances in the past but are now in different situations. The article will concentrate in particular on the parliamentary representation of these minorities. The first section explores the concept of political participation and its role in achieving democratic principles and human rights. It will explain the importance of recognition, to demonstrate how recognition creates a peaceful environment in a diverse society and how it gives power to minorities to ensure their rights, of which participation is an essential aspect.

The second chapter discusses the effective participation of minorities in a broader aspect, through the perspective of international law. It explores the framework of effective participation in the main instruments of the UN, Council of Europe and the OSCE, including both binding treaties and non-binding declarations and recommendations. These are the rules and recommendations which both countries should comply with or consider. The article then moves on to an examination of the relationship between recognition and the political participation of minorities in Bulgaria. The positive effects of recognition in political life and the democratisation process will be explained from a historical perspective and with a specific focus on Turkish minorities in Bulgaria. The final chapter explains the case of the political participation of minorities in Turkey through the example of Kurdish minorities. The example has been chosen in order to provide a contribution to the debate concerning non-recognition and its obstructive effects on Turkey's democracy as well as minority rights.

1. THE CONCEPT OF POLITICAL PARTICIPATION AND ITS IMPORTANCE

A - Political Participation

The term 'political participation' has a broad meaning and can be used to refer to different kinds of activities. For instance, voting, campaigning and joining a political party are the most common forms of political participation, while protesting and taking part in demonstrations can be considered in the context of political participation as well. With scholars engaged in ongoing debates about the definition of political participation, it is difficult to agree on a single definition.

The classical and most widely-held definition of political participation is made by Verba and Nye. According to this definition, 'political participation refers to those activities by private citizens that are more or less directly aimed at influencing the selection of governmental personnel

and/or the actions they take.⁴ All attempts to define political participation are correct in some respect. However, the notion of citizenship and the efforts of citizens to influence public affairs or governmental decisions constitute core aspects of the concept of political participation.

B - The Importance of Representation of Minorities in Achieving Democracy and Human Rights

Most of the countries in the world have ethnic, cultural, religious and linguistic minorities. According to recent estimates, over 600 living language groups and 5,000 ethnic groups exist in the world's 184 independent states. Only in a few countries do all citizens share the same language, or belong to the same ethno-national group.⁵

This diverse character of nations raises substantial questions about how states should achieve real democracy, where the demands of multi-ethnic and multi-cultural society are not ignored. Providing for the needs of minorities is one of the shortcomings of democracy today. Given that political decisions in democratic systems are broadly made by majority rule, the question arises whether majority rule without the input of minorities is actually democratic. The answer must be that it is not. For a society to be considered democratic, it must be the case that the majority have regard to the interests of all groups and people in the state, not only those of its supporters.⁶ The interests of minorities must not be left to the mercy of the majority and their rights must not be removed by majority vote. Real democracy must also provide minorities with the opportunity to participate at all levels of society with their own identity, without fear and on equal terms with the majority.

Why should minorities be represented by their own representatives rather than by the majority or other groups? Fundamentally, everyone knows what is best for their own interests. This also applies to minority groups as regards to their needs and preferences. Therefore minority groups should be involved in the decision-making process in order to influence the state policies that affect them.

Minority representation is an important stage for the recognition of minorities. It provides a powerful symbol of minority acceptance and inclusion, especially where minority groups have historically been excluded from the political system.⁷ Putting minority issues on the agenda is another important feature of minority representation, as it will raise awareness of minority issues and this may create a public consensus as regards the need for solutions.

4 Quoted in Hassan Bousetta, 'Extending Democracy: Participation, Consultation and Representation of Ethnic Minority People in Public Life,' available at <http://www.international.metropolis.net/events/rotterdam/papers/14-Bousetta.pdf> (last accessed 4 December 2008).

5 Kymlicka, Will, *Multicultural Citizenship: A liberal Theory of Minority Rights*, Oxford University Press, Oxford, New York, 1996, p. 1

6 *Ibid.* Quoted in D.J Harris, *et. al.*, *Law of The European Convention on Human Rights* (1995), p. 550.

7 Anthony, Karina, 'The Political Representation of Ethnic and Racial Minorities', Briefing Paper 3/06, NSW Parliamentary Library Research Service.

Minority representation is also of crucial importance in ensuring that the rights of minorities are upheld and preventing discrimination against minorities. Without active participation in the decision-making process, other rights and the prevention of discrimination against minorities cannot be effectively ensured and minority rights protection can be substantially weakened. It is unlikely that the majority will vote for parties or candidates of other nations or ethnic groups, especially in those states where ethnic nationalism exists. Therefore, exclusion from the political system without special protection will result in the voice of minorities not being heard and consequently pose a risk to democracy.⁸

C - Recognition and Minority Rights

Most countries have minority groups in their territories and the existence of minorities is an important and complicated issue, constituting a risk for national and global democracy and threatening internal and international peace. Almost all conflicts happening in the world today are the result of minorities' demands for the recognition and enjoyment of their rights. New minority groups have even appeared on the scene and claimed recognition and respect for their rights after becoming aware of their distinct identity.

The existence of minorities is usually seen as a threat and special policies are therefore adopted by states to eliminate the identity of minorities, who face discrimination, marginalisation and poverty. This raises the question of whether the existence of minorities and their demands for recognition and the protection of their rights constitute the cause of conflicts, or whether the reaction that they get from states to their demands makes minority issues more complex and creates the conflicts. States tend to believe that recognition of minorities leads to power leaking to minority groups, thus constituting a threat to the stability of the nation-state system and leading to separation.

On the contrary, as will be shown below, in the case of Turkey, it is the failure to recognise minorities has led to instability and conflict. Recognition is essential to secure the peaceful coexistence of different groups in a state. Recognition is also of vital importance for the protection and promotion of minority rights. It is the first step in the process of ensuring the economic, social and cultural rights of minorities. However, it should be noted that the recognition of the existence of a minority or its identity is not by itself sufficient for minorities to maintain their cultural identity and to protect their rights. They should also be provided with facilities to enable them to promote their rights and pursue their interests. The most effective way to achieve this is the granting of legal status to minority groups by the states in which they reside. 'Recognition' should also include recognition by the majority of the minority's cultural traditions and recognition of autonomous forms of government for minorities.⁹ In other words, recognition should be more than just a question of tolerance; collective recognition must be secured as well as individual. This means 'minorities should be concerned with the exact same issues with which most members of ruling co-nations are concerned, namely the freedom to identify with their kin, to speak and learn

8 Bieber, Florian 'Balancing Political Participation and Minority Rights: The Experience of the Former Yugoslavia,' Central European University, Centre for Policy Studies, 2002/2003.

9 Porter, Kirsan, 'The Realization of National Minority Rights,' *Macquarie Law Journal*, 2003.

their mother tongue both in the public and the private spheres, and to preserve their co-national heritage and pass it on to their offspring through community life.¹⁰

2. THE RIGHT TO POLITICAL PARTICIPATION OF MINORITIES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS

A - United Nations

1 - *Universal Declaration of Human Rights*

The right to political participation is enshrined in several United Nations instruments. The Universal Declaration of Human Rights (the 'Declaration') defines the general principles of the right to political participation. Although the Declaration itself is not legally binding, it provides the foundation for other treaties, frameworks and minimum standards which states must consider. Article 21(1) of the Declaration states that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.' Furthermore, according to Article 21(3), 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'¹¹

2 - *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (the 'Covenant') has similar content to the Declaration regarding political rights. However, contrary to the Declaration, the Covenant is a legally binding treaty which imposes obligations on signatory states and is policed by compliance mechanisms.

Using similar language to the Declaration, Article 25 of the Covenant states that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.¹²

The article refers to Article 2 of the Covenant to make clear that these rights must be enjoyed 'without any of the distinctions' mentioned in that article. The distinctions in Article 2 are explained as follows: 'Each State Party to the present Covenant undertakes to respect and to ensure

10 Malloy, Tove H., *National Minority Rights in Europe*, Oxford University Press, Oxford, New York, 2005, p.153.

11 Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

12 International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), 999 U.N.T.S. 171, entered into force March 23, 1976.

to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹³

3 - International Convention on the Elimination of All Forms of Racial Discrimination

The political participation of all persons without discrimination on the basis of race, colour or other status is guaranteed by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Persons belonging to national or ethnic, linguistic and religious minorities are to enjoy equal rights of political participation without any discrimination. Article 5 of ICERD states that, 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...)' The rights subsequently listed under Article 5 include 'Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.'¹⁴

4 - Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Article 2.2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that 'Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.'¹⁵

Although Article 2.2 express the right to participation in general terms, 'public life' includes being elected, the holding of public office, voting and other political and administrative domains.¹⁶

Article 2.3 of the Declaration specifically refers to the effective participation of minorities in the decision-making system and states that, 'Persons belonging to minorities have the right to participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.'¹⁷ In his commentary on the Declaration, Asbjorn Eide explains that the

13 Article 2(1) of the International Covenant on Civil and Political Rights.

14 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), General Assembly Resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969.

15 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992.

16 Eide, Asbjorn, 'Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,' Working Group on Minorities, Sixth session, 22-26 May 2000, p. 7. See <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/8ccd90477d0010bd802568eb003d3e32?Opendocument>, 2 August 2007.

17 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992.

minimum requirement for this is that, 'persons belonging to minorities have the right to have their opinions heard and fully taken into account before decisions which concern them are adopted.'¹⁸

B - The Council of Europe

1 - The European Convention on Human Rights

Article 3 of Protocol No.1 of the European Convention on Human Rights¹⁹ provides for the right to regular, free and fair elections within the context of political rights. The Article states that 'the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

The European Court of Human Rights has made some illuminating judgments regarding political representation of minorities. In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court had to decide whether Article 3 of Protocol No. 1 guarantees linguistic rights during the election period. The applicants were French-speaking Belgian nationals living in the Flemish regions. They complained that they were prevented from sitting on the Flemish Council because they took their oath in French. The Court decided there was no violation of Article 3 of Protocol No. 1 and stated that, 'In any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State's margin of appreciation within the Belgian parliamentary system - a margin that is all the greater as the system is incomplete and provisional. One of the consequences for the linguistic minorities is that they must vote for candidates willing and able to use the language of their region. A similar requirement is found in the organization of elections in a good many States. Experience shows that such a situation does not necessarily threaten the interests of the minorities.'²⁰

In a joint dissenting opinion, five members of the Courts expressed their disagreement with the decision and stated that this may result in the violation of free expression. According to the dissenting opinion, 'such a situation, excluding, as it does in practice, representation of the French-speaking electorate of Halle-Vilvoorde at regional level, does not ensure "the free expression of the opinion of the people in the choice of the legislature" as stipulated in Article 3 of Protocol No. 1 (P1-3), and it creates a language-based distinction contrary to Article 14 (art. 14) of the Convention.'²¹

If freedom of expression means freedom to receive information and opinions, what happens if people do not understand the state language? For instance, as will be explained below, in the case

18 Eide, Asbjorn, 'Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,' Working Group on Minorities, Sixth session, 22-26 May 2000, p. 8.

19 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, entry into force 3 September 1953. Hereinafter the Convention.

20 Judgment of *Mathieu-Mohin and Clerfayt v. Belgium*, ECtHR, 2 March 1987, para. 57.

21 *Ibid.*, Joint Dissenting Opinion.

of Kurdish minorities in Turkey many cannot speak or understand the state language. In this case, these kinds of restrictions would also violate their freedom of expression. Moreover, the broad scope in the state's margin of appreciation can be used as a justification by states to legitimate unnecessary restrictions on the use of non-official languages and to create other barriers to political representation.

The ECtHR case of *Podkolzina v. Latvia* addresses the right to stand for election and linguistic restriction. In this case the applicant was from the Russian-speaking minority in Latvia. She complained that her candidature registration in the election to the Latvian Parliament was removed because she did not have a proficiency certificate in the official language. Although the Court did not examine whether electoral rights guarantee linguistic freedom, it did determine whether the decision to remove the applicant's name from the list of candidates was proportionate to the aim pursued. The Court stated that this decision could not be regarded as proportionate to any legitimate aim pleaded by the Government and found a violation of Article 3 of Protocol No. 1.²²

In a number of cases against Turkey, the Court has dealt with the issue of the dissolution of political parties. These parties were usually dissolved on the grounds that they aimed at undermining the unity and territorial integrity of the state. They were alleged to advocate terrorism and to have the goal of dividing Turkey by referring to the Kurdish issue and proposing solutions to this question. In these cases, the Court has usually stated that the parties in question did not incite the use of violence and that banning them constituted a breach of the rules of democracy.²³ For example, in the case of the *United Communist Party of Turkey and Others v. Turkey* the Court stated that, 'The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.'²⁴ The Court decided that political parties are protected within the scope of Article 11 and found a violation of Article 11.

However, the Court adopted a different approach in the case of *Refah Partisi (The Welfare Party) and Others v. Turkey*. The party was dissolved on the grounds that it had become a centre of activities against the principle of secularism. The Turkish Constitutional Court concluded that Sharia law and a theocratic regime was the party's objective based on the evidence of various writings and declarations made by party leaders and members. Although the party did not call for or advocate the use of violence, the Court decided that dissolution of the party was 'necessary

22 Judgment of *Podkolzina v. Latvia*, ECtHR, 9 April 2002.

23 Roberta, Medda-Windischer, 'The European Court of Human Rights and Minority Rights,' *European Integration*, 2003, Vol 25(3), September, pp. 249-271.

24 Judgment of *United Communist Party of Turkey and Others v. Turkey*, ECtHR, 30 January 1998, para. 57.

in a democratic society' within the meaning of Article 11(2) and that there had therefore been no violation of Article 11.

The Court has also dealt with the issue of the requirement in Turkish law that a political party must receive 10 per cent of the national vote in order to enter parliament. In *Yumak and Sadak v. Turkey*, the Court examined whether this 10 per cent threshold violates the Convention.²⁵ The applicants in the case in question were Kurdish politicians from Turkey who failed to get elected to parliament in the 2002 elections on account of their party failing to exceed the 10 per cent national threshold, despite obtaining approximately 45 per cent of the votes in their region. The applicants complained that the imposition of the 10 per cent threshold in the parliamentary election violated their rights under Article 3 of Protocol No. 1. The Court pointed out that the 10 per cent threshold is higher than in any other European Country and that it needs to be lowered. However, the Court avoided drawing this conclusion in its decision, holding that the 10 per cent threshold fell within the margin of appreciation of the Government. Therefore the Court concluded that there was no violation of Article 3 of Protocol No. 1.

2 - Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities²⁶ is the most important and comprehensive convention under the Council of Europe regarding minorities. It is the first legally binding multilateral treaty devoted to the specific protection of minority rights. The Framework Convention provides mechanisms for the implementation of the European Convention on Human Rights. The Committee of Ministers of the Council of Europe is entrusted with the task of monitoring implementation by the State parties. The Advisory Committee assists the Committee of Ministers to ensure the efficiency of the monitoring of the implementation of the Framework Convention.²⁷

Article 15 of the Framework Convention regulates the right to effective participation in general. However, the explanatory report on the Framework Convention and the opinions and recommendations of the Advisory Committee provide further clarification regarding the concept and the efficiency of political participation. The explanatory report to the Framework Convention provides some measures that states may adopt to give effect to the public and political participation of national minorities. These measures are:

- consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;
- involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;
- undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;

25 Judgment of *Yumak and Sadak v. Turkey*, ECtHR, 30 January 2007, para. 77.

26 Framework Convention for the Protection of National Minorities, Council of Europe, 1 November 1995. Herein after the Framework Convention.

27 Article 24-26 of the Framework Convention for the Protection of National Minorities.

- Effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels;
- decentralized or local forms of government²⁸

In its several opinions and recommendations concerning implementation by the State parties, the Advisory Committee on the Framework Convention has made a significant contribution to the political participation of national minorities.

3 - *European Charter of Local Self-Government*

The European Charter of Local Self-Government²⁹ is an international treaty that was adopted by the Committee of Ministers of the Council of Europe in June 1985. The treaty recognises that the improvement of local democracy is a method of protecting national minorities. The Preamble of the European Charter emphasises the particular role and importance of local self-government and its contribution to the process of the construction of democratic principles in Europe.

C - The Organization for Security and Cooperation in Europe (OSCE)

1 - *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*

The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE³⁰ requires states to provide effective participation of national minorities in the decision-making process, especially where decisions affect them.

2 - *The Lund Recommendations on the Effective Participation of National Minorities in Public Life*

The Lund Recommendations on the Effective Participation of National Minorities in Public Life³¹ were drafted in 1999 by a group of international experts upon request of the High Commissioner on National Minorities. They represent the first comprehensive instrument on the mechanisms for achieving the inclusion of national minorities in public institutions. John Packer argues that The Lund Recommendations are an authoritative interpretation of the relevant international standards concerning the political participation of minorities.³²

28 Explanatory report on the Framework Convention for the Protection of National Minorities, Council of Europe, Strasbourg, November 1994, Para. 80.

29 European Charter of Local Self-Government, Strasbourg, 15 October 1985. Hereinafter the European Charter.

30 The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, OSCE, Copenhagen, 29 June 1990. Hereinafter the Copenhagen Document.

31 The Lund Recommendations on the Effective Participation of National Minorities in Public Life, OSCE, 1999. Hereinafter the Lund Recommendations.

32 Parker, John, 'The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life,' Helsinki Monitor, No. 4. p. 41, Available at <http://www.nhc.nl/hm/2000/vol4/packer.2000.4.pdf>.

3 - Warsaw Guidelines

The Warsaw Guidelines were adopted by the High Commissioner on National Minorities in January 2001 to elaborate the Lund Recommendations and contain recommendations to assist national minority participation in the electoral process.³³

3. MINORITIES POLICY IN BULGARIA AND POLITICAL PARTICIPATION

A - Minority Rights in Bulgaria

1 - Main Minority Groups in Bulgaria

Turks are the largest ethnic minority group in Bulgaria, constituting 10 per cent of the total population. Turks were deprived of their minority rights several times in Bulgarian history, facing the most vicious assimilation policy under the Communist regime. However, they currently enjoy a considerable degree of minority rights. The Turkish language is used in printed media, broadcasting, and education at primary school level, and Turks are represented at local and national level by their own representatives.

Roma are the second biggest ethnic minority group in Bulgaria. Unlike other minorities, Roma live in disparate areas, usually on the outskirts of the big cities or in villages. They are the most disadvantaged ethnic group in Bulgaria and not having a kin state plays a significant role in this disadvantaged situation. Currently they can express their self-identity by forming cultural and human rights associations, publishing newspapers and magazines, broadcasting their own radio and TV and obtaining primary education in the Romany language.³⁴ Yet despite these positive steps, Roma still face discrimination in receiving social services, education, health care and housing.³⁵

Macedonians are another main minority group in Bulgaria. Their identity was denied for a long time and they were considered Bulgarian. Despite positive steps taken by the Bulgarian government to improve the situation of human and minority rights, the rights of the Macedonian minority are still violated. For instance, the registration of OMO Ilinden PIRIN, a political party which receives support from Macedonians in Bulgaria, is still refused by the Bulgarian authorities.³⁶

33 Warsaw Guidelines to Assist National Minority Participation in the Electoral Process, OSCE, January 2001.

34 Vassilev, Rossen, 'The Roma of Bulgaria: A Pariah Minority,' *The Global Review of Ethnopolitics*, Vol. 3, no. 2, January 2004, 40-51.

35 Koinova, Maria, 'Ethnic and Religious Minorities in Bulgaria,' *Southeast Europe Review for Labour and Social Affairs*, Volume 2, Number 2, 1999.

36 'Statement of the UMO "Ilinden" – PIRIN at the 2008 OSCE Human Dimension Implementation Meeting, Working Session 3: Fundamental freedoms I, Freedom of Association,' 30 September 2008. Available at http://www.omoilindenpirin.org/news/2008/september30b_e.asp, (last accessed 1 November 2008).

Pomaks (Bulgarian Muslims) and Catholics are the main religious minority groups, in addition to Armenians, Jews, Protestants, Greeks, Tartars, Gagauz and Circassians.

2 - Legislative Protection for Minorities in Bulgaria

The Bulgarian Constitution of 1991 provides protection for minority rights not on a collective basis but on an individual basis. Paragraph 2 of Article 6 of the Constitution provides equal rights for all citizens with a general discrimination clause and states that 'All citizens shall be equal before the law. There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status.'³⁷

The Constitution does not accept the term 'national minority'. The Constitution accepts the doctrine of the so-called one-nation state and the principle of a unitary state. The formulation of the unity of the Bulgarian nation exists in a number of provisions of the Constitution.³⁸ Therefore, there is no specific article that explicitly emphasises the recognition of minority groups. However, the Constitution accepts the existence of minorities within the state and allows minorities to maintain their cultural, linguistic and religious practices. In this context, Article 36 provides that, 'Citizens whose mother tongue is not Bulgarian shall have the right to study and use their own language alongside the compulsory study of the Bulgarian language'³⁹ and Article 54 provides everyone has the right to 'develop his own culture in accordance with his ethnic self-identification, which shall be recognised and guaranteed by the law.'⁴⁰

Moreover, the Bulgarian Constitution provides direct protection to minorities through international law. According to Article 5, 'Any international treaties which have been ratified by the constitutionally established procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.'⁴¹ Most international treaties concerning minority rights have been signed and ratified by the Bulgarian authorities.

As regards political rights, the Bulgarian Constitution does not provide collective political rights to minority groups in Bulgaria. Paragraph 4 of Article 11 of the Constitution states that, 'There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power.'⁴² Therefore, persons belonging to ethnic and religious minority groups can participate in political life through Bulgarian parties. The principle of unity and indivisibility of the nation and state is the main reason for this continuing practice.

37 Constitution of the Republic of Bulgaria, 13 July 1991, Article 6, para. 4., Available at <http://www.parliament.bg/?page=const&lng=en>, (last accessed 17 August 2007).

38 Karasimeonov, Georgi, 'The Constitutional Rights of Minorities in Bulgaria.' Available at http://www.cecl.gr/RigasNetwork/databank/REPORTS/r9/BU_9_Konstantinov.html, (last accessed 17 August 2007).

39 Article 36, paragraph 2 of the Constitution of the Republic of Bulgaria.

40 Article 54, paragraph 1 of the Constitution of the Republic of Bulgaria.

41 Article 5, paragraph 4 of the Constitution of the Republic of Bulgaria.

42 Article 11, paragraph 4 of the Constitution of the Republic of Bulgaria.

B - The Changing Minorities Policy in Bulgaria – the Historical Context

Bulgaria was given autonomous status by the great powers after the 1878 Ottoman-Russian war and gained independence in 1908. In accordance with the conditions imposed by the great powers, the Constitution of Bulgaria, in force between 1879 and 1947, provided recognition and protection to religious minorities. The Treaty of Berlin⁴³ also guaranteed the protection of ethnic groups (Turks, Romanians, Greeks and other populations) in Bulgaria. The 1919 Treaty of Neuilly⁴⁴ introduced race, ethnicity and language as a basis for the equal protection of minorities.⁴⁵ It granted minorities in Bulgaria the right to use their mother tongue in court, to open religious and social institutions and endowments, to learn their language in their schools and to receive education in their mother tongue in primary schools.⁴⁶

There was no open discrimination against or repression of minority populations in Bulgaria until the military coup of 1934. After the coup, the situation of minorities started to worsen. The number of schools and periodicals published by minorities diminished and political parties and organisations with an ethnic basis were no longer allowed to exist.⁴⁷ The 1930s witnessed repression and violations against minorities in Bulgaria.

The Communists took power in Bulgaria in 1944. At the beginning of the Communist regime, minorities were accepted with their own identity and the new regime adopted a policy that actively involved minorities in building the new order and improving their economic and cultural level. The 1947 Constitution of Bulgaria recognised the existence of minorities. The Constitution also guaranteed the fundamental civil rights of minorities and provided the opportunity for their ethnic and cultural development.⁴⁸ However, the Communist regime soon abandoned this policy and the repression of minorities returned. Over 35,000 Bulgarian Jews migrated to Israel between 1948 and 1953. Muslim Roma were forced to change their names and convert to Christianity in the 1940s.⁴⁹

During the Communist period the Turks of Bulgaria also faced an intense policy of assimilation, along with other minorities. Their educational, linguistic and religious rights were restricted and there was a mass exodus of more than 250,000 Turks in the 1950s. In 1962 the Government adopted a document entitled 'Endorsement of measures against the Turkish self-identification of Gypsies, Tatars and Bulgarians professing the Mohammedan religion.' The purpose of this document was to minimise or eliminate Turkish influence within these communities. As a result, Muslim

43 Signed in 1878 between United Kingdom, Austria-Hungary, France, Germany, Italy, Russia and The Ottoman Empire.

44 Signed on 27 November 1919 in France.

45 Bulgarian Helsinki Committee, 'Minority Rights in Bulgaria,' September 1999. Available at http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=1935, (last accessed on 17 August 2007).

46 Köksal, Yonca, 'Minority Policies in Bulgaria and Turkey: The Struggle to Define a Nation,' *Southeast European and Black Sea Studies*, Vol. 6, No.4, December 2006, pp 501-521.

47 Marushiakova, Elena and Popov Vesselin, 'Muslim Minorities in Bulgaria.' Available at http://www.emz-berlin.de/projekte_e/pj41_pdf/Marushiakova.pdf

48 *Ibid.*

49 Bulgarian Helsinki Committee: Minority Rights in Bulgaria, September 1999.

communities were forced to change their Muslim names to Bulgarian ones. For instance, between 1971 and 1973 all Pomaks were forced to change their names. In the late 1960s a policy was adopted to create a single nation state with a single language and homogenous culture. The Constitution of 1971 did not mention the terms 'national minorities' or 'ethnic groups' and these terms were not used in official discourse. Instead the term 'unified Bulgarian nation' was used by the official press. For example, an article published in the Communist Party daily newspaper (*Rabotnichesko Delo*) in 1977 defined Bulgaria as 'almost completely of one ethnic type and moving toward complete national homogeneity'. Furthermore, in 1979 the party leader Todor Zhivkov claimed that, 'the Bulgarian national question has been solved definitively and categorically by the population itself. Bulgaria has no internal problems with the national question.'⁵⁰

This assimilation policy reached its peak after 1980. The term 'Turk' was excluded from official usage and was replaced by the term 'Muslim Bulgarian citizen'. In the assimilation campaign of 1984-1985, Todor Zhivkov claimed that 'Turks' had been Turkicized and Islamicized during the 500-year rule of the Ottoman Empire and that in reality they are of Bulgarian origin.⁵¹ During the period 1984-1989 Turks were forced to change their names to Bulgarian-sounding names and public use of their language and religious practices and clothes were banned. This policy also applied to Roma and other minority populations. According to estimates, 500 to 1,500 people were killed and thousands were sent to labour camps or resettled forcibly due to their resistance against these assimilation measures.⁵²

Since the fall of Communism in 1989, the policy regarding minorities in Bulgaria has changed radically and Bulgaria has achieved significant improvements concerning the protection of minorities. Minorities regained the right to use their original names, speak their mother tongue in public and wear their traditional dress. Minority groups have begun to publish their own newspapers and magazines and broadcast in their own language. The right to education in the mother tongue in primary school was granted by the Bulgarian government. The legal and political obstacles to the establishment of cultural, educational associations and professional organisations of minority groups were removed, whilst the Constitution of 1991 afforded protection to the development of minority cultures.⁵³

C - Democratic Transformation in Bulgaria and its Effects on the Right to Political Participation: The Example of the Turkish Minority

The democratisation process and the emergence of a pluralist political system in Bulgaria began in the early 1990s after the collapse of the totalitarian Communist system. At the beginning of this new process, political pluralism was restored along with basic rights and freedoms resulting

50 Eminov, Ali, *Turkish and other Muslim Minorities in Bulgaria*, C.Hurst & Co. Ltd, England, 1997, pp.7-8.

51 McIntosh, Mary E., Abele Mac Iver Martha, Abele Daniel G., Nolle David B., 'Minority Rights and Majority Rule: Ethnic Tolerance in Romania and Bulgaria,' *Social Forces*, Volume 73, No. 3. (Mar., 1995) pp. 939-967.

52 Can, Tuncer and Martin Stilyanov Todorov, 'Turks of Bulgaria: Assimilation Policy and Linguistic Oppression,' Syracuse University, December 2004.

53 Bulgarian Helsinki Committee, 'Minority Rights in Bulgaria,' September 1999.

in the revival of civil society. The adoption of a new constitution was an important element in the establishment of democracy. The Constitution of 1991 laid down the foundations of a parliamentary, social and law-based state, asserted the division of power and established a parliamentary form of government. A proportional electoral system was adopted with a 4 per cent threshold for parliamentary representation.⁵⁴ Bulgaria is also a party to most international treaties relating to minority rights, including the Framework Convention for the Protection of National Minorities. Under the Bulgarian Constitution, the protection afforded to minority rights under these international treaties thus becomes a part of domestic legislation.

The democratic transformation in Bulgaria had a considerable effect on the right to effective participation for minorities. In particular, the Turks of Bulgaria have played a significant role in the Bulgarian political structure since the new era started in 1989. The Movement for Rights and Freedoms Party (Hak ve Özgürlükler Hareketi Partisi - MRF) was established by Turks in 1990 and defends the interests of the Turkish minority in Bulgaria. Despite a ban on establishing political parties on ethnic and religious grounds, the 1990 Election Law allowed other organisations and movements to participate in elections and the MRF thus succeeded in entering parliament that year with 23 seats. Following further elections the following year, it secured 24 seats.⁵⁵

The process of including the Turkish minority in the political sphere was not easy. There were several attempts by nationalists to exclude MRF from the elections and to prevent it taking seats in the parliament. The arguments used by the nationalists or other opponents were mainly based on Article 11(4), which bans the formation of political parties on ethnic and religious grounds. MRF's opponents argued that it was founded on ethnic and religious grounds, used the Turkish language and favoured a policy of ethnic assimilation of Bulgarian Muslims to the Turkish minority, thus promoting ethnic and religious confrontation within the population. They therefore requested that the Constitutional Court declare MRF unconstitutional and its deputies in parliament illegitimate. The Constitutional Court rejected these claims on 22 April 1992 in a historical decision for the parliamentary representation of minorities in Bulgaria.⁵⁶ After this decision MRF has continued to be one of the major components of the political structure in Bulgaria. In the 2005 elections, MRF was the third party, winning 13 per cent of total votes and acquiring 34 seats in parliament, taking an important role in the government with four ministries.⁵⁷

Despite the successful inclusion of Turks in its political life, Bulgaria has failed to provide equal opportunities to other minority groups. For instance, Bulgaria is still refusing to register the Macedonian party OMO Ilinden PIRIN as a political party, thus preventing it from participating in elections and gaining seats in parliament. Moreover, the 4 per cent threshold in election law prevents the representation of small minority groups in parliament.

54 Giatzidis, Emil, *An Introduction to post-Communist Bulgaria: Political, Economic and Social Transformation*, Manchester University Press, Manchester and New York, 2002, p. 51.

55 *Ibid.*, p.58

56 Eminov, Ali, *Turkish and other Muslim Minorities in Bulgaria*, C.Hurst & Co.Ltd, England, 1997, pp.169-170.

57 Salgin, Sercan, 'Integration of the Turkish Citizens to the Bulgarian Political Structure,' *The Journal of Turkish Weekly*, 16 August 2007.

However, the rise of MRF in Bulgaria is an important case in point for understanding the mutual interaction between recognition and political participation. It also helps to illustrate the consequences of this mutual interaction. As explained above, after a painful assimilation policy, the Turks of Bulgaria were finally recognised and this has led them to play a crucial role in decision-making and to enjoy their rights extensively. MRF has also played an important role in achieving the recognition of a Turkish entity in Bulgarian politics. Furthermore, the case of MRF shows how effective inclusion of minority groups in political life can help them to integrate with the society in which they live. This reduces tension and creates peaceful ethnic relations in a multi-ethnic society. The Turks of Bulgaria are now very well integrated in political, social and economic life in Bulgaria and they never consider any form of separation from their country. The representation of the Turkish minority is one of the most significant factors in Bulgaria's success in maintaining peaceful ethnic relations and this has provided the Bulgarian Turks with a chance to participate in decision making, and has facilitated confidence-building between ethnic Turks and ethnic Bulgarians, in that there have been no calls for territorial autonomy.⁵⁸ Moreover, as a result of its full integration and representation in political life, MRF has played the role of political and social stabiliser through the influence it exercises over the Turkish minority and other minorities that have not been able to produce viable political organisations and gain representation, such as the Roma⁵⁹

The decision of the Constitutional Court of Bulgaria declaring that MRF was a legitimate party was of vital importance in establishing constitutional democracy in Bulgaria. Unlike the Constitutional Court and other judicial mechanisms in Turkey, as will be examined below, the Constitutional Court of Bulgaria used its judicial independence and broad vision in favour of the creation of a democratic culture rather than in support of official or majority will. In Ganev's words 'the Court showed how ethno politics may be structured, not on the basis of simple interpretations of majority will, but in accordance with "justificational considerations": the constitutionality of states of affairs was assessed, not through an analysis of nationalist "original intent", but in light of their compatibility with the general principles undergirding the constitutional text of an aspiring liberal democracy. The court also made clear to other political actors that contentious democratic politics may be a rule structured process unfolding in an accessible public sphere. In short, the institutionalized dynamic of judicial review, and not someone's "good will" ensured the constitutional affirmation of the momentous entry of ethnic minorities on the political scene in post-communist Bulgaria.'⁶⁰

The accession process through which Bulgaria became a member of the European Union also played a major role in the democratic consolidation of Bulgaria. EU membership was recognised as a national goal by all political parties and society and this aim triggered democratic transformation. Bulgaria succeeded in achieving the Copenhagen Criteria and became a member of the EU on 1 January 2007.

58 Petkova, Lilia, 'The Ethnic Turks in Bulgaria: Social Integration and Impact on Bulgarian-Turkish Relations, 1947-2000,' *The Global Review of Ethnopolitics*, Vol.1, No. 4, June 2002, 42-59.

59 Giatzidis, Emil, *An Introduction to post-Communist Bulgaria: Political, Economic and Social Transformation*, Manchester University Press, Manchester and New York, 2002, p. 59.

60 Ganev, Venelin I. 'History Politics and the Constitution: Ethnic Conflict and Constitutional Adjudication in Post Communist Bulgaria,' *Slavic Review*, Vol. 63, No. 1. (Spring, 2004), pp.66-89.

4. THE MAIN DEADLOCK IN TURKEY'S DEMOCRACY: THE MINORITY ISSUE

A - Minorities in Turkey

Kurds are the largest ethnic-linguistic minority group in Turkey. The estimated number of Kurds in Turkey is approximately 15 million and they represent 20 per cent of Turkey's population. They have been seen as a potential threat to the integrity of the state since the foundation of the Republic of Turkey. Turkey's policy has been shaped on the basis of this fear and Kurds have faced vicious human rights violations and an aggressive policy of assimilation.

