

THE
KURDISH
Human
Rights

PROJECT

Legal Review



(2004) 6 KHRP LR
November 2004

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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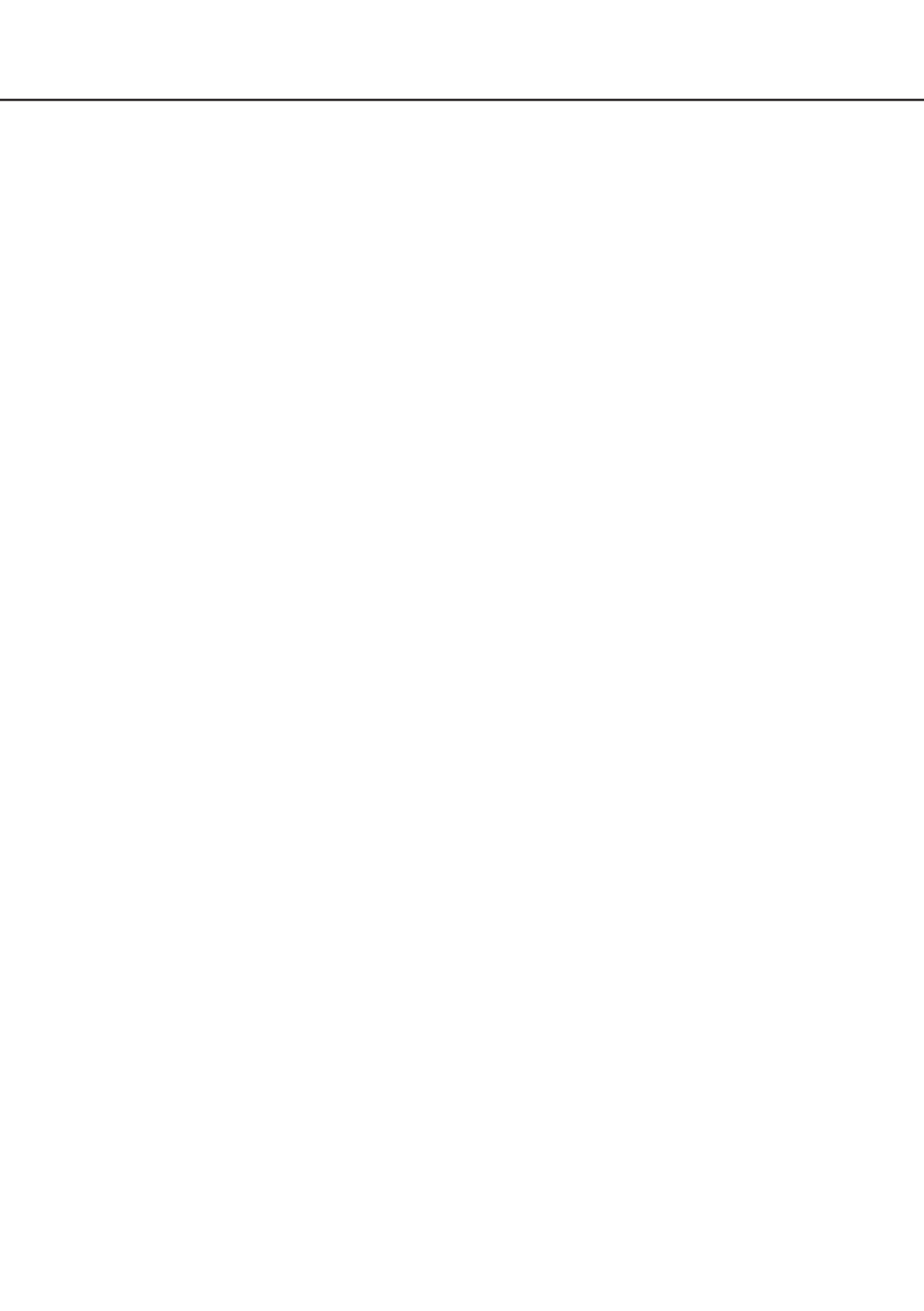
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Abbreviations

CAT	United Nations Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
The Convention	The European Convention for the Protection of Human Rights and Fundamental Freedoms
The Court	The European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	The Democracy Party (Turkey)
HADEP	The People's Democracy Party (Turkey)
ICJ	International Court of Justice
IHD	Human Rights Association, Turkey
NGO	Non-Governmental Organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PKK	Kurdistan Workers' Party

Relevant Articles of the European Convention on 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 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 3:	Right to free elections

Section 1: Legal Developments & News

Monaco becomes the 46th Member State of the Council of Europe

The leaders of the Council of Europe welcomed the Principality of Monaco's accession to the organisation on 5 October 2004. The Chairman of the Committee of Ministers, Norwegian Foreign Minister Jan Petersen, said that the accession brought the Council closer than ever to its goal of bringing all European democracies together on an equal footing. Parliamentary Assembly President Peter Schieder expressed his delight that one of the last pieces of the "complex European jigsaw puzzle" was fitting into place, and Secretary General Terry Davis said that it was natural for Monaco to join the organisation, as the Principality was an integral part of European civilisation and shared Europe's fundamental values.

ECtHR: Death of Judge Gaukur Jörundsson

On 21 September 2004, Gaukur Jörundsson, judge in respect of Iceland at the European Court of Human Rights since 1998, died. Mr Jörundsson was born on 24 September 1934 in Reykjavik. He was a lecturer in the Faculty of Law in the University of Iceland from 1967 to 1969 and became Professor of Law in 1969. He was twice appointed to the Supreme Court, in 1983 and 1987. He was elected Parliamentary Ombudsman for Iceland in 1988 and again in 1992 and 1996. He was a member of the European Commission of Human Rights from 1974 until 1998, when he became a judge of the European Court of Human Rights.

ECtHR: Appointment of Judge in respect of Slovakia

The Parliamentary Assembly of the Council of Europe has elected Ján Šikuta as judge of the European Court of Human Rights in respect of the Republic of Slovakia. Mr Šikuta was born in 1960 and read law at the Comenius University, Bratislava, and the Charles University, Prague. He was a judge of the District Court in Bratislava from 1986 - 1989 and Judge of the Appeal Court from 1990 - 1994. Since 1994 he has been a Legal Officer at the office of the United Nations High Commissioner for Refugees in Bratislava. Mr Šikuta's term of office of six years will begin on 1 November 2004.

ECtHR: Election of President, Vice Presidents and Section Presidents

The European Court of Human Rights re-elected its President, Luzius Wildhaber (Swiss) for a

third three-year term beginning on 1 November 2004.

The Court re-elected two Vice-Presidents, Christos Rozakis (Greek) and Jean-Paul Costa (French), who will also sit as Section Presidents. Sir Nicolas Bratza (British) was re-elected Section President and Boštjan Zupančič (Slovenian) was elected Section President for the first time. The terms of office of the Vice-Presidents and Section Presidents will also be of three years and begin on 1 November 2004.

ECtHR examines Polish length-of-proceedings cases

The European Court of Human Rights announced on 30 September 2004 that it is examining the effectiveness of various new remedies for Polish length-of-proceedings cases. Four leading cases have been given priority and around 700 similar cases have been adjourned. The applicants in these cases all complain that they were denied a hearing within a reasonable time, in breach of Article 6 and 13 of the Convention.

New Polish legislation was introduced on 17 September 2004 in response to the European Court of Human Rights Grand Chamber judgment in the case *Kudła v. Poland* (30210/96), in which the Court held that the lack of an effective remedy for a breach of the right to a hearing within a reasonable time was in violation of Article 13. The new law is designed to provide such an effective remedy by allowing those involved in court proceedings to file a complaint concerning the length of their proceedings while those proceedings are still pending. The appellate court can find a violation of Article 6, instruct the lower court to take measures to accelerate the proceedings and award the complainant just satisfaction of up to PLN 10,000 (approximately EUR 2,250). In addition, those involved in proceedings that have finished can seek damages from the State.

The new remedy is also available to individuals who lodged applications with the European Court of Human Rights while their domestic proceedings were still pending, provided their applications have not yet been declared admissible by the Court. They have until 17 March 2005 to apply to the Polish courts.

OSCE publications and activities

Between July and October 2004, the OSCE regional offices carried out a variety of activities aimed at promoting awareness and protection of human rights, including:

- Publishing a handbook for monitoring women's participation in elections (available online)
- Launching an NGO public advocacy training course, a legal aid clinic and a Rapid Reaction project intended to ensure rapid reaction to human rights violations in Baku, Azerbaijan.

- Between 4 and 15 October 2004, the OSCE human dimension implementation meeting was held in Warsaw, Poland. This meeting is organised by ODIHR every year when no review conference occurs, and is intended to review the implementation of OSCE commitments in the field of human rights and democracy (“the human dimension”) by participating States. The meeting was attended by OSCE participating States, NGOs and international organisations and institutions. Key issues discussed included the promotion of non-discrimination, freedom of assembly and association, the right to a fair trial, trafficking in human beings and co-operation between international organizations promoting human rights.

CPT 14th General Report and Standards published

On 21 September 2004, the CPT published its 14th General Report on its activities, outlining 22 visits to 19 countries during the last 12 months, including Turkey. In a number of its General Reports the CPT has described some of the substantive issues which it pursues when carrying out visits to places of deprivation of liberty. On 21 September 2004, the CPT also published the “Substantive” sections of these General Reports, hoping to give a clear advance indication to national authorities regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters. The standards are available in English at <http://www.cpt.coe.int/en/documents/eng-standards.doc> and in Turkish at <http://www.cpt.coe.int/turkish.htm>.

CPT Report on Armenia

On 28 July 2004, the Council of Europe’s Committee for the Prevention of Torture (CPT) published its first report on Armenia. In the report, the CPT concluded that persons deprived of their liberty by the police in Armenia run a significant risk of being ill-treated. In virtually all cases, the ill-treatment was said to have been inflicted in the context of police interrogation (mostly by operative police officers) and with a view to extracting confessions or information. In some cases, the ill-treatment alleged was so severe that it could be considered as amounting to torture.

The Committee therefore recommended strict selection criteria at the time of recruitment of police officers and the provision of adequate professional training. The Armenian authorities should also seek to integrate human rights concepts into practical professional training for handling high-risk situations, such as the interrogation of criminal suspects. The report also draws attention to overcrowding in prisons and their poor state of repair. The Committee were particularly concerned about the shortage of activities for inmates.

In their official response to the report, the Armenian authorities referred to measures which have

been taken to improve police training and to step up the control of police activities. The authorities also made reference to the introduction of a new criminal code, which they claim has reduced the size of the prison population.

Council of Europe Parliamentary Assembly Resolution on Armenia

On 7 October 2004, the Council of Europe's Parliamentary Assembly passed a Resolution stating that relations between it and the Armenian authorities continue to be characterized by excellent co-operation and that the Armenian authorities have committed themselves to a series of reforms. Noting the implementation of the last two Resolutions on Armenia adopted by the Assembly in 2004, the Assembly said that a number of delicate issues remain, including speedy progress concerning the revision of the Code of Criminal Procedure. The Assembly also referred to developments in the media sector, saying that it expected fair conditions for awarding broadcasting licenses to television channels to be created. In saying this, the Assembly referred to the A1+ television channel, a company whom KHRP has assisted in taking cases before the European Court of Human Rights. The full text of the Resolution can be found in the Appendices.

Azerbaijan ratifies European Social Charter

On 2 September 2004, ratification documents of the European Social Charter of the Azerbaijan Republic were presented to the Council of Europe. The European Social Charter protects the economic, social and cultural rights of individuals. Among these rights and guarantees are: the right to work, to organize unions, to bargain collectively, to social security, to social and medical care, the rights of physically and mentally disabled persons, and the rights of migrant workers.

Within the ratification documents, the Republic of Azerbaijan declared that it would be "unable to guarantee compliance with the provisions of the Charter in its territories occupied by the Republic of Armenia until these territories are liberated from that occupation."

Syria accedes to the UN Convention against Torture

On 19 August 2004, Syria acceded to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention (CAT) bans torture under all circumstances and establishes the UN Committee against Torture. It defines torture, requires states to take effective measures to prevent torture and forbids countries to return a refugee to his own country if there is reason to believe he/she will be tortured.

Under the CAT, states must make torture illegal and provide appropriate punishment for those who commit torture. States must train law enforcement and military officers on torture prevention and promptly investigate any allegations that its officials have committed torture in the course of their official duties. The state must also ensure that individuals who allege that someone has committed torture against them are permitted to make an official complaint and have it investigated, and, if the complaint is proven, receive compensation. In addition, under the CAT, states cannot admit into evidence during a trial any confession or statement made during or as a result of torture

Shadow NGO Report on Turkey's Fourth and Fifth combined Periodic Report to the Committee on the Elimination of Discrimination against Women (CEDAW)

This Shadow NGO Report, the first of its kind, was submitted to the CEDAW pre-session in July 2004. The Report was intended to raise a number of critical issues of concern taken up in the fourth and fifth combined official periodic report of Turkey submitted to CEDAW. The Report was prepared by Women's Human Rights (WWHR) and endorsed by 26 NGOs who are members of the Women's Platform on the Turkish Penal Code.

The Report was not intended to provide a comprehensive list of issues with regards to the shortcomings of the implementation of CEDAW in Turkey. Instead, it focuses on a number of critical issues pertaining to on-going advocacy and lobbying efforts of women's organizations with the Government regarding a number of legal and public efforts of women's administrative reform processes currently on the agenda of the Turkish Parliament.

The critical issues fall under four areas of reform: reform of the Turkish Penal Code and the remaining gender discriminatory provisions; reform of the Local Public Administrative Law and the threat therein to the status of women's shelters and community centres; recent amendment to the Constitutional Clause overseeing equality between the sexes and the lack of an affirmative action perspective therein; and finally the recent reform of the Turkish Civil Code and the discriminatory clause on property regime in marriage.

Fact-finding mission to Turkey by ECHR judges

From 6 to 11 September 2004 a delegation of judges from the European Court of Human Rights conducted a fact-finding mission in Turkey, in relation to applications from around 50 detainees allegedly suffering the after-effects of being on long-term hunger strike. The applicants in *Balyemez v Turkey* (324958/03) and 52 other cases concerning Turkey all claim to have developed Wernicke-Korsakoff syndrome in 2001 as a result of being on long-term hunger strike. Given their state of

health, they complain that their continued detention in prison would be in violation of Articles 2 and 3 of the European Convention of Human Rights.

Turkish Penal Code reform passed

The long-awaited reform of the Turkish Penal Code was finally agreed by the Turkish Parliament on 26 September 2004. Voting on the reform package had been suspended due to controversy over proposed last-minute amendments which introduced a clause criminalising adultery. Once the clause was dropped, an emergency session was convened on Sunday 26 September to ensure the reforms were passed prior to the 6 October Report by the European Commission.

As the majority of the new Penal Code is not due to come into force until 2005, the Code is currently only available in Turkish. Whilst Turkish human rights organisations have praised many aspects of the Code for improving the protection of fundamental rights, they have also alleged that other articles in the Code continue to restrict rights and freedoms.

Turkey ratifies two Council of Europe treaties and signs four treaties

On 6 October 2004, Turkey ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights. Both treaties will enter into force on 1 February 2005.

On the same day Turkey also signed several other treaties: Protocol No. 14 to the ECHR; the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illegal Traffic in Narcotic Drugs and Psychotropic Substances; the Revised European Social Charter; and the Protocol Amending the European Social Charter.

Turkey promises to ratify the Rome Statute

In a speech to the Parliamentary Assembly on 6 October 2004, the Prime Minister of Turkey stated “Legal changes that will enable Turkey to become a party to the International Criminal Court, as is the case with the majority of the members of the Council of Europe, are among the reforms that we have accomplished. In this context, our new Penal Code includes the crime of genocide and crimes against humanity in line with contemporary norms. We enacted the necessary amendments to the Constitution. Having completed the domestic legal preparations, I would like to announce

today from this rostrum that Turkey will, in the near future, ratify the Rome Statute and become a party to the International Criminal Court.”

http://www.coe.int/T/E/Com/Files/PA-Sessions/oct-2004/20041006_news_erdogan_disc.asp

European Commission Enlargement Report on Turkey

On 6 October 2004, the European Commission published both its Regular Report of 2004 on Turkey and a Recommendation to the Council and European Parliament on the opening of accession talks with Turkey. The Report covered all areas of the criteria laid down for candidates to attain and discussed Turkey’s progress towards these goals; the Recommendation then provided the Commission’s opinion on whether to open accession talks with Turkey.

The decision whether Turkey fulfils the political criteria follows a request by the Copenhagen European Council in December 2002, which stated that it would decide whether to open accession talks with Turkey on the basis of a report and recommendation by the Commission in 2004. A brief review of the Report’s findings regarding progress towards protection of human rights and fundamental freedoms, together with the Recommendation’s conclusions can be found directly after the News section of this Legal Review; a summary of the overall findings of the Regular Report on Turkey can be found in the Appendices of this Legal Review.

Turkey Visit for Representative of Secretary-General on Human Rights

The Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Hina Jilani, undertook a fact-finding mission to the Republic of Turkey from 11 to 20 October 2004 at the invitation of the Government. The Special Representative was there to assess the situation of human rights defenders, and examine in particular both the legal framework and any possible limitations on the right to defend human rights in the country.

The Special Representative requested to meet, among others, with the Deputy Prime Minister and Minister for Foreign Affairs, the Ministers of Interior and Justice, the Human Rights Inquiry Commission of the Grand National Assembly, the Presidents of the Court of Appeal and the Constitutional Court, the General Prosecutor, and officials of the security forces including the police and counter-terrorism branch. She was also meeting with a wide range of representatives of civil society, including human rights defenders, the press and officials of the United Nations and diplomatic missions in the country.

A report containing the Special Representative’s complete findings and recommendations will be

published early in 2005 and be presented to the United Nations Commission on Human Rights in April 2005.

Summary of the European Commission 2004 Regular Report and Recommendation on Turkey's progress towards accession

Communication to the Council and the European Parliament, 6 October 2004

Note: The following is intended as a brief summary to relevant parts of the Report and Recommendation. All comments below are the findings of the European Commission and not the Kurdish Human Rights Project.

Introduction

In December 1999, the European Council decided that Turkey was a candidate for accession to the EU. The Copenhagen European Council in December 2002 concluded that “if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay”. These conclusions were reaffirmed by the European Council in Brussels in June 2004.

On 6 October 2004 the Commission published its annual Regular Report on Turkey and, alongside it, a Recommendation regarding Turkey's future progress towards accession. The Report and Recommendation are intended to provide a basis for the European Council decision in December 2004 on whether to open accession talks with Turkey.

Regular Report

Within the Regular Report, the Commission notes that the European Council decision of December 1999 has proved to be a robust catalyst for Turkey to embark upon a process of far-reaching constitutional and legislative reforms:

- There has been a substantial institutional convergence in Turkey towards European standards.
- Political reforms have introduced changes ranging from improved civil liberties and human rights to enhanced civilian control of the military.
- Civil society has grown stronger. The reform process has clearly addressed major issues and highlighted a growing consensus in favour of liberal democracy.

Within the field of human rights and fundamental freedoms, Turkey has acceded to many international and European Conventions; the principle of the supremacy of these international human rights conventions over domestic law has been enshrined in the Constitution. Turkey has increased its efforts to execute decisions of the European Court of Human Rights and its higher judicial bodies have issued a number of judgments interpreting legislative reforms in accordance with the standards of the European Court. Since 1 January 2004, more than 100 judgments have been recorded in which judges and prosecutors have applied the ECHR and the case-law of the ECtHR; these cases resulted mainly in acquittals. Many retrials have occurred as a result of European Court judgments.

Further efforts have been made to strengthen the fights against torture and ill-treatment, including provisions in the new Penal Code. The authorities have adopted a zero tolerance policy towards torture and a number of perpetrators of torture have been punished. Although torture is no longer systematic, numerous cases of ill-treatment including torture still continue to occur and further efforts are required to eradicate such practices.

As regards freedom of expression, the situation has improved significantly, but several problems remain. Whilst constitutional amendments and a new Press Law have increased press freedoms, there are still many cases where journalists and other citizens expressing non-violent opinion continue to be prosecuted.

If adopted, the new Law on Associations (which was initially passed in July 2004 but then vetoed by the President) will be significant in terms of reducing the possibility of state interference in the activities of associations and will contribute towards the strengthening of civil society. Despite measures taken to ease restrictions on demonstrations, there are still reports of the use of disproportionate force against demonstrators.

Freedom of religious belief is guaranteed by the Constitution, and freedom to worship is largely unhampered. However, non-Muslim religious communities continue to experience difficulties connected with legal personality, property rights, training of clergy, schools and internal management. Appropriate legislation could remedy these difficulties. Alevis are still not recognised as a Muslim minority.

As regards economic and social rights, the principle of gender equality has been strengthened in the Civil Code and the Constitution. Under the new Penal Code, perpetrators of “honour killings” should be sentenced to life imprisonment, virginity tests will be prohibited without a court order and sexual assault in marriage is classed as a criminal offence. Despite these advances, the situation of women is still unsatisfactory and discrimination and violence against women remain a major problem. Children’s rights have been strengthened, but child labour remains an issue of serious concern. Trade union rights still fall short of ILO standards.

With regard to the protection of minorities and the exercise of cultural and linguistic rights, the Constitution has been amended to lift the ban on the use of Kurdish and other languages. As a result, several Kurdish language schools have opened in Southeast Turkey, and broadcasting in Kurdish and other languages and dialects is now permitted. There has been greater tolerance for the expression of Kurdish culture; however the measures adopted in the area of cultural rights represent only a starting point. Overall, considerable restrictions still exist, particularly within the areas of broadcasting and education in minority languages.

The state of emergency was lifted in 2002, having previously been in force for 15 years in some provinces in Southeast Turkey. As a result, provisions used to restrict pre-trial detention rights under emergency rule have been amended. Turkey entered into dialogue with a number of international organisations on the question of internally displaced persons and a Law on Compensation of Losses Resulting from Terrorist Acts was approved. Despite the work already underway to define a more systematic approach towards the region, no integrated strategy with a view to reducing regional disparities and addressing the economic, social and cultural needs of the local population has yet been adopted. Return of internally displaced persons in the Southeast is limited and has been hampered by the village guard system and a lack of material support. Future measures should address specifically the recommendations of the UN Secretary General's Special Representative for Displaced Persons.

In conclusion, Turkey has achieved significant legislative progress in many areas, through further reform packages, constitutional changes and the adoption of a new Penal Code, and in particular in those identified as priorities in last year's report and in the Accession Partnership. Important progress was made in the implementation of political reforms, but these need to be further consolidated and broadened. This applies to the strengthening and full implementation of provisions related to the respect of fundamental freedoms and protection of human rights, including women's rights, trade union rights, minority rights and problems faced by non-Muslim religious communities. Civilian control over the military needs to be asserted, and law enforcement and judicial practice aligned with the spirit of the reforms. The fight against corruption should be pursued. The policy of zero tolerance towards torture should be reinforced through determined efforts at all levels of the Turkish state. The normalisation of the situation in the Southeast should be pursued through the return of displaced persons, a strategy for socio-economic development and the establishment of conditions for the full enjoyment of rights and freedoms by the Kurds.

The changes to the Turkish political and legal system over the past years are part of a longer process and it will take time before the spirit of the reforms is fully reflected in the attitudes of executive and judicial bodies, at all levels and throughout the country. A steady determination will be required in order to tackle outstanding challenges and overcome bureaucratic hurdles. Political reform will continue to be closely monitored.

Recommendation

The Commission services also prepared an assessment of issues arising from Turkey's membership perspective. Its findings are presented in this Communication; they are summarised in the following conclusions and recommendations:

(1) Turkey has substantially progressed in its political reform process, in particular by means of far reaching constitutional and legislative changes adopted over the last years, in line with the priorities set out in the Accession Partnership. However, the Law on Associations, the new Penal Code and the Law on Intermediate Courts of Appeal have not yet entered into force. Moreover, the Code on Criminal Procedure, the legislation establishing the judicial police and the law on execution of punishments and measures are still to be adopted.

(2) Turkey is undertaking strong efforts to ensure proper implementation of these reforms. Despite this, legislation and implementation measures need to be further consolidated and broadened. This applies specifically to the zero tolerance policy in the fight against torture and ill-treatment and the implementation of provisions relating to freedom of expression, freedom of religion, women's rights, ILO standards including trade union rights, and minority rights.

(3) In view of the overall progress of reforms attained and provided that Turkey brings into force the outstanding legislation mentioned in paragraph 1, the Commission considers that Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened. The irreversibility of the reform process, its implementation in particular with regard to fundamental freedoms, will need to be confirmed over a longer period of time.

(4) A strategy consisting of three pillars should be followed. The first pillar concerns cooperation to reinforce and support the reform process in Turkey, in particular in relation to the continued fulfilment of the Copenhagen political criteria. In order to guarantee the sustainability and irreversibility of this process, the EU should continue to monitor progress of the political reforms closely. This will be done on the basis of a revised Accession Partnership setting out priorities for further reforms. A general review of progress of the political reforms will take place on a yearly basis starting from the end of 2005. To this end, the Commission will present a first report to the European Council in December 2005. The pace of the reforms will determine the progress in negotiations.

(5) In line with the Treaty on European Union and the Constitution for Europe, the Commission will recommend the suspension of the negotiations in the case of a serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded. The Council would decide on such a recommendation with a qualified majority.

(6) The second pillar concerns the specific way of approaching accession negotiations with Turkey. Accession negotiations will take place in the framework of an Intergovernmental Conference where decisions require unanimity and with full participation of all EU Members. The negotiations will be complex. For each chapter of the negotiations, the Council should lay down benchmarks for the provisional closure and, where appropriate, for the opening of negotiations, including legislative alignment and a satisfactory track record of implementation of the *acquis*. Existing legal obligations in line with the *acquis* must be fulfilled before the opening of negotiations on related chapters. Long transition periods may be required. In addition, in some areas, such as structural policies and agriculture specific arrangements may be needed and, for the free movement of workers, permanent safeguards can be considered. The financial and institutional impact of Turkey's accession will be important. The EU will need to define its financial perspective for the period from 2014 before negotiations can be concluded.

Furthermore, the Commission shall monitor during the negotiations the ability of the Union to absorb new members and to deepen integration taking fully into account Treaty objectives as regards common policies and solidarity.

(7) The third pillar entails a substantially strengthened political and cultural dialogue bringing people together from EU Member States and Turkey. Civil society should play the most important role in this dialogue, which should be facilitated by the EU. The Commission will present proposals on how to support such a dialogue.

(8) The Commission is convinced that the negotiation process will be essential in guiding further reforms in Turkey. By its very nature, it is an open-ended process whose outcome cannot be guaranteed beforehand. Regardless of the outcome of the negotiations or the subsequent ratification process, the relations between the EU and Turkey must ensure that Turkey remains fully anchored in European structures. Turkey's accession would need to be thoroughly prepared in order to allow for a smooth integration which enhances the achievements of fifty years of European integration.