Roma in Turkey were registered on Ottoman territories for the first time in 1475, primarily for taxation purposes. According to official records they number over 500,000 and they live throughout Turkey. They are either Muslim or Christian and they speak the Romani language which is influenced by Turkish, Kurdish and Greek languages.⁶¹

*Alevi*s are the second largest religious group (after Sunnis) in Turkey and they belong to different ethnic groups i.e. Turks, Kurds, Arabs or Azeris. They consider themselves to be part of the Shia sect or movement who revere Ali (Muhammad's cousin and son-in-law) and the Twelve Imams of his house.⁶² Because they are not officially recognised as a minority, they still cannot practice their religious rights effectively.

Armenian Orthodox Christians, Greek Orthodox Christians and Jews are the only officially recognised religious minority groups in Turkey although there are other Muslim and non-Muslim minority religious groups such as Syriacs, Yazidis, Albanians, Georgians, Circassians, Bulgarians, Laz and Arabs.

B - Turkey's Official Policy towards Minorities

Turkish official policy on minorities is based on the Treaty of Lausanne, which provides protection only for non-Muslim minorities. Since the Treaty was signed in 1923, all Turkish governments have interpreted it as guaranteeing protection to three specific communities – Armenian Orthodox Christians, Greek Orthodox Christians, and Jews – whilst excluding other non-Muslim groups such as Protestants, Catholics and Syriac Orthodox Christians. Other religious, linguistic and ethnic groups have also been excluded from formal recognition.

At the initial stage of the founding of the Republic, state policy towards minorities was different. For example, Mustafa Kemal promised the Kurds their national rights in order to gain their support. The 1921 Constitution was drafted in such a way as to represent the mosaic of peoples

61 International Helsinki Federation for Human Rights (IHF), 'Turkey: A Minority Policy of Systematic Negation,' October 2006.

62 Zeidan, David, 'The Alevi of Anatolia,' December 1995. Available at <http://www.angelfire.com/az/res-con/ALEVI.html>.

living in Turkey. It did not contain the word 'Turkish' or the phrase 'Turkish nation'.⁶³ However, after the Kemalists gained power, they changed their practice and developed an assimilation policy towards ethnic, religious and linguistic minority groups. This policy was started after the Treaty of Lausanne and was based on 'Turkification', which fails to recognise individuals' rights to ethnic, national, and religious self-identification and aims at forced assimilation with a Turkish identity.⁶⁴

The same policy was followed by other subsequent rulers of Turkey. In 1925, when he was expressing his opinion on the Kurds, Ismet Inonu (the second president of Turkey) publicly stated, 'We are openly nationalist. Nationalism is the only cause that keeps us together. Besides the Turkish majority, no other (ethnic) element shall have any impact. We shall at any price, Turkicize those who live in our country, and destroy those who rise up against the Turks and Turkishness.'⁶⁵

The desire to join the EU has forced Turkey to change her traditional policy towards minorities. During the accession process, Turkey has made dramatic and unexpected changes in cultural and linguistic rights as well as democratic, constitutional, legislative reforms to bolster human rights in general. However, although in 1991 the then Prime Minister Suleyman Demirel declared that 'Turkey has recognised the Kurdish reality', and several other leaders of Turkey have made similar points, this has never turned into real recognition. Accepting other identities besides Turkish identity is still seen as a threat to the unitary, secular state, and Turkey has both refused to recognise the existence of minorities or to identify them as minorities, and has failed to provide them with minority rights as required by international norms.

C - The Issue of Recognition and its Effects on the Judicial System and Practice in Relation to the Right to Political Participation

1 - Turkey's Legislative Approach to the Recognition of Minorities

The current Constitution of Turkey and other related Turkish laws were designed in conformity with the official state policy with respect to the recognition of minorities. Like the Bulgarian Constitution, the Constitution of the Republic of Turkey⁶⁶ also does not have any provisions referring to minorities. Similarly, the Turkish Constitution guarantees the rights of all individuals with a general provision. Article 10 provides that 'All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.'⁶⁷

63 Yurtdas, Sedat, 'The Turkish Constitution and Denial of Rights to the Kurds', in *A Democratic Future for the Kurds in Turkey*, London, 1995, p.50.

64 International Helsinki Federation for Human Rights (IHF), 'Turkey: A Minority Policy of Systematic Negation', October 2006.

65 Van Bruinessen, Martin, 'Uprising in Kurdistan', in *A Democratic Future for the Kurds in Turkey*, London 1995, p.32.

66 The Constitution of the Republic of Turkey, 7 November 1982. Available at http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf, (last accessed 21 September 2007).

67 Article 10 of the Constitution of the Republic of Turkey.

However, unlike the Bulgarian Constitution, the Turkish Constitution does not provide any protection for the cultural rights of minorities and does not refer to minority languages. In direct contradiction, it is devoted to the sole protection of Turkish culture, language and values, thus the possibility of promoting any other cultures, languages and other characteristics of minority groups is ruled out. This is clearly explained in the preamble of the Constitution, which speaks about ‘The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics...’⁶⁸ As will be explained in the next section, reference to the existence of minorities has also been interpreted as ‘creating minorities’ and this has been used as a reason for the dissolution and criminalisation of political parties.

As regards international law, Article 90 of the Constitution regulates the ratification of international treaties and states that, ‘In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.’ However, minorities are deprived of the protection of international law as a result of reservations issued by Turkey, and this provision therefore remains almost completely ineffective concerning minority rights. For example, in signing and ratifying the Convention on the Rights of the Child Turkey placed a reservation on Articles 17, 29 and 30, which concern the rights of children who belong to an ethnic, religious or linguistic minority or indigenous population. The reservation states that the Articles must be interpreted according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923. Turkey also has not signed key international treaties regarding the protection of minority rights, including the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

2 - Minorities and the Right to Establish Political Parties

Articles 68 and 69 of the Turkish Constitution deal with the formation of political parties and impose restrictions and sanctions regarding their activities, which are relevant to the establishment and maintenance of political parties representing minorities.

Paragraph 4 of Article 68 shows how activities of political parties must conform to the principles of the constitution which are based on the non-acceptance of multi-ethnicity. According to the article:

The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and

68 The preamble to the Turkish Constitution, available at http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf (last accessed 21 September 2007).

secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.⁶⁹

Paragraph 5 of Article 69 provides sanctions to be used in cases when political parties act against these principles. It states that, ‘The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.’⁷⁰

The Law on Political Parties⁷¹ (LPP) ensures the implementation of these principles. Article 78 of the LPP imposes prohibitions on Political parties that aim to change the democratic state order, or which are involved in any activity to this end. Article 78 states that:

Political parties (a) shall not aim, strive or incite third parties to change: the republican form of Turkish state; the... provisions concerning the absolute integrity of the Turkish State’s territory, the absolute unity of its nation, its official language, its flag or its national anthem;... the principle that sovereignty resides unconditionally and unreservedly in the Turkish nation; ...the provision that sovereign power can not be transferred to an individual, a group or a social class... jeopardize the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of language, race, colour, religion or membership of a religious sect, or establish, by any means, a system of government based on any such notion or concept...⁷²

Articles 80 and 81 of the LPP impose other restrictions on political parties which derive from Articles 68 and 69 of the Constitution. Article 80 states that, ‘Political parties shall not aim to change the principle of the unitary State on which the Turkish Republic is founded, nor carry on activities in pursuit of such an aim.’⁷³ Article 81(a) prevents political parties from claiming the existence of minorities as follows:

Political parties shall not a) assert that there exist within the territory of the Turkish Republic any national minorities based on differences relating to national or religious culture, membership of a religious sect, race or language or (...); b) aim to destroy national unity by proposing, on the pretext of protecting, promoting or disseminating a non-Turkish language or culture, to create minorities on the territory of the Turkish Republic or to engage in similar activities...⁷⁴

These provisions have been used as justification for the repression and dissolution of political parties which include minority issues (particularly the Kurdish issue) in their programmes. Parties which are seen to be against the principle of secularism have also faced dissolution. Since 1992, 12 political parties have been dissolved by the Constitutional Court on these grounds.⁷⁵ Another

69 Article 68, paragraph 4 of the Constitution of the Republic of Turkey.

70 Article 69, paragraph 5 of the Constitution of the Republic of Turkey.

71 The Law on Political Parties, No. 2820, 22 April 1983.

72 Article 78 of the Law of Political Parties, Quoted from Akbulut Olgun, ‘The State of Political Participation of Minorities in Turkey - An Analysis under the ECHR and the ICCPR,’ *International Journal on Minority and Group Rights*, 2005, 377-395.

73 Article 80 of the Law of Political Parties.

74 Article 81(a),(b) of the Law of Political Parties.

75 Akbulut, Olgun, ‘The State of Political Participation of Minorities in Turkey - An Analysis under the ECHR and the ICCPR,’ *International Journal on Minority and Group Rights*, 2005, 377-395.

dissolution case against the pro-Kurdish Democratic Society Party (DTP) is pending before the Constitutional Court on the same grounds.

The Constitutional Court has operated as a guardian for nationalism and secularism and to serve the official ideology, rather than helping to consolidate democracy in Turkey. For example, in its judgment regarding the dissolution of the United Communist Party of Turkey, the Court stated that:

the State was unitary, the country indivisible and that there was only one nation. It considered that national unity was achieved through the integration of communities and individuals who, irrespective of their ethnic origin and on an equal footing, formed the nation and founded the State. In Turkey there were no 'minorities' or 'national minorities', other than those referred to in the Treaty of Lausanne and the friendship treaty between Turkey and Bulgaria, and there were no constitutional or legislative provisions allowing distinctions to be made between citizens. Like all nationals of foreign descent, nationals of Kurdish origin could express their identity, but the Constitution and the law precluded them from forming a nation or a minority distinct from the Turkish nation. Consequently, objectives which, like those of the *TBKP*, encouraged separatism and the division of the Turkish nation were unacceptable and justified dissolving the party concerned.⁷⁶

In its judgment in a case concerning the Freedom and Democracy Party (FDP), the Constitutional Court decided on the dissolution of the party due to contraventions of Articles 78 and 81 of the LPP in its programme. The Court said that:

the aim of the domestic legal regulations is not to prohibit ethnic differences and different languages and cultures. Turkish citizens who have a different ethnic background are free to use their language and enjoy their own culture. However, separating the community who has lived together for a thousand years, shared the same religion and a tradition, had a common culture and living style, contradicts articles 78 and 81(a) of LPP.

The FDP, with the explanations in its program... divided the Turkish nation into two with the terms 'Turkish and Kurdish nations'. It further declared the aim of providing the right to self-determination to Kurds which it defines as an oppressed people... Yet it suggested education in the mother tongue and the usage of mother tongue in courts in its programme for the aim of secession. Hence its goal was to destroy the integrity of the State by advocating a Kurdish territory and nation.⁷⁷

The judgment clearly illustrates that, according to the Constitutional Court, one can freely express ones identity but cannot claim to be a member of a minority group that is seen as a danger to the unitary state and nation. Although the European Court of Human Rights found a violation of Article 11 of the Convention regarding the dissolution of these parties, the Constitutional Court has not changed its approach in this regard.

76 Judgment of *United Communist Party of Turkey and Others v. Turkey* 19392/92 Council of Europe: European Court of Human Rights. 30 January 1998, para. 11. Available at [http://cmiskp.echr.coe.int/\[\[tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=709&sessionId=2293509&skin=hudoc-en&attachment=true](http://cmiskp.echr.coe.int/[[tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=709&sessionId=2293509&skin=hudoc-en&attachment=true) (last accessed 22 September 2007).

77 Akbulut, Olgun, 'The State of Political Participation of Minorities in Turkey - An Analysis under the ECHR and the ICCPR,' *International Journal on Minority and Group Rights*, 2005, 377-395.

3 - Prohibition of Free Expression in a Minority Language in Political Activities and Election Campaigns

The use of minority languages during election campaigns and in the activities of political parties is prohibited by Article 81(c) of the Law on Political Parties and Article 58 of the Election Law.

Article 81(c) of the Law on Political Parties states:

Political parties... (c) cannot use a language other than Turkish in writing and printing party statutes or programs, at congresses, indoors or outside; at demonstrations, and in propaganda; cannot use or distribute placards, pictures, phonograph records, voice and visual tapes, brochures and statements written in a language other than Turkish; cannot remain indifferent to these actions and acts committed by others. However, it is possible to translate party statutes and programs into foreign languages other than those forbidden by law⁷⁸

Article 58 of the Election Law states that, 'It is forbidden to use any other language or script than Turkish in propaganda disseminated in radio or television as well as in other election propaganda.'⁷⁹

These provisions have been used particularly against pro-Kurdish parties, many of whose supporters or electors cannot speak Turkish. For instance, executives of HAK-PAR (Rights and Freedoms Party) were imprisoned for speaking in the Kurdish language at the first Ordinary Congress of the Party and for sending invitations to the President of Turkey in Kurdish and Turkish.⁸⁰ In June 2008, Ibrahim Ayhan, an independent candidate for parliamentary elections in 22 July 2007, was sentenced by the Siverek First Magistrate Criminal Court for playing Kurdish music during the election campaigns.⁸¹ On 12 September 2008, another independent candidate in Mersin, Orhan Miroğlu, was also sentenced by the Mersin Second Magistrate Criminal Court for speaking Kurdish during the election campaigns.⁸²

A report prepared by the OSCE regarding parliamentary elections on 22 July 2007 also states that these provisions inhibit those representing, or seeking to represent, minority and particularly Kurdish interests predominantly in the south-east of the country, from effective campaigning.⁸³

78 Article 81(c) of the Law on Political Parties.

79 Article 58 of Election Law, no. 2839.

80 See <http://www.ihd.org.tr/eana.html>, 23 September 2007.

81 'DTP' li Başkan 'a 'Kürtçe Müzik Cezası,' *Aktüel Bakış*, 14 June 2008. Available at <http://www.aktuel-bakis.com/Politika/8926.html> (last accessed 1 November 2008).

82 'Siyasetçi Orhan Miroğlu'na Beş Yıl Kürtçe Yasak!' *Bianet*, 12 September 2008. Available at <http://www.bianet.org/bianet/kategori/bianet/109690/siyasetci-orhan-mirogluna-bes-yil-kurtce-yasak> (last accessed 10 November 2008).

83 OSCE: 'Turkey, Parliamentary Elections, 22 July 2007: OSCE/ODIHR Needs Assessment Mission Report' 29 May-1 June 2007, p. 7. See http://www.osce.org/documents/html/pdfhtml/25051_en.pdf.html (last accessed 23 September 2007)

4 - 10 Per Cent Threshold in the Electoral System

Turkey's electoral system is a proportional representation system with a 10 per cent national threshold. In order to be eligible to win parliamentary seats, political parties must gain at least 10 per cent of the total vote cast, must be registered in more than half of the provinces and must present lists of candidates in all those provinces. Article 33 of the Election Law states that, 'In a general election parties may not win seats unless they obtain, nationally, more than 10% of the votes validly cast... An independent candidate standing for election on the list of a political party may be elected only if the list of the party concerned obtains sufficient votes to take it over the 10% national threshold.'⁸⁴

It is indisputable that a 10 per cent threshold prevents minority parties and small parties from entering parliament. It also raises the question of whether the high threshold is maintained by the Turkish government specifically to keep pro-Kurdish parties out of the parliament. For instance, DEHAP (Democratic People's Party) obtained more than 45 per cent of the vote in a number of Kurdish provinces and 6.2 per cent of the total national vote in the November 2003 elections, but did not obtain any seats in parliament. Instead, these seats went to AKP (Justice and Development Party) or to independent candidates who gained less than 15 per cent of votes in these provinces.

The OSCE has stated in several reports that the 10 per cent threshold for political party representation is unusually high and remains the highest in the OSCE region. It claims that this leads to distortions. In particular, concerns were expressed to the OSCE/ODIHR Needs Assessment Mission that it unfairly prejudices Turkish citizens of Kurdish origin.⁸⁵

In order to overcome this hurdle, the DTP and other small parties registered their candidates as independent candidates in the July 2007 elections. In total, there were 604 candidates who stood in the elections as independents.⁸⁶ Independent candidates do not need to exceed the 10 per cent national threshold and they can join a political party or form a political party after being elected.

However, the Turkish government tried to create new barriers against Kurdish candidates to prevent them entering parliament. The ruling party AKP submitted a new proposal to parliament to amend the electoral law and to abolish independent candidates' right to have separate ballot papers, instead proposing that their names be listed on the same ballot paper as the candidates of parties. All parties voted for this proposal unanimously and parliament passed this law by 468 votes, the highest number of votes in the history of the Turkish parliament. Although in its 2002 report the OSCE recommended this method to the authorities as a means to avoid compromising the secrecy of the vote, the change may have the effect of making independent candidates less visible due to the issues of illiteracy, complexity and the length of a joint ballot paper.⁸⁷ Taking into account the fact that the rate of illiteracy is high among the potential voters of pro-Kurdish

84 Article 33 of the Election Law.

85 *Ibid.*, p.3.

86 '604 Independent Candidates for the Elections,' *Bianet*, 7 June 2007, <http://bianet.org/bianet/kategori/english/97243/604-independent-candidates-for-elections>.

87 Kurdish Human Rights Project Briefing Paper, *Upcoming Elections in Turkey*, 9 July 2007.

independent candidates, the government hoped that this practice would create confusion among illiterate voters and that, consequently, the number of Kurdish deputies would be fewer than expected in the new parliament.

Despite government efforts to limit the success of pro-Kurdish independent candidates, the DTP launched a campaign to educate people on how to find the name of the candidate on the ballot paper in order to overcome this obstacle. In the end, 21 pro-Kurdish candidates were elected on 22 July 2007 and took their seats in the new Turkish Parliament. This is the first time that pro-Kurdish deputies have gained seats since they were ousted from parliament in 1994.

However, Turkey's strong resistance to the acknowledgement of differences and its creation of obstacles to repress minorities' voices gives rise to the suggestion that perhaps only the presence of minority representatives in parliament can lead to effective political participation. Since the establishment of the Republic of Turkey, Kurds or members of other minority groups have managed to enter parliament by denying their identity. There are no limitations on the political participation of those Kurds or members of other minority groups who decide to discard their own identity and enter the political arena as Turks. The highest ranks of Turkish politics, bureaucracy and military are open to Turkish citizens of minority descent, but on the condition that they identify themselves as Turks.⁸⁸ To accept Kurds as Turkish citizens is not a problem in Turkey. The problem is precisely the attempt to force Kurds to see themselves as Turks.⁸⁹ There are ethnic Kurds among the leading politicians in Turkey who have accepted this role. Turgut Ozal, the eighth President of Turkey, Erdal İnönü, the son of the second president of Turkey and deputy prime minister between 1991 and 1993, and Hikmet Cetin, the speaker of parliament between 1997 and 1999, were all of Kurdish descent.⁹⁰ In 1994, roughly 60 Turkish parliamentarians were of Kurdish origin.⁹¹ Furthermore, some ministers in the current parliament and most of the mentors of the Prime Minister are of Kurdish origin. However, they have never described themselves as Kurdish and have not attempted to defend the rights of Kurds, instead welcoming Turkish identity and serving the official policy.

Since pro-Kurdish candidates gained seats in parliament and formed a group under the pro-Kurdish party DTP, this situation has changed. The DTP group express themselves with their own identity and claim that they will seek peaceful solutions for the Kurdish issue through democratic means. The DTP's Vice Chairman, Selahattin Demirtas, has said, 'For the first time since 1924

88 Grigoriadis, Ioannis N. 'Political Participation of Turkey's Kurds and Alevis: A Challenge for Turkey's Democratic Consolidation,' *Southeast European and Black Sea Studies*, Vol.6, No.4, December 2006, pp.445-461.

89 Hale, William, quoted in Will Kymlicka, 'Misunderstanding Nationalism,' *Dissent*, (Winter 1995), p. 132.

90 Koivunen, Christina, quoted in Martin van Burinnesen, 'Genocide in Kurdistan? The Suppression of the Dersim Rebellion in Turkey (1937-1938) and the Chemical War against the Iraqi Kurds (1988)', in: *The Conceptual and Historical Dimensions of Genocide*, Ed. G. Andreopoulos, University of Pennsylvania Press, Philadelphia, 1994, p.154.

91 Koivunen, Christina, quoted in HRW/H (Human Rights Watch/Helsinki), 'Forced Displacement of Ethnic Kurds from southeastern Turkey', ed. Christopher Panico, Human Rights Watch/Helsinki Report, Vol.6, No. 12. October 1994, p.7.

we deal in politics in Parliament as Kurdish people who are citizens of the Turkish Republic.⁹² However, the practice of denying the Kurdish identity in politics has continued in different forms. There have been efforts to remove parliamentary immunity of DTP MPs because of statements they have made which some claim are against the state, in order to reduce the number of DTP MPs in parliament and to counteract them. They have been ignored by state institutions and they are not seen as representatives of the electorate although they have the status of deputies in parliament. They have also been threatened with judicial investigations in respect of their statements regarding the Kurdish issue. The Diyarbakır Prosecutor's Office has started to prepare a request for lifting the parliamentary immunity of Ahmet Türk, the Chairman of the DTP, over charges that he disseminated PKK propaganda in a speech he made on 21 October 2008 in Diyarbakır along with DTP deputies and mayors. In his speech he made allegations regarding the mistreatment of Abdullah Öcalan in jail.⁹³ In March 2008, the Office of the Prime Minister sent 45 requests to the Assembly Speakership regarding the removal of the parliamentary immunity of a number of MPs, most of whom were from the DTP.⁹⁴

The dissolution of political parties is the most effective and most frequently used mechanism to repress minority voices in Turkish politics. When the Constitutional Court shuts down a party, it can also ban particular deputies from politics, a move which leads to their immunities being automatically lifted. To date, 24 political parties have been closed down by the Constitutional Court. Another dissolution case against the DTP is still pending before the Court and the final decision is expected to be released soon. There have also been dissolution cases against the ruling AKP and HAK-PAR this year, although the Constitutional Court did not close the parties, raising hopes in relation to the case of the DTP.

CONCLUSION

Since recognition is essential to secure the rights of minority groups in a state, the struggle for recognition of minority groups in the political arena has become central. Non-recognition of minorities can create potential sources of domestic conflict, while legally guaranteed recognition can lead to long-term stability and peace within a state. Recognition is an essential step for securing the rights of minorities and gives power to minorities by providing them with the opportunity to be involved in the decision-making process. Representation in parliament is one of the most significant and common means for the effective political participation of minorities. Involvement in parliament and the decision-making process strengthens the protection of minorities, helps them to integrate in the state and creates the opportunity for dialogue between minority and majority, thus enabling mutual accommodation between them.

92 Article in *Hürriyet* news, available at <http://www.turkishdailynews.com.tr/article.php?enewsid=81425> (last accessed 24 September 2007).

93 'Prosecutor's office prepares brief to lift Türk's immunity', *Today's Zaman*, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=157249> (last accessed 10 November 2008).

94 'Çoğu DTP'li 27 Vekilin Dokunulmazlığına Karşı Fezleke', *Bianet*, 6 March 2008, <http://www.bianet.org/bianet/kategori/bianet/105405/coğu-dtp-li-27-vekilin-dokunulmazlığına-karsi-fezleke> (last accessed 10 November 2008).

Bulgaria and Turkey have similar state formations in their constitutions which are based on the principle of a unitary state and homogenous nation. However, unlike Turkey, Bulgaria recognises people whose mother tongue is different and gives them constitutional rights to protect and maintain their cultural, linguistic and religious practices. Despite the fact that there is no explicit reference to minority groups in its Constitution, Bulgaria provides *de facto* recognition and protection to its minorities. This protection is also secured by international law. In Turkey, due to the positive effects of the EU accession process, the existence of different groups has been accepted, but there is still resistance to recognising them as minorities either formally or *de facto*. Nevertheless, both states have followed assimilation policies towards their minorities, although this policy has been more systematic and long-term in Turkey.

Since 1989, Bulgaria has succeeded in maintaining peaceful ethnic relations and has witnessed a democratic transformation within its territory. Providing opportunities to the Turkish minority to be represented in parliament is one of the most important factors in this process of democratic transformation in Bulgaria. MRF, the Turkish party in Bulgaria, has taken advantage of this opportunity to improve ethnic relations and reduce tension among multi-ethnic populations, in addition to ensuring the rights of the Turkish ethnic group, which has also affected other minorities. EU membership negotiations and the adoption of European norms have had a significant influence on this continuing process. However, it is worth noting that Bulgaria started this process before the EU membership process. In other words, their transition from communist rule to democracy was initiated internally rather than with external pressure. It can be said that the EU process has accelerated this evaluation of democracy in Bulgaria. Moreover, democratisation has also taken place within the institutions of the state, with the Constitutional Court of Bulgaria playing a particularly significant role as an initiator in establishing this culture with its decision on the legality of the MRF.

Unlike in Bulgaria, the democratisation process in Turkey started with the desire to join the EU club. The realisation of democratic transformation has never been initiated by domestic dynamics like in Bulgaria. Therefore, it is difficult to describe Turkey's democratic transition as successful so far. It is true that Turkey has made significant changes in terms of democracy, human rights and minority rights during the EU negotiation process. However, Turkey is still reluctant to take the same steps in recognising minorities and providing them with the opportunity to be represented in parliament with their identity. Unlike in Bulgaria, the judicial mechanisms in Turkey have also followed official policy, instead of having a significant role in transforming the country towards an actual consolidated democracy. As long as 'being different' and the acknowledgment of differences is not accepted by the whole of society and its institutions, Turkey will never be successful in real democratic transformation. The presence of the DTP in parliament would help this process if they were allowed to be heard. The case of the DTP is a chance for the Constitutional Court to play a key role in achieving real democracy in Turkey.

Turkey is still paying the economic, social and political price for the non-recognition of minorities, which has resulted in a long-term and continuing domestic conflict. If Turkey really wants to be a peaceful, democratic and prosperous country, it should not miss the opportunity offered by the presence in parliament of the largest minority group's elected representatives (DTP), and should start to talk to them and listen to them. In this process, Turkey might start to take Bulgaria as a

role model and implement the same measures as it wanted Bulgaria to grant to Turkish minorities. Claiming minority rights for its kin people but depriving its own minorities of the same rights demonstrates starkly the paradoxical situation of Turkey. It is also ironic because the recognition of rights of minorities or indigenous people who do not have a kin state have always been left to the mercy of the state in which they live. This is one of the most significant weaknesses of international law and international organisations. Finally, in order to improve the efficiency of political participation, after recognition of its minorities, Turkey must grant them their rights under national and international law, remove all reservations from international treaties regarding the protection of minorities and sign and ratify the Framework Convention for the Protection of National Minorities without any reservations. Turkey must also lower the 10 per cent threshold for parliamentary representation and abolish all restrictions on the use of minority languages in election campaigns and political activities.

ATTACKING HATE SPEECH UNDER ARTICLE 17 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

DAVID KEANE*

Abstract

The issue of racist or hate speech engages both Article 10 and Article 17 of the European Convention on Human Rights. The early admissibility decisions of the Commission, invoking Article 17 alone, or Article 10 in conjunction with Article 17, reflected a confused understanding of the relationship between the provisions. The Lehideux and Isorni vs France (1996) judgement of the European Court of Human Rights clarified that Article 17 applies only in the context of Holocaust denial and related questioning of historical facts, and as a result, racist or xenophobic speech against minorities is protected under Article 10(1) of the Convention. The article asks whether all racist speech should find protection under Article 10(1), interference being allowed only when balanced against the conditions of Article 10(2); or whether all such speech should be condemned and attacked under Article 17. The philosophical arguments and legal implications of both approaches are analysed. Finally, the desire to protect criticism of religion at the European level is explored in the context of the 'Danish cartoons' controversy and the evolving meaning of the term 'hate speech'.

*Mr Bloom, availing himself of the right of free speech,
he having just a bowing acquaintance with the language in dispute,
though, to be sure, rather in a quandary over voglio...*

James Joyce, *Ulysses*

1. INTRODUCTION

In 2005/2006, the prosecution of David Irving in Austria for Holocaust denial, and the controversy over the cartoons of the Prophet Mohammad in the Danish newspaper *Jyllands-Posten*, highlighted two very different approaches to freedom of expression

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in Europe. While in the former, Irving was sentenced to three years in prison with comparatively little media sympathy,¹ in the latter, no criminal proceedings resulted from the publication,² and in the general media debate, freedom of expression was strongly emphasised over the rights of religious minorities.³ The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, noted in his 2006 report that

these newspapers' intransigent defence of unlimited freedom of expression is out of step with international norms that seek an appropriate balance between freedom of expression and religious freedom, specifically the prohibition of incitement to religious and racial hatred.⁴

This two-tiered approach is reflected in the jurisprudence of the European Court of Human Rights. The Court has a higher standard of protection against Holocaust denial and related questioning of the historical facts of World War II, which it will attack directly under Article 17 of the European Convention on Human Rights (ECHR),⁵ than other forms of racist or hate speech, which are examined under Article 10.

The issue of hate and xenophobic speech engages both Article 10 and Article 17 of the ECHR. Article 10 seems to protect all types of expression under paragraph 1.⁶ The onus is therefore on the State to show that the interference was justified under paragraph 2.⁷ However, where the aim of the expression is to attack human rights and

¹ See, for example, the comments of Timothy Garton Ash, 'We Must Stand Up to the Creeping Tyranny of the Group Veto', *The Guardian*, 2 March 2006: 'you're not going to weep any tears for Irving, are you?'

² For an account of the 'Danish cartoons' controversy, see Boyle, Kevin, 'The Danish Cartoons', *Netherlands Quarterly of Human Rights*, Vol. 24, No. 2, 2006, pp. 185–191. Boyle notes that '[a] formal complaint to the police alleging violations of the Criminal Code was investigated by public prosecutors who decided that there were no grounds for prosecution.' (p. 187)

³ For example, the editor responsible for the cartoons stated: 'Some Muslims reject modern society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule.' Quoted in *idem*.

⁴ UN Doc. E/CN.4/2006/17, 'Situation of Muslims and Arab Peoples in Various Parts of the World', Section III – 'The Cartoons of the Prophet Muhammad published in a Danish Newspaper', 13 February 2006, para. 28.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 *United Nations Treaty Series* 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

⁶ Harris, D., O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 1994, p. 373. Article 10(1) states: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

⁷ Article 10(2) states: 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and

freedoms protected by the Convention, the Commission (subsequently approved by the Court) has allowed State interference under Article 17. Article 17 is unusual in that it can be invoked both by an individual against State interference and by a State to justify interference. It states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.⁸

At the hearing before the Court in *United Communist Party of Turkey vs Turkey* (1998), in which the Turkish Government sought to rely on Article 17 as a justification for banning the Communist Party of Turkey, the delegate of the Commission pointed out to the Court that ‘it was unnecessary to apply Article 17 of the Convention since the present case was clearly distinguishable from the rare cases in which the Commission had had recourse to that provision.’⁹ Those ‘rare cases’ began with the Commission admissibility decision in *Glimmerveen and Hagenbeek vs the Netherlands* (1979), and established a degree of clarity in *Lehideux and Isorni vs France* (1998), in which the Court set the threshold at which Article 17 would apply. Article 17 has a significant effect on the regulation of hate or xenophobic speech – it serves to remove that speech from the protection of Article 10(1), purely on the basis of content. It eliminates the need for a ‘balancing process’ that characterises the Court’s approach under Article 10.

This article will examine the early admissibility decisions in section 2, beginning with *Glimmerveen*, and will portray a confused understanding within the Commission of the reach of Article 17 and its relationship with Article 10. Section 3 will commence with the *Lehideux* Case, which established Article 17 as the prerogative of laws against Holocaust denial and related questioning of historical facts. Several admissibility decisions involving France have reinforced that decision. Section 4 outlines the Article 10 approach to the regulation of hate speech through the *Jersild* Case, and the ‘balancing process’ this entails. This is the mode the Court will adopt for all other forms of racist or hate speech. Section 5 will seek philosophical justifications

are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

⁸ The provision is based on Article 30 of the Universal Declaration on Human Rights: ‘Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ GA Res. 217A (III), UN Doc. A/810, 10 December 1948, at p. 71.

⁹ *United Communist Party of Turkey and Others vs Turkey*, 30 January 1998, Application No. 19392/92, para. 23. See also *Kommunistische Partei Deutschland vs Germany*, 20 July 1957, Application No. 250/57, Yearbook 1, 1995–7, at p. 222.

for attacking all racist or hate speech under Article 17; or for placing all such speech under the protection of Article 10. In conclusion, the article will signal the future challenge to the European institutions posed by the growing convergence of racial discrimination and religious intolerance.

2. EARLY DECISIONS UNDER ARTICLE 17

The Commission affirmed in its admissibility decision in *Glimmerveen and Hagenbeek vs the Netherlands* (1979)¹⁰ that the distribution of ideas encouraging discrimination in violation of the rights and freedoms of others is not protected by Article 10, holding that: 'In the present case, Article 17 does not permit the use of Article 10 to spread ideas which are racially discriminatory'.¹¹ The applicants were president and vice-president of the *Nederlandse Volks Unie*, a political party that believed that 'the general interest of a State is best served by an ethnical homogeneous population and not by racial mixing'.¹² The Regional Court of Rotterdam had found that the words used in leaflets in the possession of the applicants, addressed to the 'white Dutch people, white fellow citizens, our white people', constituted incitement to discrimination on the basis of race, and the applicants were convicted to two weeks' imprisonment.¹³ The conviction was upheld by the Dutch Court of Appeal and the Supreme Court, which found the plea that Article 10 had been disregarded unfounded in the light of paragraph 2.¹⁴

The Commission stated that the case concerned primarily Article 10, but subsequently re-framed its decision in terms of Article 17:

The Commission considers that these complaints concern principally Article 10 of the Convention (...). The Commission is of the opinion that the duties and responsibilities referred to above find an even stronger expression in a more general provision, namely Article 17 of the Convention.¹⁵

In its discussion under Article 10, it was noted that the Dutch Government accepted that there had been an interference with Article 10(1). The Commission recalled the Court's judgement in *Handyside vs United Kingdom*, where it was found that 'subject to paragraph 2 of Article 10, it [freedom of expression] is applicable not only to

¹⁰ *Glimmerveen and Hagenbeek vs the Netherlands*, 11 October 1979, Application Nos 8348/78 and 8406/78.

¹¹ *Idem*.

¹² *Ibidem*, para. 2.

¹³ *Ibidem*, para. 4.

¹⁴ *Ibidem*, para. 5.

¹⁵ *Ibidem*, para. 11.

information or ideas that are favourably received or regarded as inoffensive (...) but also to those that offend, shock or disturb the State or any sector of the population'.¹⁶

The Commission also drew attention to the 'duties and responsibilities' which come with the exercise of freedom of expression.¹⁷ It stated that these duties and responsibilities find more solid foundation in Article 17. The policy of the applicants to remove all non-white people from the Netherlands¹⁸ was clearly one of racial discrimination aimed at the destruction of the rights and freedoms of others. The Commission cited Article 14, and stated that the political ideas in the leaflets:

clearly constitutes an activity within the meaning of Article 17 of the Convention. The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention.¹⁹

Consequently, the Commission found that 'the applicants cannot, by reasons of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention.'²⁰

In the admissibility hearing in *Kuhnen vs Germany*,²¹ the applicant was a leading figure in a party attempting to reinstate the prohibited National Socialist Party (NSDAP) in Germany. He prepared and disseminated various pamphlets, stating: 'We are against: bigwigs, bolshevists, Zionists, crooks, cheats and parasites (...) capitalism, communism, Zionism, estrangement by means of masses of foreign workers (...) We are for: German unity, racial pride, camaraderie'.²² The applicant was convicted on 25 January 1985 for preparing and disseminating propaganda material appertaining to an unconstitutional organisation. In the Frankfurt Court's view, he clearly violated the basic order of freedom and democracy as well as the notion of understanding among peoples.

The applicant complained under Article 10 that he was punished for the free expression of his opinion. He claimed that Article 17 did not apply since he was merely advocating the reinstatement of the NSDAP as a legal party. After finding that the interference was prescribed by law and sought to protect a legitimate aim under

¹⁶ *Handyside vs United Kingdom*, 7 December 1976, *European Human Rights Reports*, Vol. 1, p. 737, at p. 756.

¹⁷ *Glimmerveen and Hagenbeek vs the Netherlands*, *supra* note 10.

¹⁸ The applicants distributed leaflets which stated, *inter alia*: 'The truth is that the major part of our population since a long time has had enough of the presence in our country of hundreds of thousands of Surinamers, Turks and other so-called guest workers, who, moreover, are not at all needed here (...) As soon as the *Nederlandse Volks Unie* will have gained political power in our country, it will put order into business and to begin with: (1) remove Surinamers, Turks and other so-called guest workers from the Netherlands...'; *ibidem*, p. 195.

¹⁹ *Idem*.

²⁰ *Idem*.

²¹ *Kuhnen vs Germany*, 28 May 1986, Application No. 12194/86.

²² *Idem*.

Article 10(2), the Commission examined the necessity of the measure. It sought to delineate the relationship between Articles 10 and 17, holding that Article 17 covered

essentially those rights which will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular, the Commission has found that the freedom of expression enshrined in Article 10 of the Convention may not be invoked in a sense contrary to Article 17.²³

The Commission noted the conclusions of the Frankfurt Court that the publications at issue advocated national socialism, aimed at impairing the basic order of freedom and democracy. It found that the applicant was seeking to use the freedom of information enshrined in Article 10 as a basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention. The interference at issue was held to be ‘necessary in a democratic society’ within the meaning of Article 10(2) of the Convention.

The approach in *Kuhnen* was reproduced in *Remer vs Germany*,²⁴ in which the applicant had been convicted in Germany of incitement to hatred and race hatred for writing and disseminating a publication which contained articles suggesting that the gas chambers in the concentration camps during the Nazi regime had never existed. Further issues contained ‘information about the applicant’s efforts to inform the population about the truth regarding in particular the concentration camp in Auschwitz and to fight against the lies about the gassing of four million Jews in Auschwitz.’²⁵

In outlining its finding against the applicant, the Commission stated that it ‘had regard to Article 17’. It ruled that the conviction had ‘no appearance of a violation of the applicant’s right under Article 10’.²⁶ The decision, like that in *Kuhnen*, seems to rely on both Article 17 and Article 10(2), but employs Article 17 as a guiding provision, while making the decision under Article 10. It appears that the decision in both cases is founded on the belief in the Commission that the interference on the part of the German State was justified under Article 10(2). While reference is made to Article 17, it is not expressly relied on to reach the conclusion that the applications were inadmissible. This was the construction placed on the *Glimmerveen* ruling in *Kuhnen*, and followed in *Remer*.

Nevertheless, it is evident that the *Glimmerveen* decision was not arrived at because the restrictions by the Netherlands Government were felt to be justified under

²³ *Idem*.

²⁴ *Remer vs Germany*, 19 August 1994, Application No. 25096/94, Part A: ‘Particular Circumstances of the Case’.

²⁵ *Ibidem*. Part B: ‘Relevant Domestic Law’.

²⁶ *Idem*.

Article 10(2), but rather because the content of the material was prohibited under Article 17. In this sense, that decision differs significantly from the *Kuhnen* and *Remer* approach. The rationale of the *Glimmerveen* decision was resurrected in a series of French cases beginning in 1998 with *Lehideux*. In *Lehideux*, Article 17 emerged as a stand-alone provision that acted to remove certain materials from the protection of Article 10(1). Such materials could be prohibited by their content alone and would not be subjected to analysis by the Court over whether interference was justified under Article 10(2). The category of materials this applies to has been confined, so far, to Holocaust denial and related questioning of Nazi atrocities.

3. HOLOCAUST DENIAL AND ARTICLE 17

In *Lehideux and Isorni vs France*,²⁷ the plaintiffs had been prosecuted for issuing an advertisement in *Le Monde* glorifying the achievements of Phillippe Pétain, and complained of a violation of Article 10 of the Convention. The French Government asked the Court to dismiss their application as being incompatible with the provisions of the Convention pursuant to Article 17, and in the alternative because there had been no violation of Article 10.²⁸ The Court summarised the offending document as having

sometimes tried to justify Philippe Pétain's decisions by endeavouring to give them a different meaning and at other times (...) purely and simply omitted to mention historical facts which were a matter of common knowledge, and were inescapable and essential for any objective account of the policy concerned.²⁹

As a result:

it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.³⁰

In the present case, the Court stated, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as 'Nazi atrocities and persecutions' or 'German omnipotence and barbarism'. In describing Philippe Pétain's policy as 'supremely skilful', the Court found that the authors of the text were

²⁷ *Lehideux and Isorni vs France*, 23 December 1998, Application No. 24662/94, Publication 1998–VII, No. 92.

²⁸ *Ibidem*, para. 31.

²⁹ *Ibidem*, para. 46.

³⁰ *Ibidem*, para. 47.

rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy Government, the so-called ‘double game’ theory.³¹

In a concurring opinion with the majority judgment that there had been a breach of Article 10,³² Judge Jambrek sought to underline the features of Article 17 being identified by the Court in the case, and, in particular, the high threshold required for its application. He reiterated the *ratio* of the decision that

[a]rticle 17 may ‘remove the protection of Article 10’ from certain expressive acts, such as, for example, any attempt to deny or revise in a publication ‘Nazi atrocities and persecutions’ or ‘German omnipotence and barbarism’ or even the Holocaust, would represent.³³

In *Lehideux*, the events in question and their interpretation

do not belong to the category of established historical facts whose negation or revision would in itself aim at the destruction of certain rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention; they rather represent a part of an ongoing debate among historians.³⁴

The application of Article 17 requires that

the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.³⁵

Therefore, ‘the requirements of Article 17 are strictly scrutinised, and rightly so.’³⁶ Judge Jambrek justifies the strict scrutiny of Article 17 by reference to the historical framework in which the Convention was concluded. While being careful to stress the importance of the freedom of expression safeguard provided by Article 10 in the context of the protection of democracies,³⁷ he views the requirements of Article 17 as also reflecting concern for the defence of democratic society and its institutions.³⁸

³¹ *Idem*.

³² *Ibidem*, para. 58: ‘In short, the Court considers the applicants’ criminal conviction disproportionate and, as such, unnecessary in a democratic society. There has therefore been a breach of Article 10. Having reached that conclusion, the Court considers that it is not appropriate to apply Article 17.’

³³ *Ibidem*, concurring opinion of Judge Jambrek, para. 1.

³⁴ *Idem*.

³⁵ *Ibidem*, para. 2.

³⁶ *Idem*.

³⁷ *Idem*. ‘The best protection for democracies against the resurgence of the racist, anti-Semitic and subversive doctrines which originated in the totalitarian regimes of national-socialist or communist persuasion remains the possibility of engaging in a free critique which reveals the real dangers and the ways to forestall them.’

³⁸ *Ibidem*, para. 3.

The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during World War II, and one of its tasks was to ‘sound the alarm at their resurgence’.³⁹ This original aim ‘also corresponds to the more recent dangers to the European principles of democracy and the rule of law.’⁴⁰ Calling for a finding of a breach of Article 10 rather than Article 17 in the case, he completes his judgement by stressing the importance of Article 17, as reflected in the strict circumstances in which it may be invoked:

In conclusion, while I would firmly agree that the requirements of Article 17 of the Convention should be applied with strict scrutiny, the spirit in which that Article was drafted should be respected, and its relevance upheld.⁴¹

The ruling was confirmed in *Chauvy and Others vs France*,⁴² a case involving the author of a book entitled *Aubrac, Lyon 1943*, which was published in 1997 and reconstructed the chronology of events involving the Resistance movements in Lyon. The Court discussed the case under the aegis of Article 10, holding that no breach of that provision had resulted from the prosecutions. It also stressed the boundary between the offending material and material which might engage Article 17 of the Convention. As a result, the book was protected under Article 10(1), but the interference was justified under Article 10(2), resulting in no breach of the Convention. On the applicability of Article 17, citing its own decision in *Lehideux*, it stated:

The Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as ‘Barbie’s written submissions’ or the ‘Barbie testament’, the issue does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention.⁴³

In *Lehideux* and in *Chauvy*, the materials at issue did not meet the strict Article 17 requirements. An example of materials that did meet these requirements is found in the Court’s admissibility decision in *Garaudy vs France*. In 1995 the applicant published a book, *The Founding Myths of Israeli Politics*,⁴⁴ which contained one

³⁹ *Idem*, quoting Rolv Ryssdal, ‘The Expanding Role of the European Court’, in: Eide, Asbjørn and Helgesen, Jan (eds), *The Future Protection in a Changing World*, Norwegian University Press, Oslo, 1991.

⁴⁰ *Idem*.

⁴¹ *Idem*.

⁴² *Chauvy and Others vs France*, 29 June 2004, Application No. 64915/01, para. 10.

⁴³ *Ibidem*, para. 69.

⁴⁴ *Garaudy vs France*, 24 June 2003, Application No. 65831/01.

chapter entitled ‘The Myth of the Nuremberg Trials’ and another ‘The Myth of the Holocaust’. The Paris Court of Appeal, in finding that Garaudy’s prosecution did not violate Article 10, had referred to Article 17 of the Convention:

Article 10 of the aforementioned Convention has to be interpreted in the light of the provisions of Article 17 of that Convention (...) section 24 *bis* of the [Press Freedom] Act of 29 July 1881 is aimed at preventing or punishing the public denial of facts that have been the subject of a final ruling by the Nuremberg International Military Tribunal and relate to events that are totally incompatible with the values of the Convention for the purposes of Article 17.⁴⁵

In the admissibility hearing, Garaudy also invoked Article 17, claiming before the Court that section 24 *bis* of the Press Freedom Act 1881 ‘created a censorship mechanism that wrongfully restricted freedom of expression. He relied on Article 17 of the Convention’; while the French Government’s ‘principal submission was that the application should be declared inadmissible under Article 17 of the Convention.’⁴⁶

The French Government noted that ‘the proven aim of the applicant’s book was indeed to deny the reality of the Holocaust’, and consequently requested that his application be dismissed as inadmissible. Citing the *Glimmerveen* decision and its judgement in *Lehideux*, the Court pointed out:

[W]here the right to freedom of expression was relied on by applicants to justify the publication of texts that infringed the very spirit of the Convention and the essential values of democracy, the Commission had always had recourse to Article 17 of the Convention, either directly or indirectly, in rejecting their arguments and declaring their applications inadmissible. The Court had subsequently confirmed that approach.⁴⁷

The notion of ‘directly or indirectly’ invoking Article 17 reflects the history of the provision’s use. The Commission would have directly invoked Article 17 in the *Glimmerveen* decision, and indirectly in *Kuhnen* and *Remer*. According to van Dijk *et al.*, the Strasbourg organs ‘have invoked Article 17 to negate the protection of certain Convention rights, [for example] in the *Glimmerveen and Hagenbeek* case’; and the Commission has also incorporated ‘elements of Article 17 into the appraisal

⁴⁵ *Ibidem*, Part A: ‘The Circumstances of the Case’.

⁴⁶ *Ibidem*, ‘The Law’. Section 24 *bis* states: ‘Anyone who denies the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal under Article 9 of the Statute or by a person found guilty of such crimes by a French or international court shall be liable to the penalties set forth in section 24(6)’.

⁴⁷ *Idem*.

of limitations allowed under the specific provision. This may be described as the “indirect application” of Article 17.⁴⁸

Holocaust denial entails the direct application of Article 17. In the *Garaudy* decision, the Court held that the book ‘systematically denies the crimes against humanity perpetrated by the Nazis against the Jewish community’, and that

[t]he denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.⁴⁹

The decision emphasised the aim of Garaudy’s book, stressing:

The Court considers that the main content and general tenor of the applicant’s book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention. Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity.⁵⁰

4. HATE SPEECH AND ARTICLE 10

The French cases established that Holocaust denial does not enjoy the protection of Article 10(1) of the Convention. It may be inferred that racist or hate speech that does not come under ‘the category of clearly established historical facts – such as the Holocaust’ does enjoy the protection of Article 10(1), although restrictions under Article 10(2) may be invoked. While a full analysis of the Court’s interpretation of Article 10 is beyond the scope of this paper, in the context of racist or hate speech, it

⁴⁸ Van Dijk, Pieter, Van Hoof, Fried, Van Rijn, Arjen and Zwaak, Leo (eds), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Antwerpen/Oxford, 2006, pp. 1085–1086. They give the example of *Remer* to illustrate the ‘indirect application’ of Article 17. The authors posit a third approach whereby the Strasbourg organs ‘discarded the examination under Article 17’. This approach is discussed in section 4 below in the context of Article 10 ECHR.

⁴⁹ *Garaudy vs France*, *supra* note 44.

⁵⁰ *Idem*.

set out its stance in *Jersild vs Denmark*,⁵¹ in which the Danish Government was found to have violated Article 10.

Jersild, a journalist, was prosecuted for a programme in which he interviewed a group of young persons known as the 'Greenjackets'. He was charged with aiding and abetting the three youths in making racist comments amounting to incitement to hatred by broadcasting their views, irrespective of the fact that the programme was in the context of a serious discussion on anti-immigration movements in Denmark. The Commission ruled in its report that the interference with Article 10(1) was not proportionate to the legitimate aim pursued, and as a result was not necessary in a democratic society. Even though the programme affected the rights of others because of its discriminatory contents, a fair balance between their rights and the applicant's right to impart information must be struck.⁵² The rights of others was found by the Commission to carry little weight due to the insignificance of the group of persons making the remarks, and the informative value of the programme which touched on an issue of public concern.⁵³

An important dissent in the Commission by Gauker Jorundsson⁵⁴ took Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) as the basis for rejecting a breach of Article 10.⁵⁵ The dissent argued that the Supreme Court of Denmark recognised that the case involved a conflict between the right to impart information and the rights of others. The Supreme Court, weighing the interests of both sides, gave correspondingly less weight to the applicant. Jane Liddy, in a separate dissent, also argues that the ICERD places an obligation on States under Article 4 to make the dissemination of ideas based on racial

⁵¹ *Jersild vs Denmark*, 23 September 1994, Application No. 15890/89, *European Human Rights Reports*, Vol. 19, p. 1.

⁵² *Jersild vs Denmark*, 8 July 1993, Application No. 15890/89 (Admissibility decision), Report of the Commission, para. 41.

⁵³ *Ibidem*, para. 42.

⁵⁴ Joined by Basil Hall and Jean-Claude Geus.

⁵⁵ Article 4: 'States condemn all propaganda and all organisations which are based on ideas or theories of racial superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with *due regard* to the principles embodied in the Universal Declaration and the rights expressly set forth in Article 5 of the Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organisations, and also organised and all propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.' (emphasis added).

hatred an offence *whatever the motivation of their proponents*. There was a pressing social need for the conviction, and it was proportionate to the aim pursued:

There has therefore been no violation of Article 10. I am supported in this conclusion by the consideration that although the applicant himself did not subjectively aim at the degradation of others this was the foreseeable consequence, contrary to the spirit of Article 17.⁵⁶

Jorundsson's dissent centred on the controversial 'due regard' clause which was introduced by the Third Committee of the General Assembly during the drafting of the ICERD to allay the fears of those who thought the provision would violate freedom of speech. It was interpreted as giving contracting States the assurance that Article 4 ICERD imposed no obligation that was not fully consistent with their constitutional guarantees of freedom. The dissent points to three separate incidences where the conflicting interests of freedom of expression and Article 4 were considered for the purposes of this case,⁵⁷ concluding that

[i]t was the view of the Danish courts that such statements could only be justified if balanced by opposing considerations which could have outweighed the wrongfulness of the statements. This is very much in line with the interpretation indicated in the preparatory work of the ICERD.⁵⁸

This conclusion is reached even where there is no evidence that the words caused any persecution.

K.J. Partsch, a former member of the Committee on the Elimination of Racial Discrimination, has interpreted the 'due regard' clause as meaning that 'State Parties must strike a balance between fundamental freedoms and the duties under the ICERD taking into account that the relevant guarantees are not absolute but subject to certain limitations authorised in the relevant instruments'.⁵⁹ He quotes the Special Rapporteur for the Committee's study on Article 4 as stating that 'it is clear that a balance must be struck between Article 4(a) of the Convention and the right to free

⁵⁶ *Jersild vs Denmark*, *supra* note 52, dissenting opinion of Mrs Jane Liddy.

⁵⁷ These three instances occurred during: 1. the drafting of the ICERD; 2. the preparation of the Bill introducing the amendment of the Danish Penal Code which incorporates the ICERD; and 3. when the Bill was dealt with by the Danish Parliament. Thus Section 266b of the Danish Criminal Code considers it an offence whereby 'a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual orientation'. Quoted in: Boyle, *loc. cit.* (note 2), p. 189.

⁵⁸ *Jersild vs Denmark*, *supra* note 52, dissenting opinion of Mr Gaikur Jorundsson.

⁵⁹ Partsch, K.J., 'Racial Speech and Human Rights: Article 4 of the CERD', in: Coliver, S., Boyle, K. and D'Souza, F. (eds), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, Article 19, London, 1992, pp. 21–28, at p. 24.

speech'.⁶⁰ It was Jorundsson's opinion that such a balancing process had taken place in the Danish institutions, satisfying the Article 10 requirements.

Similarly, before the Court, the boundaries between the ECHR and the ICERD were explored. The Court interpreted the Danish Government's argument as being that Article 10 ECHR could not be used to delimit or destroy the protection afforded by Article 4 ICERD, while the applicant's argument rested on the need for a fair balance between his right to expression and the rights of others, a balance envisaged by the 'due regard' clause of Article 4 ICERD. The applicant drew attention to the fact that the Committee of Ministers of the Council of Europe, while urging member States to ratify the ICERD, also felt compelled to propose an interpretative statement to their instrument of ratification which would, *inter alia*, stress that respect was also due for the rights laid down in the European Convention.⁶¹ The Court stated:

[T]he object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction which – as the government have stressed – was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was necessary within the meaning of Article 10 paragraph 2 (...) Denmark's obligations under Article 10 must be interpreted (...) so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the 'due regard' clause in Article 4 of the UN Convention which is open to various constructions. The Court is, however, of the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention.⁶²

A 'significant feature' of the case, the judgement continued, was that the applicant 'did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist'.⁶³ The programme's purpose could not be said to be the propagation of racist views and ideas. The interference was found not to be necessary in a democratic society and the means employed disproportionate to the aim of protecting 'the reputation or rights of others'.⁶⁴ Importantly, the majority commented: 'There can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10'.⁶⁵ In a footnote, the Court justifies this by reference to the *Glimmerveen* and *Kuhnen* cases. It is unclear if this statement is to be interpreted as meaning that the Greenjackets' remarks did not enjoy the protection of Article 10, and ought instead to be attacked under Article 17, or if interference would have been deemed 'necessary' under Article 10(2) only. If the latter,

⁶⁰ *Ibidem*, at p. 25; and UN Doc. A/CONF.119/10, 18 May 1983.

⁶¹ Resolution (68) 30 adopted by the Ministers Deputies on 31 October 1968.

⁶² *Jersild vs Denmark*, *supra* note 51, para. 30.

⁶³ *Ibidem*, para. 31.

⁶⁴ *Ibidem*, para. 37.

⁶⁵ *Ibidem*, para. 35.

then the remarks would be protected by Article 10(1), with the majority indicating that the ‘balancing process’ set out above would allow interference with the Article 10(1) right on the grounds indicated in Article 10(2). It is probable that this is what the majority decision envisaged. Therefore while racist or hate speech comes under the sweep of Article 10(1), restrictions on such speech, including criminal sanctions, are allowed under Article 10(2).

Prior to *Jersild*, no instance of racist or hate speech had reached the Court, having failed at the admissibility stage, as illustrated in the *Glimmerveen, Kuhnen* and *Remer* decisions. In a dissenting opinion by Judges Ryssdal, Bernhardt, Spielman and Loizou, attention was drawn to the fact that this was the first time that the Court was dealing with a case of the dissemination of racist remarks that denied to a group of persons the quality of human beings. They stated:

In earlier decisions the Court has – in our view rightly – underlined the importance of the freedom of the press and the media in general for a democratic society but it has never had to consider a situation in which ‘the reputation or rights of others’ were endangered to such an extent as here.⁶⁶

They concurred with the majority that the Greenjackets themselves were not protected by Article 10, but also felt that ‘the same must be true of journalists who disseminate such remarks.’⁶⁷ They disagreed with the majority because ‘the majority attributes much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred’.⁶⁸ The protection of racial minorities cannot have less weight than the protection of freedom of expression. They found that it is not the duty of the Court to perform the exercise of balancing the conflicting interests, but rather that should have been left to the Danish Court who enjoy a margin of appreciation in this sensitive area.⁶⁹

5. AN ARTICLE 17 OR AN ARTICLE 10 APPROACH?

In *Jersild*, as noted above, the Court stated that ‘there can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10’;⁷⁰ citing

⁶⁶ *Ibidem*, dissenting opinion of Judges Ryssdal, Bernhardt, Spielman and Loizou, para. 1.

⁶⁷ *Ibidem*, para. 2.

⁶⁸ *Idem*.

⁶⁹ In the dissenting opinion of Judges Golcuklu, Russo and Valticos, the ICERD cannot be ignored when the European Convention is being implemented. It must guide the decisions of the Court: ‘While appreciating that some judges attach particular importance to freedom of expression (...) we cannot accept that this freedom should extend to encouraging racial hatred’; *ibidem*, joint dissenting opinions of Judges Golcuklu, Russo and Valticos.

⁷⁰ *Supra* note 65.

Glimmerveen and *Kuhnen* in the accompanying footnote. In the case of *Glimmerveen*, the racist speech was attacked directly under Article 17, while in *Kuhnen*, Article 17 was used in conjunction with Article 10(2). This distinction leads to the question whether Article 10(1) includes hate speech. According to Harris *et al.*, writing in 1994 before the decision in *Lehideux*:

[T]here appears to be no expression which is not protected by Article 10 because of its content. However some anti-democratic sentiments might be attacked directly under Article 17 and some expression, such as racist epithets, is regarded as particularly obnoxious and therefore only lightly protected against limitation by the State. Nonetheless, the Court has not relied on Article 17 to justify interference with an expression interest, rather requiring that the legitimacy of interference must be justified under Article 10 paragraph 2, even in relation to the most reviled expression.⁷¹

In a later section, they state that ‘whether relied on its own or in conjunction with Article 10 paragraph 2, the importance of Article 17 is that it allows content based restrictions on freedom of expression.’⁷²

While the statements may seem contradictory, they stem from the unique feature of Article 17 mentioned earlier that allows it to be used both by an individual and by a State to justify interference. It would seem to imply in practice that States can justify interference with such speech under Article 17 based solely on its content, while in theory, hate speech remains protected by Article 10(1) and the subsequent requirements of proof under Article 10(2). An all-encompassing Article 10(1) shifts the burden of proof to the State to justify interference. If States can restrict speech under Article 17 because of its content, the burden of proof required to justify intervention is shifted away from that intervention and on to what it is intervening against. The result is a loss of any degree of proportionality; interference is justified because of content, not because of any balancing act with a conflicting right, such as equality. The State would not be required to show that there was a pressing need for an interference – it would be required to prove only the content of the speech in question and not the effect of that speech.

This is the result of the Court’s decision in *Lehideux*, but only, so far, in cases of Holocaust denial. The *Lehideux* decision reinstated the Commission’s finding in *Glimmerveen*, but only for this narrow category of cases, qualification being strictly assessed, as borne out in the subsequent rulings. Under the present interpretation by the Court, the racist pamphlets in *Glimmerveen* would not fall under the rubric of Article 17. Furthermore, the 1994 *Remer* decision, which involved denial of gas chambers and preceded *Lehideux*, would have been decided directly under Article 17 using its present interpretation, rather than under Article 10 with Article 17 used

⁷¹ Harris, O’Boyle and Warbrick, *op.cit.* (note 6), at pp. 373–374.

⁷² *Ibidem*, at p. 409.

as a guiding provision. The category of ‘established historical facts – such as the Holocaust’, is clearly directed at World War II historical revisionists. It does not seem to incorporate racist or hate speech aimed at minorities.

A further element captured by the earlier Article 17 decisions is political parties – both *Glimmerveen* and *Kühnen* involved members of political parties with racist policies and views. In 1998, Turkey invoked Article 17 in its failed defence of its actions against the Communist Party of Turkey, even though there was no racist or xenophobic speech involved.⁷³ It is uncertain whether *Lehideux* extended the provision’s reach beyond the political context and into the area of Holocaust ‘revisionism’, or just restricted it to this category; whether following *Lehideux*, racist speech in the political context can no longer be attacked directly under Article 17. The *Communist Party of Turkey* ruling may have ended the Court’s willingness to employ Article 17 against political parties who employ racist speech, as it did in *Glimmerveen*, given Turkey’s linking of the provision to terrorism.⁷⁴

The technique in *Jersild* of deeming restrictions on racist or hate speech, such as criminal proceedings, as valid under Article 10(2), still applies. This means, theoretically, that in regard to such speech the Court would assess the question of proportionality, and would be able to reach a decision like that arrived at in *Jersild*, that the rights of others must have been disproportionately affected if interference under Article 10(2) is to be upheld. In practice, most cases of racist speech would fail at the admissibility stage, as would have happened if, for example, the Greenjackets themselves had claimed a violation of Article 10. The Greenjackets’ application would fail under Article 10(2), rather than Article 17. Nevertheless, should content-based restrictions on racist or hate speech come under the reach of Article 17? Can a system of what is in essence ‘enhanced protection’ against Holocaust denial be justified? Or should all speech, including Holocaust denial, be protected by Article 10(1)?

There are convincing philosophical justifications for excluding all forms of hate speech from the protection of Article 10(1). Stanley Fish, in his book *There’s No Such Thing as Free Speech*,⁷⁵ criticises theories of free speech which start on the premise that speech takes place in weightless situations, where one does not speak to elicit an action or a response – in that sense, he is arguing that ‘there is no such thing as free

⁷³ *United Communist Party of Turkey and Others vs Turkey*, *supra* note 9, para. 21: ‘At the very least, Article 17 of the Convention should be applied in respect of the TBKP [Communist Party of Turkey] since the party had called into question both the bases of the Convention and the freedoms it secured. In that connection, the Government cited the Commission’s decisions in the cases of *Glimmerveen and Hagenbeek v. the Netherlands* (...) *Kühnen v. Germany* (...) and *Remer v. Germany*’.

⁷⁴ ‘In a context of vicious terrorism such as Turkey was experiencing, the need to preclude improper use of the Convention by applying Article 17 was even more obvious, as the Turkish authorities had to prohibit the use of ‘expressions’ and the formation of ‘associations’ that would inevitably incite violence and enmity between the various sections of Turkish society’; *idem*.

⁷⁵ Fish, Stanley, *There’s No Such Thing as Free Speech (and it’s a good thing too)*, Oxford University Press, Oxford, 1994.

speech, that is, speech that has as its rationale nothing more than its own production'.⁷⁶ Speech is designed to provoke action or urge an idea and has a purpose behind it. In the context of racist or hate speech, Fish points out that defending such speech in order to defend an illusory principle of freedom of expression is erroneous. Racists do not believe they are racist (a point easily forgotten) but rather that they are telling the truth. It is not an error that needs to be corrected, but

the truth telling of a vision we happen to despise (...) The only way to fight hate speech or racist speech is to recognise it as the speech of your enemy and what you do in response to the speech of your enemy is not prescribe a medication for it but attempt to stamp it out.⁷⁷

This is in line with the Article 17 approach to hate speech. If we turn to the preamble of the ECHR, we see that it is clearly aligned against the sentiments expressed by Glimmerveen and Hagenbeek, the Greenjackets and Kuhnen, as well as those who question historical facts in relation to Nazi atrocities and the Holocaust. Perhaps all examples of such speech should simply be treated as anathema under Article 17, permitting both individuals and States to interfere in order to prevent its dissemination purely on the basis of content, and irrespective of the aim of the disseminator, as is currently the Court's practice in relation to Holocaust denial.

Owen Fiss attempts in his work to redress what he calls 'the irony of free speech' in the context of the US Constitution.⁷⁸ Fiss outlines clearly the relative positions, the clash of two of liberalism's most important values, freedom of speech and equality: 'The regulation of hate speech (...) forces the legal system to choose between transcendent commitments – liberty and equality – and yet the [US] Constitution provides no guidance as to how that choice should be made'

He sees no reason to defend the partisans of equality 'by simply asserting the priority of equality. They seem to be mirroring the error of libertarians who assert the priority of speech'.⁷⁹ Fiss' solution to the impasse is to 'transform what at first seemed to be a conflict between liberty and equality into a conflict between liberty and liberty'.⁸⁰ He explains this by stating that with hate speech, the problem is not that it will persuade people to act a certain way (in direct contrast to Fish) but rather that it will stop those being targeted from participating in the discussion. What he calls the 'silencing dynamic' of hate speech validates State interference in order to make sure that the public gets to hear all that it should. The State is not therefore arbitrarily choosing one value over another, but ensuring that all sides are presented

⁷⁶ Lowe, Peter and Jonson, AnnMarie, 'An Interview with Stanley Fish', *Australian Humanities Review*, February 1998, available at: www.lib.latrobe.edu.au/AHR/archive/Issue-February-1998/fish.html (last accessed 18 October 2007).

⁷⁷ *Ibidem*, at p. 9.

⁷⁸ Fiss, Owen, *The Irony of Free Speech*, Harvard University Press, Cambridge, 1996.

⁷⁹ *Idem*.

⁸⁰ *Ibidem*, at p. 15.

to the public: 'Sometimes we must lower the voices of some in order to hear the voices of others'.⁸¹ Fiss' reconceptualisation of the terms of the hate speech debate means that the groups who are targeted will not be asserting their rights to equality or freedom from discrimination but rather their right to free speech. Speech 'now (...) appears on both sides of the equation, as a value threatened by the regulation and as the countervalue furthered by it'.⁸²

The irony is evident: in order to make speech more free we have to make it less free. The perceived liberty/equality dialectic is shown to be illusory, rather it is that both terms are dependant and informed by each other. He is also acknowledging and addressing the inherent contradictions in any approach to freedom of expression in general and hate speech in particular. It is both novel and promising that Fiss does not abandon the debate and 'pick a side', as Fish does, but rather attempts to express one side in the terms of the other. It is as mathematical an approach as it is literary. It is interesting to see juridical writers wrestling with the same liberty/equality dialectic – inevitably, they will come down on one side or the other without addressing the very terms of the debate itself.

Sandra Coliver, concluding the examination of racist speech and laws designed to curb it by over thirty experts from around the world, states that '[t]he rise of racism and xenophobia throughout Europe, despite a variety of laws restricting racist speech, calls into question the effectiveness of such laws in the promotion of tolerance and non-discrimination'.⁸³ She draws attention to the tactics employed by extremist politicians of watering down the content of their speech in order to avoid conviction and simultaneously appeal to a wider audience. A recent example of this in the European context may be found in a 2000 Report by the 'Three Wise Men', Martii Ahtisaari, Jochen Frowein and Marcelino Oreja, appointed by the Court to assess the Austrian Government's commitment to common European values.⁸⁴ The Report stressed the use of 'ambiguous language', rather than racist or hate speech, by the politicians and former leader of the Freedom Party of Austria, Jörg Haider.⁸⁵

It must be noted that Coliver comes down in favour of freedom of expression. She points to the controversial US Supreme Court case of *Skokie*,⁸⁶ where the right of Nazis to march down a neighbourhood inhabited by Jewish Holocaust survivors was upheld

⁸¹ *Ibidem*, at p. 24.

⁸² *Idem*.

⁸³ Coliver, S., 'Hate Speech Laws: Do They Work?', in: Coliver, Boyle and D'Souza (eds), *op.cit.* (note 59), pp. 363–374, at p. 374.

⁸⁴ Unprecedented diplomatic sanctions imposed on Austria by the other 14 members of the European Union in the wake of the FPO forming a coalition government in Austria were only lifted upon publication of the report, available at: www.arena.uio.no/PDF/reportwisemenustria.pdf (last accessed 18 October 2007), Paris, 8 September 2000.

⁸⁵ On the use of 'ambiguous language' by the FPO, see *ibidem*, paras 88–92.

⁸⁶ *National Socialist Party of America vs Village of Skokie*, 434 US 1327, 1977. The case supported the concept of a 'free marketplace of ideas'.

as a 'victory of tolerance over intolerance'.⁸⁷ Similarly, she states that the laws in France have done nothing to curb the growth of racism, and that what is clear is that despite the lack of regulation of speech in the US, racism and intolerance is at least no worse than it is in Europe. She concludes that 'we undeniably are weighing evils. Finding a balance in each context is a delicate process (...) [which] will undoubtedly bring us closer to realising the mutually reinforcing values of free speech and equality.'⁸⁸ There can be little doubt, however, that she is supporting freedom of speech – we see again the results of a balancing process as coming down on one side or the other, without examining the fact that the argument is circular. Equality and free speech become nested oppositions, and there is no logical basis for privileging one over the other.

The philosopher L.W. Sumner reaches a similar conclusion.⁸⁹ He states that 'where hate propaganda is concerned, these values [equal respect for minorities and freedom of expression] appear to conflict. Any resolution of this conflict will necessarily favour one value at the expense of the other.'⁹⁰ Sumner regards the balancing process undertaken by judges as a trade-off; the optimal trade-off is where 'any further gains in one of the values would be outweighed by greater losses in the other (...) we seek a balance point at which the greater protection for minorities (...) would be outweighed by the chilling effect on political speech'.⁹¹ The trade-off does not occur on strict utilitarian terms. Public policy must be factored in, and in the case of the European Court of Human Rights, this means an initial presumption in favour of protection of minorities, whereas the converse would be true in the United States – the initial presumption would be in favour of freedom of expression. Ultimately, the Court in *Jersild* sought this optimal trade-off point, but for any proposed restriction, the question is whether the marginal gain in freedom of expression is worth purchasing at the marginal cost to equality.⁹² If we return to the language of the Court in the case, we see that 'the Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations'.⁹³ This is an iteration of the initial presumption in favour of equality and protection of minorities. However, the Court states in paragraph 35 that '[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest'.⁹⁴ Accordingly, the gain in freedom

⁸⁷ Coliver, *loc.cit.* (note 83), at p. 373.