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The United States and the “War on Terror”: *Rasul and Hamdi*

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On 28th June 2004, the United States Supreme Court gave judgment in the first two cases relating to the Bush Administration’s policies in the “War on Terror” to reach the Court. The cases were Rasul et al. v. George W. Bush et al. (“Rasul”)² and Hamdi v. Donald Rumsfeld (“Hamdi”).³ Each case resulted in defeat for the Administration and affirmed the jurisdiction of the United States courts to review the legality of executive detention even in times of emergency or perceived emergency. This article seeks to analyse the two judgments and then to assess their implications.

I. Rasul

The facts

The *Rasul* case concerned the jurisdiction of the United States courts to review the legality of the detention of foreign nationals captured abroad, allegedly in connection with hostilities against the United States, and then incarcerated at the Guantanamo Bay Naval Base in Cuba. The petitioners in the case – two Britons,⁴ two Australians and 12 Kuwaitis – had been captured abroad during hostilities between the United States and the Taliban and then held at the Guantanamo Bay Naval Base from January 2002 onwards.⁵ The Base itself comprises 45 square miles of land and water along the southeast coast of Cuba and is occupied pursuant to the terms of a 1903 treaty which provides that “the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]” and that “the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise complete jurisdiction and control over and within said areas.”⁶

Before the lower courts,⁷ the Administration had successfully argued that the courts lacked jurisdiction to review the legality of the petitioners’ detention. The Administration relied on the

earlier Supreme Court decision of *Johnson v. Eisentrager*,⁸ which, it submitted, established that the writ of *habeas corpus* was not available to foreigners held on non-sovereign territory.

The result

By a majority of 6 to 3, the Supreme Court rejected the Administration's arguments and held that the United States courts do have jurisdiction to consider challenges to the legality of detention by all of the foreign nationals held at Guantanamo Bay. The opinion of the Court was given by Justice Stevens (with whom O'Connor, Souter, Ginsburg and Breyer JJ joined), Justice Kennedy gave a concurring opinion and Justice Scalia (with whom Rehnquist CJ and Thomas J joined) gave a dissenting opinion.

The opinion of the Court

Justice Stevens reached the conclusion that the United States courts had jurisdiction to consider the petitioners' challenges for four principal reasons.

First, *Eisentrager* was distinguishable on a number of grounds. That case had concerned an attempt by 21 Nazi war criminals tried and convicted by an American military commission to obtain *habeas* relief from United States courts to challenge their incarceration in the Landsberg Prison in occupied Germany. In *Rasul*, by contrast, none of the petitioners was a national of a country at war with the United States, none had been charged with any offence (let alone tried and convicted), and the circumstances of the detention at Guantanamo Bay – under the exclusive jurisdiction and control of the United States – could not be equated with those of the detentions in occupied Germany.⁹

Secondly, on a proper reading, the judgments in *Eisentrager* concentrated only on the extent of the detainees' constitutional entitlement to *habeas corpus*. This was distinct from any statutory entitlement and, by reason of a subsequent decision of the Court,¹⁰ *Eisentrager* could not be treated as binding authority on the extent of such entitlement under the specific terms of the federal *habeas corpus* statute which granted federal courts authority to hear applications for *habeas corpus* by "any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States."¹¹ Justice Stevens observed that this statute did not draw any distinction based on the nationality or citizenship of the detainee and held that its availability was limited only by the necessity that the court seized of an application for relief have territorial jurisdiction in the normal way over the detainee's guardian.¹² The petitioners were, therefore, entitled to relief on the basis of this statute.

Thirdly, allowing *habeas corpus* to run to Guantanamo Bay would be consistent with the historical reach of the writ. Justice Stevens traced the history of the writ back to Magna Carta and, referring

to English authorities going back over four centuries,¹³ concluded as follows:¹⁴

At common law, courts exercised *habeas* jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called “exempt jurisdictions,” where ordinary writs did not run, and all other dominions under the sovereign’s control. As Lord Mansfield wrote in 1759, even if a territory was “no part of the realm” there was “no doubt” as to the court’s power to issue writs of *habeas corpus* if the territory was “under the subjection of the Crown.” ... Later cases confirmed that the reach of the writ depended not on formal notions of sovereignty, but rather on the practical question of “the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.” (*Ex parte Mwenya* [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)).

Fourthly, and independently of the position in respect of *habeas corpus* relief, the detainees at Guantanamo Bay have a statutory entitlement to pursue claims under United States federal law including under the Alien Tort Statute.¹⁵ This “privilege of litigation” extends to foreign citizens so the fact that the detainees were being held in military custody abroad was immaterial to the question of the United States courts’ jurisdiction to hear their claims.¹⁶

The opinion of Justice Kennedy

Justice Kennedy concurred with the majority as to the result, but his opinion was founded purely on the distinctions he drew between the circumstances of the detainees in *Eisentrager* and those in the present case. He placed particular emphasis on the fact that Guantanamo Bay is “in every practical respect a United States territory ... far removed from any hostilities”, and on the indefinite nature of the detentions at Guantanamo without access to court.¹⁷

The dissent

Justice Scalia wrote a forceful dissenting opinion for the minority in which he categorised the majority’s approach as “novel”, “implausible” and an “irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.”¹⁸ He did not agree with the majority that the *habeas* relief considered in *Eisentrager* was independent of, or distinct from, that arising out of the federal *habeas corpus* statute. As for that statute, he held that on its own terms it only granted a detained person a right of access to a court where that person was within the territorial jurisdiction of the court.¹⁹ Like the majority, Justice Scalia analysed the history of the writ of *habeas corpus* in considerable detail; however, he challenged the majority’s analysis of the English case law and held that it fell short of supporting the conclusion set out in Justice Stevens’ opinion.²⁰ Justice Scalia emphasised the importance of the Administration being able to proceed on a sure legal footing at a time of national emergency; he considered that the majority’s “wrenching

departure from precedent” and “judicial adventurism of the worst sort” was “in frustration of our military commanders’ reliance upon clearly stated prior law”.²¹ Moreover, he contended, it could have “a potentially harmful effect upon the Nation’s conduct of a war ... [by] bringing the cumbersome machinery of our domestic courts into military affairs.”²²

II. *Hamdi*

The facts

Hamdi was, if anything, a more extraordinary case on the facts than *Rasul*. It concerned an American citizen captured in Afghanistan in April 2002, not by United States forces but by the Northern Alliance, a coalition of military groups opposed to the Taliban government. *Hamdi* was handed to United States military forces and transported first to Guantanamo Bay, before, because of his nationality, being transferred to a naval base in South Carolina. He was classified by the Government as an “enemy combatant” for having taken up arms against the United States. He was then held in incommunicado detention for almost two years.²³

Hamdi sought to challenge his classification as an enemy combatant and the legality of his detention. He claimed that he had been in Afghanistan for only a short period of time and had been engaged in relief work. Before the District Court, the Government sought to justify his classification as an enemy combatant by tendering a declaration from a Defence Department official, which the Court referred to as the “Mobbs Declaration”,²⁴ which stated that *Hamdi* had been captured in Afghanistan and had, at the time of his capture, been in possession of a weapon. The District Court held that the Mobbs Declaration alone was insufficient to support *Hamdi*’s continued detention and called on the Government to provide further details of the circumstances surrounding his capture and detention. The Government appealed successfully. The Court of Appeals ruled that although it had jurisdiction to consider *Hamdi*’s application, since he had been captured in an active combat zone, and given the contents of the Mobbs declaration, no further factual inquiry or evidentiary hearing at which he might be heard or at which he could rebut the Government’s assertions was either necessary or proper.²⁵ *Hamdi* appealed to the Supreme Court. The two issues for consideration were, first, whether the Government had any lawful power to detain American citizens in circumstances such as *Hamdi*’s, and, secondly, if the Government did have such a power, what rights a person so detained had to contest the lawfulness of the exercise of that power in relation to him.

The result

The Supreme Court’s judgment comprises four opinions, none of which attracted a majority of five members. Justice O’Connor, with whom Chief Justice Rehnquist and Justices Kennedy and Breyer joined, held that the Government had been granted authority by Congress to detain citizens in

the narrow circumstances alleged in respect of Hamdi, but constitutional due process guarantees demanded that citizens so detained be given a meaningful opportunity to contest the factual basis of their detention before a neutral decision-maker. Justice O'Connor held that this had not been done in the present case and concluded, therefore, that the decision of the appellate court had to be set aside. Justice Souter (joined by Justice Ginsburg) and Justice Scalia (joined by Justice Stevens) held that Hamdi's detention had not been authorised by Congress. Justices Souter and Ginsburg, however, also joined with Justice O'Connor in holding that, on remand to the lower courts, Hamdi had to be given a meaningful opportunity to offer evidence that he is not an enemy combatant. Justice Scalia, to the contrary, held that the failure of the Government to charge Hamdi with treason or some other criminal offence meant that he had to be released. Justice Thomas found for the Administration on both issues, holding that it had authority and that it had complied with the due process rights guaranteed by the Constitution. He alone held that the Executive was entitled to detain Hamdi irrespective of Congressional authorisation.

The overall result of this somewhat complex set of opinions was that eight members of the Court (all except Thomas J) rejected some aspect of the Administration's position. A majority of five members of the Court (Rehnquist CJ, O'Connor, Kennedy, Thomas and Breyer JJ) held that the Government did have authorisation to detain Hamdi, and a majority of six members (Rehnquist CJ, O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ) held that Hamdi had not been accorded the opportunity accorded by the Constitution's due process guarantees to challenge effectively the legality of his detention. Hamdi's *habeas corpus* application was, therefore, upheld, and his case was remanded.

The opinion of Justice O'Connor

For Justice O'Connor, the "threshold question" whether the Government has authority to detain as "enemy combatants" American citizens who are part of, or who support, forces hostile to the United States was to be decided in favour of the Administration. She did not resolve the Administration's argument that no explicit Congressional authorisation was needed since she held that, in any event, such authorisation did exist. This was to be found in the Authorisation for Use of Military Force resolution ("AUMF") passed by Congress in the immediate aftermath of the September 11, 2001 terrorist attacks and which authorised the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" or "harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons." It did not matter that AUMF did not, in terms, provide for the detention of American citizens since the power to prevent captured enemies from returning to the battlefield and taking up arms again was a necessary concomitant of the authorisation to use "all necessary and appropriate force".²⁶

Hamdi had further complained that even if Congress had authorised his detention, given the nature of the war the United States was fighting, he faced the prospect of being detained indefinitely. Justice O'Connor had some sympathy for this complaint. She held that AUMF had to be read in the light of the clearly established principle that detention as an enemy combatant could last no longer than the period of active hostilities.²⁷ She recognised that this principle might “unravel” if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed [its] development”, but held that this was not so in the present case since active combat operations against Taliban forces were ongoing and large numbers of American troops were on active duty in Afghanistan.²⁸

Having held that the Administration had authority to detain enemy combatants, Justice O'Connor then turned to consider the question of “what process is constitutionally due to a citizen who disputes his enemy-combatant status.”²⁹ All parties agreed that since he was being detained in the United States, Hamdi was able to apply for *habeas corpus* relief challenging the lawfulness of his detention. The difficulty was in determining what exactly it was that the Government had to do to establish that Hamdi's detention was lawful. The Administration contended that, in presenting the Mobbs Declaration, it had done all that it had to do and to require it to do any more would impose unreasonable burdens on it at a time when it was prosecuting a war overseas. Hamdi argued that the constitutional guarantee of due process required that he be given a meaningful and timely opportunity to challenge his classification as an enemy combatant.

After engaging in a process of “judicious balancing” of what she regarded as the legitimate, yet competing, concerns of both sides, Justice O'Connor came down largely in favour of Hamdi. She firmly rejected the proposition that no further process beyond the Mobbs Declaration was necessary or appropriate for four main reasons: first, the importance of the right at stake – that of physical liberty;³⁰ secondly, the real potential for error even in the case of battlefield detentions; thirdly, the need for a proper check on the power of the Executive even in times of international conflict; and, fourthly, the limited interference with military operations that would be caused by the scope of the review that would be required.³¹ Justice O'Connor concluded this critical aspect of the opinion with the observation that “[it] is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”³²

As for the scope of the review required, Justice O'Connor held that “a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker.... It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.... These essential constitutional promises may not be eroded.”³³

Justice O'Connor did not set out exhaustively what a "meaningful" process would entail. As the passage just quoted indicates, a neutral decision-maker would be one element. So too would be a prompt opportunity for challenge. She also made a number of important additional observations about the nature of such a process: first, hearsay evidence might need to be accepted; secondly, a rebuttable presumption as to the accuracy of credible Government evidence could operate;³⁴ and, thirdly, a detainee in the position of Hamdi would "unquestionably" have a right of access to counsel.³⁵

The concurring opinion of Justice Souter

Justice Souter agreed that the appeal should be allowed and the case remitted to the lower courts. However, he departed from Justice O'Connor's opinion in a number of potentially important respects. First, he held that AUMF did not authorise Hamdi's detention in the present circumstances and that, in the absence of any other source of executive authority, Hamdi's authorisation was unlawful.³⁶ And, secondly, although he accepted much of what Justice O'Connor had to say about the nature of the process that would be required, he did not agree that any evidential presumption should operate in favour of the Government.³⁷

The dissenting opinion of Justice Scalia

Justice Scalia and Justice Stevens are often perceived to be at the opposing extremes of the court: the former the leading conservative on the court, the latter the leading liberal voice. On no occasion in the judicial year just ended had they joined together in a dissenting opinion. This made their approach in *Hamdi* highly unusual. They considered that absent express congressional suspension of the writ of *habeas corpus*, no assertion of military exigency could suffice to permit detention without charge. They reached this conclusion for five reasons.

First, for the reason that "[t]he very core of liberty secured by [the] Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."³⁸ As the majority had done in *Rasul*, Justice Scalia placed considerable emphasis on the history of the writ of *habeas corpus*, citing Blackstone, the *Five Knights' Case* of 1627 and the *Habeas Corpus Act* of 1679.³⁹

Secondly, England and the United States had traditionally treated citizens aiding the enemy as traitors subject to the criminal process rather than as enemy combatants capable of being detained pending the cessation of hostilities save when, in exceptional cases during each nation's history, *habeas corpus* had been expressly suspended. Again, Justice Scalia relied upon detailed analysis of English legal history, this time beginning with England's Statute of Treasons of 1350 and including *Harding's Case*,⁴⁰ *the Trial of Parkyns*,⁴¹ *the Trial of Vaughan*,⁴² and *the Trial of Downie*⁴³ from the end of the 17th Century.⁴⁴

Thirdly, the preclusion of any possibility of indefinite detention being legitimate in the absence of suspension of *habeas corpus* was consistent with the expressed attitudes of the Founders of the United States. As Justice Scalia observed: “The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal. In the Founders’ view the “blessings of liberty” were threatened by those military establishments which must gradually poison its very fountain.”⁴⁵

Fourthly, the notorious case of *Ex parte Quirin*⁴⁶ – which could be read as supporting the Administration position – was either wrongly decided or could be distinguished.⁴⁷ In that case, eight German saboteurs had been executed within a week of the Supreme Court dismissing their challenge to the military commissions which had tried them and sentenced them to death but several months before the Court had produced its written reasons. Its decision was described by Justice Scalia as “not this Court’s finest hour” and as having misinterpreted the earlier case of *Ex parte Milligan*⁴⁸ where the Court had upheld verdicts of false imprisonment against military officers and issued the writ of *habeas corpus* to an American citizen who had been tried by military commission for offences including conspiracy to overthrow the Government. In any event, as Justice Scalia observed, *Ex parte Quirin* could be distinguished on the basis that the persons concerned were not American citizens.

Fifthly, Justice Scalia viewed Justice O’Connor’s approach as an unwarranted trespass on the terrain of Congress. He regarded it as being for Congress to determine whether the right to liberty of citizens should be curtailed and, if so, to set the terms. This it had express power to do under the Constitution’s Suspension Clause and, if it has chosen not to invoke that power, it was not for the Court to do so. On this point, he distanced himself from the opinion of Justice O’Connor. Whereas she had held that AUMF did amount to express congressional authorisation for the detention of American citizens properly classified as enemy combatants, Justice Scalia held that it did not even “remotely” do so.⁴⁹

Justice Scalia concluded his dissent with the following words, echoing Lord Atkin’s own celebrated dissent in *Liversidge v Anderson*:⁵⁰ “Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis – that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.”

The dissenting opinion of Justice Thomas

As already indicated, Justice Thomas was the lone voice to accept the Administration's arguments in their entirety. He considered that the President had constitutional authority to protect national security and did not need congressional authority, that that authority carried with it a broad discretion as to how it was to be exercised, and that it was inappropriate for the judicial branch to interfere with the exercise of that authority save in the clearest possible case.⁵¹ While acknowledging that the courts had jurisdiction to determine whether executive detention was lawful, he held that in circumstances such as the present one, where detention was based on the classification of the detainee as an enemy combatant, "the question comes to the Court with the strongest presumptions in favour of the Government ... [and] is of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."⁵²

III. What next?

Foreign nationals detained at Guantanamo Bay

The existence of the courts' jurisdiction to entertain such applications now affirmed by *Rasul*, it is anticipated that a raft of individual applications for *habeas corpus* – perhaps running into hundreds – will be made to United States federal courts by detainees held at Guantanamo Bay.⁵³ Further proceedings may also be brought alleging torture by United States authorities either as a result of the general conditions of detention – and in particular the isolation experienced over the last two and a half years – or on the basis of specific allegations of ill-treatment. The approach that will be taken to the exercise of the courts' jurisdiction to consider such proceedings remains for argument. However, the Supreme Court's decision in *Hamdi*, where jurisdiction was not in issue but the proper exercise of it was, suggests that there will be a number of minimum requirements for such proceedings.

First, each detainee wishing to challenge his detention should have access to counsel. This is perhaps the most significant single breakthrough likely to follow from the Supreme Court's decisions.

Secondly, each detainee should be informed of the factual basis on which the Administration considers it appropriate to detain him.

Thirdly, each detainee should be able to present evidence to a court to explain why that averred factual basis is ill-founded.

Fourthly, the courts are likely to fashion some means of reducing the logistical and intelligence

burden on the Administration arising out of such hearings whether through the admission of hearsay evidence, the operation of presumptions, the holding of hearings *in camera* or otherwise.

Fifthly, and at least in so far as detainees held at Guantanamo are said to be associated with *Al Qaeda* as opposed to the Taliban, it is likely the Administration will be required to adduce evidence not just of previous association and hostility but also of residual threat to the security and interests of the United States. The Administration may also find it more difficult to establish congressional authority for the detention of *Al Qaeda* suspects at all given the emphasis Justice O'Connor placed on the conventional nature of the conflict under consideration in Hamdi's case.⁵⁴

Finally, the Administration may be required to cease all interrogations of those held at Guantanamo Bay. This would seem to at least arguably follow from Justice O'Connor's rationalisation of the scope of Congressional authority as resting on the legitimate goal of preventing enemy combatants from returning to the battlefield and from her acceptance of Hamdi's argument that "the AUMF does not authorise indefinite detention for the purpose of interrogation"⁵⁵.

The Administration's response to the Supreme Court's judgments has been swift if somewhat erratic ranging from a suggestion that all detainees might be transferred to a mainland prison to the more modest establishment of military review panels. At the time of writing, the Pentagon had announced that it would hold hearings for all the detainees still being held in Guantanamo Bay. Details are still forthcoming, but early reports suggest that each detainee will be notified of his status and his right to a *habeas corpus* hearing before a federal court. Each detainee will also have to the right to apply to have his status reviewed by a "Combatant Status Review Tribunal", which will be composed of three commissioned military officers and for which he will be entitled to receive the assistance of a non-lawyer military officer acting as a "personal representative."⁵⁶ The tribunals will operate a rebuttable presumption in favour of the Government's evidence, but there will be some scope for the detainees to tender their own evidence and to contradict the Government's evidence.⁵⁷ The purpose of these hearings would appear to be to strengthen the Administration's position in any later *habeas* hearings in federal courts that the detainee's status has been properly determined.⁵⁸ These proposals are already under fierce attack from lawyers representing the detainees. In at least two obvious respects they would appear to be inadequate and to fail to meet the standards set by the Supreme Court: first they provide for no access to counsel and secondly it is very difficult to see how the military officers who will sit on the tribunals could be seen to constitute "neutral decision-makers" in the structural sense in circumstances where those officers will be in the same chain of command as those who have authorised detention in the first place.

American citizens detained in the United States

Other than Hamdi, there is only one other American citizen presently being detained in the

United States as part of the “War of Terror”: Jose Padilla. His application for *habeas* relief came before the Supreme Court at the same time as *Rasul* and *Hamdi*, but it was dismissed on technical forum grounds having been commenced in what was held to be the wrong federal district.⁵⁹ Both *Hamdi*’s and *Padilla*’s cases will need to be reconsidered by the lower courts in accordance with the constitutional due process considerations identified by Justices O’Connor and Souter and set out above. *Padilla*’s position may, however be treated as distinct from *Hamdi*’s in that it has never been suggested that he was a Taliban soldier of any kind. As has already been observed, Justice O’Connor’s opinion relied heavily on the classification of the conflict in Afghanistan as “conventional”, therefore her conclusions may not apply to *Padilla* and the Administration may, accordingly, have to do more to justify his detention. Indeed, it may struggle to establish even that it has congressional authority to detain him at all.

Detainees held by United States authorities outside Guantanamo Bay

This is not an academic question. The United States authorities currently control thousands of prisoners in both Iraq and Afghanistan. Furthermore, recent press reports have confirmed the existence of “ghost detainees” held at secret locations and to which even the Red Cross has no access.⁶⁰ In the light of *Rasul* and *Hamdi*, it cannot be long before the relatives of these detainees consider bringing proceedings on their behalf before the United States courts.

From the moment it granted certiorari in *Rasul* and defined the question it was prepared to consider, the Supreme Court has, however, been careful to seek to limit the scope of its deliberations to the position of Guantanamo. That intention is reflected in the majority opinion of Justice Stevens and in the concurring opinion of Justice Kennedy and the emphasis they placed on the unique nature of the Guantanamo Bay Naval Base as a detention centre.⁶¹ Perhaps ironically it is the dissenting opinion of Justice Scalia which may give the strongest basis for extending the principle established by the Court in *Rasul* to, in his words, “the four corners of the earth.”⁶² He asserted that the effect of the Court’s opinion would be that “from this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive’s conduct of a foreign war.”⁶³

Further strength is given to the proposition that detainees held further afield than Guantanamo Bay will now have access to United States courts by another important judgment from the Supreme Court handed down the day after *Rasul* and *Hamdi*. In *Sosa v. Alvarez Machain*,⁶⁴ the Supreme Court indicated that claims alleging breaches of international law norms – including torture and, apparently, prolonged arbitrary detention – by United States authorities committed outside the United States would be actionable in the United States courts.⁶⁵

Conclusion

While the precise implications of *Rasul* and *Hamdi* will, it seems, be the subject of hard fought further litigation before the federal courts, the significance of the Supreme Court's intervention to date should not be underestimated. In both cases, the Court held that the Administration had acted unlawfully in depriving the persons concerned of the protection of the ancient writ of *habeas corpus*. In so doing, and in the strongest possible fashion, the Supreme Court underscored the importance of the individual's right to liberty and affirmed the rule of law. It made it clear that even in times of perceived crisis the Executive cannot put itself beyond the scrutiny of the courts and that any individual deprived of his liberty must have access to court to challenge such detention. In so doing it upheld principles which have underpinned true democracies for centuries.

Footnotes

¹ Tim Otty is a barrister practising from 20 Essex Street, London and a member of the Executive Committee of the CLA. He was one of the authors of the *amicus curiae* brief filed with the US Supreme Court in the case of *Rasul et al v George W Bush et al*. He is also a legal consultant of the KHRP. Ben Olbourne is a pupil barrister who will join 20 Essex Street as a tenant in autumn 2004.

² Case Nos 03-334 and 03-343, 542 US (2004).

³ Case No 03-6696, 542 US (2004).

⁴ The two Britons had been released by the time the case came on for oral argument on 20 Apr 2004.

⁵ It is important to note that not all the petitioners or the other detainees at Guantanamo Bay were captured in Afghanistan. Some were taken into custody in the Gambia, Pakistan, Bosnia and other countries: see *Rasul*, Opinion of the Court, p 3, fn 4.

⁶ Lease of Lands for Coaling and Naval Stations, 23 Feb 1903, US – Cuba, Art III.

⁷ 215 F Supp 2d 55 (DC 2002); 321 F 3d 1134 (CADDC 2003).

⁸ 339 US 763 (1950).

⁹ *Rasul*, Opinion of the Court, pp 6-8.

¹⁰ *Braden v. 30th Judicial Circuit Court of KY.*, 410 US 484 (1973).

¹¹ 28 USC §2241.

¹² *Rasul*, Opinion of the Court, pp 8-11, 15.

¹³ In this respect, Justice Stevens' opinion drew upon the case law addressed in the *amicus* brief filed on behalf of the Commonwealth Lawyers Association and written by Sir Sydney Kentridge QC, Colin Nicholls QC and Timothy Otty of the English Bar and Stephen Pollak and John Rich of Shea & Gardner, Washington DC. The opinion referred, in particular, to *King v Overton*, 1 Sid 387, 2 ER 1173 (1668), *King v Salmon*, 2 Keble 450, 84 ER 282 (1669), *King v Cowle*, 2 Burr 834, 97 ER 587, *King v The Earl of Crewe ex p Sekgome* [1910] 2 KB 576, and *In re Ning-Yi-Ching* 56 TLR 3 (1939).

¹⁴ *Rasul*, Opinion of the Court, pp 13-14.

¹⁵ 28 USC §1350.

¹⁶ *Rasul*, Opinion of the Court, pp 16-17.

¹⁷ *Rasul*, Concurring Opinion of Kennedy J, pp 3-4.

¹⁸ *Rasul*, Dissenting Opinion of Scalia J, p 1.

¹⁹ *ibid*, pp 2-3.

²⁰ *ibid*, pp 15-18.

²¹ *ibid*, pp 19-20.

²² *ibid*, p 19.

²³ By the time the case came on for argument Hamdi had been granted access to counsel but his legal representatives were prohibited by the United States authorities from disclosing the content of their discussions with him.

²⁴ After the name of the relevant Defence Department official

²⁵ 296 F 3d 278 (2002 CA 4th Cir).

²⁶ *Hamdi*, Opinion of O'Connor J, pp 10-12.

²⁷ *ibid*, pp 12-13.

²⁸ *ibid.*, pp 13-14.

²⁹ *Ibid*, p 14.

³⁰ *ibid*, pp 22-23.

³¹ *ibid*, pp 23, 28-30.

³² *ibid*, p 25.

³³ *ibid*, p 26.

³⁴ *ibid*, p 27.

³⁵ *ibid*, p 32.

³⁶ *Hamdi*, Concurring Opinion of Souter J, p.3.

³⁷ *ibid*, p 16

³⁸ *Hamdi*, Dissenting Opinion of Scalia J, p 2.

³⁹ *ibid*, pp 2-5, 9.

⁴⁰ 2 Ventris 315, 86 ER 461 (1690).

⁴¹ 13 How St Tr 63 (1696).

⁴² 13 How St Tr 485 (1696).

⁴³ 24 How St Tr 1 (1794).

⁴⁴ *Hamdi*, Dissenting Opinion of Scalia J, pp 6-7.

⁴⁵ *ibid*, p 16.

⁴⁶ 317 US 1 (1942).

⁴⁷ *Hamdi*, Dissenting Opinion of Scalia J, pp 17-20.

⁴⁸ 4 Wall. 2 (1866).

⁴⁹ *Hamdi*, Dissenting Opinion of Scalia J, p 21.

⁵⁰ [1942] AC 206; Dissenting Opinion of Scalia J, p 27.

⁵¹ *Hamdi*, Dissenting Opinion of Thomas J, p 3.

⁵² *ibid*, pp 7-8.

⁵³ The first such applications have already been filed: see, eg, "Lawyers Seek Relief for 5 Detainees", *Washington Post*, 03 Jul 2004, p A20.

⁵⁴ See text accompanying fn 32 above.

⁵⁵ See Opinion at p 13

⁵⁶ "Pentagon Sets Hearings for 595 Detainees", *Washington Post*, 08 Jul 2004, p A01.

⁵⁷ *ibid*.

⁵⁸ See, also, "U.S. to Tell Detainees of Rights: Pentagon Outlines New Procedures", *Washington Post*, 10 Jul 2004, p A07.

⁵⁹ *Rumsfeld v Padilla*, Case No 03-1027, Decided 28 Jun 2004, 542 US (2004).

⁶⁰ See, eg, "Rumsfeld ordered secret detention of Iraqi suspect", *The Guardian*, 18 Jun 2004 <<http://www.guardian.co.uk/international/story/0,3604,1241576,00.html>> (accessed 12 Jul 2004); "Ghost detainees' at Camp Delta", *The Guardian*, 10 Jul 2004 <<http://www.guardian.co.uk/international/story/0,3604,1258099,00.html>>(accessed 12 Jul 2004).

⁶¹ *Rasul*, Opinion of the Court, p 8; Concurring Opinion of Kennedy J, p 3.

⁶² *Rasul*, Dissenting Opinion of Scalia J, p 11. The irony is in fact heightened by the fact that in *Rasul* the Administration had sought to rely upon the dissenting opinion of a similarly dismayed Justice Black in *Eisenstrager* to support its contention for a broad interpretation of the majority's reasoning in that case.

⁶³ *Rasul*, Dissenting Opinion of Scalia J, p 12.

⁶⁴ Case No 03-339, 542 US (2004).

⁶⁵ *ibid*, pp 38-45.

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Turkey's Implementation of European Human Rights Standards

Legislation and Practice

1. Introduction

Turkey has for many years been high on the international list of countries with serious human rights violations. Now, human rights organisations both in Turkey and abroad are hopeful that Turkey will become a country sharing European values and standards. The prospect of Turkish membership of the EU is the best opportunity Turkey has ever had of becoming a real democracy, with full respect for human rights and the rule of law, based on European values.

The purpose of this article is to evaluate the extent to which Turkey has complied with the conditions and criteria established by the EU in relation to countries applying for membership of the European Union. The criteria state, in essence, that an applicant state must have achieved:

“stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.

The Council of Ministers recognised in December 2003 the efforts made by Turkey to “accelerate the pace of reforms”. However, the Council also stated that **“further sustained efforts are needed”**. The Council pointed in particular to the following areas, on which this article also will focus:

- **“strengthening the independence and functioning of the judiciary”;**
- **“the overall framework for the exercise of fundamental freedoms (association, expression, religion)”;**
- **“the further alignment of civil-military relations with European practice”;** and
- **“the situation in the Southeast of the country and cultural rights”.**

On 6 October 2004, the EU Commission published its annual Progress Report. Subject to various reservations and conditions being fulfilled, the Commission stated that:

“Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened.”

The Council of Ministers will in December 2004 take a decision on the possible opening of accession negotiations, based on the progress made by Turkey in complying with the Copenhagen criteria.

2. Summary of the Present Status

It is interesting to note that the Progress Report does not conclude that the Copenhagen criteria have been fulfilled, but that the degree of compliance is sufficient to open accession negotiations. As admitted by the Turkish government itself, there are various shortcomings which must be overcome, before one can conclude that Turkey has achieved the degree of democracy and rule of law prevailing, both in law **and in practice**, in the EU member states.

In the area of **legislation**, considerable efforts have been made over the last few years, and in particular since the end of 2002 by the new Government. Nonetheless, there are still numerous articles scattered throughout various laws that need amendment. Examples are various articles of the new Penal Code, and the laws on Associations (No. 2908), on Foundations (No. 2860) and on Meetings and Demonstrations (No. 2911). The philosophy of the further legislative reforms must be to move away from laws whose **primary objective is to control and restrict** the exercise of all fundamental freedoms, to a situation where human rights are seen as **desirable and necessary**.

However, the **main problem** remaining, is the **practical implementation** of the reforms. Every day there are cases which demonstrate that police and security officers, prosecutors, judges and other public servants either do not understand or do not have the will or ability to comply with the legislative reforms and the relevant human rights standards, some of which were accepted by Turkey decades ago.

The lack of **practical implementation** of the reforms must be seen in the light of the existence of powerful forces among the military, certain political circles, elements within the bureaucracy and the media, often called the “deep state”, or simply “the state” (thus being distinguished from the Government and the Parliament). These forces consider the reforms a threat against the “unity” of the “secular” Turkish state, and the tenets of the Atatürk ideology, which continue to be protected by the 1982 Constitution. These forces look upon the reforms as a threat to their positions and power. They claim that the reforms have been imposed by the EU, and welcome any opportunity to stop or at least slow down the reform process.

The Government promised in the spring of 2004, belatedly, that after its reforms have been

legislated, the time has now come to **implement** these reforms. The Government has probably underestimated the **enormous** difficulties it will have in changing a **mentality**, which has become ingrained in the judiciary and the bureaucracy during decades. The “**acid test**” of Turkey’s compliance with human rights standards and respect for minorities lies precisely in the **practical implementation of the reforms**.

3. The Independence and Proper Functioning of the Judiciary

In a democratic state, it is vital to have an independent judiciary, which applies the law fairly and correctly, without any interference from the executive and legislative arm of the state. Paradoxically, it may be said that a main problem in Turkey, is that the judiciary is too independent of the Government and the Parliament. The judiciary does not seem to have acknowledged the determination of the Government and the Parliament to ensure that international human rights standards must be observed by the judiciary in interpreting and applying Turkish law. Even if this principle has now been incorporated into the Constitution, the Turkish judiciary has failed to take on board modern values and standards in the field of human rights.

Kemal Atatürk himself was a believer in embracing modern values and ideals. He once stated, shortly before he died:

“I am leaving no ... commandment that is frozen in time or cast in stone ... To argue for rules that never change would be to deny the reality found in scientific knowledge and reasoned judgment”.

Unfortunately, the opposite has happened. Enshrined in the Constitution, Atatürk’s ideas have been proclaimed eternally sacrosanct. They cannot be amended and even proposals to do so may constitute a criminal offence. From Ottoman times, the dominant philosophy was that the state was right and could do no wrong. The concept of individual rights was weak. The result is that anything which can be seen as a potential threat to the state (“devlet”) must be punished. Human rights standards protecting individual rights are interpreted consistent with the interests of the state, as perceived and interpreted by the “the deep state”.

It is not helpful to changing old habits and thinking, when the authorities themselves sometimes send out confusing and conflicting signals. One example is the abolition of article 8 of the Anti-Terror Law, which prohibited “separatist propaganda”. First, President Sezer vetoed the proposed abolition. When the proposal was reintroduced, the Justice Minister declared, apparently to comfort the members of Parliament, that the deletion of article 8 only meant that the same offence would remain punishable under existing articles of the Penal Code!

A proper reform of the Turkish legislation, establishing the rule of law and respect for human rights, should ideally have started with a complete overhaul of the Constitution, preferably in the form of a completely new Constitution. This is an aim mentioned by the Government and the EU on various occasions, but not acted upon so far. Although the 1982 Constitution has been changed many times, it still bears the hallmarks of a constitution imposed under threats by the military regime. The former Chief Justice of the Supreme Court of Appeals, Sami Selcuk, said already in 1999:

“The degree of the legitimacy of the 1982 Constitution is close to zero ... (because it has been) imposed on a society under threat”.

Numerous court cases bear witness to the need for a complete reform of the Constitution. One of these cases, against four MPs, including **Leyla Zana**, is an adequate illustration. The European Court of Human Rights (ECHR) found serious errors in the proceedings and declared that the defendants had not received a fair trial. The retrial proved to be a repetition of the trial in 1994, with the same deficiencies. The court upheld its previous sentence and failed to respect the clear conclusions of the ECHR. After heavy pressure from abroad, particularly from the EU, the Supreme Court “saved” the situation by setting the four parliamentarians free, having spent almost ten years in jail. However, there will be another retrial, and in addition they are under investigation in connection with speeches they have delivered after their release from prison.

Under the Turkish criminal procedural system, the functioning of the **prosecutors** is a main key to ensure the rule of law and respect for human rights. However, in spite of the Government’s declared policy on human rights, the prosecutors continue to bring cases in blatant violation of Turkey’s obligations under the European Human Rights Convention (“the European Convention”), other relevant international instruments and ECHR case law. The numerous cases brought against Turkey under the European Convention have so far had only limited impact on Turkish court cases, although in the last year some progress can be noted.

One line of reasoning in Turkish legal practice is **guilt by association**. One example:

1. The terrorist organisation PKK is making propaganda for the right to use the Kurdish language, including in education.
2. Consequently, anyone who advocates the right to use the Kurdish language is guilty of supporting (“aiding and abetting”, article 169 of the Penal Code) a terrorist organisation.

Another problem frequently seen in the prosecutors’ indictments is the failure to distinguish between the **non-violent** expression of political views, and cases of **manifest violence** or **incitement** to violence. For example, a charge of “aiding and abetting an illegal organisation” does

not need to be supported by concrete evidence of any linkage with the organisation.

A third case in point is the use of “taboo” words. Some of the prominent taboo words are:

- “Kurdish people”, or worse “the Kurdish people”, or even worse “the Kurdish nation” or “Kurdistan” (being seen as encouragement to “separatism” or “incitement to hatred”),
- “Turks and Kurds”, or worse “the Turkish and Kurdish people” (suggesting that they are two distinct peoples),
- “Mr.” Öcalan (the combination of these two words constituting “aid and assistance to an illegal organisation”; in 2003 there were 58 sentences on this basis).

A fourth case is the “sanctity” attributed to public institutions, such as the military, the police, the President and, above all, Kemal Atatürk’s memory. For example, under the revised article 159 of the Penal Code, “insulting or belittling” different state bodies are still punishable, including criticizing:

“Turkishness (sic!), the Republic, the Grand National Assembly or the moral personage of the Government, the military security forces of the State or of the judiciary”.

Although an unclear addition was made to this article, to exclude “expression of thought made only for criticism...”, penal provisions like article 159 will still lend themselves to the continued suppression of the free word. In 2003, 70 cases were instituted under this provision. 21 cases were tried, resulting in seven sentences and 14 acquittals.

A main concern is the numerous cases brought against human rights defenders, journalists and lawyers, who are prosecuted on flimsy “evidence” and spurious charges. It seems that the prosecutors either do not understand, or refuse to understand, that they are obliged to apply the law in an **objective, independent manner, in harmony with Turkey’s obligations under the European Convention.**

Although many of these cases lead to acquittals when they come to the courts, the constant investigation and prosecution of human rights defenders constitute a **pattern of harassment and persecution.**

Statistics from the Turkish Human Rights Foundation (HRFT) show that 65 % of cases tried during 2003 under three of the most frequently invoked articles restricting the freedom of expression resulted in acquittals! This supports the contention made by human rights defenders that the objectives of the prosecutors is not primarily to have the defendants placed behind bars. The effect of this practice is to perpetuate an atmosphere of uncertainty, fear and intimidation.

During the first 14 years of its existence, the Turkish Human Rights Association (IHD) has had 300 cases opened against. In the last three years more than 450 cases have been opened. One of its members, the lawyer Osman Baydemir, now elected as mayor of Diyarbakır, has had a record 200 cases opened against him for his human rights activities, including as chairman of the local branch of IHD. These figures do not include the cases of investigations that did not result in a prosecution.

The **pressure** on human rights defenders is partly due to old persisting attitudes, and also to open or covert pressures from certain elements of the state. Whatever the explanation, it cannot be seen that the Government has been able to take any **effective** steps to put an end to this practice. With considerable assistance from the EU, Turkish judges and prosecutors have been trained in European human rights standards and practices, but the effect so far is limited.

During the court hearings, **judges** often behave in a manner that would not be tolerated in Europe. For example, the judge will sometimes demand, even in minor cases, that observers and other persons following the hearings, not only are subjected to a body search, but also that pen and paper which they may have brought, are taken from them. Nobody holds judges accountable for such behaviour.

The **police and security forces** are another area of serious concern. Unlawful detentions, brutal and inhuman treatment, including torture, continue to be widespread. IHD reports 6,472 cases of human rights violations in the Kurdish areas in 2003. There has been much discussion about the use of **torture**. The Turkish government, while accepting that torture occurs, denies that it is **systematic**. The EU Commission appears to agree with this.

HRFT reports 770 torture victims in the period January-September, 2003, compared with 456 for the corresponding period in 2002. IHD reports that 692 persons were subjected to torture in the first six months of 2004. Torture methods such as electric shock, Palestinian hanging and falaka are still in use. The IHD branch in Diyarbakır claims that one third of the persons recently detained said they had been tortured.

Such massive use of torture could not be used, unless there is at least a tacit understanding within the police and security forces, and that the responsible authorities either know about it, or fail to exercise necessary supervision or to adopt adequate systems and procedures. At least in this sense, torture remains **systematic** in Turkey, as claimed by IHD and HRFT.

The suspicion that there is a mechanism of **impunity** is supported by the slow and low rate of prosecution of public servants guilty of torture and inhuman treatment. Those few cases which are prosecuted often lead to acquittal or lenient sanctions. In fact, persons complaining about police brutality risk prosecution on the basis of “belittling” the security forces.

4. The Fundamental Freedoms

Freedom of association and **freedom of assembly** continue to be curtailed in a manner inconsistent with the European Human Rights Convention. Of particular concern are the restrictions imposed on human rights organisations, trade unions and political parties. Those organisations and parties that work for a solution of the Kurdish problem have in particular been singled out for harassment and prosecution.

In fact, human rights organisations report a **massive increase** of cases against associations, in particular those that work for human rights and democracy. Article 33 of the Constitution on freedom of association was amended in 2001, and declared to be in harmony with European standards. However, it contains important restrictions on this freedom, “on the grounds of protecting national security and public order, or prevention of crime, or protecting public morals or the public health”.

These restrictions are broadly interpreted by the prosecutors and judges, to close down or penalise associations and individuals who dare to criticize the state, in particular relating to violations of human rights standards.

In addition to the provisions of the Constitution, Turkish law provides a wide variety of legal provisions, which can be used, and are used, to impede activities of human rights organisation, close them down and punish the leadership and members.

For example, articles 5 and 37 of the Law on Association prohibit associations whose goals or whose activities, respectively, are:

“contrary to ... national security and public health and morals, advocating the creation of a minority in the Turkish Republic on the basis of race, religion, sect and regional difference and the division of the unitary state structure of the Turkish Republic; or the denigrating or belittlement of the personality, principles, works or memories of Atatürk” (sic!).

In January 2003, a saving clause was introduced to allow persons to claim that there is in fact a minority in Turkey based on these differences! Nonetheless, provisions such as articles 5 and 37 still lend themselves to a broad interpretation if the authorities wish to close down a human rights association.

Freedom of assembly, an essential element of human rights in Europe, continues to be impeded and restricted. Human rights organisations and individual defenders of human rights are frequently impeded and restricted in holding press conferences, holding public meetings and arranging

public demonstrations. Such activities are met with prosecution under various provisions giving the authorities wide discretionary powers. This leads to an ad hoc administration of the law, prohibiting activities which the authorities do not like.

Police and security officers are supervising meetings and other activities in a manner which is, and is intended to be, threatening and intimidating. This includes recording and photographing those who are present. In other cases, the meeting is prohibited. According to Human Rights Watch, in the nine months since the Parliament enacted more liberal wording in the Law on Meetings and Demonstrations (No. 2911), 105 peaceful public gatherings, press conferences and demonstrations were dispersed, and 1,822 demonstrators were arrested. This is clearly a situation which is not acceptable by European standards.

One example is a seminar organised in Izmir in 2003 by the Turkish Medical Association. The police demanded to observe the seminar, claiming to have information that the seminar was used to carry out “propaganda for an illegal organisation” (read: PKK). When the organisers complained, an investigation was initiated against them. The charge was “propaganda for an illegal organisation”, “insulting the spiritual personality of the state”, and “slandering the security forces”.

With regard to **freedom of speech and of the press**, the judiciary continues to prosecute and sentence organisations and people who speak out against violations of human rights, even completely non-violent and innocuous statements. One of the problems in this area is the above-mentioned established legal logic of guilt by association.

Although many of the frequently used provisions of Turkish laws restricting the freedom of expression, have been amended in the last few years, these amendments have so far not been seen by prosecutors and judges as preventing them from pursuing cases, which under European standards would never have been investigated or prosecuted. Article 26 of the Constitution, which was amended in 2001 to harmonize it with European standards, still contains important restrictions. Freedom of expression is limited to the extent necessary

“for the purpose of protecting national security, ... the basic characteristics of the Republic and ... the indivisible integrity of the State”, etc., etc.

Again, such language is lending itself to wide interpretation, which would make it punishable to criticize, for example, “the basic characteristics of the Republic” (whatever these “characteristics” may be considered to imply?).

One of the articles of the Penal Code which is used to limit the freedom of expression is article 312-2. This article criminalizes “incitement to enmity ... based on social class, race, religion, creed or religious difference”. The article was amended in 2002, reducing the sentences allowed, and

clarifying that only statements which are “dangerous to the public order” can be punished. However, the article was amended in the opposite direction, by punishing the new offence of insulting “a section of the public in a degrading manner and which would damage human dignity”.

Vaguely worded provisions such as article 312 may be used, and have been used, to punish statements which in Europe could never be considered as a criminal offence. IHD reports that 35 trials involving 218 persons were launched in the first six months of 2004, under the infamous articles 159, 169 and 312 of the Penal Code. This compares with 27 trials against 78 persons in the corresponding period in 2003.

An example in point is the recent case against the NGO “Göc-Der”. In January 2004 the leader of the association and a university sociologist were brought before the State Security Court. The charge was based on a report they had prepared on village evacuation in the southeast. The report claimed that individuals had been tortured, their houses and livestock burned, and that they had been threatened with death if they returned to their village. This was seen as “openly inciting the people to hatred”. The leader was given a fine of the equivalent of 1,300 €, and the sociologist was acquitted.

On the positive side, the number of confiscated and banned publications has decreased from 2003 to 2004. “Only” 3 books and 4 journals were confiscated, and 1 newspaper and 4 journals banned in the first half of 2004.

In the area of **religion**, the rights under the European Convention continue to be neglected, and various obstacles are placed upon the free exercise of their faith by religious communities other than Sunnis. The major Islamic sect of Alewites (the majority of whom are Kurds) are subjected to the same discrimination as non-Muslim faiths. This applies to such issues as difficulties in having property rights and legal status recognised, training of clergy, etc.

5. Civil-Military Relations

Some legislative reforms have been made, including in the Constitution, to limit somewhat the role of the military, which traditionally has been seen as the “guardian” of Kemal Atatürk’s ideology, including the ideals of the secular state. The military has traditionally been widely respected by the population at large, as a stabilising and incorrupt institution.

In acts and words, the military continues to exert influence and make political statements on issues which in Europe would be seen as highly inappropriate, e.g. on the education system and the role of religion in Turkish society. The main areas where the military today continue to influence the political agenda are:

1. “Separatism”, i.e. the fear of Kurdish nationalism.
2. “Fundamentalism”, i.e. the fear of Islamists changing the “secular society”.

In the past few months, the Deputy Chief of General Staff, Ilker Basbug, has, for example, expressed the following:

- “Secularism and moderate (!) Islam cannot coexist; there is either one or the other”,
- The future will be “very difficult and bloody” if there is established “a federal structure in Iraq on an ethnic basis” (i.e. the fear of Kurdish autonomy in Iraq),
- The US was criticized for not “meeting our (the military’s?) expectations to start military action against the PKK”.

Reforms proposed by the Government are quickly dropped if the military comes out with statements against such reforms. Investigations of “subversive” cases, e.g. speeches on the Kurdish problem, are often started after the military has come out with public criticism of the speech. Such activities by the military are often the result of alliances made by the military with political forces, which share the military’s views on any given subject.

A recent example is the Government’s proposal to amend the law on YOK, the Higher Education Board, which is supervising universities, in conjunction with changing the situation of the religious schools, called “Imam Hatip” schools. The proposal would give graduates from the Imam Hatip Schools wider access to universities than they have had until now.

The Chief of General Staff, Hilmi Ozkok, issued a stern statement, stating that the reform bill “contradicted the principles of secularism”, that it would boost the influence of Islam in education. It also said that the military was “one of the sides” in the dispute. The EU Commission Representative in Ankara, Mr. Kretschmer, characterized these statements as not displaying “a constructive attitude”, referring to the civil-military relations as important criteria for the EU. Some politicians demanded that Mr. Kretschmer should be declared “persona non grata”, for interfering in Turkey’s internal affairs and showing “disrespect for codes of international diplomacy”. The spokesman of the Foreign Ministry also referred to these codes, for which he expected respect (from Mr. Kretschmer). Criticism of the military is obviously not easily acceptable in Turkey.

Many of the Government’s proposals are seen by the “deep state” as evidence of the “hidden agenda” of the Government to lead Turkey in the direction of Islamist fundamentalism. It is assumed that the President, Ahmet Necdet Sezer, himself a strong “secularist”, will veto the new law on YOK.

6. The Kurdish Problem

The Council of Ministers of the EU referred to “the situation in the Southeast of the country and cultural rights”, as one of the four major areas of concern. This is a diplomatic euphemism for “**the Kurdish problem**”, a very sensitive and controversial area in Turkish politics. The Turkish perception of human rights and minority rights, has since 1923 been that the Kurds are **not a minority**. The official view is that only non-Muslim communities have minority rights (described as Jews, Armenians and Greeks in the Lausanne Treaty of 1923), and that human rights problems must be solved on the basis of the individual’s human rights.

Even some Kurds do not like to be described as a minority, being a demeaning swear word. Some say they are a **nation**, others say they are a part of the majority. The point is that international law and various pertinent conventions grant minorities certain rights, which in practice have often been denied to them. Once a minority has all the rights to which they are entitled, it becomes largely irrelevant how they are described. However, the international concept of “minorities” has had no impact on the uniquely Turkish concept of minority rights.

The Copenhagen criteria specifically refer to “respect for and protection of minorities”, in order to underline the importance of minority protection. The Commission has in all its Progress Reports stated again and again its requirements as far as minority rights are concerned. In its 2004 report, the Commission:

- rejected the Turkish interpretation, reminding the Turkish government that there are other communities in Turkey than Jews, Armenians and Greeks, “including the Kurds”;
- expressed in this context, its concern that Turkey’s reservations to UN Covenants on the right to education and the rights of minorities “could be used to prevent further progress in the protection of minority rights”;
- pointed out the valuable role which the OSCE High Commissioner on National Minorities could play “in assisting Turkey to move towards full compliance with modern international standards on the treatment of minorities”;
- also pointed out that Turkey has not signed the European Framework Convention for the Protection of National Minorities, or the Charter for Regional and Minority Languages.

Commenting on the Report, the Turkish President dismissed the fact that Kurds (and Alawites) constituted a minority. He said they were just part of the majority in the country, and “why should we call a part of the majority a minority?” The Progress Report had a chapter (1.3) on “Human rights and the protection of minorities”, dealing at length with minorities, including the Kurdish minority. Nonetheless, the Turkish Foreign Minister, Abdullah Gul, proclaimed that the Report “did not refer to minorities”. He even claimed that the Commission had “agreed to take out all

references to minorities”. The Turkish Prime Minister recently put the official view this way: “If you do not think about it, there is no Kurdish question” (sic!).

With attitudes like these at the highest political levels, it is not surprising that the authorities have never attempted to resolve the problem through peaceful means. Instead, Turkey has so far met the Kurdish problem with a wide range of repressive measures, which has brutalised Turkish society. Every year thousands of Kurds (and Turks) are beaten up during demonstrations, arrested, detained, tortured, sentenced or they simply “disappear”, all as a result of having expressed non-violent, but unpopular, opinions about the solution of this problem. The prisons are overcrowded with such persons.

The Kurdish population comprises somewhere between 15 and 18 million people, about 25 % of the total population of Turkey. The Kurdish problem is **the single most important cause of human rights violations in Turkey**. However, as long as Turkey **denies the existence of the problem**, it will be impossible to find a satisfactory solution in the near future. Turkey will have come a long way, the day it realises that “minorities” in Turkey are not only Jews, Armenians and Greeks! As mentioned above, it is no longer a criminal offence to say that, for example, Kurds are a minority in Turkey, even though the state does not recognise them as a minority (!). This is at least a step in the right direction.

In spite of this **policy of denial**, the Turkish Government has declared that it accepts and promises to implement fully the Copenhagen criteria, which very specifically include **“the respect for and protection of minorities”**. Confronted with the Copenhagen criteria, some legislative reforms have now been made, somewhat hesitantly. For example, in the area of broadcasting and teaching of the Kurdish language, a few reforms have been introduced, narrowly circumscribed and giving wide, discretionary powers to the authorities to determine the extent of the “rights” which in principle have been granted.

For example, programs in Kurdish for children on radio or TV are prohibited. Radio programs must not exceed one hour per day and 5 hours per week. TV programs must not exceed 45 minutes per day, and 4 hours per week. Subtitles or translations into Turkish are mandatory. Such clauses are far from showing “respect for and protection of minorities”. Warnings and closure of TV and radio stations continue to be frequent. In February 2004 the supervisory authority, RTUK, issued a warning to one TV channel which had shown a music program with songs in Kurdish. This was based on a provision which prohibits programs that are “in breach of the general principles of the Constitution, ... national security...”etc. The citizens of any EU country would surely not accept such laws and practices.