⁸⁸ *Ibidem*, at p. 374.

⁸⁹ Sumner, L.W., 'Hate Propaganda and Charter Rights', in: Waluchow, W.J. (ed.), *Free Expression – Essays in Law and Philosophy*, Clarendon Press, Oxford, 1994, pp. 153–174.

⁹⁰ *Ibidem*, at p. 158.

⁹¹ *Ibidem*, at p. 160.

⁹² *Ibidem*, at p. 161.

⁹³ *Jersild vs Denmark*, *supra* note 51, para. 30.

⁹⁴ *Ibidem*, para. 35.

of expression was worth purchasing at the cost to equality – a breach of Article 10 was found.

The balancing process can be illustrated using a common law burden of proof metaphor. Morally, the question of conflict between equality and freedom of expression ought to be resolved on the balance of probabilities. But in the Court, there is a rebuttable presumption in favour of equality – this means that the burden of proof lies with freedom of expression. The Court requires a high level of proof that freedom of expression ought to be respected over equality. With regard to Holocaust denial, under the current Article 17 approach, the presumption becomes irrebuttable. There can be no freedom of expression justification attributed to questioning the historical facts of the Holocaust. Should this be extended to cover all instances of racist speech?

6. CONCLUSION

In *Glimmerveen*, the Commission noted: ‘The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention.’⁹⁵

The ‘balancing process’ that is inherent in the Court’s treatment of Article 10 is severely restricted under Article 17. The Court has recognised that Holocaust denial, and related revision of the historical facts of World War II, poses a danger to the democratic institutions of Europe of a kind that exceeds other forms of racist or hate speech. Nevertheless, is it desirable to have a two-tier system in relation to the Court’s treatment of hate speech? Or could all hate speech be attacked under Article 17, purely on the basis of its content?

Practically, there would not be a profound effect in treating all hate speech as inadmissible under Article 17, the approach adopted by the Commission from the very first in *Glimmerveen*. Nearly all instances of State interference with racist or hate speech are deemed necessary under Article 10(2). Thus, while in the *Chaupy* decision the materials under scrutiny did not meet the standards of Article 17, interference with the Article 10(1) right was justified and necessary under Article 10(2).

One rare example of a material difference to a decision if treated under Article 17 is *Jersild*. The ‘balancing process’ and analysis of the element of proportionality would have been removed if the case had been examined under Article 17; indeed *Jersild* would not have passed the admissibility stage, and based on content alone, the Danish State would have been justified in prosecuting the journalist, irrespective of the context of the news piece. Clearly, *Jersild* is unusual in involving an example of hate speech beyond the admissibility stage, as acknowledged in the dissenting opinion of Judges Rysdal, Bernhardt, Spielman and Loizou.

⁹⁵ *Glimmerveen and Hagenbeek vs the Netherlands*, *supra* note 10, para. 11.

The recent debate over freedom of expression in Europe is understandably confused. David Irving's prosecution for Holocaust denial in Austria, compared with the inaction over the publication of the cartoons of the Prophet Mohammad in Denmark,⁹⁶ and indeed the virulent defence of freedom of expression that resulted, seems to give a contradictory message; total intolerance for racist or hate speech extends only to Holocaust deniers and is not as strictly enforced in its other guises. This contradiction is reproduced in the Court, which has a higher standard of protection against Holocaust denial than it does against other forms of racist or hate speech.

Judge Jambrek's concurring opinion in *Lehideux* extended Article 17 to cover situations where the aim of the offending actions is to 'pursue objectives that are racist'.⁹⁷ There has been no indication whether this is the approach the European Court of Human Rights will adopt in future admissibility hearings that challenge State intervention under Article 10 in relation to racist speech against minorities.

One final issue which will impact significantly upon the future development of European human rights law in this area is the growing interrelationship of race and religion.⁹⁸ On 30 June 2006, the Human Rights Council decided to request the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on contemporary forms of racism to report to its next session on the increasing trend of defamation of religions.⁹⁹ The joint report, entitled *Incitement to Racial and Religious Hatred and the Promotion of Tolerance*, was submitted to the second session of the Council on 20 September 2006.¹⁰⁰ The report was required to examine the issue under Article 20(2) of the International Covenant of Civil and Political Rights (ICCPR), which provides that: '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

The positions taken by the Special Rapporteur on religion, Asma Jahangir, and the Special Rapporteur on racism, Doudou Diène, were decidedly different. For the Special Rapporteur on racism

⁹⁶ According to the report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *loc.cit.* (note 4): 'As regards the legal position, it was reported that one person had been charged in connection with death threats received by the newspaper's receptionist on 30 September, and the police were making inquiries regarding four threats received by telephone and e-mail following the publication of the cartoons. Meanwhile, the regional public prosecutor decided to discontinue his investigation of a complaint against *Jyllands-Posten* filed by certain private associations, on the grounds that there was no "reasonable suspicion that a criminal offence indictable by the State has been committed"?' (para. 30).

⁹⁷ *Lehideux and Isorni vs France*, *supra* note 27, concurring opinion of Judge Jambrek, para. 2.

⁹⁸ On this topic, see further Keane, David, 'Addressing the Aggravated Meeting Points of Race and Religion', *Maryland Law Journal of Race, Religion, Gender and Class*, Vol. 6, No. 2, 2006, pp. 367-406; and Ghana, Nazila, 'Phobias and Isms: Recognition of Difference or the Slippery Slope of Particularisms?', in: Ghana, Nazila, Stephens, Alan and Walden, Raphael (eds), *Does God Believe in Human Rights? Essays on Religion and Human Rights*, Martinus Nijhoff, The Hague, 2007, pp. 211-232.

⁹⁹ UN Doc. A/61/53, Part I, Chapter II(B), 30 June 2006.

¹⁰⁰ UN Doc. A/HRC/2/3, 20 September 2006.

the increasing trend in defamation of religions cannot be dissociated from (...) the ominous trends of racism, racial discrimination, xenophobia and related intolerance which in turn fuel and promote racial and religious hatred.

By contrast, the Special Rapporteur on religion took a far more muted approach to the issue of defamation of religion. She held that ‘criminalizing defamation of religion can be counterproductive’,¹⁰¹ and criticised the fact that in a number of States, defamation of religion constituted a criminal offence. Expressions should only be prohibited, she urged, ‘if they represent incitement to imminent acts of violence or discrimination against a specific individual or group.’¹⁰²

In line with the split evidenced in the joint report on the part of the Rapporteurs, the European institutions tolerate defamation of religions but they do not tolerate racially discriminatory speech. According to Boyle:

While there is a strong consensus in Europe on the legitimacy of the restriction of racist speech, there is less over the question of speech that involves targeting the religious beliefs of others.¹⁰³

This is often justified on the basis that one may choose one’s religion but not one’s ethnicity. However, ‘where such speech is also motivated by racial prejudice (...) it falls outside the scope of protected speech.’¹⁰⁴

The difficulty lies in the fact that the lines between the categories are blurring. According to Sullivan, it is often difficult to ‘separate the religious elements from ‘racial’ or ‘ethnic’ components of group identity.’¹⁰⁵ Or, as Lerner puts it, ‘religion plays a weighty role in xenophobia, racism, group hatred, and even territorial changes.’¹⁰⁶

Increasingly, hate speech is taking the form of religious intolerance. Perhaps in the future, European human rights practice will require a relaxing of prohibitions on expression, in order to protect criticism of religion. A residual exception for speech which incites to violence, in line with Article 20(2) ICCPR, would remain. The legacy of the ‘Danish cartoons’ is a fundamental challenge to what is meant by the concept of hate speech.

¹⁰¹ *Ibidem*, para. 42.

¹⁰² *Ibidem*, para. 47.

¹⁰³ Boyle, *loc.cit.* (note 2), p. 189.

¹⁰⁴ *Idem*.

¹⁰⁵ Sullivan, Donna, ‘Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination’, *American Journal of International Law*, Vol. 82, No. 4, 1988, pp. 487–520, at p. 508.

¹⁰⁶ Lerner, Natan, ‘The Nature and Minimum Standards of Freedom of Religion or Belief’, International Law and Religion Symposium Article, *Brigham Young University Law Review*, 2000, pp. 905–932, at p. 921.

Section 3: Case Summaries and Commentaries

A. ECHR Case News: Admissibility Decisions and Communicated Cases

Prohibition of torture and inhuman or degrading treatment

Gökhan Yıldırım v. Turkey

(31950/05)

European Court of Human Rights: Partial admissibility decision dated 30 September 2008

Ill-treatment whilst in police custody - unfair criminal proceedings - unlawful arrest - Articles 3, 5, 6, 8 and 13 of the Convention.

Facts

The applicant, Mr Gökhan Yıldırım, is a Turkish national who was born in 1976 and lives in Kayseri. In February 2001, the Kayseri Law and Order Department received intelligence that the applicant was involved in fraud.

On 22 February 2001, the police arrived at the building where the applicant lived. The applicant resisted with a knife but the police entered with the help of the fire brigade and arrested the applicant. The applicant was subsequently taken to the police station for questioning. He was allegedly beaten while in police custody.

A series of medical examinations conducted following the applicant being taken into police custody revealed various injuries, including one on his forehead that could have been caused by a blow with a blunt object, and a lesion in his abdomen.

On an unspecified date, the Kayseri public prosecutor initiated criminal proceedings against the applicant, accusing him of resisting police officers with a knife and breaking into his neighbours' flat. On 23 December 2002 the Kayseri Criminal Court found the applicant guilty as charged and sentenced him to seven months and seventeen days' imprisonment.

In the intervening period, on 26 March 2001 the applicant had filed a criminal complaint against the police officers. On 20 March 2001 the Kayseri public prosecutor decided not to prosecute. On 31 May 2001 the Boğazlıyan Assize Court refused the applicant leave to appeal. On 2 July 2001 the applicant further applied to the Ministry of Justice and requested that the decision of the Boğazlıyan Assize Court be quashed.

On 18 February 2002 the Kayseri public prosecutor filed an indictment with the Kayseri Assize Court against eight police officers from the Kayseri Security Directorate, accusing them of ill-treating the applicant during his time in police custody. On 30 March 2004 the court acquitted the police officers of the offences with which they had been charged. It held that the evidence in the case file did not suffice to convict these officers.

Complaints

The applicant alleged violations of Articles 3, 6 and 13, complaining that he had been ill-treated in police custody and that the ensuing criminal proceedings against the accused police officers had not been fair or effective. He further complained of a breach of Article 5, alleging that his arrest had been unlawful. Finally, the applicant maintained that, as the police officers had entered his neighbours' flat without having obtained prior authorisation from a judge, his rights under Article 8 had been breached.

Held

The Court held that these complaints should be examined from the standpoint of Article 3 of the Convention alone. It further considered that it could not, on the basis of the case file, determine the admissibility of these complaints and therefore the case was communicated to the Government. The Court unanimously decided to adjourn the examination of the applicant's complaints concerning Article 3 of the Convention, and declared the remainder of the application inadmissible.

As for the remaining allegations, the Court found that the complaints did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols and therefore they were rejected as being manifestly ill founded, pursuant to Article 35(3) and (4) of the Convention.

Right to a fair trial

Atsız and Others v. Turkey

(7987/07)

European Court of Human Rights: Communicated 10 June 2008

Reasonable length of detention under Article 5 – fair trial encompassing reasonable length of proceedings – reliance on evidence obtained under torture - bringing an Article 6 claim when domestic proceedings still pending – Articles 3, 5, 6, 7, 13 of the Convention.

Facts

The applicants are Mr Sedat Atsız, Mr Mehmet Emin Türk, Mr Şerafettin Türk, Mr Mahfuz Sığınç and Mr Orhan Sakcı, Turkish nationals who were born in 1970, 1970, 1966, 1974 and 1970 respectively.

The applicants were remanded in custody between January and March 1994, on suspicion of membership of the Kurdistan Workers' Party (PKK), an illegal organisation.

On 20 January 1994 a single Judge at the Muş Magistrates' Court remanded the fifth applicant in custody. On 31 March 1994 a single judge at the Muş Magistrates' Court remanded the other applicants in custody.

On 16 March 2004, the Diyarbakır State Security Court convicted the applicants of carrying out activities for the purpose of bringing about the secession of part of the national territory under Article 125 of the former Criminal Code, and sentenced them to life imprisonment. On 6 June 2005, the Court of Cassation quashed the judgment of 16 March 2004 in respect of some of the accused, including the applicants, and remitted the case to the first-instance court. On 16 November 2007 the Diyarbakır Assize Court convicted the applicants under Article 125 of the former Criminal Code and again sentenced them to life imprisonment. On 20 January 2008 the applicants appealed to the Court of Cassation.

According to the information in the case file, at the time of application the case was still pending before the Court of Cassation.

Complaints

The applicants claimed that statements were taken from them under duress, and that they were ill-treated during their detention in police custody, amounting to a violation of Article 3 of the Convention.

The applicants claimed that their detention, which lasted over 12 years in total, had exceeded the 'reasonable time' requirement under Article 5(3), which states that all arrested or detained on suspicion of committing an offence shall be entitled to trial within a reasonable time or to release pending trial.

The applicants claimed that the length of criminal proceedings against them, which lasted 14 years, exceeded the 'reasonable time' requirement under Article 6(1), which indicates that proceedings must be of reasonable length.

The applicants claimed that they were further denied their Article 6(1) right to a fair trial, as their convictions were based on evidence extracted under torture and their witnesses were not heard by the domestic courts.

The applicants invoked Article 7 (no punishment without law), stating that their punishment was outside the provisions of the law.

The applicants claimed that the domestic system did not provide them with an effective remedy, in breach of Article 13.

Held

The Court considered that it could not, on the basis of the case file, determine the admissibility of the applicants' Article 5(3) or Article 6(1) complaints with regards to the reasonableness of the length of their detention and trial, respectively. The Court therefore held that it was necessary, in accordance with Rule 54(2)(b) of the Rules of Court, to give notice of these parts of the application to the respondent Government.

The Court noted that the applicants had failed to give any details or provide any supporting documents, such as medical reports, to substantiate their Article 3-based allegations of ill-treatment.

The information in the case file indicates that the applicants raised the Article 3 complaint at the Muş Magistrates' Court, and there appeared to be no investigation of these complaints by the national authorities.

The Court considered that the failure of the judicial authorities to act must have become gradually apparent to the applicants up until 16 March 2004, when the Diyarbakır State Security Court gave its judgment on the matter. Accordingly, the six-month period in which to bring the claim (Article 35(1) of the Convention) should be considered to have started running no later than 16 March 2004, and the application should have been made no later than September of that year, whereas it was actually introduced on 26 January 2007.

Therefore, the Court considered that the Article 3 claim had been introduced out of time and must be rejected under Article 35(1) and (4) of the Convention.

The Court held that the complaint that the admission of unlawfully obtained evidence and the failure to hear the applicants' witnesses in the domestic courts amounted to a breach of Article 6 fair trial rights was premature, as the criminal proceedings against the applicants were still pending before the domestic courts.

The Court rejected this part of the application under Article 35(1) and (4) of the Convention for non-exhaustion of domestic remedies.

With regard to the applicants' remaining complaints under Articles 7 and 13 of the Convention, the Court held that the material within its possession did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols, in so far as the matters complained of were within the Court's competence. Accordingly, it rejected these complaints as being manifestly ill-founded, pursuant to Article 35(3) and (4) of the Convention.

The Court unanimously decided to adjourn the examination of the applicants' complaints concerning their Article 5(1) rights and their Article 6(1) right to a fair hearing within a reasonable time, and declared the rest of the application inadmissible.

Communicated under Articles 5(3) and 6(1) of the Convention.

Private and family life and prohibition of discrimination

Taşkın and Others v. Turkey

(30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05, 45609/05)

European Court of Human Rights: Communicated 27 May 2008

Whether right to private life encompasses freedom to change name to include non-Turkish letters – adequacy of domestic legislation – whether refusal amounts to discrimination – power of Court to

consider the complaints under Articles not relied upon by those appearing before it - Articles 8, 9, 10, 13, 14, 18 of the Convention.

Facts

The eight applicants, Kemal Taşkın, Medeni Alpkaya, Abdulkadir Fırat, Doğan Genç, Emin Anç, Celalettin Yöyler, Emirali Şimşek and Reşit Sünbül, are Turkish nationals and live in different cities in Turkey.

On various dates, the applicants applied to the domestic courts for permission to change their names to the names by which they were known to their friends and relatives, which contained letters from the Kurdish alphabet which were non-existent in the Turkish alphabet: 'X', 'Q' and 'W'.

In seeking such permission, the applicants claimed that the fact that they were currently registered under different names from those that they used with friends and relatives led to difficulties in their daily lives. Registration of Kurdish names had been prevented by Law no. 1587, which stated that newborns could not be given names incompatible with national culture, customs, traditions and ethical principles or that impaired the public conscience. However, this law was amended by Law no. 4928 on 15 July 2003, which removed the words 'national culture' and 'customs, traditions'. The applicants claimed that after this amendment, decisions against the registration of Kurdish names had been quashed by the Court of Cassation. They also questioned the use of foreign letters by trade companies or for names of medicines, and the fact that foreigners acquiring citizenship received identity cards, regardless of whether their names contained the letters 'X', 'Q' or 'W'.

In the case of application no. 45376/04, the Istanbul Civil Court had issued a decision of non-jurisdiction at a hearing which - according to the applicant - was attended by members of the public and press for only some of the time, and transmitted the case to the Beyoğlu Civil Court. The applicant stated that during the hearing the court did not request a power of attorney from the representative of the opposite party and did not ask for the parties' opinion on the matter. The applicant appealed and the Court of Cassation upheld the decision of non-jurisdiction. Subsequently, the applicant brought his complaint before the competent court.

The domestic courts rejected the applicant's request, mainly on the ground that the Turkish alphabet did not contain the letters 'X', 'Q' or 'W', and out of the need for protection of public order. It agreed to add 'Baver' instead of 'Bawer' which had initially been requested by the applicant.

Appeals by the applicants against those judgments were dismissed by the Court of Cassation.

Several articles on the issue were published in the media, one of which made a reference on 6 October 2005 to a statement made by the then Minister of the Interior, Abdülkadir Aksu, who responded to a campaign inviting Kurdish families to change their names by saying that the use of letters which were not in the Turkish alphabet would not be allowed.

Complaints

All the applicants, except application no. 43681/04, complained that refusal to register the names they used in their daily lives was a violation of their right to respect for private and family life, and so amounted to a breach of Article 8. Furthermore, they alleged a breach of Article 14 (right to be free from discrimination), claiming that they were discriminated against as both private companies and previous foreign nationals acquiring Turkish citizenship were permitted to use the non-Turkish letters 'X', 'Q' and 'W'.

The applicant in application no. 43681/04 complained that the refusal of the authorities to change his name amounted to a violation of his freedom of expression, and so was a breach of his Article 10 rights. He also relied on Article 14, alleging that he had been discriminated against on account of his Kurdish origin, and Article 18. Article 18 states that the restrictions provided for in the wording of Convention rights must not be applied for any purpose other than that for which they have been prescribed. The applicant alleged that the authorities' reason for refusal (protection of public order) constituted a breach of Article 18.

In addition, the applicant in application no. 45376/04 alleged an Article 6 (right to a fair and public hearing) breach in that the press and public had been excluded from the hearing during which non-jurisdiction was declared, that the court had not asked for opinions of both parties when making its jurisdictional decision, that the representative of the opposite party had not been requested to submit a power of attorney and that the Court of Cassation's decision lacked reasoning.

The applicants in application nos. 32797/05 and 45609/05 complained under Article 6 that the statement of the Minister of the Interior in the media had prevented a fair hearing, and that the Court of Cassation's decision lacked reasoning. They also invoked Article 13 of the Convention (right to an effective remedy), asserting that the remedy provided under Turkish law with respect to name changes had been ineffective. In application no. 32797/05, the applicant further alleged that the domestic court had not collected the evidence he requested, infringing the equality of arms principle.

The applicant in application no. 12881/05 complained that his freedom of thought under Article 9, and freedom of expression under Article 10 had been infringed upon by the authorities' refusal to change his name in the State register.

Held

In view of the similarity of the applications, the Court found it appropriate to join them.

The Court noted that all the applicants, apart from in application no. 43681/04, invoked Article 8 claims, and that applications nos. 43681/04 and 12881/05 alleged violations of Article 9 and 10 rights. However, the Court indicated that it, rather than applicants, must be considered as the master of the characterisation that the facts of the case take on in law. The Court may consider, of its own motion, the complaints under Articles or paragraphs not relied on by those appearing before it. Therefore, the Court considered that the applicants' complaints fell to be examined under Article 8 of the Convention.

All the applicants had also alleged breach of their Article 14 rights. The Court considered that it could not determine the admissibility of those complaints, and it was therefore necessary to give notice of this part of the applications to the respondent Government, under Rule 54(2)(b) of the Rules of Court.

The Court then considered the Article 6 complaints. At the outset, it recalled its ‘fourth instance’ doctrine, namely that its duty is to observe national courts’ compliance with the Convention, and not to deal with any errors of fact or law allegedly committed by a national court unless it is in breach of its Convention obligations. Moreover, Article 6 guarantees the right to a fair trial, but does not lay down any rules on admissibility, and does not require a court to give detailed reasons when rejecting an appeal with reference to the reasoning of the lower court.

It observed that no decision was taken by the first-instance court in application no. 45376/04 to exclude the press and public from the hearing in question. With regards to the statements of the Minister of the Interior concerning the issue, the Court held that the relevant applicants had failed to show how the press coverage affected the fairness of the trial or had any impact on the proceedings. The Court noted further that the first-instance courts’ judgments explained the facts, submissions, evidence, courts’ interpretations and the legal provisions applied.

In view of the above, the Court found that the Article 6 claims must be rejected as being manifestly ill-founded under Article 35(3) and (4) of the Convention.

An examination by the Court of the material submitted to it regarding the alleged breaches of Articles 13 and 18 of the Convention did not disclose any appearance of a violation. Therefore, these parts of the application were also rejected under Article 35(3) and (4) of the Convention, as being manifestly ill-founded.

The Court unanimously decided to join the applications, adjourn the examination of the applicants’ complaints concerning Articles 8 and 14 of the Convention, and declare the remainder of the applications inadmissible.

Communicated under Articles 8 and 14 of the Convention.

B. Substantive ECHR Cases

Right to life

Gülen v. Turkey
(28226/02)

European Court of Human Rights Chamber: Judgment dated 14 October 2008

Right to life - Article 2 of the Convention.

Facts

The applicants were born in 1942 and 1931 respectively and live in Germany.

In connection with an ongoing investigation against activist members of the illegal armed organisation Devrimci-Sol (Revolutionary Left), on 17 April 1992 police officers from the Anti-Terrorism Branch of the Istanbul Security Directorate conducted an operation in three buildings located in different areas in Istanbul. The applicants' daughter, Ayşe Gülen Uzunhasanoğlu, was killed during this operation.

On 28 April 1992 a criminal complaint was filed against Mr Necdet Menzir, the Head of the Istanbul Security Directorate at the time, and the police officers that had been involved in the three operations conducted on 17 April 1992.

On 24 June 1997 the Kadıköy public prosecutor filed a bill of indictment with the Kadıköy Assize Court against 15 police officers for having killed Ayşe Gülen Uzunhasanoğlu. The applicant intervened in the proceedings.

On 14 November 2000 the Kadıköy Assize Court, finding that there were no grounds for imposing any punishment on the defendants, acquitted the police officers.

On 14 November 2001 the Court of Cassation denied the applicants leave to appeal.

Complaints

The applicants complained that the killing of Ayşe Gülen Uzunhasanoğlu had violated Article 2 of the Convention.

The applicants argued in the first place that their daughter had been killed intentionally by the police. They further stated that Ayşe Gülen Uzunhasanoğlu's death had resulted from the use of lethal force, which had been more than absolutely necessary. The police claimed to have used firearms acting in self-defence and in accordance with the requirements of the Law and Regulations on the duties and powers of the police.

The applicants further alleged a breach of Articles 3, 6 and 14 of the Convention and Article 1 of Protocol No. 1. Under Article 3, they complained about the suffering they had endured as a result of their daughter's death; under Article 6 they stated that the proceedings brought against the police officers were unfair; under Article 14 they complained about the non-prosecution of Mr Necdet Menzir, the Head of the Istanbul Security Directorate at the time; and finally under Article 1 of Protocol No. 1, they argued that there had been an interference with their right to peaceful enjoyment of their possessions as their flat was sealed by the police following the incident.

Held

As to the death of Ayşe Gülen Uzunhasanoğlu

The Court underlined that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the

convention from which no derogation is permitted. However, the article also needs to make its safeguards practical and effective.

The Court did not find it sufficiently established that the police officers had acted from the outset with the aim of killing Ayşe Gülen Uzunhasanoğlu. Lethal force can only be justified 'in case of absolute necessity authorised by law'. The Court considered that in the present case, the use of lethal force in the circumstances, however regrettable it may have been, did not exceed what was 'absolutely necessary' for the purpose of self-defence and in order to effect a lawful arrest. As a result, the Court found no violation of Article 2.

As to the alleged inadequacy of the investigation

The Court stated that the obligation to protect the right of life under Article 2 of the Convention must be read in conjunction with the State's general duty under Article 1 of the Convention to 'Secure to everyone within its jurisdiction the rights and freedoms defined in the Convention'. This duty requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

The investigation could not be considered to have been effective given the substantial delays involved. In this connection, the Court noted that the prosecuting authorities waited more than five years before initiating criminal proceedings against the accused police officers. Subsequently, the Kadıköy Assize Court took more than four years in reaching a final judgment in the proceedings.

Therefore, the Court considered that the proceedings in question, which lasted more than nine years, could not be described as a prompt response by the authorities in investigating the allegedly unnecessary and disproportionate use of force. The Court concluded that there had been a violation of the State's procedural obligation under Article 2 of the Convention.

Isaak and Others v. Turkey

(44587/98)

European Court of Human Rights: Judgment dated 24 June 2008.

Right to life – whether killing of victim constitutes violation of right to life – lack of effective investigation – Article 2 of the Convention.

Facts

The applicants are all related to the victim. The first applicant is the widow, the second and third applicants are the parents and the fourth and fifth applicants are the sisters of Mr Anastasios Tassos Isaak, a Greek Cypriot, who died on 11 August 1996.

Anastasios Isaak participated in a demonstration organised by the Cyprus Motorcycle Federation (CMF) that took place on 11 August 1996 at several points of the United Nations (UN) buffer zone east of Nicosia, including the area of Dherynia. The demonstration was aimed at protesting against the Turkish occupation of the northern part of Cyprus. On 2 August 1996 a group of over

100 Cypriots and other European motorcyclists set off from Berlin and travelled through Europe to Cyprus.

On 11 August 1996, following an urgent appeal by the UN Secretary General, a decision was made to cancel the final part of the rally. The President of the Republic made a special plea to the motorcyclists to disperse peacefully. Notwithstanding that plea, a group of motorcyclists and other civilians, including Anastasios Isaak, proceeded to enter the UN buffer zone, crossing the National Guard ceasefire line on foot after breaking through the police and UN barrier.

Behind the ceasefire line of the Turkish forces, a mob of Turkish-Cypriot and Turkish civilians gathered, many of them armed with sticks, batons and catapults. There were also armed Turkish soldiers and 'Turkish Republic of Northern Cyprus' ('TRNC') policemen. According to the report by the United Nations Peace Keeping Forces in Cyprus (UNFICYP), the Turkish forces allowed about 1,000 persons in buses to pass through their 3km military zone and assemble there. Some of them belonged to the 'Grey Wolves' organisation, a Turkish youth organisation of the Nationalist Movement Party (MHP).

After entering the buffer zone armed with long sticks, batons and iron bars, part of the Turkish mob, together with uniformed policemen, managed to isolate several Greek-Cypriot demonstrators and started beating them. A group of about 15 to 20 persons, including five uniformed policemen, isolated and surrounded Anastasios Isaak, who was unarmed. He was thrown to the ground and beaten with metal and wooden batons. There were in total eight 'TRNC' police officers in the vicinity.

Anastasios Isaak's body was dragged to the area controlled by the Cypriot Government where Greek-Cypriot demonstrators put the body in a car. He was later pronounced dead at the hospital.

Turkish authorities alleged that the victim had died as a result of having become entangled and trapped in spiral barbed-wire barriers that had been put up by UN forces. According to the post-mortem examination performed the following day, the cause of death was multiple blunt trauma to the head. The same conclusion appeared in the preliminary post-mortem report issued by Dr M Enk of UNFICYP.

Complaints

The applicants complained about the killing of the victim, alleging, *inter alia*, that there had been a substantive violation of Article 2. The applicants also alleged that there had been a violation of Article 2 in respect of the failure by the authorities to conduct an effective investigation into the circumstances in which the victim had died.

Held

The Court held that there had been a violation of Article 2 of the Convention in respect of the killing of Anastasios Isaak. The Court considered that there was clear evidence that the victim was killed by, and/or with the tacit agreement of, agents of the Turkish authorities. The force that had been used against the victim could not be justified by any of the exceptions laid down in Article

2(2). The agents could have taken preventative operational measures to protect the victim's life and the killing of the victim had not been 'absolutely necessary'.

The Court also 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 Anastasios Isaak died. The Court found that the authorities had failed to produce any evidence showing that an investigation had been carried out into the circumstances of the victim's death. Nor had the authorities alleged that, more than 11 years after the incident, those responsible for the killing had been identified and arraigned before a domestic tribunal. Accordingly, the authorities had failed to carry out an effective criminal investigation into the circumstances which had surrounded the victim's death.

Küçük and Others v. Turkey
(63353/00)

European Court of Human Rights: Judgment dated 14 October 2008

Right to life - intentional killing of victim by security force - complaint against insecurity in the region - Articles 2, 3, 6 and 13 of the Convention and Article 1 Protocol No. 1.

Facts

The applicants are the 11 children and wife of Yusuf Küçük, who was killed in June 1998 in the Ovacık village in the department of Tunceli, which was at the time under a state of urgency due to conflict between PKK and security forces. Yusuf Küçük had been looking for his sheep with three other villagers and was killed by a shell fired from a tank in an ambush position.

Following this incident, on 5 June 1998, a crime scene investigation was carried out, as well as an autopsy of Yusuf Küçük's body. It was noted that the death had been caused by a perforation of vital organs.

The prosecuting authorities opened an investigation into the incident the next day. The public prosecutor subsequently relinquished jurisdiction and transmitted the case to the administrative committee of Tunceli province. The province in turn transmitted it to the Gendarmerie post in Tunceli with a request for them to carry out an internal inquiry. A report was drawn up on the strength of which the Tunceli province administrative committee decided to close the case and discontinue the proceedings.

On 4 August 2000, the applicants brought a claim in front of the administrative tribunal to overturn the decision of the Tunceli regional administrative committee. However, the administrative tribunal did not allow the applicants' claim.

Complaints

The applicants mainly relied on Article 2 of the Convention in relation to the killing, complaining that Yusuf Küçük was killed intentionally by security forces and that the investigation surrounding

his death was inadequate. They also complained of the insecurity prevalent in their region for a number of years, relying on Articles 3, 6 and 13. The applicants also claimed a violation of Article 1 of Protocol No. 1, on the basis that Yusuf Küçük was killed whilst he was looking for his lost animals.

Held

Article 2 of the Convention

From a material angle, the Court considered whether the security forces' actions were proportional to their mission of maintaining order in the region. The Court asserted that the security forces, whilst deploying armed troops in a civilian occupied region, had the duty to consider the risks involved. The Court was not convinced that any such risk assessment was considered. Finally, the Court did not believe that the firing of a shell from the tank was absolutely necessary. For these reasons, the Court deemed that the security forces' actions contravened Article 2 of the Convention.

From a procedural angle, the Court observed that in the context of a homicide committed by a State agent, it is necessary that an adequate investigation be conducted by impartial and independent persons. The Court stated that it had found in several cases that inquiries conducted by regional administrative committees gave rise to serious doubts insofar as they were not independent of the executive, and found unanimously that there had been another violation of Article 2 because of the lack of an adequate investigation into the circumstances of Yusuf Küçük's death.

Articles 3, 6 and 13 of the Convention, and Article 1 of Protocol No. 1

The Court concluded that, given that a breach of Article 2 had been found, there were no separate questions arising under these latter articles. There was therefore no reason to examine the claimed violations of Articles 3, 6 and 13 of the Convention, and Article 1 of Protocol No. 1.

Solomou v. Turkey

(36832/97)

European Court of Human Rights: Judgment dated 24 June 2008

Right to life – no investigation carried out into victim's death – whether killing of victim constitutes violation of right to life – whether violation of right to effective investigation – Articles 1, 2, 3, 8 and 14 of the Convention.

Facts

The applicants, Spyros, Antonis, Panayiotis, Maria, Costas, Niki and Paraskevi Solomou, were born in 1941, 1964, 1966, 1972, 1975, 1974 and 1971 respectively and live in Paralimni, Cyprus. They are the father, brothers and sisters of Solomos Solomou, a Greek Cypriot who died on 14 August 1996.

On 14 August 1996 Solomos Solomou, having attended Anastasios Isaak's funeral, entered the buffer zone with other demonstrators near the spot of the killing and, in protest, climbed up a flagpole flying the Turkish flag. He was shot and killed.

The parties disagreed as to the origin of the five bullets that hit Mr Solomou. According to the applicants and the Government of Cyprus, the bullets were fired by two men in Turkish uniform and by another man in civilian clothes who was on the platform of the Turkish observation post.

The Turkish Government alleged that Mr Solomou had been the victim of the crossfire that had broken out when the Greek-Cypriot demonstration had developed into a riot.

The applicants submitted a number of witness statements from officers of the United Nations Peace Keeping Forces in Cyprus (UNFICYP). Several officers clearly stated that two soldiers in Turkish uniform and a man in civilian clothes standing on the Turkish observation post platform had aimed their weapons at Mr Solomou and fired in his direction while he was climbing the flagpole. The applicants also submitted photographs and a video film of the shooting.

Complaints

The applicants claimed that the killing of their relatives amounted to a violation of Articles 1 and 2, alleging that their relatives were unlawfully killed by agents of the Turkish Government and that the Turkish authorities failed to carry out an investigation into the incidents. They further claimed that the method of killing amounted to inhumane treatment in violation of Article 3. Moreover, the applicants complained that as they had been deprived of a member of their family, this violated Article 8. The applicants also submitted that the killing had involved discrimination, so engaging Article 14.