The reforms and the practice followed by the RTUK indicate that the Government is not yet prepared to accept the granting of all rights that the Kurds have under the European Convention

and other international instruments. Its reservations about Article 27 of the UN Covenant on Civil and Political Rights are indicative in this respect.

In 2003 a new law was passed allowing Kurds to use their Kurdish names. It is indicative of the attitudes of the authorities, that the Commander of the Gendarmerie requested from the Attorney General the full list of people who had applied to use Kurdish names. He considered such persons as “potential threats to the social order”.

It is encouraging to see that the minority issue is now at least beginning to come on the public agenda. A recent report by a public human rights body, attached to the Prime Minister’s office, has pointed to the need for Turkey to re-examine the definition of “minorities”. Although heavily criticised by some politicians, the discussion will hopefully continue and help in solving the Kurdish problem.

It would be helpful if the EU clarified in some detail its requirements under European standards, to ensure “respect for and protection of minorities”. The EU should address the problem directly, for example by using the term “the Kurdish minority”, instead of euphemistic terms, such as “the southeast”, “the situation in the southeast”, and “citizens of Kurdish origin”. This is terminology used by Turkey to prevent a **real** discussion of the **real** issue, which is **the Kurdish problem**.

7. The Objectives

The EU Commission in its Report has indicated some basic conditions for the opening of accession negotiations. Among these are:

- the “legislation and implementation measures need to be further consolidated and broadened”;
- the Commission will “continue to monitor progress of the political reforms closely”;
- there will be an annual review of the progress,
- “the pace of reforms will determine the progress in negotiations”;
- there will be benchmarks for each chapter of negotiations, including “legislative alignment and a satisfactory track record of implementation”;
- there should be a “substantially strengthened political and cultural dialogue” between people from the EU and Turkey, and “civil society should play the most important role in this dialogue, and
- in case of a serious breach of the “principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”, accession negotiations may be suspended.

From a human rights perspective, the goal of the accession negotiations must be to ensure at the earliest stage of the accession negotiations, that Turkey has achieved the following objectives, in its legislation and its practice:

- **An independent and well functioning judiciary,**
- **Full freedom of expression, including the press, radio and TV, in line with European standards, with abolition of the censorship system, and based on a system of equality as far as use of the Kurdish language is concerned,**
- **Freedom for associations and political parties, without the bureaucratic restrictions - whose main purpose are control - including the right to freely cooperate with foreign and international institutions, as practiced in Europe,**
- **An end to the traditions of torture, inhuman treatment and “disappearances”.**
- **Recognition of the cultural and other rights of the Kurdish people, including the right to give and receive education in the mother tongue,**
- **Aligning the civil-military relationship with European practices,**
- **Right of return for the millions of Kurdish internally displaced persons to their homes and villages, assistance to do so, and redress for the losses suffered.**

8. Methods to Achieve the Objectives

There are various procedures which may be considered by the EU, in order to achieve the above-mentioned objectives.

As mentioned above, finding a solution to the Kurdish problem is a “sine qua non”, for Turkey to comply with the Copenhagen criteria. Therefore, it is important to clarify that:

- **there exists in Turkey a Kurdish minority, which under the Copenhagen criteria and international law has the right to be respected and protected by Turkey,**
- **there is in Turkey a Kurdish problem, which needs to be resolved urgently in law and practice,**
- **Turkey can never be able to comply with the Copenhagen criteria until this problem has been satisfactorily resolved.**

Secondly, in order to achieve the overall objectives of full respect for human rights, the following may be suggested:

1. As indicated by the Commission, Turkish and European NGOs should have a prominent role in monitoring the implementation of the reforms.
2. A tripartite body, consisting of representatives from the Turkish Government, the EU

Commission and NGOs, should be established.

3. This tripartite body should have the authority to examine any case of alleged violations, which any participant in this body considers important to bring to its attention. Depending on the workload, subordinate groups may be created to deal with individual cases.
4. In this tripartite body, the Government will be expected to explain and document why a violation has occurred, during which the prosecutor involved may be called upon to explain what action he has taken or proposes to take.
5. The tripartite body may give recommendations as to the steps to be taken to remedy the violation, and to help ensure that similar violations do not recur.
6. The tripartite body will advise the Government on the type of information and instructions or guidelines that may be issued to the judiciary and other relevant public bodies, to help in the practical implementation of the reforms; this would include:
 - the instruction that (under the recent amendment to the Constitution), Turkish law is subordinated to the European Convention, including the jurisprudence of the ECHR,
 - detailed explanations of human rights standards as they should be interpreted and applied in various standard types of cases,
 - a reminder of the personal responsibility of each member of the judiciary to comply with, and apply, Turkish laws and the European Convention.

As a pilot project, one could also visualise that during a trial period of, say, 6 months, all prosecutors would submit to the Ministry of Justice (for review by the tripartite body), all proposals they may entertain, to bring prosecutions relating to:

- the proposed closure of any media (newspapers, periodicals, radio, TV),
- words spoken or written on the basis that they are violating specified articles which punish the expression of views,
- the proposed dissolution of, or other sanctions against, a political party, an association or a foundation,
- words spoken or written by members of political parties, associations or foundations relating to their activities as members.

The tripartite body would discuss the above-mentioned cases, in consultation with the relevant prosecutors, and advise the Government of the steps to be taken to avoid instituting proceedings on manifestly unfounded grounds. Procedures should be adopted to ensure that all cases where officials are suspected of having violated human rights standards will be promptly and effectively investigated and prosecuted.

The EU should at this stage be more specific than it has been so far with regard to the remaining legislative reforms that are needed, as well as specific steps to be taken to ensure effective implementation of the reforms. This would help the Government to get a more complete understanding of these requirements and assistance in complying with the requirements. In this way, Turkey would get the opportunity to adopt a work program that would fully address all remaining areas of concern, and in the end would make human rights a reality in the daily life of all citizens.

About the author

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Prisoners: The Establishment and Protection of Human Rights under the European Convention of Human Rights

“Frequently enough to carry conviction, a prisoner will recount how somebody in authority has said ‘I’m the law here’. The sense of impotence and isolation the phrase creates is designedly chilling. In too many instances, moreover, the officer is right: he or she is in sole charge and there is no recourse to any legal authority”

Stephen Sedley (now Lord Justice Sedley), in his foreword to *Prison Law*, Stephen Livingstone and Tim Owen, 1st Edition 1993

Prisoners have always been at the mercy of their jailers. The Romans would parade captured leaders of the Germanic tribes through Rome before executing them and no-one at the time thought ill of King Henry V of England when he ordered the execution of captured French soldiers at the Battle of Agincourt during the course of a French counter-attack. There was simply a recognition that those who allowed themselves to be captured in war were at the mercy of their captors.

Meanwhile, the ordinary criminal prisoner has long been at the bottom of the heap with regard to care and protection. In various countries, including England, cells would be placed at different depths depending upon the significance of the crime and the poverty of the criminal. Many lost their liberty with no expectation of leaving jail alive.

English law took its early steps to protect prisoners with the principle of Habeus Corpus and then through various Gaol Acts in the eighteenth and nineteenth centuries. However, it was still said that courts were sometimes unwilling to protect those citizens who found themselves behind bars.

Indeed, it has been said that the judicial authorities in England and Wales did not exercise true judicial protection until after the riots at Hull prison and the subsequent **R v Board of Visitors of Hull Prison, ex parte St. Germain [1979] QB 425**. It was in this case that Lord Justice Shaw detailed the status of a prisoner as being a citizen behind bars whose entitlement to the court’s vigilance for those rights which he or she retained was as great as any other person.

Prisoners' rights have struggled to develop in other European countries and as a consequence there has been a considerable reliance upon the protection of the European Convention on Human Rights. Indeed, the Convention has placed the seed of numerous rights in the legal system of many countries and allowed prisoners to seek redress in their home courts. This can indeed be said to have occurred in the United Kingdom where applicants such as Sidney Golder won their arguments in Strasbourg and encouraged English judges to be conscious of the Convention even before the implementation of the Human Rights Act 1998.

Prisoners continue to have difficulties in presenting their cases. Often the allegations are made about people who have a power over them and with regard to the very authorities who are detaining them. However, whilst accepting that the authorities have a margin of appreciation in some matters, the Strasbourg Court has been clear in its determination to protect those rights which take on even greater importance to those who are detained and suffer a loss of liberty.

Right to Life – Investigations into Deaths in Custody

Article 2, European Convention on Human Rights

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided for by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
 - a) *in defence of any person from unlawful violence;*
 - b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - c) *in action lawfully taken for the purpose of quelling a riot or insurrection*

Article 2 is one of the most fundamental provisions in the Convention from which no derogation is permissible, save in time of war.

In the light of its importance, the Court has placed considerable emphasis on national authorities to protect life and also to conduct appropriate investigations into the deaths of prisoners in custody.

In **Edwards v United Kingdom**⁶⁶ the Court considered the death of Christopher Edwards who was killed by Richard Linford, a prisoner who was suffering from a severe mental illness, while being held on remand in Colchester Prison in November 1994. The European Court found that there had been a breach of the positive obligations to protect life under Article 2. There was information

available to the authorities which demonstrated that Richard Linford was a real and serious risk to Christopher Edwards when placed in his cell and the Court observed that information was available to the authorities which should have prevented them from placing him in the same cell as Christopher Edwards.

The Court held, unanimously, that the failure of the agencies involved, medical, police, prosecution and court, to pass on information about Richard Linford to the prison authorities and the inadequate nature of the prison screening process, amounted to a breach of the state's obligation to protect the life of Christopher Edwards. It also found that there had been a breach of the procedural obligation to carry out an effective investigation into Christopher Edwards' life.

In **Jordan v. United Kingdom**⁶⁷ the Court identified the following features as being necessary so as to ensure that an investigation into a death in custody is compliant with Article 2:

- the investigation must be independent;
- the investigation must be effective;
- the investigation must be reasonably prompt;
- the next of kin must be involved to the appropriate extent

The Protection Offered by Article 3

Article 3, European Convention on Human Rights

No one shall be subject to torture or to inhuman or degrading treatment or punishment

Prisoners have sought the protection of Article 3, both with regard to the extreme matter of the death penalty and also with regard to the protection of their own physical and moral integrity whilst in detention. The Court has been willing to use this Article to protect prisoners from physical and mental abuse as it recognises that Article 3 of the Convention enshrines one of the most fundamental values of democratic society.

Death Penalty

The death penalty sits uneasily with the Convention and as the ambit of the Convention has grown across Europe, the existence of the death penalty has reduced. The Court has long held that a long period of detention on death row can in itself amount to inhuman and degrading treatment under Article 3⁶⁸.

Conditions of Detention

Article 3 will protect all citizens and so protects prisoners against torture, inhuman or degrading treatment. However, within the context of those being held in prisons, the threshold for establishing a breach of Article 3 is fairly high. The question that is asked is whether or not the conditions of confinement fall below the standards evolving in Europe. As the general standards improve in European jails, it is hoped that the threshold required falls, but at the moment too many nations that have ratified the Convention possess a standard of prison system that could be best described as basic.

The Court and the Commission have found that severe overcrowding may breach Article 3⁶⁹, as may unsanitary conditions including no exercise, fresh air or daylight⁷⁰, lack of psychiatric care⁷¹ and exposure to TB in overcrowded conditions⁷².

The fact that the appalling conditions were brought about by a prisoner's own actions is a relevant factor but will not automatically absolve the authorities of all responsibility⁷³.

Solitary Confinement

Segregation is undesirable under the Convention but will not always lead to a breach. In **Ensslin, Baader and Raspe v. Federal Republic of Germany**⁷⁴ the Commission held that the exclusion of a prisoner from a prison community did not in itself amount to inhuman and degrading treatment.

However, to exclude a prisoner from almost all or all contact with those present in a prison is a serious measure and so regard must be had to the particular conditions, the severity of the measures and its duration as well as to the objective being pursued and the effects upon the prisoner⁷⁵.

The Court has been willing to find that extreme conditions of control approaching isolation are justifiable if there are grounds to assert that the prisoner is a very great security risk.

In **M v. United Kingdom**⁷⁶ the applicant was kept in a cage-like cell for 23 hours a day and provided with cardboard furniture. He was not allowed to associate or see any other prisoner. He was allowed to possess a radio and had access to certain books and newspapers. The Commission held that in the light of the very dangerous nature of the prisoner, and his having murdered three inmates since he was first detained and his having been diagnosed as possessing an untreatable psychopathic condition, the conditions of isolation were legitimate and did not exceed the severity threshold set by Article 3.

Complete sensory isolation coupled with complete social isolation continue to be a breach of the

Convention⁷⁷

Ill-Health

Authorities are required to maintain a continuous review of detention arrangements so as to ensure the health and well-being of prisoners in its care⁷⁸.

If insufficient treatment is provided, or if no treatment is provided at all, it may be possible to argue that a breach of Article 3 has occurred. In such matters, the health of the prisoner and the nature of the expected treatment would have to be taken into consideration.

In **Henaf v. France**⁷⁹, the applicant was a serving prisoner who had previously failed to return to prison after a period of leave. In 2000, he was transferred to hospital to undergo an operation. The prison governor requested the presence of police officers to escort and watch over him. The applicant remained handcuffed at the hospital until the operation when his leg was chained to the bedpost. The Court held that there had been a violation of Article 3. There had been no specific allegation of an act of violence by the applicant nor that he posed a danger at the material time. As there were guards outside his room, there was no justification for his being handcuffed to the hospital bed the night before the operation.

In **McGlinchey v. United Kingdom**⁸⁰ a prisoner manifested heroin withdrawal whilst in prison. She was treated by a doctor on various occasions before being admitted to hospital where she died. The Court held that there was a violation of Article 3 as there were failures in her treatment. She was vomiting and losing weight, yet the authorities failed to provide her with adequate medical care.

Intimate Searching

There has always been a concern for prisoners when faced with intimate searches for it is a very personal intrusion that can easily and subtly be exercised in a degrading manner. The Court is clear that intimate searches require clear justification and where no such justification is established, there will most probably be a breach of Article 3⁸¹.

In **Van der Ven v. the Netherlands**⁸² the Court found that strip-searches, albeit carried out in a “normal” manner, had a degrading effect and violated Article 3 of the Convention as they were performed systematically on a weekly basis as a matter of practice which lacked clear justification in the particular case of the applicant.

Drug Testing

The requirement to provide a urine sample does not in itself reach the necessary degree of severity to breach Article 3⁸³.

Handcuffs and Restraints

Handcuffs and restraints are another clear area of friction between law enforcement agencies and prisoners. It is a regular occurrence for a lawyer to meet a client and to be immediately shown marks where handcuffs have been fitted too tightly. There is a view that a tight pair of handcuffs will result in a detainee being less predisposed to being difficult. Whatever the reasons, there will always be regular complaints from prisoners as to the appropriateness of handcuffs and restraints being used. The Court has held that using handcuffs whilst prisoners are being transported will not breach Article 3 where their use is necessary and reasonable, unless there is a clear intention to physically harm or humiliate the prisoner⁸⁴.

Ill-Treatment

In the recent matter of **Pantea v. Romania**⁸⁵ the applicant was detained and complained that he was beaten by fellow inmates at the instigation of prison wardens. He was then handcuffed to his bed for 48 hours and having sustained multiple fractures he was transported to hospital in a railway wagon; a journey which took several days. He was not given food, water or medical treatment. The Court found a breach of Article 3 and that the authorities had failed to discharge their positive obligation to protect the applicant's physical integrity.

In **Yankov v. Bulgaria**⁸⁶ the applicant held a doctorate and taught economics. He was arrested and convicted of a criminal offence. Whilst in prison his hair was shaved off and he was been detained for seven days in an isolation cell in bad conditions. The Court found that a particular characteristic of the treatment complained of, namely the forced shaving off of a prisoner's hair, was that it consisted of a forced change to the person's appearance by the removal of his hair. The person undergoing that treatment was very likely to experience a feeling of inferiority as his physical appearance is changed against his will. Further, for at least a certain period of time a prisoner whose hair has been shaved off would carry a mark of the treatment he has undergone. The mark was immediately visible to others, including prison staff, co-detainees and visitors. Such an action diminished the prisoner's human dignity and so breached Article 3.

Deprivation of Liberty

It is clear that for a detention to be lawful, it must comply with Article 5. This Article is concerned with the deprivation of liberty and not with mere restriction upon liberty. There is clearly a

deprivation of liberty when a prisoner is detained in prison and so the reasons for the deprivation must be lawful and in accordance with the Convention.

The Right to a Fair Trial

Article 6, European Convention on Human Rights

1. *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 within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimal rights:*
 - a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b) *to have adequate time and facilities for the preparation of his defence;*
 - c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

This is an area in which the approach has changed over the years. In the mid-1970's, the Commission found that prison disciplinary proceedings were outside the scope of Article 6⁸⁷.

However, this approach was reversed by the Court in **Campbell and Fell v. United Kingdom**⁸⁸ where it held that certain prison disciplinary offences were sufficiently serious to attract the criminal due process guarantees of Article 6. The charge in the matter of Mr. Campbell was of mutiny and of violence against a prison officer. Whilst the offences were deemed to be criminal and not disciplinary, the loss of both 570 days of remission and of 91 days privileges were severe penalties and so the potential consequences were sufficiently severe to identify the proceedings as criminal and so requiring the protections detailed within Article 6. However, the Court confirmed

that prison disciplinary proceedings can still be held in private.

This matter was again considered by the Court in **Ezeh and Connors v. United Kingdom**⁸⁹ where it held that for Article 6 to be applicable it sufficed that the offence in question was by its nature to be regarded as criminal from the point of view of the Convention, or that the person concerned was liable to a sanction which, by its nature and degree of severity, belonged in general to the criminal sphere. Conduct which constituted an offence under the prison rules might also amount to an offence under the criminal law, so that, theoretically at least, there was nothing to prevent such conduct being the subject of both criminal and disciplinary proceedings. In this matter the Court held that the deprivations of liberty, which were at stake, and which actually resulted from the awards of additional days to the two applicants, had to be regarded as appreciably detrimental and the presumption that the charges resulting in such awards were criminal had not been rebutted. In such circumstances the Court observed that the Convention required that a person charged with a criminal offence who did not wish to defend himself in person had to be able to have recourse to legal assistance of his own choosing.

Private and Family Life

Article 8, European Convention on Human Rights

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Contact with family and friends

The Convention is clear that a deprivation of liberty that is lawful under Article 5 will not constitute an interference with a person's family or private life under Article 8.⁹⁰

However, regardless as to the lawfulness of the detention, Article 8 requires that a National State assist prisoners as far as possible to continue, develop or even create ties with people outside of prison walls so as to facilitate their social rehabilitation. This requirement recognises the need not only for inmates to sustain contact with their families but also with friends and the community at large.

Consequently, an absolute prohibition on outside contact will rarely be considered to be justifiable

under Article 8(2). In **McVeigh, O’Neill and Evans v. United Kingdom** the Commission accepted that in certain circumstances, a refusal to allow a detainee to contact the outside world may be necessary to avert the risk of an accomplice escaping, destroying or removing evidence. However, such an approach suggests that there is only a limited time-period in which such incommunicado detention could be permissible and so the longer the detention in such circumstances the harder it would be for the authorities to justify.

In **McVeigh and Others**, the Commission was mindful of the effect on the family of a detained person and that such effects should not be overlooked. It observed that the authorities ought to fulfil any request from the person detained that his family be notified and answer any reasonable requests made by close relative about a detainee.

The Convention also protects the right of a prisoner to have respect for his family life by requiring the authorities to allow him to maintain effective contact with close family members⁹¹.

This right has also enabled prisoners to require that contact with the outside world be maintained so far as is possible so as to be able to reintegrate with society upon release. Thus, they are permitted to correspond with friends and relatives and to have the provision of visiting facilities.

The Court has, however, made clear that the requirement of enabling a prisoner to remain in contact with his family and friends is not an overriding obligation. Thus, it is possible for a prisoner to be placed in a prison which is situated some considerable distance from his home area if this is the consequence of the ordinary and reasonable requirements of imprisonment. This could be because of a high-level of security required for the prisoner. In such circumstances, the Court has found that the national authorities have a degree of discretion when regulating a prisoner’s contact with his family⁹².

The Commission further held that it was not a breach of Article 3 if the authorities did not move a prisoner closer to his where his fiancée lived so as to facilitate visits⁹³.

A national authority is still expected to respect national court orders even when dealing with a serving prisoner. Where a court has held that a prisoner has a right to see his child, the prison authorities should do everything reasonably within their power to guarantee the effective exercise of the right of access that was accorded by that court⁹⁴.

However, the history of the prisoner will be taken into account when assessing the ability to facilitate the right of contact. In **X v. United Kingdom**⁹⁵ the Commission held that an eighteen-year prison sentence for offences of violence were sufficient in their seriousness to deprive a divorced, non-custodial parent of a right of contact with his children. The Commission took into account not only the nature of the offences but also the fact that the oldest child was aged 3 at the

date of the applicant's arrest and that the applicant had a further 14 years to serve in prison with little chance of parole.

To date there has been no Court decision concerning the rights of female prisoners to have contact with their babies. In **Togher v. United Kingdom**⁹⁶ the Commission declared as admissible a complaint under both Articles 3 and 8 with respect to the enforced separation of a female prisoner from her baby whilst she was still breast-feeding her baby. This matter was resolved by a friendly settlement.

However, the Convention does not guarantee all aspects of ordinary private life to a serving prisoner and Article 8 has not been extended to detail a right to conjugal weekend visits⁹⁷.

The United Kingdom authorities refused to allow prisoners to provide sperm so that their wives could be artificially inseminated. There was concern on behalf of certain prisoners that because of the age or health of their wives, it would not be possible for them to wait until their husbands were released as they would lose the ability to have a child. The refusal was challenged⁹⁸ and the United Kingdom authorities agreed to allow the procedures to be carried out.

Correspondence

Where a prisoner, without adequate assistance, would be unable to afford postage costs, the authorities may be required to pay all or part of the costs in order to ensure that the prisoner's rights under Article 8 are appropriately respected⁹⁹.

However, limiting the amount of post sent is not in itself a breach of the Article. In **AB v The Netherlands**¹⁰⁰ the prisoner complained about the facilities for communications within the prison. He was only allowed to send 2 or 3 letters a week though he could receive letters at all times. The Court held that his contacts with persons outside prison had not been unreasonably restricted.

It was also held in **AB** that Article 8 cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for correspondence are available and adequate, and where access to telephones is allowed, the needs of security will permit significant restrictions on its use.

It has been recognised that some measure of control over prisoners' correspondence is not of itself incompatible with the Convention, insofar as it is consistent with the ordinary and reasonable requirements of imprisonment¹⁰¹. However, the Court had been mindful of the fact that writing and receiving letters are sometimes the only personal link to the outside world possessed by a prisoner and such a fact is relevant in the assessment as to the permissible extent of such control by the national authorities.

Thus, any grounds for censoring prisoners' correspondence must be sufficiently defined so as to protect individual prisoners from inappropriate interference in their relations with other people. Such interference has to be justified in the light of Article 8(2) and to be in accordance with law.

The issue of correspondence has been particularly considered with regard to contact between a prisoner and his lawyers. There is an understandable need in a democratic society for a prisoner to be able to have full, detailed and uninhibited discussion with his legal representatives. For a person detained in prison, the right to correspond is of significant importance when instructing his lawyer. The Court has held that with regard to the right to a fair trial under Article 6, *"if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective"*¹⁰².

In **Campbell v. United Kingdom**¹⁰³ the Court recognised that it is difficult to draw a line between mail concerned with litigation and ordinary mail. Indeed, a letter to a lawyer may contain much that is not concerned with litigation. *"Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8"*

Consequently, the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure but it should only be opened and not read. This requires that suitable guarantees preventing the reading of the letter should be provided such as opening it in the presence of the prisoner.

The Court detailed in **Campbell v. United Kingdom** that the reading of a prisoner's mail to and from his lawyer should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege was being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be considered to be "reasonable cause" will depend upon all the circumstances but it presupposes the existence of facts or information which could satisfy an objective observer that the privileged channel of communication was being abused.

In **Golder v. United Kingdom**¹⁰⁴ a prisoner wanted to bring a libel action against a prison officer. His request to be able to write to a lawyer with a view to commencing proceedings for libel were refused. The Court held that preventing a person from even initiating correspondence was the most far-reaching form of interference. It found that preventing a prisoner from contacting a lawyer with a view to commencing civil proceedings was not necessary in a democratic society irrespective of the likelihood of such proceedings actually being successful.

The Court will obviously protect legal correspondence with its own administration. In **Puzinas**

v Lithuania¹⁰⁵ the prisoner's correspondence with the Commission and the Council of the Baltic States had been screened before he was given access to it. The authorities censored a letter the applicant sent to his wife in which he accused prison staff of theft and on all occasions, the letters were open in the prisoner's absence. The Prison Code permitted such interference. The European Court found that whilst the interference had a legal basis and a legitimate aim, it could not be seen as necessary in a democratic society.

In **AB v The Netherlands**¹⁰⁶ the applicant complained about the censoring of his correspondence with the Commission and the stopping of his correspondence with his lawyers. This was in accordance with the relevant domestic rules. The Court held that in relation to the correspondence with the Commission, there was no legitimate aim or necessity for the interference. The stopping of the correspondence with the lawyer who was advising the prisoner in his application to Strasbourg, even though he was not authorised to practice in the Netherlands Antilles and was a former prisoner himself, also breached the Convention.

Freedom of Thought, Conscience and Religion

Article 9, European Convention on Human Rights

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

Freedom of Thought and Conscience

This Article of the Convention has given rise to interesting arguments on behalf of prisoners, which have often been viewed by the authorities as efforts to go beyond the boundaries of discipline or a back route into challenging the lawfulness of detention.

The Commission has found that Article 9 does not guarantee the right of a prisoner to manifest his political beliefs by wearing his own clothing and not the clothing provided by the authorities¹⁰⁷. Further, it does not cover the wish to wear no clothes¹⁰⁸.

Article 9 does not grant political prisoners a right of special status¹⁰⁹.

Further, a prisoner's belief in his innocence was not accepted to be a philosophy protected by

Article 9. Consequently, it would not be contrary to Article 9 for a prisoner to be required to take part in an offending behaviour programme when he disputed his guilt.

The requirement that a prisoner clean his cell was not found to be a breach of Article 9¹¹⁰.

Religion

It has long been established that the national authorities are under no obligation to provide books to prisoners that they consider necessary for the exercise of their religion or for the development of their philosophy of life¹¹¹.

It was found that the authorities had complied with Article 9 when they offered a Jewish prisoner a kosher diet and permitted him contact with a Jewish lay visitor¹¹².

It was found not to be a breach of Article 9 in refusing to allow a Buddhist to obtain a prayer-chain¹¹³, a refusal to allow a high-risk prisoner to attend Sunday service¹¹⁴, that a high caste Sikh clean his cell floor¹¹⁵ and the confiscation of a religious book that possessed a chapter on martial art¹¹⁶.

The Right to Marry and to Found a Family

Article 12, European Convention on Human Rights

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right

The right for prisoners to marry whilst serving a prison sentence has exercised the Court. In both **Hamer v. United Kingdom**¹¹⁷ and **Draper v. United Kingdom**¹¹⁸ the Commission found that the inability of prisoners to marry was a breach of Article 12 as the right to marry involves a right to form a legal relationship and to acquire a status. It is thus possible for a couple to marry in prison, a spouse visiting the establishment for the purpose of the marriage.

With regard to the right to found a family, the Commission found in **X v. Federal Republic of Germany**¹¹⁹ that although it was an absolute right, some limitations on the right could be justified.

In **X v. United Kingdom**¹²⁰ the Commission held that with regard to prisoners Article 12 does not mean that at all times a person must be given the actual possibility to procreate. It would seem that the situation of a lawfully convicted person detained in prison falls under his own responsibility and so his right to found a family has not been otherwise infringed.

Other Issues

Education

There is no obligation upon the authorities to provide elementary education in prisons for convicted adult prisoners¹²¹.

Further, there is no obligation upon the authorities to organise re-training programmes for serving prisoners¹²².

The Commission has also held that if a person is lawfully convicted of a crime and serves a prison sentence, any interruption to his education is not considered to be a deprivation of his right to education¹²³.

Discrimination

It has been held that different treatment to prisoners or to different categories of prisoner may be justifiable.

In **Koskinen v. Finland**¹²⁴ the Commission held that a dangerous recidivist who was not eligible for parole was not in the same position as other prisoners.

Voting

The Commission has previously upheld the disenfranchisement of convicted prisoners¹²⁵. It was influenced by the fact that the practice was common among a number of national states and so applied the margin of appreciation.

The matter was again considered in the matter of **Hirst v. United Kingdom**¹²⁶ in which the applicant was serving a sentence of life imprisonment. He was barred under domestic law from voting in parliamentary or local elections. He argued that he was discriminated against as a convicted prisoner in relation to his voting rights.

The Court held that there had been a violation of Article 3 of Protocol 1, the right to free elections. It observed that there were divergences in the law and practise of countries which had ratified the Convention, but found that any devaluation or weakening of the right to vote threatened to undermine the democratic system and therefore the right to vote should not be lightly or casually removed.

The Court left open as to whether or not a proscription on some prisoners voting could be permissible, as it observed that the United Kingdom merely applied a blanket approach to 70,000 prisoners regardless of their own facts and that the applicant had served the punishment element of his sentence.

Property Rights

Property is of importance to prisoners as they are often allowed few personal possessions during their period of incarceration. The Court has found that prisoners retain their right to peaceful enjoyment of their possessions under **Protocol 1, Article 1** though this would be within the constraints of their imprisonment.

As can be seen by the above discussion, which merely touches upon some of the rights extended to serving prisoners, the Convention has been willing to protect those whose position places them in a vulnerable position before the authorities. We do not need to go too far back into European history to see the capricious nature of authorities towards its serving prisoners.

There has been a recognition that in committing a crime, lawful punishment may suspend some natural human rights such as living with one's family and enjoying an adult education. However, the Convention has proved to be robust in protecting core human rights as enshrined in Articles 2 and 3.

It still remains a challenge to some serving prisoners to engage Convention rights, the delay in punishment to final consideration by the Court can take many years and in the meantime further harassment may take place within the walls of their prison. This is in an inherent problem when the allegation is made against the very authorities depriving a person of their liberty as there are obvious positions of strength and weakness in the relationship. However, even lost cases can result in a beneficial change to the system and the ability to bring a case before the Court in Strasbourg often gives a prisoner a sense that justice can be served in his case for there will be an examination as to the actions of the very authorities detaining him.

Footnotes

- ⁶⁶ Application. No. 46477/99. Judgment 14th March 2002
- ⁶⁷ Application No. 24746/94.
- ⁶⁸ Soering v. United Kingdom (1989) 11 E.H.R.R. 439
- ⁶⁹ The Greek Case (1969) 12 Yearbook 1
- ⁷⁰ Dougoz v. Greece (2001) BHRC 306
- ⁷¹ Keenan v. United Kingdom (2001) BHRC 319
- ⁷² Kalaishnikov v Russia Application No. 47095/99. Judgment 15th July 2002
- ⁷³ McFeely v. United Kingdom (1981) 3 E.H.R.R. 161
- ⁷⁴ 14 D.R. 64
- ⁷⁵ Reed v. United Kingdom 19 D.R. 113
- ⁷⁶ 35 D.R. 130
- ⁷⁷ Ensslin, Baader and Raspe v. Federal Republic of Germany 14 D.R. 64
- ⁷⁸ B v. Germany 55 D.R. 271
- ⁷⁹ Application No. 65436/01. Judgment 27th November 2003
- ⁸⁰ Application No. 50390/99. Judgment 29th April 2003
- ⁸¹ McFeely v. United Kingdom (1981) 3 EHRR 161
- ⁸² Application no. 50901/99
- ⁸³ Galloway v. United Kingdom 27 E.H.R.R. CD 241
- ⁸⁴ Raninen v. Finland (1997) 26 RHRR 563
- ⁸⁵ Application No. 33343/96. Judgment 3rd June 2003
- ⁸⁶ Application no. 39084/97. Judgment 11th December 2003
- ⁸⁷ X v. United Kingdom (1976) 2 Digest 241; X v. Switzerland 11 D.R. 216
- ⁸⁸ Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165
- ⁸⁹ Application Numbers 39665/98 and 40086/98. Judgment 9th October 2003 (Grand Chamber Judgment)
- ⁹⁰ McVeigh, O'Neil and Evans v United Kingdom 25 D.R. 15 (paras 52-53)
- ⁹¹ X v. United Kingdom 30 D.R. 113
- ⁹² Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165
- ⁹³ Wakefield v. United Kingdom 66 D.R. 251
- ⁹⁴ Ouinas v. France 65 D.R. 265
- ⁹⁵ X. v United Kingdom 9 D.R. 166
- ⁹⁶ 25 E.H.R.R. C.D. 99
- ⁹⁷ X v. Germany App. No. 3603/68
- ⁹⁸ Application Nos. 10822/84 and 17142/90
- ⁹⁹ Boyle v. United Kingdom 41 D.R. 91
- ¹⁰⁰ Application No. 37329/97
- ¹⁰¹ Silver v. United Kingdom (1983) 5 E.H.R.R. 347
- ¹⁰² S. v. Switzerland (1991) 14 E.H.R.R. 670
- ¹⁰³ (1993) 15 E.H.R.R. 137
- ¹⁰⁴ Golder v. United Kingdom (1979-1980) 1 E.H.R.R. 524
- ¹⁰⁵ Application No. 44800/98
- ¹⁰⁶ Application No. 37329/97
- ¹⁰⁷ McFeeley v. United Kingdom 20 D.R. 44 at 77
- ¹⁰⁸ X v. United Kingdom 28 D.R. 5 at 27
- ¹⁰⁹ McFeeley v. United Kingdom 20 D.R. 44 at 77
- ¹¹⁰ X v. United Kingdom 28 D.R. 5 at 38

- ¹¹¹ X v. Austria App No. 1753/63
¹¹² X v. United Kingdom 28 D.R. 8
¹¹³ X v. Austria App No. 1753/63
¹¹⁴ X v United Kingdom 5 E.H.R.R. 289
¹¹⁵ X v. United Kingdom 28 D.R. 5 at 38
¹¹⁶ X v. United Kingdom 5 D.R. 100 at 101
¹¹⁷ (1982) 4 E.H.R.R. 139
¹¹⁸ 24 D.R. 72
¹¹⁹ (1961) 4 Y.B. 240
¹²⁰ 2 D.R. 105
¹²¹ Natoli v. Italy App. No. 26161/95
¹²² Valasinas v. Lithuania App No. 44558/98
¹²³ Durmak, Isik, Unutmaz and Sezal v. Turkey App No 46506/99
¹²⁴ (1994) 18 E.H.R.R. CD 147
¹²⁵ H v. The Netherlands 33 D.R. 242
¹²⁶ App. No. 74025/01. Judgment, 30th March 2004

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The Kurdish Women's Charter – A First Interpretation

Discrimination against women occurs globally, but is all the more damaging when compounded with ethnic, religious or other forms of discrimination. Women in the Kurdish regions and diaspora, therefore, face an uphill struggle as they attempt to tackle discrimination on several fronts; often without access to political representation or adequate legal remedies.

Many international treaties, conventions and declarations aim to protect the rights of women, but Kurdish women - mainly due to their unique experiences as part of an ethnic minority - often face very specific problems. It is these specific problems that need particular attention.

A step towards international recognition of the rights of Kurdish women was taken by two non-governmental-organisations, the Kurdish Human Rights Project (KHRP) and the Kurdish Women's Project (KWP). In June 2004, they published the Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora (Kurdish Women's Charter)¹²⁷. The Kurdish Women's Charter calls for the elimination of discrimination against women in private and public life, the full participation of Kurdish women in family, political, economic, educational and social and cultural life, and the elimination of violence against Kurdish women.

International Law on Women's Rights

Internationally, women's rights have been enshrined, *inter alia*, in the Universal Declaration of Human Rights of 1948¹²⁸, the International Covenant of Civil and Political Rights (ICCPR)¹²⁹ and the International Covenant on Economic, Social and Political Rights (ICESCR) both of 1966¹³⁰. More specific documents like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979¹³¹ and the Declaration on the Elimination of Violence Against Women of 1993 deal solely with women's rights and issues. Within the area of the Council of Europe, women's rights are protected in the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No.11 (ECHR) of 1998¹³² and in Protocol No.12 to the European Convention of 2000.

These instruments mainly include first and second generation rights¹³³:

- Equal rights of men and women before the law;
- Guarantees of basic human rights and fundamental freedoms for women;
- Elimination of discrimination against women in the public and political sphere;
- Elimination of any form of violence against women;
- Equal rights for women in the field of education, health and employment;
- Women's reproductive rights.

These treaties, conventions and declarations read like a wish list for women but for millions of women these rights are far from being guaranteed. This is as well the case for the majority of Kurdish women, not least because of the reluctance of the states in the Kurdish areas to implement the international standards. Most states within the Kurdish areas have ratified the main international and regional treaties that protect women's rights¹³⁴, but very few have also recognised those mechanisms that allow for individual complaint procedures, e.g. the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Furthermore, many of these states¹³⁵ have not actively been involved in the reporting mechanism that allows the treaty bodies to review and comment on the steps undertaken by state parties to implement the provisions of the respective treaties. Apart from this, Kurdish women face very specific problems, which the Kurdish Women's Charter tries to address in particular.

The Specific Rights of the Kurdish Women's Charter

The Charter was initiated by a number of Kurdish women in exile and has been continually developed to ensure that it appropriately identifies the needs and wishes of women in the Kurdish regions and diaspora. It is envisaged to continue as a living document responding to needs as they arise. The two main issues of the Charter are the elimination of discrimination in all areas of life and the eradication of violence against women.

The drafters of the Charter mainly referred to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as the standard since CEDAW is established as an international bill of rights for women. Therefore the Convention itself as well as other documents, e.g. General Recommendations by its governing body the Committee on the Elimination of Discrimination against Women¹³⁶ have to be taken into account if one tries to interpret single articles of the Charter. Apart from CEDAW earlier treaties and covenants dealing with non-discriminatory issues, e.g. the ICCPR¹³⁷, need to be consulted to determine the scope and meaning of the Charter.

Preamble

In its preamble, the Charter calls for a separation of religion from state in order to guarantee a free democratic society. This demand has already caused disconcertment especially by some groups of Kurdish women in Turkey. These women, who wear the headscarf and face oppression by their secular Government in their everyday lives, fear that this could justify infringements of their right to freedom of religion¹³⁸. This concern was reinforced by the judgment of the European Court of Human Rights in the case *Leyla Sahin v Turkey* (Application No.44774/98) of 29 June 2004¹³⁹. The applicant, a medical student at the University of Istanbul, was suspended from university for wearing the Islamic headscarf. The Court held that restrictions could be placed on the freedom to manifest one's religion in order to defend the values and principles of a democratic society. It is very arguable whether a fair balance was struck between these values. The Charter shall be interpreted in the light of the reconciliation of the interests of different individuals and groups since this is of key importance in guaranteeing respect for all human rights.

Definition of 'Discrimination Against Women'

Article 1 of the Charter calls for the condemnation and elimination of discrimination against women. It especially calls for implementation through legal systems within the Kurdish regions. The term 'discrimination against women' as referred to in Article 1 KWC is defined in reference to CEDAW. The definition of CEDAW is supported by the definition of 'discrimination' in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and by General Comment No. 18¹⁴⁰ of the Human Rights Committee addressing non-discrimination.

The term 'discrimination' used by the Charter shall encompass direct discrimination as well as indirect discrimination. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups¹⁴¹.

Therefore one refers to indirect discrimination when the 'effect' of a law is to discriminate, rather than when discrimination is a law's ostensible 'purpose'. According to the wording of Article 1 KWC, indirect discrimination shall also be eliminated: 'Discrimination' should be understood to imply "[...] any distinction [...] on the basis of sex which has the *effect* or *purpose* of impairing or nullifying the recognition, enjoyment or exercise by women [...] of human rights and fundamental freedoms".

The Charter calls not only on states to protect and fulfil this right to non-discrimination for women but also to ensure the advancement of women in order to improve their position to one of *de jure* as well as *de facto* equality with men. As the Committee on the Elimination of Discrimination against Women¹⁴² and the Human Rights Committee¹⁴³ have stressed, it is not sufficient for states

parties to guarantee rights in their laws. States parties must take measures to ensure that such rights are actually available and able to be exercised. The same shall apply for the Charter. For the full enjoyment of the rights enshrined in Article 1 KWC affirmative action has to be part of the legally accepted measures under this article. Affirmative action denotes positive steps taken by a state to improve the status of disadvantaged groups. Under the Charter such actions may involve granting certain preferential treatment in specific matters to women. However, in accordance with General Comment No.18 by the Human Rights Committee¹⁴⁴ these preferential treatments may not be established on a permanent basis, they may only be granted for a certain time. This temporary element is also to be found in Article 4 CEDAW regarding temporary measures.

Specific Obligations of Non-Discrimination

Article 1 establishes a comprehensive obligation to eliminate discrimination in all its forms, which is additional to the specific obligations contained in Articles 2, 3, 4, 7, 8 and 9 KWC.

Article 2 KWC is modelled on Articles 7 and 8 CEDAW¹⁴⁵ and contains the right of women to participate in political and public life. This right is recognised in many other international standards of equality¹⁴⁶. The main precondition to guaranteeing women participation in political and public life is to guarantee them 'equality before the law' which is stipulated in Article 2(a) KWC. It is not only in Iran where women generally and Kurdish women in particular suffer under the rigid laws which subjugate women and where culturally the value of one woman is generally less than the value of one man. It was only in September 2004 that Turkey¹⁴⁷ abolished a provision of the Penal Code that foresaw the possibility of reducing the sentence of a perpetrator if his act was perpetrated as an 'honour killing'¹⁴⁸. De jure mitigating circumstances were applicable to men and women, but de facto it was mainly male perpetrators who were privileged by this provision.

Furthermore, Article 2 KWC calls for the right to vote and to be elected, the right to participate in the formulation of government policy and the right to hold public office and to perform public functions at national and international level and the right to participate in non-governmental organisations. States within the Kurdish area lack not only a de facto implementation of these rights, but often even a de jure implementation.

Article 3 KWC, which regulates marriage and family relations, derives its existence from Article 16 CEDAW¹⁴⁹.

Underage, arranged and forced marriages occur frequently in the Kurdish regions¹⁵⁰. Article 3(a) KWC calls for the full and free consent of both parties before entering a marriage and for the minimum age of 18. Compared to the minimum age specified by the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages¹⁵¹ (Principle II)

of not less than 15 years, this is quite high. However, the drafters of the Charter felt the necessity to increase the minimum age to 18 as the Committee on the Elimination of Discrimination against Women did in its General Recommendation No.21¹⁵² referring to the Convention on the Rights of the Child of 1989. Furthermore, Article 3(b) KWC urges states to implement the same rights and responsibilities for spouses. This is an extreme concern for women in Iran who suffer major difficulties in obtaining a divorce¹⁵³. Temporary marriages¹⁵⁴ and heritage rights, addressed in Articles 3(e) and 3(d) KWC respectively, are again a problem faced mainly by women in Iran. Women in Syria also suffer the consequences of a discriminating legal system on rights related to marriage, as the legal system in that country is based on a combination of Islamic sharia' law and civil law¹⁵⁵.

Article 4 KWC deals with the elimination of discrimination in the field of employment. This includes the right to equal remuneration, which finds extensive recognition in the Equal Remuneration Convention (No.100) of 1951, and the protection of employees during pregnancy and the first years of child care.

Article 7 KWC guarantees to girls and women the right to education. In Turkey thousands of Kurdish children, exiled from their villages, do not attend school because they do not speak Turkish¹⁵⁶. Those who do attend are so disadvantaged by their lack of proficiency in Turkish that they usually lag two years or more behind Turkish children of the same age. Often only 20% of Kurdish girls in the Kurdish region of Turkey go on to secondary school, and many never attend primary school. One reason is early marriage and motherhood for many girls especially amongst the internally displaced persons (IDPs).

Article 7(a) and (b) particularly call for the elimination of curricula that are inconsistent with the principles of gender equality and of unfriendly and unsafe environments that discourage girls' participation.

Article 8 KWC concerns women's health. Article 8(1) KWC urges states to eliminate discrimination against women in their access to health-care services throughout the life cycle, including family planning, e.g. pregnancy, confinement and the post-natal period. The Charter refers to paragraph 13 of General Recommendation No.24¹⁵⁷ which states the obligations that have to be fulfilled by states parties to ensure equal access: "to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action."¹⁵⁸

It is also noted that special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, e.g. migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and

women with physical or mental disabilities¹⁵⁹.

As female genital mutilation is a problem that Kurdish women have to face, Article 8(2) KWC calls specifically upon states to eradicate this practice.¹⁶⁰

Article 9 KWC refers generally to women's economic and social rights. In particular this article highlights the rights to social benefits for Anfal¹⁶¹ women and children and internally displaced women and girls.

Violence against Women

Article 6 KWC addresses sexual exploitation and trafficking of women and girls and Article 5 KWC more generally addresses violence against women. In Article 5(1) the term is defined as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. General Recommendation No.19 in 1992¹⁶² and the Declaration on the Elimination of Violence Against Women in 1993 first introduced this widely used definition. While CEDAW does not include a definition of the term, the Committee on the Elimination of Discrimination Against Women has held that the term is included in the definition of discrimination provided by Article 1 CEDAW since the effect of violence against women is to impair or nullify women's equal enjoyment of human rights and fundamental freedoms.¹⁶³ These rights include rights that are enshrined in other international standards¹⁶⁴, e.g. the right to life and the right not to be subjected to torture¹⁶⁵.

The Charter urges states not only to eliminate violence against women perpetrated by or on behalf of governments but also calls on states to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. States shall also be held responsible for private acts if they fail to act with due diligence to prevent violations of rights, to investigate and punish acts of violence, or to provide compensation¹⁶⁶. This includes specifically the need for states in the Kurdish regions to punish 'honour killings' adequately and to address in general domestic violence.

Conclusion

The Kurdish Women's Charter is not meant to reinvent women's rights. This brief interpretation has shown that the two main principles of women's rights developed by international law, namely the elimination of discrimination against women and the elimination of violence against women, prevail the tenor of the Charter. However, the Charter wants to highlight those women's rights

that are specifically important for Kurdish women and which are most likely not to be granted to Kurdish women. If analysing the situation of Kurdish women it is essential to also take into account the historic, social, ethnic and religious conditions that are dominating Kurdish society as a whole.

Footnotes

¹²⁷ Launch in the House of Lords in London on 22 June 2004 and Conference on the Charter in the Kurdistan National Assembly in Erbil, Iraqi Kurdistan on 12 July 2004.

¹²⁸ Articles 2, 7 of the Universal Declaration of Human Rights.

¹²⁹ Articles 2(1), 3, 4(1), 23(2), 26 ICCPR.

¹³⁰ Articles 1 (1) and (2), 2 (2), 3, 7 ICESCR.

¹³¹ Articles 1 – 16 CEDAW.

¹³² Article 14 ECHR.

¹³³ First generation rights are civil and political rights; second generation rights are economic, social and cultural rights; third generation rights are group rights (primary commitment to the welfare of the community).

¹³⁴ The ICCPR was ratified by Iran (date of entry into force: 23 March 1976), Iraq (date of entry into force: 23 March 1976), Syria (date of entry into force: 23 March 1976) and Turkey (date of entry into force: 23 December 2003). None of the aforementioned countries ratified the Optional Protocols to the ICCPR. The ICESCR was ratified by Iran (date of entry into force: 3 January 1976), Iraq (date of entry into force: 3 January 1976), Syria (date of entry into force: 3 January 1976) and Turkey (date of entry into force: 23 December 2003). CEDAW was ratified by Iraq (date of entry into force: 12 September 1986), by Syria (date of entry into force: 27 April 2003) and by Turkey (date of entry into force: 19 January 1986). Only Turkey ratified the Optional Protocol to CEDAW which entered into force on 29 January 2003.

Turkey ratified the ECHR which entered into force on 18 May 1954. Turkey signed the Protocol No. 12 to the ECHR on 18 April 2001 but has not yet ratified the Protocol No. 12. So far only 8 member states of the Council of Europe ratified Protocol No.12 which has thus not yet entered into force.

¹³⁵ Iran has yet to file its third and fourth periodic reports under the ICCPR (due on 31/12/94 and 31/12/99 respectively) and its second and third reports under the ICESCR (due on 30/6/95 and 30/6/2000 respectively). Iraq has yet to file its fifth periodic report under the ICCPR (due on 4/4/2000), its second periodic report under the ICESCR (due on 30/6/2000) and its fourth and fifth periodic reports under CEDAW (due on 12/9/99 and 12/9/03 respectively). Syria has yet to file its initial report under CEDAW (due on 27/4/04).

¹³⁶ The Committee on the Elimination of Discrimination against Women was established under the terms of CEDAW (see Article 17 et seq.). The Committee is entrusted with the task of overseeing the implementation of the Convention by states parties and watches over the progress of women's rights made in those countries that are state parties to CEDAW. Under the Optional Protocol to CEDAW, which came into force on 22 December 2000, the Committee can also receive and consider communications submitted in accordance with Article 2 of the Optional Protocol.

¹³⁷ The Human Rights Committee was set up to monitor the implementation of the ICCPR by states parties (Article 28 et seq.). Articles 6 to 27 ICCPR encompass individual rights that can be invoked before the Committee as set out in the First Optional Protocol to the ICCPR.

¹³⁸ Safeguarded by Article 18 of the Universal Declaration of Human Rights, Article 18 ICCPR, Article 9 ECHR.

¹³⁹ See section "Case Summaries and Commentaries – B. Substantive".

¹⁴⁰ General Comment No.18: Non-discrimination: 10/11/89, CCPR, Thirty-seventh Session, 1989, para.7.

¹⁴¹ E.g., consider the following hypothetical law: Only people above 1.80 metres can attend university. This law constitutes direct discrimination on the basis of height. It also constitutes indirect discrimination on the basis of sex, as women tend to be shorter than men, and as a group, are less likely to fulfil the height criterion.

¹⁴² See for example General Recommendation No.25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, Thirtieth Session, 2004, para.8.

¹⁴³ See General Comment No.18: Non-discrimination: 10/11/89, CCPR, Thirty-seventh Session, 1989, paras.9

and 10.

¹⁴⁴ See General Comment No.18: Non-discrimination: 10/11/89, CCPR, Thirty-seventh Session, 1989, para.10.

¹⁴⁵ See also General Recommendation No.23, Sixteenth Session, CEDAW, 1997.

¹⁴⁶ E.g. Universal Declaration of Human Rights, ICCPR, Convention on the Political Rights of Women and others.

¹⁴⁷ In an emergency session on 26 September 2004 the Turkish Parliament finally passed the reform of the Turkish Penal Code.

¹⁴⁸ ‘Honour killings’ are murders in which predominantly women are killed as a ‘punishment’ for having infringed traditional codes of honour. They occur throughout Kurdish society in Kurdish areas and throughout the diaspora.

¹⁴⁹ See also General Recommendation No.21, Thirteenth Session, CEDAW, 1994.

¹⁵⁰ See, inter alia, Amnesty International, Turkey: Women Confronting Family Violence, 44/013/2004, 2 June 2004.

¹⁵¹ GA Resolution 2018 (XX) of 1 November 1965.

¹⁵² See General Recommendation No.21, Thirteenth Session, CEDAW, 1994, para.36.

¹⁵³ See KHRP Report: Fact-Finding Mission to Iran, August 2004, p. 25 et seq.

¹⁵⁴ A means by which couples may enter into a sexual relationship without the full obligations of marriage or falling foul of Islam. However, women who have entered a temporary marriage bear a social stigma.

¹⁵⁵ Yildiz, Kerim *The Kurds in Syria*, KHRP, unpublished.

¹⁵⁶ The Göç-Der report (Immigrants’ Association for Social Cooperation and Culture, Research and Solution Report on the Socio-economic and Socio-cultural Conditions of Kurdish Citizens Forcibly Displaced, 1999-2001) revealed that 43.4% of children aged 6-14 in their sample had cut all formal relations with school. The reasons given were mainly economic difficulties. The most significant problem that children face is not being able to use their mother tongue.

¹⁵⁷ See General Recommendation No.24, Twentieth Session, CEDAW, 1999, para.13.

¹⁵⁸ See General Recommendation No.24, Twentieth Session, CEDAW, 1999, para.13.

¹⁵⁹ See also General Recommendation No.18, Tenth Session, CEDAW, 1991.

¹⁶⁰ See also General Recommendation No.14, Ninth Session, CEDAW, 1990.

¹⁶¹ The Iraqi Government carried out a six-and-a-half month campaign of genocide against the Kurds in 1988, near the end of the Iran-Iraq war. It was conducted under the codename “Anfal”. It was characterised by gross violations of human rights, including mass summary executions and disappearances of many tens of thousands of non-combatants; the widespread use of chemical weapons, among them mustard gas and nerve agents that killed thousands; the arbitrary imprisonment and warehousing of tens of thousands of women, children and elderly people for months, in conditions of extreme deprivation and without judicial order; the forced displacement of hundreds of thousands of villagers to barren resettlement camps after the demolition of their homes; and the wholesale destruction of two thousand villages along with their schools, mosques, farms and power stations. Some 180,000 people “disappeared”.