Held

Article 2

The Court considered that there had been a violation of Article 2 by agents of the Turkish State in relation to the killing of Mr Solomou. The Court was unable to accept the Turkish Government's version of the facts. It observed that this version had been contradicted by witness statements and that it had no reason to doubt these witnesses' independence and trustworthiness. The applicants' versions had been confirmed by photographic evidence and video footage of the killings. Nothing in those images, whose authenticity had not been contested by the Turkish Government, had suggested that there had been crossfire that Mr Solomou was caught in. That Mr Solomou had been hit by five bullets was a fact which was hard to reconcile with the theory that his shooting had not been intentional.

Further, the Court maintained that Mr Solomou's killing had not been necessary to defend 'any person from unlawful violence'. He appeared unarmed and had not been attacking anyone, and it had been obvious that he could hardly have escaped from the control of the security forces. The killing could not be considered as measures aimed at quelling violence generated by protests.

The Turkish Government had failed to produce any evidence that an investigation had been carried out into the circumstances of Solomos Solomou's death. Nor had they submitted that, more than

11 years after the incidents, those responsible for the killings had been identified and called to account before a domestic court. The Court accordingly held that there had been a violation of the procedural aspect of Article 2.

Articles 1, 3, 8 and 14

Finally, the Court considered that, in the light of the conclusions reached under Article 2, it was not necessary to examine whether there had also been a violation of Articles 1, 3, 8 and 14.

Commentary

This was the second episode in a series of events that left two people dead. A few days earlier, Anastasios Isaak, also Greek-Cypriot, was kicked and beaten to death during a demonstration against the occupation, at the ceasefire line. Solomou's action was apparently triggered by Isaak's death. A summary of proceedings before the Court relating to the death of Anastasios Isaak (*Isaak and Others v. Turkey*) can be found at page 127.

The applicants in the two cases were the families of the deceased. Although Turkey disputed the facts and even the implication of Turkish military personnel in the killings, testimony of UN Peacekeepers and video and photo materials convinced the Court that Turkish soldiers participated in the mob that killed Isaak and that Solomou had been killed by bullets coming from the guns of Turkish soldiers. The Court considered that the violence had not been absolutely necessary in either of the two cases and thus found a substantive violation of Article 2. In addition, for lack of any investigation into the circumstances of their deaths, a procedural violation of the same article was found as well. High amounts of money were awarded for non-pecuniary damage.

Legally, the case is mainly notable because of the Court's detailed analysis of whether the killings could have been justified by the exceptions allowed under Article 2. The test is very strict, as should be expected for one of the most important rights in the Convention. The killings caused a lot of uproar and media attention at the time and even led to a condemnation by the European Parliament.

Prohibition of torture and inhuman or degrading treatment

Atalay v. Turkey

(1249/03)

European Court of Human Rights Chamber: Judgment dated 18 September 2008

Police brutality - lack of effective domestic remedy - Article 3 and 13.

Facts

The applicant, Mr Yunus Atalay, was born in 1956 and lives in Istanbul.

On the 24 August 1995, a police car stopped outside the shop run by the applicant in Istanbul's Beyoğlu district. Three police officers got out of the car and asked the applicant to remove the

letters 'DHKP/C' (the acronym for the Revolutionary People's Liberation Party/Front) written on a wall two shops down the road from the applicant's shop. When the applicant refused to comply with that request and told the police officers that it was not his wall and that he therefore had no obligation to clean it up, the police officers started to beat him.

The police officers then took the applicant into custody, where they continued to beat him in order to force him to sign statements, confessing to the offence of obstructing the police in the course of their duty.

According to the incident report prepared by the police officers, the letters 'DHKP/C' had been on the wall of the applicant's shop, the applicant had told them that he would rather die than wipe them away and the applicant had thrown stones at the police and had kicked and punched them.

The applicant told the prosecutor at the public prosecutor's office that the police officers had tortured him. The same day the prosecutor ordered the applicant's release. The applicant lodged a formal complaint with the prosecutor seeking the prosecution of the three police officers responsible for the ill-treatment. The Beyoğlu District Administrative Council, presided over by the Beyoğlu Governor, granted authorisation for the prosecution of the three officers. However, the applicant did not claim compensation by bringing the case before the administrative courts.

On 29 February 2000, the Beyoğlu Criminal Court of First Instance convicted the three police officers of the offence of ill-treatment contrary to Article 245 of the Criminal Code and sentenced each of them to three months imprisonment and ordered their suspension from duty for a period of three months. However the court reduced the prison sentence by a quarter and sentenced each officer to two months and seven days imprisonment and it suspended their sentence.

Two of the three police officers lodged appeals against the judgment and on 30 January 2002 the judgments against both officers were quashed by the Court of Cassation. The Court of Cassation held that Law no. 4616 should be applied to them. Law no. 4616 provides for the suspension of criminal cases in respect of certain offences committed before 23 April 1999.

On 26 April 2002 the court suspended the proceedings against the two police officers in accordance with Law no. 4616. The applicant lodged an objection with the Beyoğlu Assize Court against the trial court's decision. On 28 May 2002 the Beyoğlu Assize Court rejected the applicant's objection

Complaints

The applicant complained under Articles 3 and 13 of the Convention that he had been subjected to ill-treatment amounting to torture by police officers who were not punished.

The Court noted that the applicant had alleged in his observations a violation of Article 6 of the Convention, without explaining how and why. This complaint had been raised after the initial application was communicated to the government, in reply to the observations of the government.

Held

The Court considered that these complaints should be examined solely from the standpoint of Article 3 of the Convention.

The Court observed that the complaint under Article 6 of the Convention must be declared inadmissible as it had been raised for the first time in the applicant's observations, outside the time limit laid down in Article 35(1) of the Convention. Under this provision, the applicant would have had to raise the complaint within six months of the proceedings ending against the police officers, and had failed to do so.

Article 3

The Court observed at the outset that the Government had not challenged the accuracy of the applicant's allegation of ill-treatment and the Court therefore accepted that the applicant was ill-treated. The issue to be decided by the Court was whether that ill-treatment attained the minimum level of severity for it to fall within the scope of Article 3 of the Convention.

The Court considered that the applicant's injuries were sufficiently serious to amount to ill-treatment within the meaning of Article 3.

The Court also reiterated the absolute nature of the prohibition of torture or inhumane or degrading treatment or punishment, irrespective of the victim's conduct. Thus in the Court's view the reduction of the prison sentence imposed on the police officers on the grounds of provocation fell short of the Convention standard of protection from ill-treatment.

The Court considered that the lenient prison sentence imposed on the police officers and its suspension must be regarded as manifestly disproportionate to the gravity of the offence in question.

As regards to the suspension of the criminal proceedings, the Court considered that it rendered the criminal law system far from rigorous and had no deterrent effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant.

The Court therefore held that there had been a violation of Article 3 of the Convention.

Commentary

The Court underlined that the failures highlighted above undermined the deterrent effect of the judicial system in place and the significance of the role it was required to play in preventing violations of the prohibition of ill-treatment.

The Government had submitted in its arguments that the applicant had failed to claim compensation by bringing a case before the administrative courts, and so his allegations were ill-founded and the Government had fulfilled its duty. The Court commented that if the authorities could confine their reaction to incidents of wilful police ill-treatment to the mere payment of compensation, while not doing enough in the prosecution and punishment of those responsible, it would be ineffective in practice. It would be possible in some cases for agents of the State to abuse the rights of those

within their control with virtual impunity, ignoring the general legal prohibition of killing and torture and inhuman and degrading treatment, despite its fundamental importance.

The important point for the Court to review, therefore, was whether and to what extent the national authorities had done everything within their power to prosecute and punish the police officers responsible for the applicant's ill-treatment and whether they had imposed adequate and deterring sanctions on them. The Court held that it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.

Çamdereli v. Turkey
(28433/02)

European Court of Human Rights Chamber: Judgment dated 17 July 2008

Prohibition of inhuman or degrading treatment – inadequate criminal proceedings - Article 3 of the Convention.

Facts

The applicant was born in 1953, and is a Turkish national living in Bursa (Turkey).

On 18 February 1999 the applicant was taken to her local gendarmerie station after being involved in a dispute with her neighbour. The following day, the applicant filed a complaint with the Bursa Public Prosecutors office. Ms Çamdereli stated that the gendarme had ill-treated her and requested a medical examination.

Upon examination on 19 February 1999, the doctor reported that the applicant had extensive bruises on her shoulders, arms and right thigh, which made her unfit to work for ten days. The Bursa Prosecutor heard evidence from the applicant and the accused gendarme, and brought criminal proceedings against the accused gendarme.

In December 2000, Bursa Civil Court of First Instance suspended proceedings against the accused, in accordance with Law no. 4616. Accordingly, if the accused did not commit the same or similar crime within a five-year period, Ms Çamdereli's action would be discontinued. Although the applicant objected to the dismissal, the criminal proceedings were dropped by the court in 2006.

The applicant also sought redress from the civil courts. In December 2002, Bursa Civil Court of First Instance found that the applicant had been beaten at the gendarmerie station. The accused gendarme was declared responsible for Ms Çamdereli's injuries and ordered to pay her approximately 904 euros.

Complaints

The complaint alleged that the applicant was ill-treated by a gendarme and that the civil proceedings in relation to the incident were inadequate. She relied on Article 3.

Held

The Court noted that the domestic criminal proceedings regarding the applicant's complaint had granted the gendarme virtual impunity. The Court observed that in this case, the compensation awarded the victim had been insufficient. She was not provided redress for the wilful harm caused by the State agents.

The Court noted that the degree of bruising documented by the doctor indicated that the applicant's injuries had been sufficiently serious to amount to ill-treatment as governed by Article 3. The gendarme had not been suspended during the period of trial and investigation. Additionally, the criminal proceedings were suspended and the charges against the gendarme dropped, due to the application of Law no. 4616 on the conditional release and the suspension of trials and sentences for offences committed up until 23 April 1999 – an amnesty for those accused of offences committed before that date. Accordingly, the charges had been dropped on the condition that no further offences were committed within the following five years.

The Court reflected that in the past, it had found in a similar context that Turkish criminal procedure provided no dissuasive effect to ensure effective prevention of unlawful acts perpetrated by agents of the State.

The Court concluded that the measures taken by the authorities in the applicant's case had not provided her with appropriate redress for the ill-treatment she experienced. As such, the Court held that Turkey had violated Article 3 of the Convention.

Dur v. Turkey

(34027/03)

European Court of Human Rights: Judgment dated 18 September 2008

Inhumane or degrading treatment or punishment - adequate and effective investigation - Articles 3, 6, and 13 of the Convention.

Facts

The applicant, Mrs Hadiye Dur, was born in 1973 and lives in Cologne, Germany.

On 27 October 1998 a group of 43 women, including the applicant, belonging to 'Mothers of Peace' arrived at the provincial branch of the Motherland Party in Istanbul in order to meet the party's provincial leaders.

Police officers arrived in the waiting room, threw a smoke bomb inside and entered. A police officer hit the applicant on the back of her head with a truncheon, grabbed her hair and dragged her down the stairs. She was then put in a police vehicle and taken to the Beyoğlu police headquarters.

On the same day at 3.50 pm the applicant, along with the other women, was examined by a doctor at the Beyoğlu branch of the Forensic Medicine Institute. The applicant spent the night in a cell

with 10 other women at the police headquarters. Police officers came to the cell two or three times and insulted and beat the detainees each time.

The applicant and the other 42 women were brought before the Beyoğlu Magistrates' Court. They were questioned about whether they had deprived Y.U., the person who was in charge of the coffee bar in the waiting room, of his liberty and whether they had resisted the police officers who arrested them. They all contended that they had neither deprived Y.U. of his liberty nor resisted the police officers. The Court remanded five women in custody and ordered the release of the others, including the applicant.

On 2 November 1998 the Beyoğlu public prosecutor filed a bill of indictment with the Beyoğlu Assize Court, charging all 43 women with resisting the police and depriving Y.U. of his liberty for ideological reasons. On 4 November 1999 the Beyoğlu Assize Court acquitted the applicant and the other accused.

On 16 March 1999 the applicant lodged a complaint with the Beyoğlu public prosecutor's office, alleging that physical force had been used by the police officers during her arrest, and requested that an investigation be initiated. On 8 October 1999 the Beyoğlu public prosecutor issued a decision not to prosecute the police officers.

On 31 March 2003 the Istanbul Assize Court dismissed the applicant's objection, holding that the decision of 8 October 1999 was in accordance with the law.

Complaints

The applicant complained that the treatment to which she had been subjected during her arrest amounted to a violation of Article 3 of the Convention. She further complained under Articles 3, 6 and 13 of the Convention that there had been no adequate or effective investigation into her allegation of ill-treatment.

Held

The Court found it appropriate to examine these complaints under Article 3 of the Convention alone and further stated that there was no need to examine separately the complaint under Article 13 of the Convention concerning the alleged inability of the applicant to bring compensation proceedings against the officers who had subjected her to ill-treatment.

The Court reiterated that Article 3 does not prohibit the use of force in certain well-defined circumstances, such as to affect an arrest. However such force may be used only if indispensable and must not be excessive. It found that the applicant's injuries were sufficiently serious to fall within the scope of Article 3.

The Court further noted that it was not disputed between the parties that the applicant's injuries resulted from the use of force by the State security forces in the performance of their duties. The Court therefore considered that the burden rests on the Government to demonstrate with convincing argument that the use of force was indispensable and not excessive.

The Court considered that the Government failed to furnish credible arguments serving to explain or to demonstrate that the force used against the applicant was indispensable. The Court concluded that the State was responsible under Article 3 of the Convention for the injuries sustained by the applicant. It followed that there had been a violation of Article 3 of the Convention under its substantive limb.

The investigation into the applicant's allegations of ill-treatment could not be described as adequate and was therefore in breach of the State's procedural obligations under Article 3 of the Convention.

The Court unanimously held that there had been a violation of Article 3 of the Convention under both its substantive and procedural limbs.

Erdem v. Turkey
(42234/02)

European Court of Human Rights Chamber: Judgment dated 17 July 2008

Police brutality - inhuman and degrading treatment – infringement of freedom of expression and association – Articles 3, 10 and 11 of the Convention.

Facts

The applicant is a Turkish national, born in 1976 and practising as a lawyer in Istanbul.

On 14 October 2001 he took part in an unauthorised anti-war demonstration, of around 500 people, organised by several political parties and non-governmental organisations at Kadıköy Square in Istanbul.

The organisers were warned by megaphone that the demonstration was unlawful and that they must disperse and not make press statements. When the crowd did not disperse and Mr L.T., head of the Labour Party of Turkey (EMEP), continued making a press statement, despite warnings, the Rapid Response Force intervened to disperse the demonstrators, arresting 46 people who resisted.

The applicant alleged that, although he did not resist, the police used excessive force on him without warning, spraying pepper spray in his face, hitting him with truncheons and kicking him. After this he remained in the area and witnessed other instances of police brutality, including that by a high-ranking police officer, until he was himself sworn at and pushed around by this same officer and forced to leave by a group of police.

Approximately two hours later, the applicant made a formal complaint at the office of the Kadıköy prosecutor and asked to be referred to hospital. In his complaint he specifically stated that while the press statement was being read the Rapid Response Force had begun spraying pepper spray and hitting protestors without warning. He complained that he had received blows to the back and

had been kicked, and stated that since the police officers were wearing masks it was not possible to identify them.

That day the applicant was examined separately by two doctors and an orthopaedist who found bruising and hyperaemia (increased blood flow in the tissue) on his back and right arm, sensitivity in his right femur and pain in his right shoulder. Several X-rays were taken. He was examined again the following day, when the doctor found no trauma except the pain in his right shoulder. On 22 October 2001 an examination of the applicant's X-rays revealed a closed fracture on the right eleventh costal cartilage. On 19 November 2001 he was examined again and found to be suffering from lumbago.

On 5 November 2001 the Kadıköy public prosecutor requested authorisation from the Istanbul governor to prosecute the police officers allegedly responsible for the applicant's ill-treatment. On 11 December an Istanbul deputy police chief was appointed to carry out a preliminary investigation of the applicant's complaints on behalf of the governor. The deputy police chief's report was prepared on the same day, relying on the evidence of an incident report by police officers who had taken part in the events in question and verbatim records of video footage of the incident. The deputy police chief's report recommended that authorisation to prosecute should be declined, submitting that police officers had had to use force because orders to disperse were ignored and that the police officers involved had, since the incident, been reminded about how to perform their functions during a demonstration. Accordingly, on 24 December 2001, the Istanbul governor declined authorisation to prosecute the police officers in question.

On 18 January 2002 (within the relevant time limit) the applicant lodged an objection to the governor's decision with the Regional Administrative Court. On 2 May 2002 the Regional Administrative Court upheld the governor's decision.

On 8 January 2002 the Kadıköy prosecutor decided not to bring any criminal proceedings at all against the Rapid Force Department. The applicant's objection to this decision was dismissed by the Üsküdar Assize Court on 15 March 2002.

Complaints

The applicant complained that he had been subjected to treatment by members of the Rapid Response Force on 14 October 2001 which had amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention.

Further, he complained that the actions of the Rapid Response Force, particularly their excessive use of force, had violated his rights to freedom of expression and association under Articles 10 and 11 of the Convention.

Held

Article 3

The Court held that the applicant's injuries were sufficiently serious to fall within the scope of Article 3 but that it had not been proved with sufficient evidence to conclude beyond reasonable doubt that the applicant had been at the demonstration and had sustained his injuries in the

manner that he claimed. The Court was therefore not able to find that the State was responsible for the applicant's injuries.

However, reiterating that Article 3 also entails a positive obligation to investigate allegations of ill-treatment, the Court held that in the applicant's case, such an investigation should have been made. The Court declared that, as a minimum standard, such an investigation should be independent, impartial and subject to public scrutiny and that it should be carried out promptly and diligently.

Examining the investigation file in the light of this requirement the Court held that the investigation had been insufficient. It noted firstly that the deputy police chief had completed his investigation and submitted his report on the same day that he was appointed to the task, and that on the basis of this brief investigation, the decision had been taken not to prosecute any of the police officers concerned. Secondly the Court held that the investigation was not independent since it was carried out under the authority of the governor, who was also responsible for the security forces that were the subject of investigation.

Therefore, the Court held that there had been a violation of Article 3 in the authorities' failure to properly investigate the applicant's allegations of ill-treatment.

Articles 10 and 11

The Court decided to consider the applicant's complaints under Articles 10 and 11 together under Article 11. It held that the applicant had not provided sufficient evidence to support his claim that his rights under this Article had been violated. Therefore the Court found these complaints to be manifestly ill-founded and declared them inadmissible.

Commentary

This case illustrates the limitations which the Court faces when the facts of a case are disputed and evidence is lacking. In circumstances such as this, where there is not the evidence before the Court to prove the case beyond reasonable doubt, the Court is nevertheless often able to find a breach of Article 3 in the state's failure to investigate.

Erdoğan Yılmaz and Others v. Turkey

(19374/03)

European Court of Human Rights Chamber: Judgment dated 14 October 2008.

Inhumane treatment or punishment - lack of effective remedy - Articles 3 and 13 of the Convention.

Facts

The applicants were born in 1960, 1955, 1974, 1924, 1955, 1957 and 1970 respectively. The first, second and seventh applicants live in Istanbul, the fourth and the fifth applicants live in Erzincan and the sixth applicant is residing in Nevnkirchen (Austria).

The fourth, fifth, sixth and seventh applicants are relatives of Mr Süleyman Yeter, who died on 7 March 1999. The other three applicants were arrested and taken into custody for suspicion of membership of an illegal armed organization, namely the MLKP (Marxist Leninist Communist Party) and allegedly subjected to various forms of ill-treatment while in custody.

On 6 March 1997, the first three applicants and Mr Süleyman Yeter were brought to the office of the police prosecutor at the Istanbul State Security Court where they denied all accusations against them. They also described in detail the treatment to which they had been allegedly subjected in police custody.

On 10 March 1997, Mr Süleyman Yeter filed a complaint with the Fatih Public Prosecutor against the police officer who had allegedly tortured him during his detention.

Seven days later the Public Prosecutor at the Istanbul State Security Court forwarded to the Fatih Public Prosecutor statements by the first three applicants and Mr Süleyman Yeter, complaining about the police officers' conduct during their detention and the relevant medical reports, and requested him to carry out the necessary investigation.

On 4 July 1997 the Istanbul Public Prosecutor filed an indictment against eight officers before the Istanbul Assize Court, accusing them of ill-treatment pursuant to Article 243 of the Criminal Code. The first two applicants were included in the proceedings as complainants, whereas the third applicant and Mr Süleyman Yeter joined the case as intervening parties.

At a hearing on 2 October 1998, a witness identified someone in the audience as one of the police officers who had tortured her. Subsequently, the public prosecutor filed a separate indictment against that individual and the number of the accused increased to nine.

On 10 December 1998 the Court took a statement from the third applicant Ms Birsen Kaya.

On 5 March 1999 police officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters arrested Mr Süleyman Yeter, who had apparently been released from detention on remand in the meantime, and placed him into custody once again. On 7 March 1999 he died in police custody.

On 29 April 1999 the confrontation procedure was not performed, as the accused police officers were not present in Court. Mr Süleyman Yeter's lawyer informed the court that his relatives, that is, the fourth, fifth, sixth and seventh applicants, would pursue his case.

In a hearing on 2 December 2002 the Istanbul Assize Court gave judgment. It acquitted five of the accused police officers for lack of evidence, holding that the remaining four officers from the Anti-Terrorist Branch of the Istanbul Security Headquarters had ill-treated Mr Erdoğan Yılmaz, Ayşe Yılmaz, Ms Birsen Kaya and Mr Süleyman Yeter in order to extract confessions from them.

Each of the police officers was sentenced to one year and two months' imprisonment. The court also made an order banning them from public service for three months and fifteen days. This was

subsequently reduced. The court ordered a stay of execution, as the defendants had no criminal record and the judges were convinced that they would not reoffend.

In April 2004 the Court of Cassation upheld the Assize Court's decision to acquit five of the police officers but quashed the decision to convict the other four on the grounds that the statutory time-limit for the offence, which is five years, had expired and the criminal proceedings against them should therefore be discontinued.

Subsequently, the Istanbul Assize Court followed the decision of the Court of Cassation and dropped the criminal proceedings against the police officers.

On 29 November 2006 the Court of Cassation rejected an appeal application from the intervening parties.

Complaints

The first, second and third applicants complained about the treatment to which they had been subjected during their police custody and about the ineffectiveness of the ensuing criminal proceedings against the accused police officers, which were ultimately dropped for being time-barred.

The first three applicants further alleged that they had been subjected to torture during their police custody.

The applicants maintained that the criminal proceedings against the police officers could not be considered to have been an effective remedy. They further stated that no disciplinary sanctions had been imposed on the accused officers.

The remaining applicants raised the same allegations in respect of their relative Mr Süleyman Yeter. In respect of their complaints, the applicants relied on Articles 3 and 13 of the Convention.

Held

The Court considered that these complaints should be examined from the standpoint of Article 3 alone.

Article 3 substantive aspect

The Government did not make any comments about the substantive aspect of Article 3 of the Convention.

The Istanbul Assize Court did find in its decision on 2 December 2002 that Mr Erdoğan Yılmaz, Ayşe Yılmaz, Ms Birsen Kaya, Mr Süleyman Yeter had been ill-treated by four police officers from the Anti-Terrorist Branch of the Istanbul security Headquarters. The question to be decided by the Court was whether it was a form of ill-treatment for which the authorities at the Anti-Terror Branch of the Istanbul Security Headquarters bore responsibility.

The Court concluded that this ill-treatment amounted to torture within the meaning of Article 3 of the Convention. There had therefore been a substantive violation of Article 3 of the Convention.

Article 3 procedural aspect

According to the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention', there should be an effective investigation.

The Court pointed out that the minimum standards as to effectiveness defined by its case law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary diligence.

The Court reaffirmed that when an agent of the state is accused of a crime that violates Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible.

The Court observed that, following the applicants' complaint of ill-treatment in March 1997, the Public Prosecutor initiated a prompt investigation. However, in 2006 the proceedings against the officers were dropped as they were time-barred.

The Assize Court found four police officers guilty of torture at the end of the proceedings. The case was then dropped as the statutory time limit of five years had elapsed. The Court reiterated its earlier finding in a number of cases that the Turkish criminal law system can prove to be far from rigorous and have no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents if criminal proceedings brought against others are dropped for being time-barred.

The Court found that the criminal proceedings brought against the police officers could not be described as being adequate and were therefore in breach of the State's procedural obligations under Article 3 of the Convention.

Nurgül Doğan v. Turkey

(72194/01)

European Court of Human Rights: Judgment dated 8 July 2008

Inhuman and degrading treatment – police custody - medical evidence of violence - ineffective investigation – Article 3 of the Convention.

Facts

The applicant, Nurgül Doğan, is a Turkish national who was born in 1965 and lives in Istanbul.

On 22 February 1999 she was arrested during an identity check and was taken into custody at the anti-terrorist branch of the Istanbul security police. Criminal proceedings were subsequently brought against her for belonging to an armed group, the EKİM-TKİB.

The applicant asserted that while in police custody she had been placed between two blocks of ice for 24 hours. She had also been sprayed with water and had not eaten or drunk anything in protest against what she considered an unjust arrest.

On 24 February 1999 the applicant was examined by a forensic medical expert, who observed in a report dated 25 February the presence of signs of violence on her body, and certified the applicant unfit to work for one day.

Later that day, the applicant stated before a judge at the Istanbul National Security Court that she had been ill-treated by the officers of the anti-terrorist branch of the security police who had questioned her during her time in custody. A criminal complaint was lodged by the applicant in September 1999, and on 5 January 2000 the public prosecutor charged two police officers in the Istanbul Assize Court.

On 20 November 2000 the police officers were acquitted for lack of sufficient evidence. The Court held that although the medical certificate of 25 February 1999 attested that the applicant had been subjected to violence, it was impossible to conclude that the marks observed had been caused by the police officers. Further, it had been impossible to secure the applicant's attendance at the trial or to obtain evidence from her, despite the fact that she had been summoned.

Complaints

Relying on Article 3, Ms Doğan alleged that she had been ill-treated whilst in police custody and that the authorities had failed to conduct an effective investigation into her allegations.

Held

The Court held that there had been a violation of Article 3 regarding the ill-treatment inflicted by the police on the applicant. The Turkish Government had been unable to provide a plausible explanation either as to the medical report drawn up after the applicant's time in police custody or as to the cause of the injuries found on her body. It therefore held that the Turkish State bore responsibility for those injuries, in violation of Article 3.

The Court noted that the medical certificate, drawn up entirely independently by a forensic medical expert, attested that there were signs of violence on the applicant's body. It observed that in its judgment of 20 November 2000 the Assize Court had acquitted the accused for lack of evidence against them, without addressing the cause of the injuries. The Turkish Government had not provided the slightest evidence to substantiate their arguments that the injuries found on the applicant's body were not caused by the officers in question, and had cast no doubt on the applicant's version of events, despite her absence from the trial.

The Court acknowledged that not all the applicant's allegations could be regarded as established and that her account was not fully consistent with the conclusions reached in the medical report.

It was also true that her absence from the trial had lessened the Court's ability to establish the facts that had given rise to the present case. However, the Court could not attach decisive weight to those factors, considering that the medical report confirmed that her injuries had resulted from violence. The Court further noted that the applicant had lodged a criminal complaint and had on several occasions given detailed descriptions of the treatment to which she claimed to have been subjected.

The Court also held that there had been a further violation of Article 3, on account of the lack of an effective official investigation into the applicant's alleged violations.

The Court reiterated that it is essential for authorities to launch an investigation into such allegations, promptly, in order to maintain public confidence in their adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.

Oršuš and Others v. Croatia

(15766/03)

European Court of Human Rights: Judgment dated 17 July 2008

Degrading treatment - right to education - racial discrimination - length of proceedings - Articles 3, 6, 13 of the Convention and Article 2 of Protocol No. 1.

Facts

The applicants are 14 Croatian nationals of Roma origin. They were born between 1988 and 1994 and all live in Orehovica, Podturen and Trnovec in northern Croatia.

The complaint arose out of the segregation of the applicants at primary school into Roma-only classes. The applicants entered primary school between 1996 and 2000. While attending elementary school, the first nine applicants attended both Roma-only and mixed classes before discontinuing their studies at age 15. The other five applicants attended and continue to attend entirely Roma-only classes.

The applicants lodged a complaint against their primary schools in April of 2002. The Čakovec Municipal Court dismissed the applicants' complaint in September 2002, finding that the Roma children placed in Roma-only classes did not have the necessary language skills to follow the lessons in the regular classes, which were taught in Croatian. That court also found that the curriculum used in Roma-only classes did not differ in content from the regular classes. As such, allegations of racial discrimination were unsubstantiated. The applicants' appeal was also dismissed.

Subsequently, the applicants lodged a constitutional complaint in November 2003, which was ultimately dismissed in February 2007.

Complaints

The first allegation involved their segregation into Roma-only classes. They alleged that they were denied the right to education in a multicultural environment and suffered educational, psychological and emotional harm.

The applicants thus invoked a violation of Article 3, Article 2 of Protocol No. 1 (right to education) and Article 14.

The applicants further alleged that the civil court proceedings were excessively lengthy, and complained of a violation of Article 6(1) (right to a fair hearing within a reasonable time) on these grounds.

The applicants also invoked a breach of Article 13, claiming that they had no effective remedy in respect of their Convention complaints.

Held

Article 3

Regarding Article 3 allegations of inhuman or degrading treatment, the Court held that the applicants' arguments were too general and speculative. No proof was offered that the Roma-only classes were intended to humiliate the applicants, or to disrespect their human dignity. The Court noted that the segregation was for a limited period in the applicants' elementary school education. Nine of the applicants attended both Roma-only and mixed classes, yet no evidence was offered to distinguish the adverse effects suffered by those in solely Roma-only classes. The Court noted that the school made efforts for the integration of the Roma children by facilitating mixed group socialising.

As such, the Court held that the applicants' complaint was manifestly ill-founded, as the alleged ill-treatment was not shown to have reached a level high enough to substantiate an Article 3 violation.

Article 6(1)

Given the nature of the right at stake, the right to education, the Court held that the four years of proceedings before the Constitutional Court was excessively lengthy. The Court therefore declared the complaint of a breach of Article 6 to be admissible.

Article 13

The Court noted that the applicants were able to bring a civil action against the State and were further able to challenge the first-instance judgment before an appellate Court and a Constitutional Court. The Court concluded that there was no appearance of a violation of Article 13.

Article 2 of Protocol No. 1

The Court also found that there was not enough evidence to substantiate an Article 2 of Protocol No. 1 violation. The Court held that the applicants had not been deprived of the right to attend school, and that their education had been adequate.

Article 14 in Conjunction with Article 2 of Protocol No. 1

The Court observed that difference in treatment of the applicants was based on their language skills. It was uncontested that when the applicants enrolled in elementary school, they did not know enough Croatian to follow lessons. As the Government pointed out, a majority of Roma children in the communities at issue did not have adequate knowledge of Croatian. The Court deferred to the relevant State authorities as the proper entities to handle such problems.

The Court found it significant that Roma-only classes were used in only four elementary schools in one particular region, owing to the high concentration of Roma pupils there. The statistics submitted by the government showed that it had not been a policy in those schools to automatically place Roma pupils in separate classes.

The Court further reiterated that States cannot be prohibited from setting up separate classes or programmes to respond to special needs within their education systems. In fact, the Court viewed positively the fact that authorities had responded to that sensitive and important issue. The Roma-only classes were seen as a positive measure intended to assist the Roma children in acquiring the language skills necessary to follow the school curriculum.

The Court found no violation of Article 14 in conjunction with Article 2 of Protocol No. 1, as the placement of the applicants in separate classes was not based on their ethnic origin, but on their inadequate knowledge of the Croatian language.

Türkan v. Turkey

(33086/04)

European Court of Human Rights: Judgment dated 18 September 2008

Ill-treatment in police custody - lack of remedies for complaints - Articles 3, 6 and 13.

Facts

The applicant, Mr Mahfuz Türkan, was born in 1968 and lives in Batman, Turkey. On 5 July 1998 the applicant was arrested by police officers for his alleged involvement in a fight and causing a disturbance while drunk. He was then taken to the police station.

The police officers allegedly covered the applicant's head with his coat and started kicking, punching and beating him. They strangled him and banged his head against the wall. They also allegedly threatened the applicant and swore at him. The applicant was released the next day without being brought before the public prosecutor.

On 8 July 1998 the applicant applied to the Human Rights Foundation of Turkey for the treatment of his injuries resulting from his ill-treatment in police custody. On 21 July 1998 the applicant filed a petition with the Eyüp Chief Public Prosecutor's Office.

On 7 August 1998 the Eyüp Chief Public Prosecutor instituted criminal proceedings in the Eyüp Criminal Court, pressing charges against the three police officers for inflicting ill-treatment on the applicant in violation of Article 245 of the former Criminal Code.

On 9 August 1999 the Istanbul Provincial Police Discipline Board, composed of the Governor of Istanbul, four senior police directors and a member of the legal service of the Governor's office, decided not to impose any punishment on the three police officers on the ground that there was insufficient evidence that they had ill-treated the applicant.

On 9 October 2001 the Eyüp Criminal Court held that the criminal proceedings against the police officers should be suspended and subsequently discontinued if no offence of the same or a more serious kind was committed by the offenders within a five year period, in accordance with that law.

When the applicant was notified of that decision on 29 December 2003 he challenged it before the Eyüp Assize Court, arguing that the police officer's acts should be characterised as torture within the meaning of Article 243 of the Criminal Code. On 19 January 2004 the Eyüp Assize Court dismissed the applicant's appeal and upheld the decision of the criminal court.

Complaints

The applicant complained that he had been subjected to various forms of ill-treatment and that there were no effective remedies for his complaints. On these grounds, he invoked breaches of Articles 3 and 13. He also claimed a violation of Article 6 arising from the fact that he was not brought before a public prosecutor for his alleged crime.

Held

The Court held that there had been a substantive violation of Article 3 of the Convention both under its substantive and procedural aspects. The Court reiterated that the State is responsible for the welfare of all persons held in detention and has to account for injuries caused to persons within their control in custody. Furthermore, where the event in issue lies wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of any convincing explanation concerning the origin of the physical trauma noted in four medical reports, the Court considered that the Government had to provide a plausible explanation of how the injuries to the applicant were caused. It therefore concluded that the physical trauma in question was the result of treatment for which the Government bore responsibility.

The Court also declared that there had been a procedural violation of Article 2. The Court considered that the criminal law system, as applied in the applicant's case, had proved to be far from rigorous and had no dissuasive effect capable of effective prevention of unlawful acts such as those complained of by the applicant and were thus not sufficiently thorough to meet the procedural requirements of Article 3 of the Convention.

The Court further held that there was no need to separately examine the complaints under Article 6 and 13 and dismisses the remainder of the applicant's claim to just satisfaction.

Right to liberty and security

Ayhan and Others v. Turkey
(29287/02)

European Court of Human Rights: Judgment dated 14 October 2008

Trial within a reasonable time or release pending trial - Article 5(3) of the Convention.