¹⁶² See General Recommendation No.19, Eleventh Session, CEDAW, 1992, para.6.

¹⁶³ See General Recommendation No.19, Eleventh Session, CEDAW, 1992, para.6.

¹⁶⁴ E.g. in the ICCPR, ICESCR and CAT etc.

¹⁶⁵ See also General Recommendation No.19, Eleventh Session, CEDAW, 1992, para.7.

¹⁶⁶ See General Recommendation No.19, Eleventh Session, CEDAW, 1992, para.9.

Section 2: Case Summaries and Commentaries

A. Case News – Admissibility decisions and communicated cases

Right to Life

Aydogan v Turkey

(7018/04)

European Court of Human Rights: Communicated in June 2004

Detention despite illness following hunger strike - Right to life - Freedom from ill-treatment - Articles 2 and 3 of the Convention

Facts

The applicant introduced the application on his own behalf and on behalf of his son. The latter, held in a type-F remand prison, had gone on hunger strike for a hundred and twenty-five days. As a result, he suffered from Wernicke-Korsakoff syndrome, an illness that leads to a series of cerebral disorders. In December 2001 the applicant was provisionally released for medical treatment. His release was ordered on the basis of a medical report by the relevant authorities. The suspension of the service was renewed twice, on both occasions on the basis of medical certificates. In September 2003, a new medical report concluded that the health of the applicant, who continued to suffer from the syndrome, did not justify extending the suspension of his sentence. The applicant was then re-imprisoned in January 2004. The Istanbul Medical Association stated that the illness's after-effects were no longer curable and held that the medical reports drawn up by the relevant authorities had no scientific basis. In March 2004, the applicant was transferred to the prison wing of a hospital.

Communicated under Articles 2 and 3 of the Convention.

Öcalan v Turkey

(46221/99)

European Court of Human Rights: Grand Chamber Hearing of 9 June 2004

Arrest and death sentence – Right to life – Prohibition of ill-treatment – Prohibition of discrimination – Unlawful detention – Fair trial – Articles 2, 3, 5, 6, 7, 8, 9, 10, 13,14, 18 and 34 of the Convention

Facts

This is a KHRP assisted case. The applicant, Abdullah Öcalan, is a Turkish national who was born in 1949. He is the former leader of the former Kurdistan Workers Party (PKK) and is currently incarcerated in İmralı Prison, Turkey. At the relevant time, seven warrants had been issued by Turkish courts for the applicant's arrest and a wanted notice had been issued by Interpol, who was accused of founding an armed gang to destroy the integrity of the Turkish State and of instigating terrorist acts.

Having been expelled from Syria on 9 October 1998, the applicant moved between various countries before going to Kenya. On 15 February 1999, in disputed circumstances, the applicant was taken on board an aircraft at Nairobi airport, arrested by Turkish officials and then flown to Turkey whilst blindfolded.

Between 16 and 23 February 1998 the applicant was held in police custody at İmralı Prison, where he was questioned without legal assistance; the applicants own lawyer and 16 other lawyers were prevented from visiting the applicant prior to 23 February 1999.

On 23 February 1999, the applicant was placed in pre-trial detention on the orders of Ankara Stat Security Court. Visits from his lawyers took place within the hearing or presence of the security forces and were restricted in length.

On 29 June 1999, the applicant was found guilty of carrying out actions calculated to bring about the separation of a part of Turkish territory and of forming and leading an armed gang to achieve that end; he was sentenced to death under Article 125 of the Turkish Criminal Code and this sentence was upheld on appeal.

On 9 August 2002, the Turkish Assembly resolved under Law no.4771 to abolish the death penalty in peacetime. Following this, on 3 October 2002 the applicant's death sentence was commuted to life imprisonment.

On 16 February 1999, an application was lodged with the European Court of Human Rights; the case was declared partly admissible on 14 December 2000. In a judgment of 12 March 2003, the Court held that there had been a violation of Articles 5(3) and (4), Article 6(1) and (3)(b) of the Convention.

On 9 July 2003, in accordance with Article 43 of the Convention a panel of Grand Chamber judges accepted requests submitted by the applicant and respondent State for the case to be referred to the Grand Chamber. This hearing took place on 9 June 2004.

Complaints

The applicant complained that the imposition of the death penalty would be in violation of Articles 2 and 3 in conjunction with Article 14 of the Convention.

The applicant complained under Article 3 of the Convention that the conditions in which he was transferred from Kenya to Turkey and subsequently detained in amounted to inhuman treatment.

The applicant complained under Articles 5(1), (3) and (4) of the Convention that he was not brought promptly before a judge and did not have access to proceedings to challenge the lawfulness of his detention.

The applicant complained under Article 6(1) of the Convention about the unfairness of his trial.

The applicant complained under Article 34 of the Convention that his legal representatives were prevented from contacting him after his arrest and the Turkish government failed to reply to a request by the European Court of Human Rights for information.

The applicant further complained under Article 7 (no punishment without law), 9 (right to respect for family life), 9 (freedom of religion), 10 (freedom of expression), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights) of the Convention.

Fashkami v United Kingdom

(17341/03)

European Court of Human Rights: Admissibility decision of 22 June 2004

Unsuccessful asylum request - Right to life - Prohibition of torture - Private and family life - Articles 2, 3 and 8 of the Convention

Facts

The applicant, a citizen of Iran, requested asylum in the United Kingdom, claiming fear of persecution in his country for being homosexual. He claimed that the Iranian security forces visited the house where he was living with his partner, arrested him and held him in custody for more than three months. He alleged that if returned to Iran, he would run the risk of extra-judicial execution and ill-treatment as punishment for his homosexual behaviour. The asylum application was first examined by the Secretary of State, who found it lacking in credibility and rejected it on the ground that he was not satisfied that the applicant was in fact Iranian. On appeal, the Adjudicator also rejected the claim after having evaluated the risk for homosexuals in Iran. Despite

harsh legislation against homosexual acts, the burden of proof was high and convictions hard to achieve. As the applicant had not expressed any prospect of continuing a relationship with his partner, no issue arose under Article 8 of the Convention. Leave to appeal against the Adjudicator's decision was rejected. Directions for the applicant's expulsion had not yet been issued.

Complaints

The applicant complained under Article 2 of the Convention that he would be at risk of extra-judicial killing if expelled to Iran

The applicant complained under Article 3 of the Convention that he faced a real risk of torture and ill-treatment in Iran.

The applicant complained under Article 5 of the Convention that he risked arbitrary detention if expelled to Iran.

The applicant complained under Article 6 of the Convention that he would not receive a fair trial in the Iranian judicial system.

Finally, the applicant claimed under Article 8 of the Convention that his "physical and moral integrity" aspect of his right to respect for private life would be infringed. He claimed that he would come to the immediate notice of the authorities on arrival in Iran due to his violation of visa regulations.

Held

The Court held that the case was inadmissible under Articles 2 and 3 of the Convention. Whilst the general situation in Iran did not foster the protection of human rights and homosexuals could be vulnerable to abuse, the applicant had not established in his case that there were substantial grounds for believing that he would face treatment contrary to these Articles. The application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The Court held that the case was inadmissible under Article 8 of the Convention. Whilst expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention can engage the responsibility of Contracting States given the fundamental importance of these provisions, such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it could not be required that an expelling contracting State only return an alien to a country which was in full and effective enforcement of all the rights and freedoms set out in the Convention. The applicant was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

Ndangoya v Sweden

(17868/03)

European Court of Human Rights: Admissibility Decision of 22 June 2004

Expulsion following intentional infection of victims with HIV - Freedom from ill-treatment - Family and private life - Articles 2, 3 and 8 of the Convention

Facts

The applicant, a Tanzanian national, was granted a residence permit in Sweden on the basis of his marriage to a Swedish national. The couple, who had two children together, subsequently separated. The applicant was thereafter convicted on two occasions: firstly, for making unlawful threats and carrying knives in public places, and secondly, for aggravated assault after engaging in sexual contacts without disclosing to his partners he was HIV positive and thus transmitting the infection to two women. The applicant was sentenced to six years' imprisonment on the last counts, but given the good relationships he had with his daughters, his expulsion was not ordered at first instance. However, the Court of Appeal found the applicant had acted with exceptional ruthlessness and indifference towards his victims, and held him liable for having committed the crimes with intent. His expulsion from Sweden was thus ordered. Leave to appeal to the Supreme Court was refused. Whilst serving the prison sentence, the applicant filed several petitions for a revocation of the expulsion order. He claimed, backed by medical certificates, that his chances of receiving life-sustaining HIV treatment in Tanzania would be slim. In addition, his close links with his children as well as his new relationship with a Swedish woman would be severely affected by expulsion. All the applicant's petitions were rejected.

Complaints

The applicant complained under Articles 2 and 3 of the Convention that his expulsion to Tanzania, due to the difficulty of obtaining medical treatment in the country, would accelerate the course of his HIV disease and considerably reduce his life expectancy.

The applicant also complained under Article 8 of the Convention that the expulsion would interfere with his contacts with his children and that his current partner would not be able to settle in Tanzania for medical reasons.

Held

The Court held that the case was inadmissible under Articles 2 and 3 of the Convention. Although the applicant's circumstances in Tanzania would be less favourable than those he enjoyed in Sweden, this was not decisive. The applicant could obtain treatment and had some family support in his country of origin. The circumstances were not of such an exceptional nature that expulsion would be contrary to the standards of Article 2 and 3 of the Convention. The application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The Court held that the case was inadmissible under Article 8 of the Convention. The expulsion order constituted an interference which had a basis in domestic law and pursued the legitimate aim of public safety and the prevention of disorder and crime. It would no doubt have serious implications for the family life of the applicant, whose regular contact with his children would be greatly limited. However, the applicant's conviction for having had unprotected sexual contacts with three women without disclosing his HIV infection, and as a result having infected two of the victims with the virus, was of the utmost gravity. As there was a risk that he could engage in further conduct of that type, the applicant's expulsion was not disproportionate to the aim pursued and a fair balance had been struck. The application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

Forced Labour

Siliadin v France

(73316/01)

European Court of Human Rights: Communicated in March 2004

Working in continuous service without remuneration - Forced labour - Article 4 of the Convention

Facts

The applicant is a Togolese national who, on arrival in France at the age of 16 and contrary to what had been agreed, was forced to work as a "maid of all work"; she had to carry out household duties and care for children from 7a.m. to 10p.m. every day, without remuneration. Without a work or residence permit and having been deprived of her passport, the applicant lived in this manner for three years, in fear of arrest; at the same time, the couple for whom she worked led her to believe that her situation would soon be legalised. Criminal proceedings were eventually opened. A conviction was secured for exploitation of the applicant's vulnerability and state of dependence with a view to obtaining non-remunerated services from her.

Communicated under Article 4 of the Convention.

Right to Fair Trial

Guliyev v Azerbaijan

(35584/02)

European Court of Human Rights: Admissibility Decision of 27 May 2004

Refusal to register candidate in elections - Right to a fair trial - Right to free elections - Article 6 of the

Convention and Article 3 of Protocol No.1 to the Convention

Facts

The applicant, who currently resides in the United States, held key posts between 1990 and 1993 in the country's oil sector, as well as in Government and Parliament. In 1996, he resigned from office and left the country. While abroad, he founded a political party (DPA) with headquarters in Baku. In 1998, the Prosecutor General indicted the applicant for misappropriation of public funds, abuse of power and fraud. In 2000, a District Court ordered his detention on remand pending trial. As a condition for returning to Azerbaijan and standing trial, the applicant asked for the replacement of the detention on remand by house arrest pending trial. His petition and subsequent appeal were dismissed. The criminal proceedings against the applicant are pending and the detention order remains unimplemented as he is still abroad. Moreover, in the summer of 2003 his political party, the DPA, nominated him as a candidate for the presidential elections. The Central Election Commission rejected the applicant's nomination.

Complaints

The applicant complained under Article 5(1) of the Convention that the order on his detention on remand was unlawful.

The applicant also complained under Article 6(1) of the Convention of the unfairness and lack of impartiality of the domestic courts which ordered his detention on remand and did not allow his house arrest

Again relying on Article 6(1) of the Convention, the applicant complained about the unfairness of the proceedings concerning the Central Election Commission's refusal to register him as a candidate in presidential elections. He alleged that the courts had erred in assessing the facts and misinterpreted the domestic law.

Invoking Article 13 of the Convention in conjunction with Article 6 of the Convention, the applicant complained that the domestic remedies in his case had been ineffective.

The applicant further complained under Article 3 of Protocol No. 1 to the Convention that his right to stand as a candidate in the presidential elections had been unlawfully restricted by the authorities.

Under Article 3(2) of Protocol No. 4 to the Convention, the applicant complained that, by threatening to arrest him upon his return to Azerbaijan, the authorities had actually prevented him from returning home and resuming normal political activity.

Under Article 2 of Protocol No. 7 to the Convention, the applicant complained of the Court of

Appeal's allegedly wrongful interpretation of the domestic criminal procedure law and its refusal to review in substance his complaint against the Sabail District Court's decision rejecting the replacement of the pre-trial detention by a house arrest.

Finally, relying on Article 14 of the Convention in conjunction with the above-mentioned Articles of the Convention and Protocols, the applicant complained that his Convention rights had been infringed as a result of the discrimination based on his political opinion, because he was one of the major political opponents of the current Government.

Held

It was not necessary for the Court to consider the complaint under Article 5(1)(c) of the Convention. The complaint was premature because the applicant had not been physically detained and currently resides in the United States. The application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The applicant's complaints under Article 6 of the Convention were premature because the applicant could not, at the present stage of the criminal proceedings, claim to be a victim of the alleged violation of Article 6 of the Convention. As regards the applicant's complaints under Article 6 of the Convention regarding the allegedly unfair trial in proceedings concerning the Central Election Commission, the Court held that Article 6 of the Convention did not apply. This part of the application was incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) of the Convention.

The Court held that Article 13 of the Convention was inapplicable in the present case. This complaint was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The Court held that Article 3 of Protocol No.12 to the Convention was inapplicable in the present case. This part of the application was incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) of the Convention.

The Court considered the applicant's complaint under Article 3(2) of Protocol No.4 to the Convention to be unsubstantiated. This part of the application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The Court held that Article 2(1) of Protocols No.7 to the Convention was inapplicable in the present case. This complaint was incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) of the Convention.

The Court held that the complaints under Article 14 of the Convention taken in conjunction with the applicant's complaints under Article 2 of Protocol No. 7 fell outside the scope of the

Convention *ratione materiae* and accordingly the applicant could not rely on Article 14 of the Convention in relation to those complaints.

The Court considered the applicant's remaining discrimination claims under Article 14 taken together with his remaining complaints relating to the allegedly fabricated criminal case and unlawful detention order, to be unsubstantiated. In accordance with the Court's findings above, the complaints relating to the allegedly fabricated criminal proceedings were premature. The application was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

Private and Family Life

Sefa Taşkin and Others v Turkey

(46117/99)

European Court of Human Rights: Admissibility Decision of 29 January 2004

Use of toxic substance in mining - Right to life - Private and family life - Articles 2, 6, 8 and 13 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

In 1994, the Ministry of the Environment approved the use of the technique of sodium-cyanide leaching to extract gold from a mine near İzmir. The applicants, who lived in the vicinity of the mine, applied to have that decision set aside on the ground that their health and safety would be at risk. In May 1997 the Supreme Administrative Court concluded, on the basis of expert assessments, that there were risks of environmental damage and harm to human lives and that the safety measures to which the company operating the mine had undertaken to confirm were not sufficient to avert them. Consequently, in October 1997 the Administrative Court annulled the company's mining licence. The applicants asked the appropriate authorities to ensure that the court ruling was enforced. In October 1999 an expert report submitted at the Prime Minister's request concluded that the risks to human lives and the environment outlined in the Supreme Administrative Court's judgment had been reduced to an acceptable level. Having regard in particular, to the report, the Prime Minister's Office authorised the continuation, on a provisional basis, of the use of cyanide for mining and extended the licences for operating the mine. In March 2002 the Cabinet decided that the gold mine could continue to operate. In the meantime, in September 2001, following an action for damages brought by the applicants, the Court of Cassation had held that the relevant ministers had not taken any steps to prevent mining from being carried out using the cyanide-leaching process, despite having been notified that the mining licence had been annulled. Subsequently, in October 2002, the Court of First Instance decided to award the applicants compensation for the damage resulting from the authorities' failings.

Complaints

Invoking Articles 2 and 8 of the Convention, the applicants complained that the use of cyanide exposed them to health and safety risks.

The applicants complained under Article 1 of Protocol No.1 to the Convention that the cyanide-leaching process affected the enjoyment and value of their property.

The applicants complained under Articles 6 and 13 of the Convention that the refusal by the administrative authorities to conform with the decisions of the Administrative Court violated their right to effective judicial protection.

Held

The Court held that the complaints under Articles 2, 6, 8 and 13 of the Convention were admissible. These complaints raised serious questions which necessitated a thorough examination.

The Court held that the complaint under Article 1 of Protocol No.1 to the Convention was inadmissible. Article 1 of protocol No.1 does not guarantee the right to the maintenance of property in a pleasant environment. Whilst true that the mining activities could affect the value of property or render it difficult to sell, the applicants did not raise this complaint in their national courts. The complaint was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

Zakharova v France

(57306/00)

European Court of Human Rights: Communicated in May 2004

Placement of child with French-speaking family and prohibition on the Russian mother speaking to her in her mother tongue - Private and family life - Article 8 of the Convention

Facts

The applicant is a Russian national, who was also acting on behalf of her daughter, who was born in 1995 to a French father and has French and Russian nationality. They live in France. After her divorce, the applicant lived with her daughter and stated that, until the age of three and a half years, her daughter spoke mainly in Russian. In December 1998, following a complaint by the mother alleging assault against her daughter, the children's judge placed the child with social services and authorised the applicant to see her daughter in the presence of a third party. The mother's insistent and invasive behaviour towards the child, who showed signs of distress, caused the authorities to reduce the mother's visits and telephone calls. As the mother's command of French was poor, a Russian interpreter was appointed; in June 1999 the children's judge obliged the applicant to speak to her daughter in French, restricting the use of Russian to customary expressions of affection. At

the end of September 1999, the applicant's access rights were suspended, and then restored for one visit per month as of April 2000. The meetings were to be held in French. In December 2000 the judge decided that the meetings would take place in the presence of a Russian interpreter. In April 2001 the children's judge noted that the mother sometimes used Russian words which her daughter, then aged almost six, did not understand, and that the daughter, who spoke French with increasing ease, used French words that her mother did not understand. The mother made an unsuccessful request for her daughter to attend Russian classes. The child's placement had been extended several times since the finding that there was no case to answer, delivered following the above-mentioned criminal complaint, and in March 2003 it was extended until March 2005; the mother was granted fortnightly visiting rights. The applicant's appeals have been dismissed.

Communicated under Article 8 of the Convention.

Freedom of Association

Kavakçı v Turkey

(71907/01)

European Court of Human Rights: Communicated in April 2004

Termination of Member of Parliament's mandate and imposition of restrictions on political rights - Freedom of thought, expression, assembly and association - Articles 9, 10 and 11 of the Convention and Article 3 of Protocol No.1 to the Convention

Facts

In 1999 the applicant was elected to the National Assembly as a member of the Fazilet Partisi (political party). She was obliged to leave the parliamentary chamber when she entered wearing a headscarf. She lost her parliamentary seat once a decision withdrawing her Turkish nationality had become definitive. In 2001 the Constitutional Court dissolved her party on the ground that it had become a "centre of activities contrary to the principle of secularism" and, as an additional penalty, prohibited the applicant from founding, belonging to or leading another political party for five years.

Communicated under Articles 9, 10 and 11 of the Convention and Article 3 of Protocol No.1 to the Convention.

Ulke v Turkey

(39437/98)

European Court of Human Rights: Admissibility Decision of 1 June 2004

Conscientious objector repeatedly imprisoned - Freedom of thought, conscience and religion - Article 9 of the Convention

Facts

The applicant was a conscientious objector and active member of an anti-militarist association. In August 1995 he was called up for military service. From September 1995 he was repeatedly convicted of having set other persons against the institution of military service, of having refused to wear uniform or of having deserted; as a result, he was sentenced to imprisonment on several occasions. Each time he was released, he was sent back to his unit and again convicted on account of his persistent refusal to wear uniform. Under the domestic legislation, all male citizens are obliged to follow at least a period of basic training, failing which they are liable to imprisonment. No other form of service is available to conscientious objectors.

Complaints

The Government objected that the six-month time limit had not been observed.

Invoking Article 3 of the Convention, the applicant complained that his treatment was contrary to Article 3.

The applicant complained under Article 9 of the Convention that his right to freedom of thought and conscience had been violated.

The applicant further complained of violations of Articles 5 and 8 of the Convention.

Held

The Court considered that all of the applicant's grievances fell under Article 9 of the Convention and held that the complaint under Article 9 was admissible, the question of this Article's applicability being joined to the merits.

The Court dismissed the Government's objection; the applicant complained of the successive sentences imposed by the national courts each time he stated that he was a conscientious objector and refused to wear uniform. This amounted to an "ongoing state of affairs" against which the applicant had no remedy in domestic law and the situation therefore continued to exist on the date on which the application was lodged.

Freedom of Expression

Meltex Ltd v Armenia

(37780/02)

European Court of Human Rights: Communicated in May 2004

Refusal of a broadcasting licence to a television company which had been on the air for a number of years - Freedom of expression - Article 10 of the Convention

Facts

This is a KHRP-assisted case.

The applicant, which is a television company, was granted a five-year broadcasting licence in 1997 by the Ministry of Communication. A Law on Television and Radio was adopted in 2000 introducing a new licensing procedure and entrusting the granting of licences to a Commission on Radio and Television. The applicant company's licence was renewed by the Commission until licensing competitions took place. In February 2002, several competitions were announced, including one for the frequency which was until then being used by the applicant. The applicant and two other companies with no previous experience in the field of television submitted bids. Prior to the announcement of the winners, the applicant instituted proceedings against the Radio and Television Commission, alleging it had exceeded its authority in defining the terms and conditions of the competition and had breached its freedom of expression. In April 2002, when one of the other competitors was announced as winner, the applicant lodged an additional claim with the Commercial Court requesting that the Commission provide reasons for its decision. The claims were rejected as was the subsequent appeal on points of law and procedure to the Court of Cassation. The day the winner had been announced, the electricity supply of the applicant company's transmitter was cut and its broadcasts ceased. The applicant company submitted bids for other frequency competitions which were subsequently announced, but it was on each occasions refused a licence.

Communicated under Article 10 of the Convention.

Christian Democratic People's Party v Moldova

(28793/02)

European Court of Human Rights: Communicated in May 2004

Temporary ban on the activities of a political party - Freedom of expression, assembly and association - Articles 10 and 11 of the Convention

Facts

The applicant is an opposition political party. As a sign of protest against a Government proposal to make the study of Russian compulsory in schools, it informed the Municipal Council of its intention to hold a meeting with its voters in front of the seat of Government. Although the Municipal Council initially granted authorisation for the meeting, it subsequently suspended this authorisation pending the official position of Parliament as to which law was to apply to the gathering. In the meantime, the party's voters held a number of meetings without having complied with formalities. The Ministry of Justice required a halt to the meetings and, after giving the applicant party a warning, imposed a one-month ban on its activities. Although the ban was subsequently lifted, the applicant party challenged this measure in the courts, arguing that the party could not be held liable for the actions of its members. The Court of Appeal dismissed the applicant's action, finding that the meetings of voters had been unauthorised demonstrations and thus that the Ministry of Justice's sanction had been legal. The Supreme Court of Justice upheld this ruling.

Communicated under Articles 10 and 11 of the Convention.

Guliyev and Ramazanov v Azerbaijan

(34553/02)

European Courts of Human Rights: Partial Admissibility Decision of 9 September 2004

Arrest and detention of political party members – Fair trial - Freedom of Expression and assembly – Freedom from Discrimination – Articles 3, 5, 6, 8, 9 and 14 of the Convention

Facts

This is a KHRP assisted case. The two applicants were members of an opposition political party which, at the relevant time was not registered and accordingly, its activity was deemed illegal by the authorities. Following two visits to the party's regional office in Sumgayit by the authorities and police, during which assets had been destroyed, party members expelled from the premises and the offices sealed, the police again visited the offices nine days later. The police claimed they had been called by neighbours complaining of the disturbance coming from the office; when the meeting participants objected to the interference a dispute broke out, as a result of which several people were taken to the police station for questioning. All but the applicants and one other person were released within a few hours. The party was refused permission to hold peaceful protests regarding the applicants' arrests and the authorities' alleged interference with its activities because it was not registered as a political party

Whilst in police custody, the applicants were unable to see a doctor or lawyer. They were detained on remand for one month pending trial, later convicted of hooliganism on 24 December 2001 and

sentenced to eighteen months' imprisonment. The applicants appealed this judgment, complaining that the case had been fabricated, that the first instance court had violated a number of procedural rules and that it had failed to give legal assessment to the testimonies of the defence witnesses. Their request was dismissed by the Court of Appeal on 13 February 2002, but given the mitigating circumstances the Court commuted their sentence to a conditional sentence. A further appeal to the Supreme Court was dismissed on 9 July 2002.

Complaints

Invoking Articles 3, 5 and 11 of the Convention the applicants complained regarding their treatment during arrest and detention and their inability to hold peaceful protests.

The applicants complained under Article 6 of the Convention that the criminal proceedings against them were unfair.

Relying on Article 8 of the Convention, the applicants alleged that their families were discredited and isolated from society as a result of their convictions.

The applicants further alleged that the politically motivated persecution by the authorities constituted a violation of their freedom of thought and conscience in violation of Article 9 of the Convention.

Finally, the applicants complained under Article 14 of the Convention in conjunction with the above complaints that their conviction was politically motivated and therefore they were discriminated on the ground of their political opinion.

Held

The Court held that the applicants' complaints under Articles 3, 5 and 11 of the Convention were inadmissible; the events complained of occurred before the date on which the Convention entered into force in Azerbaijan and accordingly the events were outside the Court's competence.

The Court held that the applicants' complaints under Articles 8 and 9 of the Convention were inadmissible. No violation of their Convention rights under Articles 8 and 9 had been disclosed; the complaint was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

The Court held that the complaints regarding the police interference with the applicants' meeting, the criminal case and conviction should be analysed from the standpoint of Articles 10 and 11 of the Convention. The Court adjourned examination of the applicants' complaints concerning the right to a fair trial under Article 6 of the Convention; the alleged violations of freedom of expression under Article 10 of the Convention; the alleged violations of freedom of assembly

under Article 11 of the Convention; and the alleged discrimination on the grounds of political opinion under Article 14 of the Convention, and gave notice of this part of the application to the respondent State.

Right to Education

Ciftci v Turkey

(71860/01)

European Court of Human Rights: Admissibility Decision of 17 June 2004

Koranic classes not permitted for child under twelve - Right to education - Article 2 of Protocol No.1 to the Convention

Facts

The applicant applied to the State School at which his son was a pupil for permission to enrol him in Koranic classes so that he could study the Koran and its interpretation. The national legislation provided for mandatory religious-education classes from primary school onwards, but required pupils to have completed primary schooling in order to be able to attend Koranic classes. The applicant's son, who was under twelve years at the material time, had not completed his primary school education. The applicant unsuccessfully applied for exemption from this rule.

Held

The Court held the complaint under Article 2 of Protocol No.1 to the Convention was inadmissible. Domestic regulations on education must not pursue an aim of indoctrination that might be regarded as not respecting the parent's religious and philosophical convictions. In the instant case, the obligation to have obtained a primary school leaving certificate before attending Koranic classes was intended to ensure that minors who wished to receive religious training in Koranic classes had attained a certain "maturity" through the elementary education provided by primary schools. As such, this legal requirement did not amount to an attempt at indoctrination aimed at preventing religious education. This precondition sought to limit the possible indoctrination of minors at an age when they asked many questions and could be easily influenced by Koranic classes. The complaint was manifestly ill-founded within the meaning of Article 35(3) of the Convention.

2. Substantive

Right to Life

*Vo v France*¹⁶⁷

(53924/00)

European Court of Human Rights: Grand Chamber Judgment of 8 July 2004

Unintentional injury to foetus resulting in therapeutic abortion - Right to life - Article 2 of the Convention

Facts

The applicant, Mrs Thi-Nho Vo, is of Vietnamese origin and was born in 1967. She lives in Bourgen-Bresse, France.

On 27 November 1991, she attended Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy. On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a coil removed at the same hospital. When the doctor who was to remove the coil called out the name “Mrs Vo” in the waiting room, it was the applicant who answered.

After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid. After finding on clinical examination that the uterus was enlarged, the doctor ordered a scan. He then discovered that one had just been performed and realised that there had been a mistake of identity. The pregnancy subsequently had to be terminated on health grounds on 5 December 1991.

On 11 December 1991 the applicant and her partner lodged a criminal complaint and applied to be joined as civil parties to the proceedings in which they alleged unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. Three expert reports were subsequently lodged.

On 31 August 1993, the doctor was committed to stand trial in Lyons Criminal Court on counts of unintentional homicide and unintentionally causing injuries.

On 3 June 1996 the Criminal Court acquitted the doctor on the grounds that the offence of unintentional homicide had not been made out, since a 20 to 21 week-old foetus was not a “human being” within the meaning of the relevant articles of the Criminal Code.

On 10 June 1996, the applicant appealed against that judgment. In a judgment of 13 March 1997, the Lyons Court of Appeal upheld the judgment in so far as it had declared the prosecution of the offence of unintentionally causing injuries statute-barred but overturned the remainder of the judgment and found the doctor guilty of unintentional homicide. It imposed a six-months suspended prison sentence and a fine of FRF 10,000.

On 30 June 1999, on an appeal on points of law by the doctor, the Court of Cassation reversed the judgment of the Lyons Court of Appeal and ruled that there was no reason to remit the case for retrial.

The application was allocated to the Third Section of the European Court of Human Rights. On 22 May 2003, the Chamber to which the case had been assigned decided to relinquish jurisdiction in favour of the Grand Chamber.

Complaints

Relying on Article 2 of the Convention, the applicant complained of the authorities' refusal to classify the unintentional killing of her unborn child as involuntary homicide. She argued that the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2.

Held

The Court concluded by fourteen votes to three that, even assuming that Article 2 was applicable in the instant case, there had been no violation of Article 2 of the Convention. The unborn child was not deprived of all protection under French law as the applicant could have brought an action for damages in the administrative courts.

Commentary

The right to life under Article 2 is the most fundamental right enshrined in the Convention; no derogation is permitted even in times of war or emergency. However, its scope in respect of the unborn child is undefined and, until *Vo*, undetermined by the Court.

The right to life of an embryo or foetus had previously only been considered by the Court and Commission in the context of abortion cases, where the Commission had rejected arguments that Article 2 provided an unqualified right for an unborn child. In *X v United Kingdom* (8416/79, Commission decision of 13 May 1980, Decisions and Reports (DR) 19, p. 244) the Commission rejected an interpretation of Article 2 as recognising an unqualified right to life for an unborn child, since the right to life must also belong to the mother and there was widespread recognition of circumstances in which the life of the mother should be given priority over the life of the unborn child. Two other possibilities were suggested: first, that Article 2 did not apply at all to

unborn children; and secondly, that Article 2 recognised the right to life of the unborn child subject to certain limitations. The Commission did not form any conclusion on these possibilities, considering that it was not called upon to decide the issue in the circumstances of the case.

Further cases including *Open Door and Dublin Well Woman v Ireland* (28177/95, 29 October 1992) saw the Commission and Court continue to successfully side-step the controversial issue of deciding whether the foetus was encompassed by the right to life as contained in Article 2.¹⁶⁸ However, *Vo v France* provided little opportunity for the Court to avoid the issue: *Vo* was not an abortion case and the different circumstances forced the Court to consider the topic.

In *Vo v France* the Court noted,

“It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a “person” directly protected by Article 2 of the Convention and that if the unborn do have a “right” to “life”, it is implicitly limited by the mother’s rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.”¹⁶⁹

However, the Court felt that the issue of when the “right to life” begins was a question to be decided at national level: firstly, because the issue had not been decided within the majority of Member States, in particular in France, where the issue has been the subject of public debate; and, secondly, because there was no European consensus on the scientific and legal definition of the beginning of life. At best, it could be regarded as common ground between States that the embryo/foetus belonged to the human race. Having regard to this, the Court was convinced that it was neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.¹⁷⁰

The Court considered it unnecessary to examine whether the abrupt end to Mrs Vo’s pregnancy fell within the scope of Article 2, seeing that, even assuming Article 2 was applicable, there had been no failure on the part of France to comply with the requirements relating to the preservation of life in the public-health sphere. The unborn child was not deprived of all protection under French law. In addition to the criminal proceedings which Mrs Vo instituted against the doctor for unintentionally causing her injury, she could have brought an action for damages in the administrative courts which would have had fair prospects of success. Such an action would have enabled her to prove the doctor’s medical negligence and to obtain full redress for the resulting damage. There had therefore been no need to institute criminal proceedings.¹⁷¹

Several judges attached separate or dissenting opinions. In a separate opinion Judge Rozacki, who

was joined by Judges Caflich, Fischbach, Lorenzen and Thomassen, agreed there had been no violation of Article 2 but had different reasons for finding this. They believed that even if the unborn child's life was protected, this protection is distinct from that given a child after birth and far narrower in scope; consequently the life of the unborn child could not be equated to post-natal life and therefore did not enjoy a right in the sense of "a right to life", as protected by Article 2 of the Convention. A further separate opinion of Judge Costa, who was joined by Judge Traja, showed the judges agreeing that no violation of Article 2 had occurred but stating that Article 2 should have been found applicable. In a dissenting opinion, Judge Ress believed that Article 2 applied and that France did not afford sufficient protection to the foetus against the negligent acts of third parties. In a further dissenting opinion Judge Mularoni, who was joined by Judge Strážnická, believed Article 2 applied and had been violated.

Determining who qualifies as a "human being" and the right to life of a foetus or embryo are some of the most controversial issues presently facing the European institutions. Ongoing medical and technological advancements continue to improve the chances of survival for younger and younger pre-term babies; consequently, the age at which an unborn foetus might have a viable chance of survival outside the womb is liable to drop. Courts are beginning to be faced with increasingly ethical, highly emotive questions given these technological and scientific advancements.

Unfortunately, no matter how complex and controversial the issue, people continue to go to the courts for a ruling. Thus in *Vo*, despite nobody in her own country being able to agree on the right to life of a foetus, the applicant asked 17 judges at the European Court of Human Rights to decide. Unsited as the judges felt they were to deciding such a question on behalf of the many millions protected under the ECHR, given the different moral, social, cultural and political backgrounds of those people, it is perhaps understandable that they attempted to avoid deciding the issue. Even amongst the 17 judges, the varied opinions show how their own views of the matter differed. Perhaps the main conclusion to be drawn from this case is that determining the "right to life" of the unborn child is not a question that can be decided by the judiciary at European level. However, until a more suitable body makes this determination, the need to define a "human being" and determine the "right to life" of the unborn child will not go away, and at some point the Court will again be asked to take a stand on the matter.

Slimani v. France

(57671/00)

European Court of Human Rights: Judgment of 27 July 2004

Death in custody - Right to Life - Prohibition of torture - Articles 2, 3 and 13 of the Convention

Facts

The applicant was born in 1969 and lives in Marseille. Her partner, M.Sliti, by whom she had two children, was a Tunisian national who had a history of psychiatric treatment.

On 2 October 1990 M.Sliti was sentenced to four years in prison following which he would be deported. That measure was not executed immediately after his release from prison.

In 1998, M.Sliti set fire to the applicant's home and leapt out of the window with his eighteen-month-old son; he was sentenced to one year's imprisonment. M.Sliti was hospitalised in Marseille from 29 July to 25 August 1998 for psychiatric treatment and was then transferred to Beaumettes prison to serve his sentence. Medical reports showed that he required psychiatric treatment, that he was currently being treated with a combination of anti-depressants and other medication and it was in his interest to continue on this treatment.

On 22 May 1999, the deportation order against M.Sliti was executed and he was placed in administrative detention in Marseilles until 24 May 1999. The officers in the Marseilles detention centre undertook the responsibility to look after M.Sliti's medication. His detention was extended to 26 May 1999; an appeal against this was rejected.

On the morning of 26 May 1999, M.Sliti twice refused to take his medication; he was not examined by a doctor even when though he was in an excitable state. At around 10:30 a.m, M.Sliti became ill and collapsed; alerted by other detainees, the police quickly arrived and summoned the fire brigade, whose doctor declared M.Sliti to be in a coma. M.Sliti was taken to hospital at 12:15 p.m, where he died approximately two hours later.

An inquiry was commenced pursuant to Article 74 of the French Code of Criminal Procedure in order to "establish the cause of death". The applicant was refused permission to take part in the inquiry. She applied to the investigating judge and subsequently to the president of the indictment division for an order requiring the inquiry papers to be sent to the public prosecutor with a view to the scope of the inquiry being enlarged to include voluntary homicide. Her application was dismissed, notably on the ground that "she did not have standing to request investigative steps in an inquiry into the cause of death".

Complaints

The applicant complained under Article 2 of the Convention that her partner died due to procedural errors by the detention authorities.

Relying on Article 3 of the Convention the applicant complained of the poor conditions at the Marseille-Arenc detention centre.

The applicant further complained of a violation of Article 13 of the Convention that she was not given an opportunity to participate in the investigation and critique reports surrounding her partner's death.

Held

The Court held that it could not find a violation of Article 2 of the Convention in relation to M.Sliti's death; the applicant had launched neither a civil nor criminal complaint with the domestic authorities prior to complaining to the Court.

The Court also held that it could not find a violation of Article 3 of the Convention concerning the conditions of the Marseille-Arenc retention centre, because the applicant had failed to submit a complaint within the domestic jurisdiction prior to applying to the Court.

For the same reasons, the Court held there had been no violation of Article 13 of the Convention combined with Articles 2 or 3 of the Convention.

The Court found that there was a violation of Article 2 of the Convention concerning the applicant's involvement in the investigation of M.Sliti's death.

The Court unanimously chose not to comment on the procedural aspect of the Government to investigate allegations of torture under Article 3 of the Convention.

The Court awarded the applicant EUR 20,000 in non-pecuniary damages and EUR 15,000 in costs and expenses.

Commentary

The Marseille - Arenec centre was the subject of two reports by the Committee for the Prevention of Torture. A report published in May 1998 stated that conditions in the detention centre left much to be desired; the material conditions were mediocre, detainees were not offered time outdoors and there was no evidence of an infirmary. A second report published by the Committee in July 2001 noticed some changes including access to a doctor.

The Court recalled that in cases such as *Keenan v. United Kingdom* (27229/95, 3 April 2001), it had established that Article 3 of the Convention compels a State to protect the health and physical integrity and provide the necessary medication to those in their custody. Despite this and the Committee reports, the Court was however unable to find a violation of Article 2 or 3 of the Convention regarding M.Sliti's death and conditions at the detention centre. The Court had to declare the applicant's complaints in this respect to be inadmissible under Article 35(1) of the Convention because she had failed to launch domestic criminal, or civil proceedings before applying to the Court.

However, the Court was still able to find procedural violations of Article 2 of the Convention regarding the investigation into M.Sliti's death. The applicant had complained of her inability to access information about the investigation, the two year time period it took to complete the investigation and the lack of a judicial presence during the examination of witnesses. She pointed to variations in the report such as the toxicologist findings that M.Sliti had taken his medication which contradicted the findings of the investigators. Furthermore the applicant argued that not all of the people present at the time of the incident were questioned.

Judge Loucaides attached a partially dissenting opinion, with which Judge Mularoni agreed. They were not convinced of non-exhaustion of all internal recourse by the government concerning their alleged responsibility in the death of M.Sliti. They commented that the investigation had several deficiencies including the fact that it took two years to complete the investigation, only two other detainees were interrogated and that the firemen of the medical personnel who took care of M.Sliti until his death along with the applicant were not interviewed. They also doubted the efficiency of the recourse because the death was not caused by an individual but by institutional negligence. The judges agreed with the applicant that it is difficult to launch a complaint without a minimum level of access to the circumstances surrounding the death. The judges further noted the retention of the concerned in a place without sufficient medical facilities was a health risk, along with other instances of negligence such as the lack of investigation into the cause of M.Sliti's agitated state.

Ikincisoy v Turkey

(26144/95)

European Court of Human Rights: Judgment of 27 July 2004

Death in Custody - Right to life - Prohibition of torture - Articles 2, 3, 5, 6, 8, 9, 13, 14 and 25 of the Convention

Facts

The applicants, A.I. (first applicant) and H.I. (second applicant), were born in 1933 and 1974 respectively and live in Diyarbakır. They are both Turkish nationals. Their application concerned the circumstances surrounding the death of Mehmet Şah İkincisoy, who was the son of the first applicant and the brother of the second applicant. The facts were in dispute between the parties.

According to the applicants at around 1 a.m. on 22 November 1993, plain-clothes police officers from the Anti-Terrorism Branch of the Diyarbakır Security Directorate, having first visited A.I.'s apartment searching for his son Mehmet Şah İkincisoy, found Mehmet Şah and other people in his uncle's apartment. Whilst there, gun shots were fired and a police officer was killed; those present in the flat were taken to Çarşı Police Station, where they were joined by A.I. and others. Both H.I. and A.I. saw Mehmet Şah at the police station and later heard his cries whilst they were at Rapid Intervention Headquarters.

A.I. was released from custody on 25 November 1993 and told by the police officers that if anyone asked about his son Mehmet Şah, the applicant had to say that he had fled to the mountains to join the guerrillas.

H.I. was released on 3 December 1993. On 6 December 1993, A.I. asked Diyarbakır's Public Prosecutor for news of his son. He was shown photographs from which he identified Mehmet Şah's body; the Public Prosecutor informed him that Mehmet Şah had died in an armed clash on 25 November 1993 and his body had been buried. A.I. was shown two unmarked graves and told one of them belonged to Mehmet Şah.

In December 1993, A.I. was refused permission to open his son's grave. He lodged a petition requesting an autopsy be conducted and filed another petition with the State Minister responsible for human rights, requesting an investigation into the death of his son. On 21 March 1993 the Minister replied that Mehmet Şah had never been taken into custody.

A.I. was summoned to the public prosecutor's office on 6 June 1995 and forced to sign a statement retracting his application to the Government. After subsequently applying to the European Commission of Human Rights, A.I. was summoned to the Diyarbakır public prosecutor's office, questioned about his application to the Commission and, he alleged, forced to sign a statement expressing his wish to withdraw his application.

According to the Turkish Government, after being informed that Mehmet Şah İkinçisoý was aiding and abetting the PKK, police officers went to his father's apartment and subsequently to his uncle's. While searching the apartment they found four men sleeping in one of the rooms and began questioning them. One of the men opened fire, killing one officer and wounding another, and when the four men tried to escape one of them was killed.

On 23 November 1993, following an anonymous telephone call informing them that two armed men had been seen hiding in a hut near the Ongözlü Bridge, police officers went to the hut where an armed clash broke out and two people were found dead in the hut. It could subsequently be seen from photographs of the bodies that one of them was Mehmet Şah İkinçisoý. Furthermore, according to the ballistic examination reports, the guns that were found in the hut matched those used during the shoot-out on 22 November 1993 in the uncle's apartment.

However, the Court established that police officers had undertaken searches to find Mehmet Şah İkinçisoý, going first to his father's and then to his uncle's apartment where a shootout had occurred. Mehmet Şah İkinçisoý had been arrested the same day and shot dead the following day while under the control of the authorities.

Complaints

The applicants alleged a violation of Articles 2 and 3 of the Convention because Mehmet Şah İkinçisoý died as a result of torture at the hands of police officers in the Rapid Intervention Force Headquarters.

The applicants complained under Articles 2 and 3 of the Convention of the suffering which his family had had to endure as a result of his death and their inability to learn the true circumstances of his death.

The applicants complained that their police custody breached Article 5 (1) (c), (3), (4) and (5) of the Convention.

The applicants complained that there was no effective investigation into Mehmet Şah's death and that they were denied access to a court, in violation of Article 6 (1) of the Convention.

The applicants complained under Article 8 regarding searches carried out at their homes

The applicants further alleged a breach of Article 9 of the Convention, referring to their inability to open the grave of Mehmet Şah İkinçisoý.

The applicants complained under Article 14 that they were discriminated against on account of their Kurdish origin.

Finally, the applicants complained that there had been a serious interference with the exercise of their right of individual petition, in breach of Article 25 of the Convention (now replaced by Article 34).

Held

The Court found a violation of Article 2 of the Convention in respect of Mehmet Şah İkinçisoý's death. Because the authorities had failed to establish the real circumstances surrounding his death, the Court held that Mehmet Şah İkinçisoý had died in circumstances engaging Turkey's responsibility without there being anything to suggest that this had been made necessary.

The Court held that there had been a violation of Article 2 of the Convention due to the State's failure to conduct an effective investigation into the circumstances surrounding the death of Mehmet Şah.

The Court held there had been no violation of Article 3 of the Convention regarding the treatment of Mehmet Şah İkinçisoý; there was a lack of evidence to support the applicants' allegations, furthermore photographs and an autopsy report contradicted their allegations. The Court further

held that there had been no violation of Article 3 regarding the applicants. Whilst the Court had no doubt of their profound suffering following these events, this did not provide a basis for finding a violation of Article 3 of the Convention.

The Court held that it was unnecessary to determine whether there had been a breach of Article 6 of the Convention.

The Court held that there had been no violation of Article 5 (1), (3), (4) and (5) of the Convention in respect of the first applicant; the Court further held that there had been no violation of Article 5 (1) of the Convention in respect of the second applicant but that there had been a violation of Article 5 (3), (4), and (5) in respect of the second applicant.

The Court considered the applicants' allegations in respect of Article 8, 9 and 14 of the Convention to be unsubstantiated.

The Court found a violation of Article 13 of the Convention. The respondent State was responsible for Mehmet Şah İkinçisoý whilst he was in their custody and thus had an obligation to carry out an effective investigation into the circumstances of his death; the Court considered no criminal investigation had been conducted in accordance with Article 13.

The Court held that the first applicant had been subjected to indirect and improper pressure to make statements, which had interfered with the free exercise of his right of individual petition. Accordingly the respondent State had failed to comply with its obligations under former Article 25 (now Article 34) of the Convention.

The Court awarded EUR 25,000 in respect Mehmet Şah İkinçisoý, to be held by the applicants for the heirs of Mehmet Şah İkinçisoý. It awarded EUR 3,500 to each of the applicants in respect of pecuniary damage and EUR 4,000 in respect of non-pecuniary damage to thesecond applicant concerning his police custody. Finally, the Court awarded EUR 15,000 in respect of the applicants' costs and expenses.

Commentary

The previous KHRP Legal Review¹⁷² considered several cases against Turkey regarding disappearances, where the Court applied varying burdens on the applicants and respondent State.

In İkinçisoý, the Court noted the general context of the situation in south-east Turkey at the relevant time and reiterated that an unacknowledged detention could be life-threatening. Having determined the facts to be that Mehmet Şah İkinçisoý had in fact been arrested, the Court consequently drew very strong inferences from the total lack of any evidence indicating that

Mehmet Şah had been taken into custody. It could not be established beyond reasonable doubt that Mehmet Şah İkinçisoý had died during a clash with police officers due to the defective autopsy and the authorities' refusal to deliver Mehmet Şah's body to his family for a detailed autopsy. Furthermore, the public prosecutor came to his conclusions without taking statements from witnesses or police officers; he had not sought any explanation as to how a person involved in an intense clash could (according to the autopsy report) be shot from behind and probably by a person who was standing above him. Combining these factors, the Court considered that the authorities had failed to establish the real circumstances surrounding the death of Mehmet Şah İkinçisoý and was responsible for a violation of Article 2 of the Convention.

In *İpek v Turkey* (25760/94, 17 February 2004), the Court was willing to take into consideration the surrounding circumstances and actions of the particular State agents allegedly involved in considering violations of Article 2 of the Convention. Where events lie wholly or partly within the exclusive knowledge of the authorities, the Court stated that strong presumptions of fact would arise in respect of injuries and death occurring during that detention. In doing so, the Court thus shifted the burden from the applicant to the State, rendering the State liable to the situation which it deliberately created.

However, the Court then retreated from this position in *Acar v Turkey* (26307/95, 8 April 2004) and *Buldan v Turkey* (28298/95, 20 April 2004), effectively permitting a State to benefit from the evidential advantage created by its own actions. In *İkinçisoý*, the burden seems to have shifted yet again; the Court used the authorities' actions to find that the respondent State had failed to establish the real circumstances surrounding Mehmet Şah's death and was thus responsible. This continual variation of the evidential burden required makes it difficult to know precisely what the Court requires in order to find a violation of Article 2 in cases involving abduction/arrest and killings. Potential applicants can never be sure whether they have sufficient evidence to persuade the Court of their arguments, especially if the State has obstructed access to crucial evidence.

Kemal Ağdaş v Turkey

(34592/97)

European Court of Human Rights: Judgment of 27 July 2004

Fatal Shooting - Right to life - Article 2, 6 and 13 of the Convention

Facts

The applicant, Kemal Ağdaş, is a Turkish national, born in 1960 and living in Istanbul. The facts of the case, particularly the circumstances surrounding the death of the applicant's brother İrfan Ağdaş, are disputed by the parties.

According to the applicant, on 13 May 1996 at around 7pm, his 17 year old brother İrfan Ağdaş was walking through the Alibeyköy neighbourhood. Having noticed that İrfan was carrying the newspaper *Zafer Yolunda Kurtuluş* (*Salvation in the Path of Glory*), three plain-clothed policemen began to follow him in an unmarked car. İrfan noticed he was being followed and began running. Two of the police officers got out of the car and opened fire, shooting İrfan who fell to the ground. Whilst lying on the ground İrfan was kicked by the police officers; when a witness went to help İrfan, they pushed her aside, placed İrfan in the car and sat on him as they drove away. Around an hour later they left his body near the Eyüp SSK Hospital.

According to the Government, three police officers from the anti-terrorist branch of the Istanbul Security Directorate were patrolling the Alibeyköy neighbourhood in an unmarked car and approached four suspects in order to carry out an identity control and a body search. The suspects, including the applicant's brother, İrfan Ağdaş, attempted to run away; during this, İrfan opened fire at the police officers. The police officers called them all to surrender and fired warning shots. The other three suspects fled into the side streets and disappeared. During the exchange of fire, the İrfan Ağdaş was wounded and died after his transfer to hospital by the police officers. The police found twenty-seven copies of the newspaper *Zafer Yolunda Kurtuluş* in the black plastic bag that İrfan had been carrying

An investigation was immediately carried out; this included a post-mortem examination, an incident report by the second police car to arrive at the scene which found spent bullet cartridges, a gun and twenty seven copies of the *Zafer Yolunda Kurtuluş* newspaper and an incident report by the police officers directly involved in the alleged armed clash.

On 14 May 1996 the applicant's other brother Cemal Ağdaş lodged a complaint with the Eyüp Public Prosecutor, requesting that an on-site inspection of the scene of the incident be conducted and that the eyewitnesses be heard. On the same day, the Fatih Public Prosecutor opened a criminal investigation into the death of İrfan Ağdaş. He requested an autopsy, which concluded that İrfan had died of a haemorrhage due to his bullet wounds, of which there were four. Two eye witnesses gave statements at the Istanbul branch of the Human Rights Association (IHD), both of which contradicted the Government's story.

On 16 May 1996, the Eyüp Public Prosecutor issued a decision of non-jurisdiction, stating that İrfan Ağdaş had opened fire on the police officers after they had requested to see his identity card. The police officers had returned fire in order to arrest him but as a result of their careless shooting, İrfan Ağdaş had been killed. The Public Prosecutor transferred the case-file to the office of the Eyüp District Governor since the alleged crime had been committed while the police officers were on duty and the District Governor subsequently transferred the file to the Istanbul Governor on 20 May 1996.

On 23 May 1996, the applicant's other brother lodged an objection against the Eyüp Public Prosecutor's decision of non-jurisdiction, stating that the public prosecutor had decided to transfer the case-file without conducting a serious investigation. He also lodged a complaint with the Eyüp Magistrate's Court, requested that an on-site inspection be conducted into his brother's death and that the eyewitnesses be heard by the court. This complaint was rejected by the Magistrate's Court on 27 May 1996 on the grounds that the administrative and judicial authorities had already initiated an investigation into the matter. Further objections by the brother were dismissed. On 11 June 1996 the Eyüp Assize Court rejected the objection filed against the public prosecutor's decision of non-jurisdiction.

Despite a recommendation report by a police superintendent in October 1996 concluding that the officers had performed their duty with diligence and that no fault or negligence could be attributed to them, on 14 November 1996 the Istanbul Provincial Administrative Council decided that proceedings should be brought against the police officers before the Istanbul Criminal Court of First Instance. The case was then transferred between several departments before finally being sent to the Eyüp Public Prosecutor on 6 March 1997.

On 3 April 1997 the Eyüp Public Prosecutor filed an indictment charging the three police officers with "intentional homicide" under Article 448 of the Turkish Criminal Code. Between the filing of the indictment and the final judgment, there were lengthy delays in the court hearings and new tests also highlighted flaws in the ballistics evidence.