Facts

The applicants, Mr Mehmet Ali Ayhan, Mr Ali Akkurt and Mr Şükrü Töre, are Turkish nationals born in 1961, 1959 and 1964 respectively.

In the course of a police operation against an illegal armed organisation, namely the TKEP (The Communist Labor Party of Turkey), the police arrested and detained Mr Ayhan, the first applicant, in police custody on 5 May 1993.

The public prosecutor initiated criminal proceedings against the applicant for, inter alia, participation in activities which undermined the constitutional order of the state, including aggravated theft and the involvement in the killing of two individuals, Mr Y.I. and Mr M.Ö., in 1990 and 1991 respectively. In the course of proceedings before the Istanbul State Security Court, the latter considered the applicant's detention at the end of each hearing on its own motion and each time it ordered continued detention. At a hearing held on 28 January 1997, the applicant requested to be released for the first time. The court ordered the continuation of his detention.

On 24 February 2004 the Istanbul State Security Court convicted the first applicant as charged and sentenced him to life imprisonment. This judgment was upheld by the Court of Cassation on 4 October 2004.

On 10 February 1994 the second and third applicants were arrested and taken into custody on suspicion of involvement in the activities of the above-mentioned organisation. They were remanded in custody on 24 February 1994.

In the course of the ensuing criminal proceedings before the Istanbul State Security Court, the latter considered the applicants' detention at the end of each hearing of its own motion and each time it ordered their continued detention with reference to the nature of the offence, the state of the evidence and the content of the case file.

On 4 November 2002 the applicants requested to be released, and were released pending trial.

On 27 December 2006 the Istanbul Assize Court convicted the applicants of, *inter alia*, involvement in activities which undermined the constitutional order of the State and sentenced them to life imprisonment. Their appeal against this decision was still pending before the Court of Cassation at time of this judgment.

Complaints

The applicants complained that their detention during judicial proceedings exceeded the 'reasonable time' requirements as provided in Article 5(3) of the Convention.

Held

The Court reiterated that if an applicant submits complaints of the present kind to the Court whilst still in detention, the case cannot be dismissed as being out of time. The Court therefore rejected the Government's objections under this head and declared the case admissible.

The Government maintained that the seriousness of the crime and the existence of a genuine public interest justified the applicant's continued detention.

The Court observed that the first instance court had considered the applicant's continued detention at the end of each hearing either of its own motion or at the request of the applicant. However, the Court noted from the material in the case file that the State Security Court ordered the applicants' continued detention using identical stereotyped terms such as 'having regard to the nature of the offence and the state of the evidence'.

The Court therefore concluded that the applicants' detention during these criminal proceedings was excessive and contravened Article 5(3) of the Convention.

Habip Çiftçi v. Turkey (28485/03)

European Court of Human Rights Chamber: Judgment dated 23 September 2008

Arbitrary detention - liberty and security of person - fair trial - Articles 5 and 6 of the Convention.

Facts

The applicant, Habip Çiftçi, was born in 1973 and is currently detained in Ümraniye prison in Istanbul.

On 4 September 1995 the applicant was arrested in Istanbul on suspicion of membership of an illegal organisation. He was placed in custody at the anti-terrorist branch of the Istanbul Police Headquarters.

On 2 October 1995 the applicant was brought before the Batman Chief Public Prosecutor and the judge ordered his detention in Batman prison pending the initiation of criminal proceedings

against him. The prosecutor at the Diyarbakır State Security Court filed an indictment with that court and charged the applicant with the offence of membership of an illegal organisation.

The Diyarbakır State Security Court noted that another set of criminal proceedings had been initiated against the applicant on 31 July 1996 on the basis of an indictment filed on 23 July 1996, and that those proceedings were pending before the Third Chamber of the Istanbul State Security Court. The applicant was tried in absentia for the offence of carrying out activities for the purpose of bringing about the secession of a part of the national territory.

Further the Third Chamber of the Istanbul State Security Court then noted that criminal proceedings were pending against a certain 'K' before the First Chamber of the Istanbul State Security Court concerning the killing of a village guard. Having regard to evidence which had the potential to prove that the applicant had been involved in that killing, the court decided to join the cases and the First Chamber of the Istanbul State Security Court took over the trial.

Between 10 April 1997 and 31 October 2000, for a period of more than three and a half years, the trial court continued its hearings in the absence of the applicant because it was unable to establish the prison in which the applicant was being detained. The first hearing in the presence of the applicant took place on 31 October 2000, where he was informed about the additional charges.

At a hearing on 12 June 2003, the applicant's request for release was rejected by the trial court on the basis of 'the nature of the offence in question and the evidence in the file'. Five days later the applicant's lawyer lodged a formal objection against the trial court's decision and reminded the court of his client's rights under Article 5 of the Convention. The objection was rejected.

The applicant's further requests for release were all rejected in subsequent hearings.

During the hearing held on 21 December 2007, the trial court found the applicant guilty as charged and sentenced him to life imprisonment. It also decided that the applicant should never be released from the prison.

At the time of judgment, the appeal lodged by the applicant against his conviction was still pending before the Court of Cassation.

Complaints

The applicant complained under Article 5(3) of the Convention that the length of his detention on remand had been excessive. He also complained that the trial court's failure to ensure his attendance at the trial between 11 December 1996 and 31 October 2000 had prevented him from taking proceedings to have the lawfulness of his detention determined, in violation of Article 5(4) of the Convention.

The applicant further complained that the length of the criminal proceedings against him had been in breach of the reasonable time requirement in Article 6(1) of the Convention.

Held

The Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case.

The Court observed that the applicant's detention on remand began in September 1995 when he was taken into police custody and ended on 27 December 2007. The Court found that the length of the applicant's detention on remand was excessive in violation of Article 5(3) of the Convention. The Court did not deem it necessary to examine whether the authorities' failure to ensure the applicant's attendance at the trial during the above mentioned four year period prevented him from having the lawfulness of his detention determined. It had already found that the existing remedy under which the lawfulness of the detention could have been challenged offered little prospect of success and did not provide a procedure which was genuinely adversarial for the accused. The Court therefore held that there had been a breach of Article 5(4) of the Convention.

However, the Court considered that the failure of the domestic courts to ensure the applicant's attendance at the trial during that period contributed substantially to the total length of the proceedings. The total length of the proceedings before the trial court so far – thirteen years – could not be explained by the delays allegedly caused by the applicant in the submission of his defence. The 'reasonable time' requirement of Article 6(1) had therefore been exceeded.

Right to a fair trial

Abacı v. Turkey

(33431/02)

European Court of Human Rights: Judgment dated 7 October 2008

Deprivation of property without compensation - unfair domestic hearing - Article 6 of the Convention and Article 1 of Protocol No. 1

Facts

The applicant was born in 1938 and lives in Hatay.

On 15 September 1993 the applicant bought a plot of land near the coast in Hatay. The land was registered in the applicant's name in the Land Registry. However, the Government maintained that, according to the Constitution, the coastal area belonged to the State and could not become private property.

The Treasury brought an action before the Samandağ Court of First Instance, requesting the annulment of the applicant's title deed to the land on the grounds that it was located within the coastal area. The Samandağ Court of First Instance upheld the Treasury's request and decided to annul the title deed of the applicant to the plot of land.

Complaints

The applicant complained that the authorities had deprived her of her property without payment or compensation, in violation of Article 1 of Protocol No. 1.

The applicant also invoked Article 6(1), alleging that the domestic court decision was unfair, biased, insufficiently motivated and against the provisions of both domestic and international law.

Held

Article 1 of Protocol No. 1

The Government claimed that the applicant had failed to make proper use of the civil law remedies available to her in domestic law. They presented a rectification decision of the Court of Cassation which had quashed a first-instance court judgment on the grounds that compensation to the owner of the title deed to land situated within the coastal area had not been awarded although the title-deed had been annulled. They further presented two other decisions where the Court of Cassation upheld first-instance court judgments which annulled the title deeds but, with reference, *inter alia*, to the Court's judgments on the right to property, held that the owners of the title deeds had the right to claim compensation before civil courts. The Court reiterated that it had already examined and found the domestic remedies to be ineffective in previous similar cases.

It therefore held that the applicant could not be expected to initiate new proceedings claiming compensation for a title deed that had been annulled by a court order, the final decision having been delivered some six years ago. As the Court had examined similar cases on previous occasions and had found violations of Article 1 of Protocol No. 1 in those instances, it saw no reason to depart from that conclusion in the present case. Accordingly it found that there had been a violation of Article 1 of Protocol No.1

Article 6(1)

An examination by the Court of the material submitted to it did not disclose any appearance of a violation of this provision. It followed that this part of the application was manifestly ill-founded and was rejected pursuant to Article 35(3) and (4) of the Convention.

Araç v. Turkey

(9907/02)

European Court of Human Rights: Judgment dated 23 September 2008

Unfair proceedings in the Administrative Court - Article 6(1) of the Convention.

Facts

This is a KHRP-assisted case. The applicant, Emine Araç, is a Turkish national born in 1973 and living in Istanbul. She was a student at the İnönü University Theology Faculty in Malatya. In September 1998, when the applicant needed to transfer to Marmara University, her application to

enrol at the Theology Faculty of Marmara University was rejected because she had failed to supply a photo of herself without a headscarf, as required by the rules in force at that time.

The applicant applied to the Istanbul Fourth Administrative Court and requested a stay of execution of the decision as well as the annulment of the action of not registering her. As a result of the Administration not replying in time, the Istanbul Fourth Administrative Court ruled on 30 April 1999 that 'the request for a stay of execution be rejected as conditions stipulated in paragraph 27, sub paragraph 2 of Law No 4001 amending Law No 2577 on Administrative Procedure were not present.'

The Istanbul Fourth Administrative Court rejected the request of the applicant based on the merits of the case on 23 September 1999. The Court decided that the action taken by Marmara University was not in contravention of the existing legislation which read: 'The photographs must have been taken within the last six months, from the front, with the head and neck open, in a way that will readily identify the candidate.'

The applicant applied to the Constitutional Court to request the overruling of the Istanbul Fourth Administrative Court's rejection ruling. In her application for appeal, the applicant stated that the court's rejection ruling was not impartial and that the principal of fair trial was violated.

The Constitutional Court, in its ruling dated 22 December 1999 ruled that 'as the reasons set out in the appeal application were not deemed of a nature that would necessitate the stay of execution of the decision of the Administrative Court, it has been decided that the request for a stay of execution be rejected.' The applicant's appeal against the university's refusal was unsuccessful.

If the applicant had been allowed to register in 1998, the applicant would have now graduated from the faculty. In fact, those who had registered at the Marmara University Faculty of Theology at the same time as the applicant were able to graduate wearing a headscarf. However, because the applicant transferred from İnönü University she was not allowed to register and thus her graduation was prevented.

In relation to the relevant law, on 16 November 1988, Law No. 3503 adopted by the Parliament had added Article 16 to Law No. 2547 with a view to not preventing students from asserting their rights to education in connection with a dress code. This law was not ratified and as a result Parliament adopted the new Article 16 by passing Law No. 5311. This law, which was signed and ratified by the president and went into effect by being promulgated in the Official Gazette dated 25 December 1988, reads as follows: 'It is obligatory to wear modern attire and have such an appearance in classrooms, laboratories, clinics, policlinics and corridors of institutions of higher learning. It is allowed to cover the neck and the hair by a headscarf or a turban due to religious belief.'

The president applied to the Constitutional Court for the annulment of the additional Article 16 and the Constitutional Court annulled the second sentence involving the headscarf. It was promulgated in the Official Gazette on 5 July 1989. On 28 October 1990 an additional Article 17 was added which says 'dress code is free provided that it is not in violation of the laws.'

Complaints

Relying on Article 6(1) (right to a fair trial), the applicant complained that the proceedings in the Administrative Court had not been fair.

The applicant had also claimed a number of other violations which were declared inadmissible in a decision dated 19 September 2006. She had complained that the right to respect for private life set out in Article 8 of the Convention had been violated, and that as her request for University registration was denied on the grounds that she had submitted a photograph taken with a headscarf, her right to freedom of religion protected under Article 9 of the Convention had been violated. Further, she claimed that, by expelling her from public duty due to her wearing the headscarf, her rights under Article 10 had been infringed. The partial admissibility decision stated that the case should be considered under Article 6(1) of the Convention alone.

Held

The Court held that the judicial review of the decision to reject her university application due to her wearing a headscarf was unfair.

The government had claimed that Article 6(1) did not apply to the applicant, as the case submitted to the Administrative Court did not concern civil issues. The government asserted that the rules adopted by the University related to issues of public law because Marmara University Faculty of Theology was a public institution, and therefore this was not a civil rights issue.

However, the Court considered that the applicant's right of access to an institution of higher education was a civil right and that Article 6 was therefore applicable in the case. It held that, as Article 6(1) of the Convention provides 'In the determination of his civil rights and obligations or of any criminal charge against him... everyone is entitled to a fair and public hearing', these guarantees applied to a dispute regarding civil rights and obligations or regarding criminal charges. In this case the applicant had lost her right to higher education in Turkey and this had a civil rights aspect, and therefore Article 6(1) should apply.

The Court also noted that previous case law existed in similar complaints where the Court had unanimously held that there had been a violation of Article 6(1) because the applicant's rights to adversarial proceedings before the Supreme Administrative Court had been infringed.

S.C. Comprimex S.A. v. Romania

(32228/02)

European Court of Human Rights: Judgment dated 30 September 2008

Length of proceedings - Article 6(1) of the Convention.

Facts

The applicant is a joint stock company based in Braşov.

On 25 August 1994 the applicant brought proceedings against the Transilvania University of Braşov seeking payment by the latter of an amount of money allegedly resulting from a contract they had entered into, which concerned repairs that had to be carried out by the applicant to one of the university's halls of residence.

On 27 October 1995 the Braşov Regional Court dismissed the action as premature, considering that the contract had not come to an end.

On 8 February 1996 the Braşov Court of Appeal allowed an appeal by the applicant, quashed the previous judgment and sent the case back to the Regional Court for fresh examination. During the retrial, an adjournment was requested to decide if the case could be transferred to another court. Subsequently the Regional Court rejected the applicant's action, the Court of Appeal dismissed an appeal and the Supreme Court of Justice allowed an appeal and subsequently remitted the case to the Court of Appeal for fresh consideration.

During the retrial on 15 November 1999, the applicant informed the Court of Appeal that it had made a request before the Supreme Court of Justice to have the case transferred to another court. On 22 June 2001, the Supreme Court of Justice by a final decision rejected the applicant's request as groundless.

Complaints

The applicant complained that the length of the proceedings had been incompatible with the 'reasonable time' requirement laid down in Article 6(1) of the Convention. The proceedings had lasted six years, nine months and 28 days for three levels of jurisdiction.

The applicant complained under Article 6(1) that the outcome was unfair, that the domestic courts had failed to assess the facts correctly, had misinterpreted the domestic law, had not been independent and impartial, and had not considered the case on the merits.

The applicant also relied on Articles 7, 14 and 17 of the Convention and Article 1 of Protocol No. 1.

Held

Article 6

The Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.

Having examined all the material submitted to it, the Court considered that the Government had not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considered that the length of the proceedings was excessive and failed to meet the 'reasonable time' requirement. There had accordingly been a breach of Article 6(1) of the Convention.

The Court found that the remaining part of the application should be declared inadmissible as being manifestly ill-founded pursuant to Article 35(3) and (4) of the Convention.

Grayson and Barnham v. The United Kingdom

(19955/05 and 15085/06)

European Court of Human Rights Chamber: Judgment dated 23 September 2008

Fair hearing - protection of property - Article 6(1) and Article 1 of Protocol No. 1.

Facts

The first applicant, Mr Grayson, and the second applicant, Mr Barnham, both submitted applications to the Court but the Court decided to join the applications and examine the merits of each application at the same time as their admissibility.

Mr Grayson (the first applicant)

On 23 January 2002, the applicant and a co-defendant were convicted with intent to supply over 28 kilograms of pure heroin. The applicant was sentenced to 22 years' imprisonment the following day.

The Judge made a confiscation order under the Drug Trafficking Act 1994. He concluded that the applicant had benefited to the amount of GBP 1,230,748.69.

Under the statutory scheme, once the judge had assessed the amount of benefit which the applicant had received from drug trafficking, the burden passed to the applicant to show on the balance of probabilities that his realisable assets were less than the amount of his benefit.

The judge set an additional ten years' imprisonment to be served by the applicant if he had not paid within twelve months.

The applicant appealed to the Court of Appeal on the grounds, *inter alia*, that the trial judge should have adjourned to allow him to submit additional accountancy evidence and that it had been contrary to Article 6 of the Convention for the judge to hold that it was for the applicant to establish, on the balance of probabilities, that his realisable property was less than his benefit.

On 18 May 2005 the Court of Appeal dismissed the appeal, although it reduced the default sentence of imprisonment from ten years to eight years.

Mr Barnham (the second applicant)

On 16 July 2001 the second applicant was convicted of two conspiracy charges involving plans to import large consignments of cannabis into the United Kingdom. The imports were not successful and the whereabouts of the drugs were unknown.

The evidence of an undercover police officer stated that the applicant had told him that his organisation was expected to receive payment of GBP 12 million, of which his personal share

would be GBP 2 million, which he asked the undercover police officer to help him 'launder'. The applicant was sentenced to eleven years' imprisonment.

Confiscation proceedings commenced in January 2002, when the first hearing took place to determine the statutory benefit to the applicant from his drug trafficking operations. The judge ruled that the total benefit to the applicant was GBP 1,525,615. The applicant did not appeal against that ruling.

In April 2002, the judge resumed the proceedings to assess the applicant's realisable assets. The applicant and his wife gave evidence to the effect that their only asset was their house in Spain, which they owned jointly.

On 12 April 2002 the judge made a confiscation order equal to the amount which he had assessed as the benefit, namely GBP 1,525,615, with a sentence of five years and three months imprisonment if the applicant had not paid within 18 months.

The applicant appealed against the judges' ruling regarding his realisable assets, asserting that Article 6(1) of the Convention applied also when the judge came to assess realisable property, and that it required the prosecution at least to make out a prima facie case of realisable assets before the burden of proof shifted to the defendant.

In the judgment of 28 April 2005, the Court of Appeal rejected this argument. The Court of Appeal found, however, that the judge had made an error of calculation and reduced the order to GBP 1,460,615.

On 6 October 2005, the Court of Appeal refused to certify the argument concerning Article 6 of the Convention as a point of law of general public importance for appeal to the House of Lords.

Complaints

Each applicant alleged that the burden on him to prove that his realisable property was less than the amount to which he had been assessed to have benefited from drug trafficking violated his right to a fair hearing under Article 6(1) of the Convention. In addition, the applicants complained that the confiscation proceedings had breached their rights under Article 1 of Protocol No. 1 to the Convention.

Held

Article 6

The Court's task, in a case involving the procedure for the imposition of a confiscation order under the 1994 Drug Trafficking Act, is to determine whether the way in which the statutory assumptions were applied in the particular proceedings offered the basic principles of a fair procedure inherent in Article 6(1).

The second stage of the procedure involving the calculation of the value of the realisable assets currently available to the applicant is the part the applicants complained about. The burden at this

stage was on the defendant to establish to the civil standard of proof that the amount that might be realised was less than the amount assessed as benefit.

The Court agreed with the judgment of the Court of Appeal in the instant case that it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. It therefore found no violation of Article 6(1) of the Convention.

Article 1 of Protocol No. 1

The Court recalled that in the Case of *Phillips v. the United Kingdom* (41087/98) it found that the requirement on Mr Phillips to pay money under a confiscation order made in compliance with Article 6(1) did not constitute a disproportionate interference with his right to peaceful enjoyment of his possessions. The Court did not consider that the present applications could be distinguished from the above mentioned case in this respect. It followed that there had been no violation of Article 1 of Protocol No. 1 in this case.

Hajibeyli v. Azerbaijan

(16528/05)

European Court Of Human Rights: Judgment dated 10 July 2008

Fair trial – freedom of movement – criminal proceedings lasting five years and four months – applicant’s freedom of movement restricted for that period – Article 6 of the Convention and Article 2 of Protocol No. 4

Facts

The applicant was born in 1960 and living in Baku. His surname was ‘Hajiyev’ before he formally changed it to ‘Hajibeyli’ on 29 April 2005.

The applicant was a politician and a member of the opposition. On 29 April 2000 the Democratic Congress of Azerbaijan, a political block uniting a number of opposition political parties, held a demonstration in Fuzuli Square in Baku that earlier had been refused authorisation. Soon after the start of the demonstration, police units began arriving in the square with the aim of dispersing the crowd. According to the applicant, the police used excessive force in a series of violent clashes. The applicant himself was beaten by the police in the square and taken to a police station.

The next day, on 30 April 2000, the applicant was charged with the administrative offence of obstructing the police and, on the same day, the Nasimi District Court sentenced him to ten days’ ‘administrative detention’ in accordance with domestic law.

Around the same date, criminal proceedings were commenced in respect of the demonstrators’ obstruction of the police, and on 4 May 2000 the Baku City Prosecutor’s Office charged the applicant, together with ten other persons, with obstructing state officials by the actual or threatened use of force. The same day, the investigator issued an order for the applicant’s detention

on remand in connection with this criminal charge. This detention on remand was substituted by a preventive measure prohibiting him from leaving his place of residence, and he was released from detention.

Between April and June 2000 the investigators interrogated a number of witnesses in connection with the case but no major investigative acts were carried out subsequently. On 25 January 2001 the Baku City Prosecutor's Office suspended the investigation in the applicant's case because one of the co-accused had absconded and he could not be located or his testimony obtained. A number of other 'accomplices to the offence' had not been identified. The prosecutor found that in the absence of other accomplices it was not possible to conclude the investigation. It was suspended until the other accomplices could be located. The applicant maintained that he was not informed of the decision to suspend the proceedings and that he only found out at a later, unspecified, date.

Complaining that the criminal charges against him were unfounded and based solely on the testimony of police officers, and that his case was still at the preliminary investigation stage despite proceedings having been instituted four years earlier, the applicant filed a lawsuit with the Sabayil District Court on 7 July 2004. He pointed out that he remained under an obligation not to leave his place of residence and as a result could not obtain an international passport or travel abroad on personal business. His submission was dismissed on 23 August 2004.

On 14 October 2004 the Court of Appeal upheld the Sabayil District Court's dismissal decision. Under the domestic rules of criminal procedure, the Court of Appeal was the highest instance for appeals against procedural decisions of investigative authorities.

On 14 September 2005 the prosecutor of the Baku City Prosecutor's Office discontinued the criminal proceedings in respect of the applicant which had been resumed on 24 August 2004. According to domestic legislation the criminal charge against him had become time-barred five years after the date of the commission of the alleged offence. The prosecutor also lifted the preventative measure prohibiting the applicant from leaving his place of residence.

The applicant filed a complaint with the Sabayil District Court against the prosecutor's decision to discontinue proceedings against him, stating that they should have been discontinued because of the lack of a criminal element in his actions, not due to time-barring. This complaint was dismissed on 24 October 2005 and the applicant subsequently appealed. On 13 December 2005 the Court of Appeal upheld the Sabayil District Court's decision.

Complaints

The applicant, relying on the 'reasonable time' requirement, as guaranteed by Article 6 of the Convention, complained that the criminal proceedings against him had been unreasonably lengthy and that he had been ill-treated by the police. He also complained, *inter alia*, that his freedom of movement had been restricted in breach of Article 2 of Protocol No. 4 to the Convention, and that he had been persecuted because of his political views.

Held

Article 6

In determining the reasonableness of the length of proceedings, regard had to be had to the particular circumstances of the case, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities, what was at stake for the applicant, and the state of affairs that existed at the beginning of the period under consideration.

An accused in criminal proceedings should be entitled to have his case conducted with special diligence. In criminal matters, Article 6 was designed to avoid a person charged remaining too long in a state of uncertainty about the outcome of the proceedings. In the instant case, the criminal proceedings against the applicant had lasted more than five years and four months and had been discontinued whilst still at the investigation stage.

As the Convention entered into force with respect to the domestic state on 15 April 2002, the period to be taken into consideration was approximately three years and five months, during which the case remained at the investigation stage. The case had not been a complex one and as such, the length of the proceedings could not be explained on the ground of the complexity of the case. Accordingly, the length of the proceedings was excessive and had failed to meet the 'reasonable-time' requirement of Article 6.

Article 2 of Protocol No. 4

In considering whether there had been a breach of Article 2 of Protocol No. 4, the Court had to determine whether a fair balance had been struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. The restriction might be justified if there were clear indications of a genuine public interest which outweighed the individual's right to freedom of movement. Such a restriction should be to pursue one or more of the legitimate aims in Article 2 of Protocol No. 4, and had to be necessary in a democratic society.

The Court found that it was disproportionate to restrict the applicant's freedom of movement for a period of three years and five months after the entry into force of the Convention, and for five years and four months in total, particularly when the investigation had clearly failed to produce any results and the case ended up being discontinued on account of the expiry of the criminal limitation period. A fair balance between the demands of the general interest and the applicant's rights had not been achieved and accordingly there had been a violation of Article 2 of Protocol No. 4 to the Convention.

Satik v. Turkey (No 2)

(60999/00)

European Court of Human Rights: Judgment dated 8 July 2008

Unfair trial - unlawfully obtained evidence - failure to hold a public hearing - failure to secure attendance of material witness - ill-treatment while in police custody- Articles 3 and 6 of the Convention.

Facts

The applicant, Kadir Satık, is a Turkish national who was born in 1966, lives in Ankara and ran a shop in Istanbul.

On an unspecified date, the State's intelligence service began recording the telephone conversations of an alleged Greek intelligence officer, who was working at the Greek consulate in Izmir. An investigation of the applicant commenced after the intelligence service noticed suspicious telephone conversations between the applicant and the alleged Greek intelligence officer.

On 18 February 1998, the applicant's shop was searched by a military prosecutor and state intelligence officers. Several photographs of military bases and two maps marked 'top secret' were reportedly found during the search. A person referred to as 'V.A.Ö.' was also present during the search. V.A.Ö. told the officers that the photographs belonged to the applicant. The applicant was taken into custody, on suspicion of transmitting official and confidential information to Greek intelligence.

On 20 February 1998, the applicant was brought before the military court, where he denied the allegation and was detained on remand. During this time, the applicant underwent a medical examination, which reported bruising on both arms which was about three to four days old. Two prior medical examinations, which had been conducted subsequent to the applicant's arrest, showed no such symptoms.

On 19 March 1998, the applicant was charged for disloyalty to the national defence by way of espionage under the Turkish Criminal Code and Military Criminal Code. The applicant claimed that he had been tortured by state intelligence officers while in custody, and coerced into signing a false statement. He also claimed that he had sold the shop to V.A.Ö., and that the photographs and maps did not belong to him. Moreover, the applicant argued that the search was illegal, and that the telephone conversations were obtained unlawfully, since a judge had not permitted the tapping of his telephone conversations. The applicant conceded that he had agreed with Greek intelligence officials to provide confidential information, but stated that any information he had provided was false.

The military court issued a summons for V.A.Ö. to give evidence during the trial, but V.A.Ö. could not be found. The military court held that although the information provided by the applicant was not confidential, he had nevertheless committed the offence for which he was charged, by accepting a proposal to provide information to Greek intelligence officials. The applicant was convicted and sentenced to twelve years and six months' imprisonment. The applicant appealed to the Military Court of Cassation, which upheld the judgment at first instance on 17 November 1999. It noted that the court had accepted that the photographs and maps did not belong to the applicant, and had not sought to rely upon the statement of V.A.Ö. Therefore, the applicant's conviction was not the result of any unlawfulness in the investigation.

Complaints

Relying on Article 6, the applicant complained on four grounds. Firstly, he claimed that the court which tried him could not be regarded as an independent and impartial tribunal, and that, as a civilian, he should not have been tried in a military court. Secondly, he alleged that he had been convicted on the basis of unlawfully obtained evidence, namely, tapped telephone conversations. Thirdly, he complained that the military court had failed to hold the hearing in public and, fourthly, that the military court failed to secure the attendance of a material witness.

Relying on Article 3, the applicant also complained that he had been subjected to ill treatment during his detention in police custody.

Held

Article 6

Lack of independence and impartiality

The Court affirmed that only in 'very exceptional circumstances' and where 'compelling reasons' existed could the determination of criminal charges by a military court against civilians be compatible with Article 6. The Court noted that the prevailing view amongst member States was that civilians should not be tried by military courts during peace time. However, the Turkish Constitution specifically provided that the military courts could do so, and the state legislation provided that the offence, for which the applicant was convicted, fell within the jurisdiction of military courts.

The Court referred to the judgment in *Ergin (no. 6)*, where the Court held that it was understandable that a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before military judges. The applicant could legitimately fear that the military court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about the court's independence and impartiality could be regarded as objectively justified.

The Court therefore concluded that the applicant in the present case had been denied the right to a fair trial, in breach of Article 6.

Use of unlawfully obtained evidence

The Court noted that its duty did not encompass dealing with errors of fact or law allegedly committed by the State's courts, except to the extent that they may have infringed the rights and freedoms protected by the Convention. Article 6 did not lay down any rules on the admissibility of evidence.

Thus, the Court found that the relevant question was whether the proceedings as a whole were fair, through an examination of the 'unlawfulness' in question and the nature of any violation of Convention rights. It noted that the applicant was given the opportunity to challenge the method by which the evidence in question was obtained, and he had objected to its use during the trial. The military court had dismissed his defence, and convicted him on the basis of other available evidence. The Court therefore dismissed the applicant's claim under this ground.

Failure to hold a public hearing

The Court noted that the applicant had not raised this complaint before the military courts, either at first instance or on appeal. It therefore found that the applicant had not exhausted all available domestic remedies, and the claim under this ground was dismissed.

Failure to secure a witness' attendance

The Court noted that the military court had summoned 'V.A.Ö,' but the witness could not be found. It also noted that the military court had consequently disregarded the witness' statements to the police officers. The Court therefore dismissed the applicant's claim under this ground.

Article 3

The State claimed that the applicant had failed to raise his complaints of ill-treatment before the state authorities, and thus had not sought remedy under domestic laws. The Court dismissed this argument, finding that the applicant had done all that could be expected of him to bring his complaint to the attention of the State. Before the military court, the applicant had challenged the admissibility of his statements, as obtained by State intelligence officers. The applicant had also referred to the medical report which noted that he had suffered bruising.

However, the Court noted that the applicant had limited this challenge before the military court to the admissibility of evidence. He did not specifically indicate the type of ill-treatment suffered, in support of his allegations that the statements were taken under torture. On application to the Court, the applicant also failed to explain the type of ill-treatment allegedly suffered. In conclusion, the Court dismissed this claim on the basis that an arguable claim for ill-treatment had not been established, pursuant to Article 3.

No punishment without law

Konov v. Latvia

(36376/04)

European Court of Human Rights Chamber: Judgment dated 24 July 2008

No punishment without law – Article 7 of the Convention.

Facts

The applicant was born in 1923 in the Ludza, Latvia. He held Latvian nationality until April 2000, when he was granted Russian nationality by special decree issued by the President of the Russian Federation, Mr V. Putin.

The applicant's case surrounded his prosecution for war crimes he allegedly committed in 1944, when Latvia was under German occupation.

In 1943, as a soldier in the Soviet Army, the applicant was parachuted into Belarus territory near the Latvian border, which was under German occupation. In Belarus, he joined a Soviet commando unit made up of members of the 'Red Partisans'.

According to the Latvian courts, on 27 May 1944, the applicant led a unit of Red Partisans wearing German uniforms (to avoid suspicion) into the village of Mazie Bati, in a 'punitive expedition' in which they killed nine villagers accused of betrayal. According to the applicant, he had not personally led the expedition or entered the village.

In January 1998, a criminal investigation into the events of 27 May 1944 was launched by the Centre for the Documentation of the Consequences of Totalitarianism. On 2 August 1998, the applicant was charged with war crimes under the former Latvian Criminal Code, Article 68-3, which established punishment as between three and fifteen years or life imprisonment. Retrospective application of criminal law was permitted under Article 6-1, and Article 45-1 eliminated any statutory limitation. The applicant was placed in pre-trial detention on 10 October 1998. He entered a plea of not guilty.

The judgment was quashed on 25 April 2000 because of unresolved issues, including whether Mazie Bati was in fact 'occupied territory' and whether the applicant and victims could be considered 'combatants' and 'non-combatants'. The applicant was released. In May 2001, the applicant was again charged with war crimes under Article 68-3.

The applicant was acquitted of war crimes, but convicted of banditry in October 2003. The Latgale Regional Court considered that the deaths of the men from Mazie Bati could be considered as necessary and justified, but that the deaths of the women and burning down of the village could not. As the commanding officer, the applicant was responsible for his unit's acts of banditry. However, as the offense of banditry is subject to statutory limitation, the applicant was relieved of criminal liability.

The prosecution appealed to the Supreme Court in April 2004. The judgment of the lower court was quashed, and again, the applicant was found guilty of war crimes. As the applicant was aged, infirm and harmless, an immediate custodial sentence of one year and eight months was imposed.

Complaints

On 27 August 2004, the applicant lodged a complaint under Article 7(1), alleging that the acts of which he had been accused, did not, at the time of their commission, constitute an offence under either domestic or international law.

Held

The issue before the Court was whether, on 27 May 1944, the applicant's acts constituted offences defined with sufficient accessibility and foreseeability under domestic law or international law. The Court did not consider the applicant's individual criminal responsibility.

The Court began its analysis by looking at the legal basis for the criminal claims brought before the Latvian Supreme Court. The domestic court had used three international instruments to frame the applicant's acts. However, upon examination, the Court found that two of those instruments came into effect only after the incident in question.

The only international instrument in force at the time, the appended Regulations to the Hague Convention of 1907, contained provisions concerning law and customs in war. Though neither Latvia nor the USSR was signatory, the text of the Convention was a mere reflection of customary rules recognised by the community of nations at the time. Therefore, the Court presumed the applicant to have been a 'combatant' under international law, and presumed that he must have been aware of the customary rules of war in 1944.

The Court then looked at whether the incident on 27 May 1944 was subject to the rules of war. The Court looked at multiple factors, including the location of the conflict, the combatant status of those killed, and whether the brigade targeted only enemy combatants.

The Court noted that, although the operation did not occur in a combat situation, it nevertheless took place in a war zone. Mazie Bati had been the location of many conflicts between the Red Partisans and the German army, and was occupied by the Germans. Additionally, the Germans had armed the 'trustworthy men' against the Red Partisans.

However, the Court considered that the applicant could not reasonably have foreseen on 27 May 1944 that his acts amounted to a war crime under the *jus in bello* doctrine applicable at the time. There was, therefore, no plausible legal basis in international law on which to convict him of such an offence.

Even if the applicant had committed offences under international law, their prosecution has long since become statute barred. Accordingly, domestic law could not serve as the basis for his conviction either. There had consequently been a violation of Article 7 of the Convention.

Private and family life

I. v. Finland
(20511/03)

European Court of Human Rights: Judgment dated 17 July 2008

Private life – applicant complaining of unlawful access to her medical records – Articles 6, 8 and 13 of the Convention.

Facts

The applicant, whose name was not disclosed in the proceedings, was born in 1960.

Between 1989 and 1994 the applicant worked on fixed-term contracts as a nurse in the polyclinic for eye diseases in a public hospital. From 1987 she paid regular visits to the polyclinic for infectious diseases of the same hospital, having been diagnosed as HIV-positive.

Early in 1992 the applicant began to suspect that her colleagues were aware of her illness. Hospital staff had free access to the patient register containing information on patients' diagnoses and doctors who treated them. Later that year the hospital's register was amended so that only the treating hospital's personnel had access to its patients' records. The applicant was registered in the patient register under a false name. Later her identity was changed once again and she was given a new social security number.

Having left her job in 1995, on 25 November 1996 the applicant requested that the County Administrative Board (CAB) examine who had accessed her confidential patient record. She was told that it was not possible to find out who, if anyone, had accessed the record - the data system revealed only the five most recent consultations and even this information was deleted once the file was returned to the archives.

Following the CAB's decision of 20 October 1997, the hospital's register was amended. It became possible retrospectively to identify any person who had accessed a patient record.

On 15 May 2000, the applicant instituted civil proceedings against the District Health Authority, which was responsible for the hospital's patient register, claiming damages for an alleged failure to keep her record confidential. The action was rejected because the court found no firm evidence that the applicant's record had been unlawfully consulted.

An oral hearing before the Court of Appeal resulted in the same finding, while the Court considered the applicant's testimony about her colleagues' hints and remarks about her HIV infection reliable and credible. The applicant was ordered to reimburse the respondent's legal expenses before the District Court and the Court of Appeal, amounting to 2,000 euros (EUR) and EUR 3,271.80 plus interest. On 23 December 2002 the Supreme Court refused leave to appeal.

Complaints

Relying on Article 8 of the Convention, the applicant complained that the district health authority had failed in its duties to establish a register from which her confidential patient information could not be disclosed.

The applicant further complained of a violation of Article 6 and 13 as she, as a complainant, bore the burden of proof to show that some of her colleagues had unlawfully accessed her patient records but that she was unable to obtain evidence about this due to the deficient safeguards in her data register.

Held

Article 8

The hospital was a public hospital, for whose acts the State bears responsibility. The Court stated that processing information relating to an individual's private life comes within the scope of

Article 8(1) of the Convention. Personal information relating to a patient undoubtedly belongs to his or her private life.

The Court noted that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorised access occurring in the first place. Such protection was not given here.

The Court held that, at the relevant time, the State failed in its positive obligations under Article 8(1) to ensure respect for the applicant's private life. There had therefore been a violation of Article 8 of the Convention.

Articles 6 and 13

In relation to Articles 6 and 13 the Court considered it unnecessary to examine this aspect of the application due to the findings in relation to Article 8.

R.K. and A.K. v. The United Kingdom

(38000(1)/05)

European Court of Human Rights: Judgment dated 30 September 2008

Right to family life - separation from child - right to an effective remedy - Articles 8 and 13 of the Convention.

Facts

The applicants, a husband and wife, are United Kingdom nationals born in 1972 and 1976 respectively with a daughter (M.) who was born on 24 July 1998. They live in Oldham in the UK.

The parents and the grandmother took M. to the hospital after she had been screaming with pain when being picked up. The nurse received information given by the family and stated that the mother had 'janked' M. The x-ray showed a slightly displaced comminuted fracture of the midshaft of the femur. There was no history of metabolic bone disease in the family, however, it was not noted that the parents were first cousins, an incident relevant to a possible genetic condition. The doctor formed the opinion that the injury was non-accidental, and the police were informed.

On 23 October 1998, M. was discharged from hospital into the care of her aunt, who became her guardian. The parents were allowed supervised contact. The parents obtained legal advice and jointly instructed an expert, with M.'s guardian, *inter alia* to clarify whether tests had been carried out to exclude brittle bone disease. However, no further tests were carried out at this stage.

On 23 December 1998 the County Court judge ordered M. to be placed in care. M. remained with her aunt who lived a few hundred yards from the family home. On 29 March 1999, M. sustained a second injury in her aunt's care. Bilateral femoral fractures were found and following further tests she was diagnosed with osteogenesis imperfecta (brittle bone disease). After being discharged

from hospital in April 1999, M. returned home and on 17 June 1999 the care order was discharged and M. returned to her parents.

On 24 September 2001 the parents brought claims under the Human Rights Act 1998 against the hospital trust and the consultant paediatrician, for negligence and breach of their Article 8 rights. They claimed that the late diagnosis of brittle bone disease, leading to M.'s removal into the care of her aunt, had resulted in the family being severely shocked and shamed. Rumours had spread to Pakistan that the mother had been put into prison. The parents' relationship with M. and with the grandmother had been severely disrupted.

On 4 December 2002, the High Court found no duty of care was owed to the parents and that the Human Rights Act 1998 did not apply to events before it came into force on 2 October 2000. The parents appealed and leave to appeal to the Court of Appeal was granted.

On 31 July 2003, the Court of Appeal upheld the ruling of the County Court judge. This case was heard together with two other similar cases, which all had the same outcome. These rulings were confirmed by the House of Lords on 21 April 2005.

Complaints

The applicants complained that their right to respect for family life had been violated by their separation from their child, that their right to moral and physical integrity under the private life aspect had been violated, that their right to reputation had been violated, affecting their right to establish and develop relationships with other human beings and that they had been deprived of the right to have inherent procedural safeguards in place and observed to ensure the protection of the above rights. They relied on Article 8 of the Convention.

They also complained that they had no effective remedy for the above complaints, invoking Article 13 of the Convention.

Held

Article 8

The Court did not dispute that the proceedings instituted with regard to M., and the interim care order which resulted in M. being placed away from the applicants, constituted an interference with the applicant's rights to respect for their family life within the meaning of the first paragraph of Article 8. The Court therefore had to consider whether the interference was 'in accordance with the law', pursued an aim or aims that are legitimate under paragraph 2 of Article 8 and could be regarded as 'necessary in a democratic society'.

The Court reiterated that mistaken judgements or assessments by professionals do not per se render childcare measures incompatible with the requirements of Article 8.

The Court was satisfied that there were relevant and sufficient reasons for the authorities to take protective measures, such measures being proportionate in the circumstances to the aim of protecting M. and which gave due account and procedural protection to the applicants' interests,

and without any lack of the appropriate expedition. The Court concluded that there had been no violation of Article 8 of the Convention in this regard.

Having regard to its conclusion as to the lawfulness and necessity of the measures, the Court considered that no separate issues arose relating to events invading the applicants' physical and moral integrity and damage to their reputation in violation of Article 8.

Article 13

The Court considered that the applicants should have had the opportunity to make a claim asserting that the local authorities' handling of the procedures was responsible for any damage which they suffered and requesting compensation for such damage. Such redress was not available at the relevant time. Consequently, the Court concluded that there had been a violation of Article 13 of the Convention in this respect.

Freedom of expression

Flux v. Moldova

(22824/04)

European Court of Human Rights: Judgment dated 29 July 2008

Freedom of expression - Article 10

Facts

The applicant is a Moldovan newspaper.

On 4 February 2003 the applicant newspaper published an article about the Spiru Haret High School. The article was not based on investigations by the newspaper's reporters but it quoted an anonymous letter that it had allegedly received from a group of students' parents.

The letter criticised the situation in the school, in particular, overcrowding and a lack of proper facilities for children. It also alleged that the school's principal used the school's funds for inappropriate purposes and that he had received bribes of 200-500 US dollars for enrolling children in the school and that the authors of the letter had been afraid to sign for fear of reprisal against their children. The letter further claimed that the principal spent money on decorating his office, building a separate bathroom for himself and launching a school newspaper which only published articles related to relationships and sex.

The principal and the editorial staff of the school newspaper asked Flux to publish a reply to the article of 4 February 2003 but their request was rejected. However they managed to have their reply published in another newspaper called Journal de Chisinau. They expressed their dissatisfaction with the fact that Flux had failed to seek their side of the story and that Flux had not done any form of investigation. On 14 February 2003 the applicant newspaper reacted to the reply published in the Journal de Chisinau by publishing a new article.

The principal brought civil proceedings for defamation against the applicant newspaper, arguing that many statements in the above article were defamatory. During these proceedings the applicant called three witnesses.

On 18 September 2003 the Buiucani District Court gave judgment for the principal, after finding the allegations of bribery to be untrue and defamatory. It ordered the newspaper to issue an apology within fifteen days and to pay the principal 1,350 Moldovan Lei in compensation. Both the applicant newspaper and the principal appealed against this judgment. On 23 December 2003 both appeals were dismissed by the Chisinau Court of Appeal.

The applicant newspaper lodged an appeal on points of law with the Supreme Court of Justice, arguing again, *inter alia*, that the purpose of the article was not to accuse the principal of taking bribes but simply to make public the rumours to that effect. On 31 March 2004 the Supreme Court of Justice dismissed its appeal.

Complaints

The applicant newspaper alleged, in particular, a breach of its right to freedom of expression after it was held liable in civil proceedings for the defamation of a high school principal. It complained under Article 10 of the Convention that the domestic courts' decisions had entailed interference with its rights to freedom of expression that could not be regarded as necessary in a democratic society.

Held

The Court reiterated that freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. The press has a task of imparting information and ideas and the public has a right to receive them. They have a vital role as a 'public watchdog.'

Article 10 of the Convention does not, however, guarantee wholly unrestricted freedom of expression in respect of coverage by the press of matters of serious public concern. Where there is a question of attacking the reputation of individuals and thus undermining their rights as guaranteed in Article 8 of the Convention, regard must be had to the fair balance which has to be struck between the competing interests at stake. Also the Court must have regard to Article 6(2) of the Convention, which states that everyone has the right to be presumed innocent of any criminal offence until proven guilty. One must look to whether the journalists are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

An assessment of the above depends in particular on the nature and the degree of the defamation at hand, the manner in which the impugned article was written and the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question. In both the first and the second articles, the allegations were sufficiently explicit to suggest to readers that the principal was guilty of the criminal offence of bribe-taking.

The Court agreed that the articles of 4 and 14 February 2003 could not be dissociated from one another. It noted that despite the seriousness of the accusations made against the principal

contained in the anonymous letter published on 4 February 2003, the journalist made no attempt to contact him and ask his opinion on the matter. Nor did it appear from the text of the article that the journalist conducted any form of investigation into the matter mentioned in the anonymous letter. Having regards to the terms of the reply published in the Journal de Chisinau, the Court did not find the language used offensive. The Court found the article of 14 February 2003 more a form of reprisal against the persons who had questioned the newspaper's professionalism.

The Court underlined that it did not accept the reasoning of the first instance court, namely that the allegation of serious misconduct levelled against the claimant should have first been claimed in criminal proceedings. The right to freedom of expression cannot be taken to confer on newspapers an absolute right to act in an irresponsible manner by charging individuals with criminal acts in the absence of a basis in fact at the material time and without offering them the possibility to counter the accusations. The Court found that the solutions of the domestic courts struck a fair balance between the competing interests of the claimant and those of the applicant newspaper.

In view of the above and of the fact that the applicant newspaper acted in flagrant disregard of the duties of responsible journalism and thus undermined the Convention rights of others, the interference with the exercise of its rights to freedom of expression was justified. The Court therefore held that there had been no violation of Article 10 of the Convention.

Meltex Ltd and Mesrop Movsesyan v. Armenia
(32283/04)

European Court of Human Rights: Judgment dated 17 June 2008

Freedom of expression – applicants denied broadcasting licence on seven separate occasions – whether lack of reasons for denial rendered decision arbitrary - Articles 6, 10 and 14 of the Convention.

Facts

The applicants are Meltex Ltd, an independent broadcasting company established in 1995 with its registered office in Yerevan (Armenia), and its chairman, Mesrop Movsesyan, who was born in 1950 and lives in Yerevan. This is a KHRP-assisted case.

Since obtaining a licensed frequency to broadcast during assigned periods in 1995, A1+ received daily threatening calls from public officials threatening to deprive A1+ of its assigned broadcasting hours as frequencies were granted by the State to defend and further State interests, rather than to criticise the authorities. Prior to the presidential election A1+ refused to show only pro-Government material and so State broadcasting was suspended in May 1995.

Later that year Mr Movsesyan established Meltex Ltd as an independent broadcaster, intended to be outside of state control. Granted a five-year broadcasting licence in 1997, it was widely recognised as one of the few independent sources of well-processed news and analysis in television in Armenia.

In October 2000 the Armenian Television and Radio Broadcasting Act established the National Television and Radio Commission ('NTRC') as a regulatory body for the activities of private television and radio companies. The NTRC's implementation of a new points-based licensing procedure resulted in A1+ losing its broadcasting licence in 2002 and failing at seven subsequent attempts to gain a licence for the remaining broadcasting frequencies in Armenia. Observers at the time believed the licence denials to be politically motivated.

On 19 February 2002, the NTRC announced calls for tenders for broadcasting frequencies. The applicant company and two other inexperienced companies submitted bids. The applicant's bid was rejected and other bids made by the applicant for tenders were rejected with no reasoning as to why bids were rejected.

After fruitless correspondence with the NTRC, Meltex Ltd lodged a total of four applications in the Armenian Commercial Court between September 2003 and March 2004, seeking, *inter alia*, a declaration that the NTRC had acted unlawfully in refusing to give reasons for the licence refusals, and an order obliging it to provide such reasons. Each submission was dismissed as unfounded, as was the company's subsequent appeal on points of law to the Court of Cassation in April 2004.

Complaints

The applicants contended that the refusals of a broadcasting licence amounted to a violation of their right to freedom of expression under Article 10.

The applicant company complained that in both sets of proceedings the domestic courts had failed to deliver reasoned judgments. Furthermore, in the proceedings concerning the tender process for band 63, the Commercial Court had violated the principle of equality of arms because it had dismissed the applicant company's requests and thereby prevented the applicant company from producing evidence in support of its claim. The applicant company relied on Article 6(1) of the Convention.

Lastly, the applicant company complained that the NTRC's decisions and those of the domestic courts had been politically motivated. It claimed that the NTRC was not an independent and impartial body since all its nine members were appointed by the President of Armenia. The applicant company relied on Article 14 in conjunction with Articles 6 and 10 of the Convention.

Held

Article 10

The Court deemed that a licensing procedure whereby the authority gave no reasons for its decisions did not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression. Accordingly, the interferences with the applicant company's freedom to impart information and ideas, namely the denials of a broadcasting licence, were unlawful and in breach of Article 10 of the Convention.

However, in relation to the second applicant, the Court considered that he had not produced any evidence to show he was a shareholder of the first applicant company, nor any documentation, nor any argument in support of the application on his behalf. All documentation indicated that

the company alone had applied for the licence. The second applicant therefore did not have victim status. That being so, the Court considered that the application, in so far as it concerns the second applicant, was incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35(3), and should be rejected in accordance with Article 35(4) of the Convention. The Court therefore limited its examination of the complaints raised in the application to those which concerned the first applicant.

Article 6

Concerning the right to a reasoned judgment, the Court considered that the Court of Cassation had carefully examined the oral and written submissions of the parties. In such circumstances, it cannot be said that the Court of Cassation failed to provide reasons merely because it endorsed the findings of the lower court and incorporated them in its decisions. It followed that this part of the application was manifestly ill-founded and had to be rejected in accordance with Article 35(3) and (4) of the Convention.

As for the equality of arms principle, the Court stated that the requests lodged by the applicant company were examined by the Commercial Court and reasons were given for their dismissal which did not appear to be arbitrary. Furthermore, the applicant company was able to contest the relevant dismissals in its appeal to the Court of Cassation which additionally examined and confirmed the reasons given by the Commercial Court. That being so, the Court stated that there had been no violation of the fair trial guarantees of Article 6(1) of the Convention in this respect.

Article 14

The Court found that there was no evidence to substantiate the applicant company's allegation that the domestic courts were influenced by political considerations when deciding on its applications. It therefore decided that there had been no violation of Article 14 as such.

Commentary

Coming amidst an unprecedented and extremely tense atmosphere on the streets of Armenia, this judgment was heralded by civil activists and figures in the press as a long overdue victory for free speech. According to Terry Davis, Secretary General of the Council of Europe, 'The decision comes after numerous calls from different bodies of the Council of Europe have been ignored by the Armenian authorities... The decision of the Court is a victory for freedom of expression. It should also serve as a lesson to all governments inclined to arbitrary interpretations of Article 10 of the European Convention on Human Rights, which guarantees this essential freedom.'

Following the February 2008 presidential elections, violent clashes between police and demonstrators on 1 March 2008 resulted in ten deaths and 200 injuries. The government subsequently imposed a 20-day state of emergency in the capital Yerevan, including a ban on any potentially anti-government media reporting. The opposition soon sought permission for a demonstration, which the government refused. The judgment immediately gave an incentive to the opposition who were adamant to proceed with their demonstration and, on the evening of 17 June 2008, crowds gathered to celebrate the judgment in North Avenue, Yerevan, where informal demonstrations normally prohibited by the state are held.

Unsurprisingly, opinions of the decision differed. While celebrations filled the streets of Yerevan, the Ministry of Justice announced in a press conference on 18 June 2008 that ‘the Republic of Armenia does not think the Court’s decision was targeted at the Republic of Armenia. Neither did it mark A1+’s victory’. However, Armenia’s Deputy Minister of Justice and representative to the Court, Gevorg Kostanyan, later asserted that the decision would compel the NTRC to properly reason its decisions in future.

Besides its legal impact, the judgment’s political impact is huge. European demands on Armenia to address the issue of media plurality, specifically referring to A1+, Meltex Ltd’s subsidiary, have been long-standing. For the international community and Armenian civil society alike, the television company has become the standard bearer for reform that Armenia’s constitution needs if it is truly to operate within Convention standards and be seriously considered as a member of the Council of Europe.

Foka v. Turkey
(28940/95)

European Court of Human Rights: Judgment dated 24 June 2008

Inhuman and degrading treatment - unlawful detention - restrictions on freedom of thought and speech - discrimination - interference with home and family life - Articles 3, 5, 8, 9, 10 and 14 of the Convention.

Facts

A request to refer this case to the Grand Chamber is pending.

The applicant was born in 1947, is of Greek-Cypriot origin and lives in Nicosia. At the material time she was an ‘enclaved’ Greek-Cypriot living in the Karpas region of northern Cyprus, where she was a teacher at a Greek-Cypriot Elementary School.

The applicant submitted that on 13 January 1995 she was returning from a family visit to southern Cyprus, travelling on a bus with some other enclaved Greek-Cypriot women. In Nicosia, at the Ledra Palace crossing point into the ‘Turkish Republic of Northern Cyprus’ (‘TRNC’), she and the other women were searched by Turkish or ‘TRNC’ police and customs officials. When the officials asked to search the applicant again, she refused, saying that they had already searched her. She alleged that the officials then forced her into a private car, beating her when she resisted and shouted for help. She was taken to a building, which appeared to be a police station, where her bag was searched and she was again beaten when she tried to observe what the police officers were doing. She was then interrogated and mocked by the police officers and her bag was returned to her empty. The officers took 120 Cypriot pounds (CYP) of the CYP 300 that she had on her.

The applicant was then driven in the same car back to the crossing point, where she asked to be returned to southern Cyprus. The officers refused, hitting her and forcing her into the bus. The day after her return to her village of Ayia Triada, the applicant was taken to see a female Turkish-

Cypriot doctor who offered her medical treatment but refused to certify the existence of bruises on her body. The applicant alleged that in the following nights stones were thrown at her house.

On 18 January 1995 the applicant was visited at her workplace by some representatives of the organisation Doctors of the World. The Doctors of the World report was submitted as part of the application and records the applicant's extreme fear and nervousness on their arrival and the bruises which she showed them 'up and down her legs'. It also noted her allegations that the reason for her beating was that she was bringing textbooks and religious crosses into 'TRNC' and that the police from the nearby town of Yialusha, who carried out the beating, continued to harass her. The applicant was also visited by a representative of the United Nations Peace Keeping Force in Cyprus (UNFICYP). The applicant stated that this took place a week after the visit by Doctors of the World, but the UNFICYP report states that it also took place on 18 January 1995. On 20 January 1995, a medical officer of UNFICYP requested permission to examine the applicant, but this was denied. Permission was finally granted on 30 January 1995 and an examination carried out the following day, although the applicant did not mention its findings in her account of the facts.

A section of the UNFICYP report on the 18 January visit was appended to the application, and describes 'bruises and blood effusions on shin bones and thighs'. It also states that the representative visited the police at Yialusha who had allegedly carried out the beating, but noted that 'all TCPE officers... were very reluctant in answering... questions and very reserved.' The report also confirmed that permission was denied for UNFICYP to medically examine the applicant until 30 January 1995.

The applicant alleged that following the incident she had been subjected to constant surveillance and harassment by local police including threats that she would be expelled from northern Cyprus or killed.

In May 1997 the applicant travelled to southern Cyprus for urgent medical treatment. Subsequently she was not allowed to return to northern Cyprus and had been living in Nicosia ever since.

The Government's version of events differs considerably from that of the applicant. They submitted that, at a routine customs check, the applicant refused to allow her bag to be searched. The applicant was taken by police car to police headquarters. She violently resisted both getting into the car and having her bag searched at the police headquarters, kicking, shouting, pushing police officers away and attacking a female customs officer. The government submitted that it was therefore necessary to use force to get her into the car and carry out the search, but that the force used was not more than reasonable and necessary. They acknowledged that the applicant may have caused injury to herself by her own actions in resisting police officers, but that this was not evident at the time because she was wearing thick, dark stockings.

The government alleged that the police search uncovered gold crosses, which were subject to customs duty but which the applicant had failed to declare, and books, brochures and cassettes which contained defamatory and racist anti-Turkish material, likely to incite racial hatred and damage inter-communal relations. The authorities kept all the items for further examination,

fined the applicant 9,000,000 Turkish lira for failing to declare the crosses and then returned her to the bus.

The government further submitted that at no time did the applicant make a complaint to the police about her alleged ill-treatment and that the UN doctor who examined her on 31 January 1995 found only 'scratches on the applicant's back [and] right calf'.¹

On 25 January 1995 most of the applicant's belongings were returned to her but the authorities kept three cassettes, two paperbacks, a diary and a postcard which they considered would incite racial hatred against Turks. The Government attached several reports and statements by police and customs officers, all corroborating their allegation that the applicant had been violent towards police officers and had resisted having her bags searched.

In March 1997 the applicant retired from her teaching position and moved to Nicosia.

Complaints

The applicant complained that her treatment by the authorities on 13 January 1995 and subsequently, had, contrary to Article 3, been humiliating and disproportionate to any threat which she posed to public order. She submitted further that, since the *de facto* boundary between northern and southern Cyprus was not an international border, the Turkish Government had no right to enforce customs legislation. She complained, also under Article 3, that no investigation had been carried out into the incident and that no remedies were available to her in northern Cyprus.

The applicant's complaints were endorsed by the Government of Cyprus, which intervened in the case as a third party.

Under Article 5(1) of the Convention the applicant complained that she had been deprived of her liberty in being forcibly restrained and held in a police station against her will. Both the applicant and the third party intervener argued that this deprivation of liberty could not be justified under Article 5(1), as it could not be seen to be necessary, and furthermore, she was not crossing any international boundary and the authorities which detained her were not lawful authorities with the power to arrest within the Republic of Cyprus.

Further the applicant and the third party intervener complained that no attempt had been made to comply with the requirements of Article 5(2).

The applicant complained, together under Articles 9, 10 and 14, that her treatment had been intended to discourage her from teaching at the Greek Cypriot Elementary School and was part of a more general policy of putting pressure on all enclaved Greek Cypriots to leave the Karpas region. She noted, in reference to this, that religious symbols had been taken from her and that the Government had not put forward any evidence or argument as to why the confiscated materials could have been thought to incite racial hatred, nor had it brought them before the Court.

1 Quoted in *Foka v. Turkey*, 28940/95, paragraph 25.

The applicant complained that her public humiliation, intrusive search and the confiscation of her belongings breached her right to respect for her home and private life under Article 8.

Held

Article 3

The Court held that there had been no violation of Article 3. In reaching this conclusion it took as its evidence only the report of the UN doctor who examined the Applicant on 31 January 1995, and found merely 'scratches' on her back and right calf. The Court held firstly that, given the time intervening between the incident and the medical examination, it was not possible to conclude that the scratches had been sustained during the incident, and secondly, that if they had been, they were nonetheless not serious enough to suggest that the police officers had used excessive force.

Examining the other parts of her complaint, the Court held that the intimidation of being taken forcibly to the police station was not severe enough to engage Article 3 and that her allegations of having stones thrown at her house were unsubstantiated.

The Court did not comment on the applicant's complaint that there had been no investigation and that there were no remedies available to her in northern Cyprus.

Article 5

The Court held that the applicant had been deprived of her liberty within the meaning of Article 5 because, notwithstanding the fact that she could not have been held in the police station for more than a few hours, she was taken there by force and against her will.

In examining whether the authorities had complied with the requirements of Article 5(1), the Court dismissed the applicant's argument that her treatment was not 'prescribed by law' because she was not crossing an international boundary and the 'TRNC' authorities were not lawful authorities in the Republic of Cyprus. The Court referred to its Judgment in *Cyprus v. Turkey* (25781/94) where it had held that, in the interests of their inhabitants, the laws and authorities of *de facto* entities cannot be ignored by international institutions and courts.

Therefore it held that in this instance it was necessary to uphold the domestic laws of the 'TRNC' and found that the authorities' actions had been prescribed by law and the applicant had provided no evidence that they had acted arbitrarily. Further, it held that the applicant should have been aware of the reasons for her arrest since, both at the crossing point and again at the police headquarters, officers had requested to search her bag and she had refused.

The Court therefore held that there had been no violation of Article 5(1) or 5(2).

Articles 9, 10 and 14

The Court decided to examine the applicant's complaints under Articles 9, 10 and 14 primarily under Article 10. It considered that the applicant's freedom of expression had been interfered with within the meaning of Article 10 due to the confiscation of her belongings. It held that the Government had failed to produce any evidence that the confiscated materials would incite racial

hatred, nor that their confiscation answered a pressing social need. Therefore the Court found a violation of Article 10.

The Court held that, having found this violation, it was not necessary to examine the applicant's complaints under Articles 9 and 14.

Article 8

The Court did not consider it necessary to examine whether there had been a breach of Article 8.

Commentary

It seems likely that the reason both for the lack of any domestic remedy and for the Court's failure to find a violation of Article 3 in this respect is the fact that 'TRNC' is an illegal *de facto* entity rather than a state. This creates an ambiguous legal position both for the enclaved Greeks living in 'TRNC' and also for 'TRNC' itself in relation to other states and international institutions. The Court attempted to remove this ambiguity in this judgment, holding that the laws of *de facto* entities must be upheld by the Court in order for it to expect an entity to protect the rights of its population.

However a level of ambiguity remains, because the Court does not apply this position evenly in its judgment. The actions of officials in applying customs legislation of 'TRNC', which the applicant found to be oppressive, were held by the Court to be 'in accordance with law'. Conversely, the law requiring 'TRNC' to protect its population from the abuse of power by its authorities (i.e. the right to a domestic remedy for breaches of the Convention) was ignored by the Court. This is ironic, since the very reason that the Court gives for upholding the laws of the 'TRNC' is the protection of the Convention rights of its population.

Freedom of assembly and association

Saya and Others v. Turkey

(4327/02)

European Court of Human Rights: Judgment dated 7 October 2008

Ill-treatment - failure to conduct an effective investigation - freedom of assembly - unlawful arrest - lack of legal assistance whilst in custody - Articles 3, 5, 6 and 11 of the Convention.

Facts

There were 11 applicants in these proceedings: Mr Şeyho Saya, Mr Hasan Ölgün, Mr Çetin Taş, Mr Müslüm Atasoy, Ms Zöhre Taş, Mr Akın Doğan, Mr Nedim Çifçi, Ms Hediye Kilinç, Mr Ali Murat Bilgiç, Mr Bahattin Barış Bilgiç and Ms Zeynep Saya. The applicants are Turkish nationals born between 1961 and 1975, and live in Adıyaman.

On 30 April 1999, the local governor authorised May Day celebrations in the Adıyaman amphitheatre. On 1 May 1999, a group of people, the applicants included, gathered at a nearby

meeting point, before walking to the amphitheatre for the celebrations. On the way to the amphitheatre, the group was stopped by police officers. Members of the group informed the officers they had obtained prior authorisation, and attempted to continue the march. The police officers intervened in an attempt to disperse the group. In the alleged incident the officers were said to have utilised force, causing the applicants to suffer injuries. Thirty-eight people were arrested, including the applicants. They were taken to the local state hospital for examination. Medical reports for six of the applicants stated that they had suffered a range of injuries, including scratches, tenderness and pain, bruises, and a possible rib fracture. For the remaining five applicants, the medical reports stated that there were no physical signs of ill-treatment. The applicants were taken into custody then released the next day.

In May 1999, the applicants filed criminal complaints with the local State prosecutor against the police officers involved. The complaints were transferred to the Adiyaman Provincial Administrative Council. On 1 June 1999, the local State prosecutor made a decision not to prosecute 70 of the demonstrators, including the applicants. On 16 February 2000, the provincial administrative council refused to initiate criminal proceedings against the accused police officers, on the basis that there was insufficient evidence.

The applicants appealed to the Supreme Administrative Council. On 14 June 2001, the Council upheld the decision at first instance.

Complaints

Relying on Article 3, the applicants complained that they had been subjected to excessive and disproportionate force during their arrests, and their allegations of ill-treatment were not examined by an independent and impartial authority.

Relying on Article 11 (right to freedom of assembly and association), the applicants complained that the police intervention during their march amounted to a violation of their freedom of assembly.

Relying on Article 5 (right to liberty and security) and Article 6 (right to a fair trial), the applicants complained that they were unlawfully arrested and deprived of their right to legal assistance while in custody.

Held

Article 3: Allegations of ill-treatment

The Court noted that Article 3 must be supported by appropriate evidence on the part of the applicants. When assessing the strength of the evidence the standard of proof applied was 'beyond reasonable doubt'. The Court considered that such proof may be satisfied by the 'coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact'. Furthermore, a complaint under this Article required a 'particularly thorough scrutiny'.

For six of the applicants, the Court noted that the medical reports at the material time did not give any indication of signs of ill-treatment. In addition, the applicants did not submit further evidence to the Court in support of their complaint. In conclusion, the Court found that there

was no evidence to show that these six applicants were injured during their arrests. The Court dismissed their complaints for violation of Article 3, on the basis that the claims had not been substantiated.

For the remaining five applicants, the Court found it undisputed that the applicants had suffered injuries resulting from the use of police force during the incident. The injuries suffered were corroborated by medical reports. Therefore, the discharge of the burden of proof rested with the State to demonstrate that the use of force was not excessive.

The Court noted that several police officers had been deployed to secure the area, after the applicants had obtained authorisation to conduct the May Day celebrations. Therefore, it could not be said that the police were called upon to react without prior preparation. The Court also gave particular weight to the findings of the local State prosecutor, who found that the group did not present a danger to public order and did not engage in acts of violence, thus deciding not to prosecute the applicants.

The Court noted that it was undisputed that the injuries found on the applicants were caused as a result of use of force by police during the incident on 1 May 1999. It concluded that the burden, therefore, was on the state to prove that the use of force was not excessive. It found that the State had failed to submit convincing or credible arguments to discharge this burden of proof. And so the applicants had been denied the right to prohibition of ill-treatment, in breach of Article 3.

Failure to conduct an effective investigation

The Court noted that the applicants' complaints of ill-treatment had been transferred to the provincial administrative council, which purported to find that there was no evidence in support of the allegations, and decided not to institute criminal proceedings against the police officers involved.

The Court reiterated its findings in previous cases that an investigation carried out by an administrative council cannot be regarded as independent, as 'they are chaired by the governors or their deputies, and composed of local representatives of the executive, who are hierarchically dependent on the governor, an executive officer linked to the very security forces under investigation.'

Therefore, the Court found that the State had failed to carry out an effective and independent investigation into the applicants' allegations of ill treatment. It concluded that the State was in violation of Article 3, procedural aspect.

Article 11

The Court noted that under Article 11, an interference with the right to freedom of assembly is in breach unless it is 'prescribed by law', in the pursuit of a legitimate aim, and 'necessary in a democratic society'.

The Court accepted that the existing State domestic laws provided a legal basis for interference with the right to freedom of assembly. It also accepted the State's argument that the interference pursued the legitimate aim of preventing public disorder.

In relation to whether the interference was ‘necessary in a democratic society’, the Court noted that, as a fundamental principle, the State authorities have a duty to take appropriate measures regarding lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens. Moreover, the State must refrain from applying unreasonable, indirect restrictions on this right. Finally, the Court stated that although the essential object of Article 11 was to protect the individual against arbitrary interference by public authorities, additional positive obligations may be required to secure effective enjoyment of this right.

The Court noted that the applicants had obtained prior authorisation to hold the celebrations, and that the police had utilised force without prior warning to disperse the march. It again noted the findings of the local State prosecutor.

The Court held that where demonstrators do not engage in violent acts, it is important for the State’s public authorities to show a ‘certain degree of tolerance’ towards peaceful gatherings, so that Article 11 is not ‘deprived of all substance’. Therefore, the forceful intervention of police in the present case was disproportionate, and unnecessary for the prevention of disorder.

The Court concluded that the applicants had been denied the right to freedom of peaceful assembly, in breach of Article 11.

Articles 5 and 6

The Court, having examined the materials submitted, dismissed the applicants’ complaints for violation of Articles 5 and 6 on the basis that an arguable claim had not been established.

Right to enjoy property

Fener Rum Patrikliği (Ecumenical Patriarchate) v. Turkey
(14340/05)

European Court of Human Rights Chamber: Judgment dated 8 July 2008

Right to fair trial – enjoyment of property

Facts

The applicant, Fener Rum Patrikliği (the Ecumenical Patriarchate), is an Orthodox church in Istanbul. It currently brings together and represents the Orthodox minority in Turkey. It is represented by His All Holiness the Ecumenical Patriarch Bartholomew I.

In January 1902, the Ecumenical Patriarchate acquired property using its own capital. The property consisted of a 23,255 m² piece of land on the top of the main hill on the island of Büyükada (Istanbul), on which stood a main five-storey building and a secondary two-storey building.

In 1903 a foundation of the Orthodox minority, the ‘Foundation of the Büyükada Greek Orphanage for Boys’ (‘the Orphanage’), was given the use of the property. When the Foundations Act entered

into force on 13 June 1935 the legal personality of the Orphanage was officially recognised and the property concerned was mentioned in the declaration registered by it in 1936. In 1964, for safety reasons, the Turkish authorities ordered the Orphanage to vacate the premises. The Ecumenical Patriarchate maintains that it took over the possession and management of the property again that same year.

On 22 January 1997 the Directorate General for Foundations issued a decision to the effect that the Orphanage was a 'defunct' foundation. The decision stated, among other things, that the Orphanage's governing body had been dismissed and that the Directorate General for Foundations had taken over its management. The Orphanage appealed in April 1997, seeking the annulment of the decision. In November 2003 the Supreme Administrative Court upheld the dismissal of the appeal. An application for rectification lodged by the Orphanage is still pending.

On 16 March 1999 the Directorate General for Foundations began proceedings to have the applicant's title annulled and the property re-registered in the name of the Orphanage, which since 1997 had been under the management of the Directorate. In December 2002 the District Court ordered the disputed property to be registered in the name of the Orphanage, noting, among other things, that the Patriarchate had carried out no maintenance work on the property, which was a historical monument of international importance. The applicant appealed against that judgment, which was set aside by the Court of Cassation in September 2003 for procedural irregularity.

In February 2004, however, the District Court again annulled the applicant's title to the property and ordered it to be registered in the name of the Orphanage. The Court of Cassation upheld that decision. It held that since the declaration registered by the Orphanage in 1936, the property had belonged to the Orphanage and no longer to the applicant.

Complaints

The applicant church alleged in particular that by ordering the registration of its real estate in the name of the Orphanage, under the management of the Directorate General for Foundations, the domestic courts had breached its right to the peaceful enjoyment of its possessions. It relied on Article 1 of Protocol No. 1 (protection of property).

Relying on Article 6 of the Convention in conjunction with Article 1 of Protocol No. 1, the applicant alleged that the right to a fair trial was not upheld, citing errors in the domestic ruling and a breach of the right to defend oneself, with regards to the rejection of the appeal.

Furthermore, relying on Article 14 of the Convention in conjunction with Article 1 of Protocol 1, the applicant alleged that the ordering of the registration of its real estate in the name of the Orphanage resulted in the applicant being denied the enjoyment of its property and that the motivation behind this was discrimination against the Orthodox minority.

Held

Article 1 of Protocol No. 1

The domestic courts annulled the applicant church's title to the property in question and decided to transfer it to the Orphanage. The applicant was thus deprived of its possession. The Court

accepted that the annulment of the title was based on the Foundations Act of 13 June 1935. The aim of that Act was to protect the public interest.

The Court indicated that it was not in dispute that the property in question had been acquired by the applicant church with its own capital. Even though, immediately after its acquisition, the property had been earmarked for a specific usage, the applicant church had always been regarded as its owner. Moreover, only part of the property had been concerned by that usage.

The Court pointed out that the ownership of the property had not been called into question by the courts or the administrative authorities, neither after the acquisition in 1902 nor after the declaration of 1936, until 1997 when the action for annulment of title was brought. The ownership had thus remained unchallenged from 1964, when the property was vacated for safety reasons, to 1997. From 1964 onwards, the use of the property by the Orphanage had in fact virtually ceased.

Since it first obtained the use of the property in 1903, the Orphanage had never claimed to be its owner, neither at the time it registered its declaration in 1936 nor at a later date. That claim was not made until it had been considered 'defunct' by the Directorate General for Foundations in 1995, when the Directorate, acting on behalf of the Orphanage, claimed ownership based on the 1936 declaration. However, the declaration had stated that the Orphanage ran the 'Greek Orphanage for Boys' but not that it was the 'owner' of the premises.

In the light of those observations, among others, the Court found that, even supposing that the property in question had been set aside for a specific usage over a long period of time, there was nothing to suggest that that usage had had the effect of nullifying the original title.

In the Court's view, the Turkish authorities were not entitled to deprive the owner of its possession without providing for appropriate compensation. The applicant church, in the present case, had not received any compensation at all. In those circumstances, the applicant having had to bear an individual and excessive burden, there had been a violation of Article 1 of Protocol No. 1.

Articles 6 and 14

The Court found that the complaints under these Articles were admissible. However, having regard to its finding in respect of Article 1 of Protocol No. 1, the Court considered that it was not necessary to examine the other complaints separately.

Prohibition of discrimination

Sampanis and Others v. Greece

(32526/05)

European Court of Human Rights: Judgment dated 5 June 2008

Prohibition of discrimination – right to education – right to an effective remedy – Articles 13 and 14 of the Convention and Article 2 of Protocol No. 1.

Facts

The 11 applicants live in the Psari authorised residential site near Aspropyrgos, Greece. They are Greek nationals, of Roma origin

The applicants' case arises from the authorities' failure to provide schooling for the applicants' children in 2004 and 2005. The children were placed in special classes, next to the primary school building. The applicants claim they were segregated due to their Roma origin.

In August 2004 the Minister of Education issued a press release about the importance of integrating Roma children into the national education system. Following this statement, on 10 September 2004, the Secretary of State for the education of persons of Greek origin and intercultural education visited the Roma camps in Psari to make sure that all school-age Roma children were enrolled at school.

In accordance with the instructions of the Secretary of State, the applicants and other Roma parents visited the Aspropyrgos primary schools to enrol their children. The Government claimed that the parents enquired about the necessary documents for enrolment, but did not attempt to enrol their children. Eventually, 23 Roma children, including those of the applicants were enrolled for the 2005-2006 school year.

From the first day of the school year, non-Roma parents blockaded the school in protest against the admission of the Roma children to the primary school. The parents demanded that the Roma children be taught at another facility. To prevent harm to the children of Roma origin, the police intervened on multiple occasions.

The applicants claimed that they were pressured into signing a statement drafted by the district school teachers, stating that they wanted their children transferred to a separate facility. From 31 October 2005, the applicants' children were given classes in another building.

However, problems occurred in these separate, prefabricated facilities that housed the three preparatory classes. In April 2007 there was a fire, and in September 2007 a new school was set up but not opened due to infrastructure problems.

Complaints

The applicants relied on Article 14 (prohibition of discrimination) taken together with Article 2 of Protocol No. 1 (right to education) and Article 13 (right to an effective remedy). They claimed that because of their Roma origin, their children had been discriminated against and deprived of the right to education. The applicants asserted that the discrimination was without any objective or reasonable justification.

Held

Article 14

In considering the evidence justifying a presumption of discrimination, the Court noted that the separate preparatory classes were attended exclusively by Roma children. The separate classes were not in place before 2005, when the district schools became overcrowded.

The Court noted that though the racist incidents that took place outside the Aspropyrgos primary school in 2005 were not imputed to the Greek authorities, it could be presumed that the incidents influenced the decision to place the pupils of Roma origin in an annexe of the primary school. The Court found a strong presumption of discrimination, and placed the burden to disprove this on the Government.

Regarding the existence of objective and reasonable justification for the Government's discrimination of the Roma pupils, the Court observed that the applicants were not explicitly prevented from enrolling their children in school for 2004-2005. However, the parents had expressed their wish to enrol their children.

The Court observed that the authorities should have facilitated the integration of the Roma children, in light of the Roma community's vulnerability. Greek law specifically recognises the Roma community's situation and seeks to facilitate the school enrolment procedure for Roma children. For example, legislation provides that pupils can be enrolled at primary school by means of a simple declaration.

The Court observed that the applicants, as members of an underprivileged and often uneducated community, were not able to assess all the aspects of the situation and consequences following from consenting to having their children transferred to separate facilities. The Court observed that the right to be free from racial discrimination cannot be waived.

Though the authorities attempted to educate the Roma children, the segregation of those children resulted in discrimination against them. As such, the Court held that Greece had violated Article 14 of the Convention taken together with Article 2 of Protocol No. 1 with respect to each of the applicants.

Article 13

The Court found that the Greek Government had not offered evidence of any effective remedy to redress the alleged violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1. Therefore the Court held that there had been a violation of Article 13.

Right to free elections

Georgian Labour Party v. Georgia

(9103/04)

European Court of Human Rights: Judgment dated 8 July 2008

Applicant political party complaining of disenfranchisement of significant section of the population – whether applicant a victim – whether applicant's right to a free and fair election infringed – Article 14 of the Convention and Article 3 of Protocol No. 1.

Facts

On 20 November 2003, the Georgian Central Electoral Commission (the CEC) announced the final results of the votes in the regularly scheduled parliamentary election. Due to numerous instances of ballot fraud reported by election observers, the Saakashvili-National Movement and the United Democrats refused to accept the election results.

Supported by the general populace, these parties called for the President's resignation. Opposition forces broke into the Parliament building when the newly elected Parliament convened for its first session. They disrupted the President's inaugural speech and ousted the Members of Parliament.

On 23 November, the President resigned. An interim President of Georgia was appointed, as provided for by the Constitution and on 25 November, the Supreme Court of Georgia annulled the CEC vote tally.

The date of the repeat parliamentary election was set for 28 March 2004 by virtue of Ordinance 167/2003, issued by the CEC chairperson on 2 December. The Tbilisi Regional Court dismissed the applicant party's challenge of that Ordinance on the basis that it lacked victim status. On 26 December 2003 that dismissive judgment was quashed by the Supreme Court. Since the applicant party was running for election, it held, there was a direct and consequential link between its interests and the decisions of the CEC. The party did therefore have victim status. The Supreme Court held, however, that the applicant's claim was manifestly ill-founded.

On 7, 9 and 12 December 2003, the CEC issued regulations requiring voters to attend electoral precincts in order to fill out particular forms that would enable them to cast ballots during the presidential election. The applicant party, together with other opposition parties, challenged the lawfulness of those regulations in court. This claim was dismissed as unsubstantiated by the Regional Court on 15 December 2003. Failing to prove any direct and specific harm the preliminary voter registration procedure had caused to its interests, the court held that the applicant party lacked victim status.

The repeat election, based on the system of proportional representation, was held on 28 March 2004. Electoral commissions, the courts and the CEC subsequently received numerous complaints about irregularities on election day. On 2 April, the CEC issued Ordinance 82/2004, which annulled the election results for all the Precinct Electoral Commissions (PECs) in the Khulo and Kobuleti electoral districts where 42,011 and 17,263 voters were registered respectively. This Ordinance did not indicate which legal provision it had acted under in making the annulment decision.

A new date for the ballots was set and voters were expected to pay preliminary visits to the precincts in order to ensure that their names were on the lists. On election day for Khulo and Kobuleti - 18 April 2004 - the polling stations failed to open. On the same day, the CEC tallied the votes in the repeat election of 28 March. It stated that 1,498,012 votes had been cast, while 2,343,087 voters had registered. The applicant party had received 6.01 per cent of the vote, which was not enough to clear the 7 per cent threshold to obtain seats in Parliament.

The Chairperson of the CEC concluded that even if the election had been conducted in the districts of Khulo and Kobuleti it would not have affected the final results. Consequently the Chairperson's proposal to approve the vote tally was accepted by a majority vote.

On 20 April, the applicant issued proceedings in the Supreme Court seeking an interim measure restraining Parliament from convening, pending its challenge to the Chairperson's accepted proposal. The Supreme Court decided that the repeat election could be considered as having been held, since, according to the vote tally, more than a third of the total number of voters had taken part in it.

On 22 April 2004, the newly-elected Parliament convened for its first session. The applicant party's chairman, acting as a private individual, commenced proceedings in the Constitutional Court claiming that the system of preliminary voter registration, the disenfranchisement of the Khulo and Kobuleti constituencies and the Presidential control of the electoral administration had infringed the constitutional principle of free and fair elections. The claim was declared inadmissible.

Complaints

The applicant party alleged violations of its rights under Article 3 of Protocol No. 1 and Article 14 of the Convention during the repeat parliamentary election of 28 March 2004, as a result of domestic electoral mechanisms and the *de facto* disenfranchisement of around 60,000 voters in two electoral districts.

Held

Article 3 of Protocol No. 1

When electoral legislation or the measures taken by national authorities restricted individual candidates' right to stand for election through a party list, the relevant party, as a corporate entity, could claim to be a victim under Article 3 of Protocol No. 1, independently of its candidates. The Court therefore held that the applicant, as a political party, could validly claim victim status for the purposes of Article 34 of the Convention.

Furthermore, the Khulo and Kobuleti voters' inability to participate in the repeat parliamentary election had to be questioned under the principle of universal suffrage. The exclusion of any groups or categories of the general population had to be reconcilable with the underlying principles of Article 3 of Protocol No. 1, including that of universal suffrage. Any unjustified departure from that principle risked undermining the democratic validity of the legislature thus elected, and the laws it promulgated.

What was at stake in the present case was not the applicant party's right to win the repeat parliamentary election but its right to stand freely and effectively for it. The party was entitled under Article 3 of Protocol No. 1 to rely on the electorate of Khulo and Kobuleti, irrespective of its chances to obtain a majority of their votes. Disenfranchisement of voters, especially if it is an arbitrary act, can impede the effective exercise by an election candidate of its right to stand for election.

As regards the examination of the compliance of the impugned disenfranchisement with the principles of Article 3 of Protocol No. 1, the Court focussed on whether there had been arbitrariness or a lack of proportionality in the restriction in question. Pursuant to the implied limitations under the Article, respondent States may always justify interference with rights with any legitimate aim that can be proved to be compatible with the principles of the rule of law and the general objectives of the Convention. In the instant case, the CEC had cancelled the electoral district results for Khulo and Kobuleti in their entirety without hearing testimony, investigating the circumstances in each precinct or examining the electoral material. By annulling the election results, the CEC had not only exceeded its authority but had also acted in a manner that excluded the possibility of resorting to legal investigative measures and remedies. There had been no reasoned, convincing explanation for the CEC's annulment decision, nor had there been sufficient explanation as to why the CEC, without having examined the electoral material, had come to the conclusion that all of the results from Khulo and Kobuleti merited annulment.

The evidence adduced by the authorities had not provided a ground for which the State could be absolved from its responsibility under Article 3 of Protocol No. 1 with respect to the failure to conduct the polls in Khulo and Kobuleti on 18 April 2004. Accordingly, in the instant case, the CEC's decision to annul the election results in the Khulo and Kobuleti electoral districts had not been in a transparent and consistent manner.

The CEC had not adduced relevant and sufficient reasons for its decision, nor had it provided adequate procedural safeguards against an abuse of power. In deciding not to resort to additional measures aimed at organising elections in the Khulo and Doublet districts after 18 April 2004, the CEC had taken a hasty decision to terminate the country-wide election without any valid justification. The exclusion of those two districts from the general election process lacked a number of rule of law requisites and resulted in a *de facto* disenfranchisement of a significant section of the population. Accordingly, there had been a violation of the applicant party's right to stand for election under Article 3 of Protocol No. 1.

Article 14

In the light of the material in its possession, the Court did not find any evidence which might arguably suggest that either the challenged electoral mechanisms or the events which took place in Khulo and Kobuleti, were exclusively aimed at the applicant party and did not affect the other candidates standing for that election. The Court therefore found that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No.1.

Yumak and Sadak v. Turkey

(10226/03)

European Court of Human Rights: Judgment dated 8 July 2008

Election threshold – free expression of opinion - Article 3 of Protocol No. 1.

Facts

Mehmet Yumak and Resul Sadak are Turkish nationals born in 1962 and 1959 respectively, and living in Şırnak (Turkey).

The application concerned Turkish electoral legislation, which required a party to cross a threshold of 10 per cent of the votes validly cast nationally in order to obtain seats in the National Assembly.

In November 2002 the applicants stood as election candidates for DEHAP (Democratic People's Party) in the department of Şırnak. DEHAP obtained 45.95 per cent of votes in the department (a total of 47,449), but failed to obtain 10 per cent of the votes on a national level. The applicants were not elected to seats in the National Assembly following the provisions of Article 33 of Law no. 2839, which provides that 'in a general election parties may not win seats unless they obtain, nationally, more than 10 per cent of the votes validly cast.'

The case was declared partially admissible on 9 May 2006. On 30 January 2006 the Court concluded by five votes to two that there had been no violation of Article 3 of Protocol No. 1. On 9 July 2007 the applicant's request to have the application heard in front of the Grand Chamber was accepted.

Complaints

The applicants alleged that the imposition of an electoral threshold of 10 per cent in parliamentary elections interfered with their free expression of opinion with regard to their choice of the legislature. They relied on Article 3 of Protocol No. 1.

The applicants submitted that the electoral threshold was based on the situation in Turkey that followed the 1980 military regime and that its aim was to depoliticise society by installing an authoritarian government. Further, they rejected the argument that the threshold served the legitimate aim of ensuring governmental stability. A study of the historical background in Turkey showed that an electoral system without a threshold could also enable solid governments to be formed. The applicants also alleged that the national threshold of 10 per cent was high, disproportionate and arbitrary, and that it impaired the very essence of the right guaranteed by Article 3 of Protocol No. 1.

The applicants also stressed that as a result of the threshold the parties from the south-eastern part of the country did not have a single Member of Parliament, although they could count on about two million votes. They submitted that the electoral threshold had been fixed in particular to block the representation of the Kurdish people of the region.

Held

By 13 votes to four, the Court decided that there had been no violation of Article 3 of Protocol No. 1.

While noting that it would be desirable for the threshold complained of to be lowered and/or for measures to be introduced to ensure the best representation of the various political sympathies

of the population, the Court considered it important to leave sufficient latitude to the national decision-makers in this area.

The Court was not convinced that the threshold had the effect of impairing the essence of the rights secured to the applicants by Article 3 of Protocol No. 1. Numerous proposals detailing ways to correct the threshold's effects were being made both in Parliament and among leading figures of civil society. The Court acknowledged these bodies' attempts to balance the principles of governmental stability, which the threshold was designed to ensure, as well as fair representation.

The Court did not consider that Turkey had overstepped its wide margin of appreciation with regard to Article 3 of Protocol No. 1 and accordingly, there had been no violation of this Convention provision.

C. UK Cases

High Court of Justice

Limbu and Others v. Secretary of State

[2008] WLR (D) 304

High Court: Judgment dated 30 September 2008

Military Law - armed forces - terms of service - Gurkha veterans refused indefinite leave to remain in United Kingdom - Government policy applying restrictive express factors - whether irrational.

Facts

The first five claimants were veterans of the Brigade of Gurkhas and the sixth was a widow of such a veteran. Each applied for entry clearance to come to the United Kingdom for settlement on the basis of past military service with the Crown. In each case that service came to an end before 1 July 1997.

In July 1997, Hong Kong was returned to Chinese sovereignty and this prompted the relocation of the Brigade's Headquarters to the United Kingdom. This meant that from 1997 on, the Gurkhas were based in the UK and returned there between operational tours. In 2004, a change in the immigration rules meant that non-British soldiers who served in the British army had the opportunity to apply for indefinite leave to remain if they had not done so on discharge. However this new opportunity was not granted to all Gurkhas, who were only able to apply for indefinite leave to remain if they were discharged after 1 July 1997, as prior to that period they had not formed sufficient ties to the UK.

Each was refused entry clearance because they did not meet one or more of the terms of the Diplomatic Service Procedures (DSP) discretionary policy as set out in chapter 29.4 of the general instructions.

Complaints

Each applicant appealed to the Asylum and Immigration Tribunal on the basis that the decision was not in accordance with the law and that it was contrary to the Human Rights Act 1998.

The claimants challenged the legality of the DSP discretionary policy in two different ways. First, they claimed that the Secretary of State for the Home Office unlawfully discriminated against Gurkha veterans without any sufficient justification by only extending a right to Gurkha veterans to claim indefinite leave to enter or remain in the United Kingdom to those who were discharged after 1 July 1997, and by continuing to exclude them from the right to obtain settlement after four years of pre-July 1997 service, as provided at this time under the Armed Forces Concession (AFC). The AFC states in its 1987 version that 'four years service by those without the right of abode may count as approved employment for the purpose of any application for indefinite leave'. For this first argument, the claimants relied on Article 14 of the ECHR. Secondly, the claimants argued that even if the right to indefinite leave could lawfully be limited to Gurkha veterans who were discharged after 1 July 1997, it was irrational for the Home Secretary to rely on a policy where discretion could only be exercised in favour of indefinite leave to remain for Gurkhas discharged before July 1997 on the basis of various restrictive express factors.

Held

Ground 1: Discrimination

The Court decided to test the legality of the policies under challenge with reference to Article 14 of the ECHR.

The Court considered the first ground of the applicants' complaint, that the Home Office had unlawfully discriminated against them, to be unfounded.

The Court considered that the situation of the Gurkhas discharged pre-1997 was not sufficiently similar to non-British soldiers to have required equal treatment in the application of the AFC concession from 1980, which is the year the AFC dates back to, up until 1997.

In reaching this conclusion, the Court firstly argued that the recruitment of Gurkhas into the British Army was a historical exception to the general rule that only British subjects should so serve. It was only by reason of special arrangements, including the retention of their status as aliens during service, that they were able to be recruited at all.

Secondly, the Court asserted that it was only by recruitment into a dedicated Brigade of Gurkhas that such soldiers could become a part of the British Army in the first place. The Home Office was entitled to attach weight to the Ministry of Defence view that immigration policies should not undermine the distinct identity of the Brigade or Gurkhas that would ultimately impact on the ability to continue to recruit.

Thirdly, the ethos of the Brigade was based on retention of the Nepali language, culture and religion, and the assumption that continued links with Nepal were of importance. This was reflected in the special leave arrangements and the practice of discharge in Nepal.

Fourthly, differential pension rates were one aspect of the special Terms and Conditions of Service (TACOS) of the Brigade of Gurkhas that had previously been held by the Court of Appeal not to be discriminatory on the grounds of nationality. Finally, the Court highlighted that people who were not physically in the United Kingdom when discharged from service were not in the same position as those who were.

Ground 2: Rational criteria for discretion for those discharged pre-1997

The Court questioned whether the policy was sufficiently clear and consistent as to be a lawful way of promoting its objectives.

The Court stated that there is a lack of clarity or inconsistency in the policy determining indefinite leave to remain for the Gurkhas. The Court went on to state that it would be impossible for an Immigration Judge to determine whether the decision had been in accordance with the law where the 'law' was so unclear as to permit conflicting decisions and where an Entry Clearance Officer (ECO) could have acted lawfully in accordance with policy by either granting or refusing entry clearance in an identical case. It is important that ECOs know precisely what discretion is being afforded to them, and for the Asylum and Immigration Tribunal (AIT) to know when the ECOs are acting in accordance with the law and when they are not.

The Court went on to say that where the minister has explained why the policy has been brought into being and what it is intended to achieve, the Court's scrutiny may extend to consider whether its terms as understood and applied by officials have illogically and irrationally frustrated its purpose.

For these reasons, the Court accepted the second ground of complaint. In its decision, the Court was not determining what the elements of a rational future policy had to be, it was merely declaring that given the context, objects and purposes of the discretionary Gurkhas policy, the instructions given to entry clearance officers were unlawful and needed urgent revisiting. The Court further stated that 'it is for the Home Office to determine what should be done in response to this judgment and take political responsibility for the outcome where it is answerable to the electorate' and further that 'rewarding long and distinguished service by the grant of residence in the country for which the service was performed would... be a vindication and an enhancement of the Military Covenant.'

Court of Appeal – Criminal Division

R. v. O.

[2008] All ER (D) 07 (Sep)

UK Court of Appeal, Criminal Division: Judgment dated September 2008

Criminal law – immigration – fair trial – European Convention on Human Rights – Council of Europe Convention on Action against Trafficking in Human Beings.

On 29 February 2008, the defendant was arrested at Dover docks on board a coach bound for France. She produced a Spanish identity card containing a picture of a woman that was clearly not her, maintaining that it was her ID. The following morning the defendant admitted that the identity card was not hers, maintaining that she had been attempting to visit an uncle living in France and had obtained the false identity card having lost her own passport. She then gave a false date in 1985 as her date of birth. On 12 March 2008, the defendant informed her solicitors that her date of birth was 10 December 1991 and claimed to have entered the UK in order to flee her father who had attempted to force her into an arranged marriage with a 63-year-old man. Following an interview with the defendant, an organisation supporting victims of human trafficking sent a letter to counsel, stating that the defendant had been a victim of a sex-trafficking organisation.

On 17 March 2008, the defendant pleaded guilty before the Crown Court to an offence of possessing a false instrument with intent to use as her own, but had made no mention of trafficking allegations in a meeting with counsel prior to her entering that plea. Thus, neither the trafficking claims nor discrepancies concerning the defendant's age had been investigated.

A sentence of eight months' imprisonment was imposed. The defendant appealed, submitting that her conviction was unsafe.

Complaint

The applicant submitted that her conviction was unsafe, *inter alia*, on the bases that the Crown, the court and the defence lawyers had conducted the proceedings without having had regard to two protocols ('the protocols') relating to the prosecution for immigration offences of defendants and/or young persons who might have been the victims of trafficking. Those protocols had been devised to give effect to the protections contained in the Council of Europe Convention on Action against Trafficking in Human Beings, prior to ratification by the UK. She also claimed that she could have had a defence of duress available to her as a victim of trafficking, but that possibility had not been investigated. Further, in the light of the fact that it had been submitted to the Crown Court that she was 17, she claimed the case should have proceeded (if at all) in the youth court. Finally, she stated that her defence lawyers had taken no steps to investigate whether she had been a victim of trafficking.

Held

The Court of Appeal, Criminal Division, considered that those who prosecuted defendants charged with immigration offences who might be victims of people-trafficking must be aware of the protocols in relation to such victims enshrined in the Code for Crown Prosecutors; defence lawyers must make inquiries if there was credible material showing that their client might have been such a victim, especially if the client was young.

The Appeal was allowed and the applicant's conviction was quashed. It was hoped that the shameful circumstances of the instant case would not be repeated.

D. Supreme Court of the United States of America

Boumediene v. Bush

The Supreme Court of the United States: 12 June 2008

Detainee rights – habeas corpus – the US Constitution and Suspension Clause.

Facts

In response to the terrorist attacks of 11 September, the United States of America Congress passed the Authorization to Use Military Force Resolution (AUMF), authorizing the President 'to use all necessary and appropriate force against those ... [who] planned, authorized, committed or aided the terrorist attacks against the United States.'² In the subsequent 'war on terror,' persons captured during military operations were transferred to the US Naval Station in Guantanamo Bay, Cuba for detention and possible war crime prosecution.

The Supreme Court, in *Hamdi v. Rumsfeld*³, held that as a necessary incident to the AUMF, the President was authorised to detain persons captured for the duration of the conflict. Combatant Status Review Tribunals (CSRTs) were then set up to assess whether detainees were eligible to be detained for the duration of the war as 'enemy combatants'.

On the same day *Hamdi* was decided, the Supreme Court held that statutory *habeas corpus* jurisdiction applied to persons held in Guantanamo. Immediately after, many petitions were filed on behalf of detainees, but Congress acted to strip courts of jurisdiction to hear detention cases.⁴

Case History

The United States Court of Appeal for the District of Columbia Circuit (the D.C. Circuit) held that the petitioners' case did not fall under their jurisdiction, or that of any other federal district court because of restrictions put in place by the Military Commissions Act (MCA). The court held that aliens held by the U.S. in a foreign country do not have a constitutional right to *habeas corpus*.

Though request for review was initially denied, the Supreme Court granted *certiorari* in June 2007. This entails that four of the nine Justices think that the circumstances described in the petition are sufficient to warrant the full court reviewing the case and the lower court's action.

Complaint

The petitioners argued that they had a constitutional right to *habeas corpus*, which was wrongly blocked by the MCA. Rights to *habeas corpus*, they asserted, can only be withheld as by the terms of the Constitution's Suspension Clause, which prohibits the suspension of *habeas corpus* except 'when in Cases of Rebellion or Invasion the public Safety may require it.'

2 P.L. 107-40, 115 Stat. 224 (2001).

3 *Hamdi v. Rumsfeld*, 542 U.S. 597, 518 (plurality opinion of O'Connor, J.).

4 See, The Detainee Treatment Act of 2005 (DTA) 542 U.S. 466 (2004); See also, the Military Commissions Act (MCA) P.L. 209-366 (2006).

The Government argued that aliens detained as enemy combatants outside the *de jure* territory of the United States are not granted constitutional rights, including the right to *habeas*, and that not granting the courts jurisdiction to hear petitioners' *habeas* claims was not in violation of the Suspension Clause.

Held

The Court began with an historical analysis of the writ of *habeas corpus*, to determine its purpose and reach. In the Court's opinion, Justice Kennedy observed the importance of the *habeas corpus* privilege as a safeguard of individual liberty. This right can only be suspended when required for public safety, as in times of war or invasion. The writ also acts as a safeguard to the separation of government powers, ensuring that the judiciary can balance the legislative and executive branches from circumventing the rule of law.

The Court observed that its jurisprudence regarding the writ was inconclusive in resolving the issue before it, 'given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age... common-law courts simply may not have confronted cases with close parallels to this one.' The length of detention for those at Guantanamo was already one of the longest in US history.

Though the US does not exercise sovereignty over Guantanamo Bay, the Court found that the Suspension Clause governs those detained there, as the 1903 lease grants complete plenary control over the territory to the US.

The Court employed a functional approach to determine the extension of its extraterritorial jurisdiction. Though precedence seemed to establish that *habeas* does not extend to enemy combatants detained abroad,⁵ the Court found this inconsistent with other cases concerning the Constitution's extraterritorial reach.⁶

The Court observed that limiting the Constitution's applicability would challenge the separation-of-powers doctrine, as the political branches would be free 'to govern without legal constraint' in a territory such as Guantanamo, where the US exercised plenary control but not legal sovereignty. Three factors were deemed to be relevant in assessing the extraterritorial scope of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner's entitlement to the writ.

In distinguishing this case, the Court observed the uniqueness of the situation of detainees in Guantanamo. First, the status of the detainees is unclear, as the petitioners deny that they are enemy combatants. Second, the US exercises considerable control over the territory in Guantanamo. The Court observed that the CSRT hearings for the detainees 'fall short of the procedures and adversarial mechanisms that would eliminate the need for *habeas corpus* review.'

5 *Johnson v. Eisentrager* 339 U.S. 763 (1950).

6 See generally the Insular Cases: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901).

In holding that the MCA does not provide an adequate substitute for habeas, the Court noted several of its deficiencies, including constraints upon detainee's access to evidence to challenge the government's case; lack of council for detainee; limiting detainee's access to classified government documents; and detainee's restrained ability to call witnesses due to restrictions on hearsay evidence.

The Supreme Court therefore held that alien enemy combatants detained at Guantanamo Bay have the constitutionally granted right of *habeas corpus*.

The Court held paragraph 7 of the MCA to be unconstitutional. The MCA does not provide an adequate substitute for *habeas*, as it limits judicial review of determinations of the petitioners' status as an enemy combatant.

The Court deemed that at a minimum, *habeas corpus* must be ensured for a prisoner 'to have a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law,' and allowing a court the authority 'to order the conditional release of an individual unlawfully detained.'

The court held that petitioners did not need to exhaust alternative remedies, but instead could immediately pursue *habeas* review in federal district court.

Commentary

The immediate result of this decision is that detainees at Guantanamo may request a federal district court review of their detention. Yet the ramifications may extend far beyond the immediate facts of this case. While the petitioners sought review of their status as enemy combatants, the Supreme Court's decision suggests that detainees may also seek judicial review regarding unlawful conditions of treatment or confinement, or to stop their transfer to another country.

Subsequent *habeas corpus* cases will raise the question of whether due process standards are being met at Guantanamo, and if the terms of detention are lawful.

Congress has thus far responded to Supreme Court decisions regarding Guantanamo detainees, and it will be worthwhile to see whether they will again attempt to limit the protections and rights afforded those detained by the United States. Congress may again attempt to provide an acceptable, alternate legal forum for detainee complaints, in an effort to keep military matters out of civilian courts.

E. International Court of Justice (ICJ)

Mexico v. The United States of America

(2008/20)

International Court of Justice: Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals*; Provisional Measures dated 16 July 2008

Capital punishment - failure to inform of right to consular access - request for compliance with previous judgment - Article 36 of the Vienna Convention - Article 60 of the Statute of the Court.

Facts and Complaints

In *Avena and Other Mexican Nationals (Mexico v. United States of America)*, the ICJ ruled that according to obligations under the Optional Protocol to the Vienna Convention on Consular Relations, the United States had violated the rights of Mexican nationals by ‘failing to inform them... of their rights to consular access and assistance.’ The Court ordered the United States to provide review of those cases ‘by means of its own choosing.’ The United States subsequently withdrew from the Optional Protocol.

On 5 June 2008 Mexico filed a request for interpretation of the judgment.

The Request stated that in the *Avena* judgment, the Court *inter alia* found that ‘the United States had breached Article 36 of the [VCCR] in the cases of 51 Mexican nationals... by failing to inform them... of their rights to consular access and assistance.’ The individuals had been arrested, tried and sentenced to death in the United States.

Mexico’s request contended that a ‘fundamental dispute’ had arisen as to the scope and meaning of paragraph 153(9) of the Court’s judgment. Article 60 of the Statute of the Court provides that, ‘In the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.’

Mexico requested provisional measures for the review and reconsideration of the petitioners’ case, which had been denied by the United States. One of the nationals, Mr Medellín received an execution date of 5 August 2008, whilst the other four nationals were due to receive theirs shortly. Mexico requested that the court stay the executions pending a final decision on its Request for interpretation.

Held

Article 60 of the Statute of the Court

The court found that both parties were in dispute about their interpretation of paragraph 153(9), and therefore the Court had jurisdiction to offer the proper interpretation. While both parties acknowledged the *Avena* judgment as an international obligation of result, they nonetheless ‘apparently hold different views as to the meaning and scope of that obligation of result, namely,

whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon all those authorities.’

Link between the alleged rights to be protected and the Request for Interpretation

The Court observed that in the *Avena* judgment, the Court ordered the United States to review and reconsider the convictions and sentences of the Mexican nationals, taking into account the violation of rights

The court indicated the following provisional measures:

- (a) The United States of America shall take all measures necessary to ensure that Mr César Roberto Fierro Reyna, Mr Roberto Moreno Ramos and Mr Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
- (b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

Finally, the Court decided that, until the Court had rendered its final judgment, it would remain seized of the matters which formed the subject of this Order.

Commentary

Mr Medellin was executed on the 5 August 2008. His case has become a focal point of contention between Mexico and the United States over the question of whether Mexicans were being denied fair trials, notably because of a lack of legal counsel available to them. Mexico opposes the death penalty and has strongly relied on the Vienna Convention on Consular Relations to lobby against the executions of the 51 Mexicans in the United States.

This case may have an important impact on human rights litigation. The US objected to the claims put forward by Mexico as being inadmissible, on the grounds that they might require changes in domestic administration of criminal justice. The US claimed that Mexico was attempting to make the ICJ ‘function as a court of criminal appeal’. However, this objection was ignored, as the US, as a signatory to a treaty, pledged to afford certain rights and limited its sovereignty. This case may have implications with greater reach than the primary issue of consular access for foreign nationals.



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

Stephen Solley QC, *Former Bar Human Rights Committee President*

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

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

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

Kate Allen, *Director Amnesty International UK*

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

Jonathan Sugden, *Turkey Researcher*

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

Can Dundar, *Journalist in Turkey*

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