On 22 July 2001, the Public Prosecutor submitted that the court should convict the accused police officers as charged but maintained that a law on the suspension of sentences regarding offences committed before 23 April 1999 should apply to the accused.

On 2 April 2001 the Eyüp Assize Court delivered its final judgment. Referring to the ballistics reports, the autopsy report, the transcripts of police radio communications and statements of the accused police officers, interveners and witnesses, the Court concluded that İrfan Ağdaş had died in an armed clash and consequently acquitted the police officers on the ground that they had acted in self-defence.

Both the applicant and the Eyüp Public Prosecutor appealed against the decision of the Eyüp Assize Court. On 1 July 2002 the Court of Cassation upheld the decision of the assize court.

Complaints

The applicant invoked Article 2 of the Convention and complained that his brother İrfan Ağdaş had been unjustifiably killed by the police officers and that there had been no adequate investigation into the circumstances of his death.

The applicant complained that he had been deprived of effective access to a court in breach of Article 6(1) of the Convention. He contended that the facts of the case demonstrated that there was no commitment to carry out an effective investigation into his brother's murder and that the domestic court was determined to acquit the police officers.

Held

The Court held there had there had been no violation of Article 2 of the Convention; there was an insufficient factual and evidentiary basis on which to conclude that the applicant's brother was deprived of his life by the police officers as a result of unnecessary force within the meaning of paragraph 2 of Article 2.

Having regard to the duration and serious shortcomings of the criminal proceedings in this case, the Court found that there had been a violation of Article 2 of the Convention regarding the investigation into the killing of İrfan Ağdaş.

The Court observed that the applicant's grievance under Article 6(1) of the Convention would be more appropriately examined in relation to the more general obligation on Contracting States under Article 13 of the Convention.

For the same reasons which caused the Court to find a violation under Article 2, no effective criminal investigation was considered to have been conducted in accordance with Article 13.

The applicant had been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation. Consequently, there had been a violation of Article 13 of the Convention.

The applicant was awarded EUR 15,000 Euros for non-pecuniary damage. The Court found it unnecessary to award pecuniary damages.

Commentary

The Court was confronted with fundamentally divergent accounts of how the applicant's brother died and the factual circumstances surrounding the death were not clear. Against the background of the case, the Court had serious doubts as to how the shooting took place, largely due to the manner in which the investigation of the scene of the incident, the post-mortem examination and the investigation by the criminal court had been conducted. However, the Court felt unable to conclude, on the evidence available to it, that there had been a violation of Article 2 of the Convention relating to İrfan's death.

The Court did find a violation of Article 2 in respect of the investigation into İrfan's death. The obligation to protect the right to life under Article 2 of the Convention also requires that there

should be some form of effective official investigation when individuals have been killed as a result of the use of force. The Court pointed out that whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. The authorities cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. Adding this to the many deficiencies present in the case, the Court held that Article 2 had been violated.

See joint commentary on Article 2 for Judge Bratza's dissenting opinion.

A.A. and Others v Turkey

(30015/96)

European Court of Human Rights: Judgment of 27 July 2004

Death in police custody - Right to life - Prohibition of torture and inhuman or degrading treatment or punishment - Articles 2 and 3 of the Convention

Facts

The four applicants are Turkish nationals residing in Diyarbakır. Their application surrounds the arrest and subsequent death of their brother and son C.A. The facts of the case are disputed.

According to the applicants, two witnesses confirmed that they had seen C.A. arrested on 10 August 1994. A third witness stated that they had seen C.A. on 12 August 1994 in Diyarbakır courthouse.

According to the custody record, C.A. was arrested and taken into custody on 22 August 1994 following an identity check. An arrest statement showed that C.A. was accused of aiding and abetting the PKK (Workers Party of Kurdistan). The applicant R.A., brother of C.A., was also arrested on 22 August 1994 and was later released.

According to the Turkish authorities, on 24 August 1994 C.A. was found dead in his cell, having hanged himself from the bars of his cell window with the aid of a bedcover and his shirt. After the Public Prosecutor attended the scene, a record was made and photographs taken. Following an autopsy on 25 August 1994, the pathologist found the cause of death to be mechanical asphyxia, caused by hanging. He noted that the body presented various injuries on the forehead, jaw, right elbow and right forearm and found bruising to C.A.'s scalp and neck.

On 8 March 1995, the public prosecutor brought proceedings against the three police officers who had been responsible for questioning C.A.. They were charged with mistreating C.A. in violation of Article 245 of the Turkish Criminal Code which makes it an offence to use force or ill-treatment

when executing a warrant.

On 9 April 1996 the Diyarbakır Criminal Court acquitted the police officers for lack of evidence and, relying on statements by police officers that there were already injuries to C.A.'s face when he was arrested, found that C.A. had committed suicide due to his anxious and pessimistic state. This judgment was upheld by the Court of Cassation on 3 November 1998.

Complaints

The applicants complained under Articles 2 and 3 of the Convention that C.A. was killed as a result of torture inflicted upon him by the police officers. They also complained that the circumstances surrounding the arrest and death of C.A. were never concretely established by a thorough investigation.

Held

The Court held that there had been a violation of Article 2 of the Convention surrounding the failure of the State to hold an effective investigation. The Court did not find an established connection between the death of C.A. and a violation of Article 2 of the Convention. It could not be proven beyond a reasonable doubt that the state officers were responsible for the death of C.A.

The respondent State was found to be responsible for the injuries on the body of the deceased found during the autopsy. The statement by the arresting officers only noted the presence of injuries to the deceased's face. Because C.A. had been in police custody when he died, it was the Government's responsibility to explain the origins of any injuries. In failing to explain the injuries suffered by the deceased, the Court found a violation of Article 3 of the Convention.

The Court awarded the applicants EUR 25,000 in non pecuniary damages and EUR 2,500 for costs and expenses.

Commentary on Article 2 cases

In each of *Ikincisoy* (26144/95, 27 July 2004), *A.A.* (30015/96, 27 July 2004), *Ağdaş* (34592/97, 27 July 2004), *Erkek v Turkey* (28637/95, 13 July 2004), *M.K. v Turkey* (29298/95, 13 July 2004), *E.O. v Turkey* (28497/95, 15 July 2004) and *Yılmaz v Turkey* (35875/97, 29 July 2004), the Court has looked to see whether it could conclude beyond a reasonable doubt that the alleged victim was killed/their death caused by the police, security forces or other agents of the State. However, a dissenting opinion by Judge Bratza in *Ağdaş* suggests that in certain circumstances, the Court might be persuaded to alter this standard of proof.

In each case referred to in the current Legal Review, it was the Court's view that there was

insufficient evidence to show that the police or other agents of the State physically caused the victim's death. For example, in *Ikincisoy* (26144/95, 27 July 2004) there was no concrete evidence showing that the police killed Mehmet Şah; in *A.A.* (30015/96, 27 July 2004) the Court found no evidence to suggest the police officers should have been aware of the victim's suicidal tendencies; in both *M.K.* (29298/95, 13 July 2004) and *E.O.* (28497/95, 15 July 2004) the victim's body was discovered several days after they had been detained. In each case there was nothing to show for certain that the victim had actually been killed by police officers. By contrast, the Government did not contest that in *Ağdaş* (34592/97, 27 July 2004), the victim had been shot and killed by the police officers. The dispute in *Ağdaş* centered around the reasons for his being shot and killed by the police. To Judge Bratza, this crucial difference required the Court apply a different burden of proof.

In Article 3 cases, where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations are backed up by medical reports.

Judge Bratza simply follows the same logic. If it is clear that an individual has been killed by the State, it should be incumbent on the State to provide a plausible explanation of why it was necessary to kill the individual concerned and to produce evidence which casts doubt on allegations by the applicant of wrongful death, particularly if those allegations are backed by eyewitnesses. He argues that if a person dies and it is undisputed that they were killed by agents of the State, the burden of proof then shifts to the State to establish to the Court's satisfaction that no more force had been used than was absolutely necessary.

Çelik v Turkey

(41993/98)

European Court of Human Rights: Judgment of 27 July 2004

Death during clash between security forces and PKK members - Right to life - Article 2 of the Convention - Friendly Settlement

Facts

The applicants, Mr İsmail Çelik and Mrs Hanım Çelik, are both Turkish nationals who were born in 1944 and live in Malatya, Turkey. On 5 November 1996, ten PKK members came to the applicants' house; on the same day, security forces were informed that a group of PKK (Workers Party of Kurdistan) members were hiding in the applicants' village and they carried out an operation in the village to apprehend the PKK members.

When the security forces surrounded the applicants' house, the applicants and their sons Bülent and Turabi emerged from their house and showed the security forces the direction in which the PKK members had fled. A clash broke out and the security forces fired a rocket which killed Bülent.

Following a request by the first applicant to the Doğanşehir public prosecutor to initiate criminal proceedings, on 31 July 1997 the Doğanşehir District Administrative Council decided that no prosecution should be brought against the members of the security forces. The Council concluded that the applicants' son had died in the course of a confrontation between PKK members and the security forces.

An objection filed by the applicants was dismissed by Malatya Regional Administrative Court on 29 September 1997.

Complaints

The applicants complained under Articles 2 and 6 of the Convention alleging the unlawful killing of their son by the security forces.

Held

On 12 May 2004, the Court received a declaration from the Government, undertaking to adopt all necessary measures to ensure that the right to life is respected in the future and offering an ex-gratia payment of EUR 60,000 to the applicants with a view to securing a friendly settlement of their application. On 24 March 2004 the Court received a declaration signed by the applicants' representative, accepting the Government's offer.

Being satisfied that the settlement was based on respect for human rights as defined in the Convention and its Protocols, particularly Articles 37 and 38 of the Convention, the Court ordered the case struck out of the list.

Prohibition of Torture and Inhuman or Degrading Treatment

Altun v. Turkey

(24561/94)

European Court of Human Rights: Judgment of 1 June 2004

Destruction of home and property - Inhuman treatment - Private and family life - Discrimination - Articles 3, 5, 6(1), 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

The applicant, Abdullah Altun, is a Turkish national of Kurdish origin who was born in 1933 and lives in Diyarbakır. Until the end of 1993, the applicant lived in Akdoruk, a village attached to the Kulp district of Diyarbakır province. The facts surrounding the destruction of the applicant's house and property are in dispute between the parties.

According to the applicant, on 11 November 1993 soldiers came to his village and began burning six houses. From the fields where he was working, the applicant saw that his house was on fire; his wife tried to save some of their belongings and animals but was prevented by the soldiers who hit her with their rifles. Ten villagers were arrested and sent to the gendarmerie station by the soldiers, who left the village on 12 November 1993. The applicant was told by his wife that if he returned to the village the soldiers would arrest him, so he went to live with his daughter in Diyarbakır.

In February 1994 the applicant and two other villagers lodged handwritten petitions at Kulp Magistrate's Court requesting that a judge visit the village to establish the damage they had suffered, a request which was refused for security reasons. The same day, the applicant and other villagers were called to the public prosecutor's office in Kulp and interrogated about their complaints. The applicants and villagers signed petitions which had been typed by the public prosecutor, but did not understand the content of what they had signed as they were illiterate. The applicant later learnt that these petitions had been transferred to the Kulp District Gendarmerie whose officers the applicant considered responsible for the destruction of his house. Having been informed that the gendarmes were looking for him, the applicant was too frightened to go to their headquarters as the two other villages who had lodged petitions had been severely beaten when they were summoned by the gendarmerie.

In early 1994 the gendarmes returned to Akdoruk village and burned down the remaining houses.

According to the Government, following the applicant's complaint to the Kulp public prosecutor, an investigation into his allegations commenced, which was transferred to the Kulp Administrative Council on 22 August 1994 when the Kulp public prosecutor issued a decision of non-jurisdiction.

On 24 June 1994 the Kulp District Governor appointed the Kulp District Gendarme Commander as investigating officer. In his report dated 1 April 1995, the Commander stated that no military operation had been conducted in Akdorak village on 11 November 1993 and that clashes between the security forces and PKK had commenced after January 1994 when the village had already been evacuated. He accordingly proposed that the District Administrative Council should issue a decision of non-prosecution, which the Administrative Council duly issued on 13 July 1995.

However, the European Court of Human Rights concluded the facts to be that on the morning of 13 November a group of soldiers arrived in Akdoruk village. The soldiers had a list of names and began to set fire to some of the houses. The applicant was working in the fields at the time of the incident but could see the smoke and flames rising from the village. His home, belongings and livestock were destroyed during the incident.

Complaints

The applicant complained under Article 3 of the Convention that the circumstances surrounding the destruction of his home and eviction of his family from their village constituted inhuman treatment.

The applicant complained under Article 5 of the Convention that he was compelled to abandon his home and village in breach of the right to exercise of liberty and enjoyment of security of person.

The applicant complained under Article 6(1) of the Convention that his right of access to court had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations.

The applicant complained under Article 8 of the Convention and Article 1 of Protocol No.1 to the Convention about the deliberate destruction of his home and property.

The applicant complained under Article 13 of the Convention that he had no effective remedy available in respect of his Convention grievances because of the failure of the authorities to conduct an effective investigation into his allegations.

The applicant, who was of Kurdish origin, complained under Article 14 of the Convention in conjunction with Articles 3, 6, 8 and 13 of the Convention and Article 1 of Protocol No.1, that the destruction of his family home and possessions was the result of an official policy which constituted discrimination because of his status as a member of a national minority.

The applicant alleged that contrary to Article 18 of the Convention, the interference or restrictions complained of were imposed for purposes incompatible with the Convention.

Held

The Court held there had been a violation of Article 3 of the Convention; the destruction of the applicant's home and possessions, in view of the applicant and his family, must have caused him suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 .

The Court found no violation of Article 5(1) of the Convention. The primary concern of Article 5 is protection from an arbitrary deprivation of liberty. In the present case, the applicant was never arrested, detained or otherwise deprived of his liberty and the applicant's insecure personal circumstances arising from the loss of his home did not fall within the notion of security of person as envisaged by Article 5(1) of the Convention.

As the Court found it established that the security forces deliberately destroyed the applicant's house and property, the Court concluded that there had been a violation of Article 8 of the Convention and Article 1 of Protocol No.1 to the Convention.

The Court found it unnecessary to decide whether there had been a violation of Article 6(1) of the Convention, deciding to examine this complaint under the more general obligation imposed on States under Article 13 of the Convention to provide an effective remedy in respect of alleged Convention violations. Having considered the facts, the Court considered that there were considerable defects in the reliability and thoroughness of the relevant authorities' investigation. By failing to conduct a thorough and effective investigation into the applicant's allegations and denying him access to any other remedy, the Government was in breach of Article 13.

The Court found the applicant's allegation that there had been a breach of Article 14 in conjunction with Articles 3, 6, 8 and 13 of the Convention was unsubstantiated.

The Court found the applicant's allegation that there had been a breach of Article 18 of the Convention was unsubstantiated.

The Court awarded the applicant EUR 10,000 in respect of his destroyed home, EUR 6,000 in respect of the lost household goods, EUR 6,000 for loss of income caused by being forced from his home, EUR 14,500 in non-pecuniary damages and EUR 15,000 in respect of costs and expenses

Mehmet Emin Yüksel v Turkey

(40154/98)

European Court of Human Rights: Judgment of 20 July 2004

Injuries sustained during detention in police custody - Prohibition of torture - Articles 3 and 13 of the Convention

Facts

The applicant, Mehmet Emin Yüksel, was born in 1972 and lives in Diyarbakır. On 4 April 1997, the applicant was arrested, placed in custody and interrogated by police officers in relation to his alleged involvement in an illegal organisation, the Yekbun (Kurdistan United People's Party). He

alleged that the officers had subjected him to ill-treatment during the interrogation, which caused an oedema, a bruised nose and a broken tooth. The Government maintained that the applicant's injuries occurred when, due to lack of sleep, he inadvertently fell and hit his nose on a sink.

On 6 April 1997, the applicant signed a statement confirming that he hit his nose on a sink, a statement he later claimed that he was forced to sign. He was subsequently examined by a doctor who found "an oedema and an ecchymosed lesion as a result of trauma" on his nose. The same day, the applicant was released pending trial by the Diyarbakır State Security Court, after stating to the court that he had been ill-treated in detention and his signed statement did not reflect the truth of what happened to him.

On 8 April 1997, the applicant filed a criminal complaint against the police officers who had allegedly ill-treated him. He was further examined by a forensic medical expert, who found an abrasion on the nose, a fractured tooth and declared him unfit to work for two days.

On 15 April 1997 the Diyarbakır Public Prosecutor issued a decision of non-jurisdiction in respect of the applicant's allegations of ill-treatment and referred the investigation file to the Diyarbakır Administrative Council.

On 13 June 1997 the applicant was acquitted of the charges against him by the Diyarbakır State Security Court, which took note in its judgment of the applicant's statement that he had been interrogated by police officers whilst under duress.

On 26 June 1997, the Diyarbakır State Security Council decided not to prosecute the police officers who had allegedly ill-treated the applicant due to lack of evidence, a decision which was confirmed by the Supreme Administrative Court on 14 May 1999.

Complaints

The applicant complained under Article 3 of the Convention that he had been subject to ill-treatment amounting to torture.

The applicant complained under Article 13 of the Convention that he had no effective remedy in respect of his allegation of torture.

Held

The Court held there had been a violation of Article 3 of the Convention. The Court did not find it convincing that the applicant could have broken one of his back teeth and sustained injuries to his nose at the same time, through accidentally coming into contact with a solid object. In the absence of a convincing and plausible explanation by the respondent State, injuries recorded in the medical reports were the result of treatment for which the respondent State bore responsibility.

The Court held that Article 13 of the Convention had been violated; investigations carried out by Administrative Councils could not be regarded as independent, since they were chaired by the governors, or their deputies, and composed of local representatives of the executive, who were hierarchically dependent on the governors. The proceedings could not properly be described as thorough, effective and independent.

The applicant was awarded EUR 10,000 in non-pecuniary damages and EUR 3,000 in respect of costs and expenses.

Commentary

Other recent Article 3 cases include *Bati and Others v Turkey* (33097/96, 57834/00, judgment of 3 June 2004), *Aydin and Yunus v Turkey* (32572/96 et 33366/96, judgment of 22 June 2004) and *Bakbak v Turkey* (39812/98, judgment of 1 July 2004). The Article 3 cases see the Court constantly reiterating that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (*Çolak and Filizer v. Turkey*, 32578/96 and 32579/96; *Selmouni v. France* [GC], 25803/94; and *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 61).

Whilst the Court generally applies the standard of proof “beyond reasonable doubt” in assessing evidence, where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities (as in the case of persons within their custody), strong presumptions of fact will arise in respect of injuries occurring during such detention; indeed the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

States are responsible for the welfare of all persons in detention as such persons are in a vulnerable situation and the authorities are under a duty to protect them. Failure to medically examine detained persons at the beginning of detention; lack of access to lawyers or doctors of the detainee's choice whilst in custody; the absence of a convincing and plausible explanation by the Government of how injuries were caused - any of these factors can cause the Court to consider that the injuries caused to the applicant were the result of treatment for which the Government bore responsibility, in violation of Article 3.

Örnek and Eren v Turkey

(41306/98)

European Court of Human Rights: Judgment of 15 July 2004

Injuries during detention – Prohibition of torture, inhuman or degrading treatment – Article 3 of the Convention - Friendly Settlement

Facts

The applicants are two Turkish nationals, Mr Tacettin Örnek and Mr Abdulvahap Eren, who were born in 1962 and 1966 respectively and live in Mardin, Turkey. On 4 January 1998, they and other villagers were gathered in Yüceli village square by police officers and soldiers and asked to indicate where PKK members were hiding. The applicants were subsequently taken to the Mardin Security Directorate.

On 5 January 1998, a forensic doctor examined the applicants; medical reports noted the presence of old and new injuries to the first applicant and old injuries on the second applicant. The applicants were returned to custody where they allege they were beaten and subjected to ill treatment.

In a second medical examination on 8 January 1998, the doctor noted the presence of various injuries similar to those recorded in the medical reports of 5 January 1998. On the same day, the applicants were brought before the Mardin Magistrate Court in Criminal Matter; the first applicant admitted before the judge that he had helped the PKK in the past by buying and transferring food for its members; the second applicant denied the charges against him but accepted that he had bought food for PKK members on one occasion. The court ordered their detention on remand.

On 21 January 1998, the applicants were charged with membership of the PKK and the court later ordered the applicants be detained on remand.

On 19 March 1998, the applicants' lawyer asserted before the court that the applicants had been tortured by police officers from the Mardin Security Directorate. He accordingly requested that criminal proceedings be instigated against the police officers. The court decided to consider this request at a later stage.

On 28 May 1998 the applicants argued before the court that their police statements had been extracted under torture. As the second applicant was suffering from tuberculosis, they asked the court to release the second applicant on bail. This request was rejected.

On 26 November 1998 the Diyarbakır State Security Court found the first applicant guilty of aiding and abetting a terrorist organisation under Article 169 of the Criminal Code and sentenced him to three years and nine months' imprisonment. The court acquitted the second applicant of

the charges against him.

The first applicant appealed against the judgment. He submitted to the Court of Cassation that he had been subjected to torture under custody and that the ill treatment was proved by two medical reports. On 6 July 1999 the Court of Cassation rejected the appeal. No criminal proceedings were brought against the police officers who had allegedly tortured the applicants.

Complaints

The applicants complained under Article 3 of the Convention that they had been subjected to torture whilst in custody.

Held

On 1 June 2004 the Court received a declaration from the Government, regretting the ill-treatment of the applicants and undertaking to adopt all necessary measures to ensure that the prohibition of such acts and the obligation to carry out effective investigations were respected in the future. The Government offered the applicants an ex gratia, all-inclusive payment of EUR 50,000, EUR 4,000 of which in respect of costs and expenses with a view to securing a friendly settlement.

On 17 May 2004 the Court received a declaration signed by the applicants' representative, accepting the terms of the Government's declaration.

Being satisfied that the settlement was based on respect for human rights as defined in the Convention and its Protocols, [particularly Articles 37 and 38 of the Convention, the Court decided to strike the case out of the list.

Unlawful Detention

Absandze v Georgia

(57861/00)

European Court of Human Rights: Strike Out of 20 July 2004

Detention for over 2 years pending trial - Unlawful detention - Fair trial - Articles 3, 5, 6 and 13 of the Convention

Facts

The applicant, Guram Absandze, is a Georgian national who was born in 1952 and lives in Tblisi, Georgia. He is currently a Vice Minister of the Government.

Between October 1993 and 9 March 1998 the applicant was charged, amongst other things, with treason and organising an assassination attempt on President Edward Shevardnadze.

On 17 March 1998 the applicant was taken into custody in Russia and extradited to Georgia. He was then placed in preventative detention initially for 3 months, however this detention was twice extended.

After escaping on 1 October 2000 and being recaptured on 12 October 2000, the applicant was sentenced to 17 years in detention for the misappropriation of public funds and the organisation and financing of the 9 February 1998 assassination attempt.

On 13 November 2001 the Grand Chamber acquitted the applicant of organising and financing the assassination attempt but upheld the verdict of misappropriation of public funds and sentenced him to six years in prison.

The applicant was later freed by presidential pardon. After the resignation of President Shevardnadze the applicant was appointed Vice Minister of the Government.

Complaints

The applicant complained under Article 3 of the Convention that he had not received proper medical care in prison.

The applicant complained under Article 5 of the Convention regarding the lawfulness of his detention and his inability to challenge this detention.

The applicant complained under Article 5 of the Convention that he had had no effective remedy by which to have the lawfulness of his detention decided and had not been presumed innocent.

The applicant complained under Article 6 of the Convention that he had not been tried within a reasonable time or released pending trial.

The applicant further complained under Article 13 of the Convention regarding the lack of an effective remedy to challenge his treatment.

Held

On 5 April 2004, the Court was informed that the applicant no longer wished to proceed with his application in view of the events in Georgia in November 2003 which had resulted in Mr Shevardnadze's resignation and the applicant's appointment as Vice Minister in the Government.

The Court was satisfied that there were no special circumstances pertaining to human-rights protection that warranted continuing with the examination of the application and decided unanimously to strike it out of the list in accordance with Article 37 of the Convention.

Ilașcu and Others v Moldova and Russia

(48787/99)

European Court of Human Rights: Grand Chamber Judgment of 8 July 2004

Arrest and detention; death sentence for one applicant - Right to life - Freedom from ill-treatment - Unlawful detention - Articles 2, 3, 5, 6, 8 and 34 of the Convention and Article 1 of Protocol No.1 to the Convention.

Facts

The applicants, Mr Ilașcu (first applicant), Mr Leșco (second applicant), Mr Ivanțoc (third applicant) and Mr Petrov-Popa (fourth applicant), who were Moldovan nationals at the time when the application was lodged, were born in 1952, 1955, 1961 and 1963 respectively. Mr. Ilașcu acquired Romanian nationality in 2000, as did Mr. Leșco and Mr. Ivanțoc in 2001.

At the material time Mr. Ilașcu was the local leader of the Popular Front and was working towards the unification of Moldova with Romania. He was twice elected to the Moldovan Parliament and was appointed as a member of the Moldovan delegation to the Parliamentary Assembly of the Council of Europe. In December 2000 he was elected to the Senate of the Romanian Parliament and appointed as a member of the Romanian delegation to the Parliamentary Assembly.

Between 2 and 4 June 1992 the applicants were arrested at their homes in Tiraspol by a number of people, some of whom were wearing uniforms bearing the insignia of the former USSR's Fourteenth Army. They were accused of anti-Soviet activities and illegally combating the legitimate Government of the State of Transdnistria, under the direction of the Moldovan Popular Front and Romania. They were also charged with a number of offences, which included two murders.

On 9 December 1993 the "Supreme Court of the Moldovan Republic of Transdnistria" sentenced Mr. Ilașcu to death and ordered the confiscation of his property. The other applicants were sentenced by the same court to terms of 12 to 15 years' imprisonment, and their property was likewise ordered to be confiscated.

The applicants, with the exception of Mr. Ilașcu and Mr. Leșcu who were released in May 2001 and June 2004 respectively, are currently detained in the "Moldovan Republic of Transdnistria" (the MRT), a region of Moldova known as Transdnistria which declared its independence in 1991.

Complaints

Mr. Ilașcu complained of a violation of Article 2 of the Convention on account of his being condemned to death by an unlawful court and alleged that he ran the risk of being executed at any time.

The applicants complained under Article 3 of the Convention of the ill-treatment to which they were subjected during their detention.

Relying on Article 5(1) of the Convention, the applicants alleged that their detention was unlawful.

The applicants complained of a violation of Article 6 of the Convention on the grounds that the court, which had convicted them, did not have jurisdiction and that the proceedings, which had led to their conviction, had not been fair.

Relying on Article 8 of the Convention, the applicants complained of being unable to correspond freely with their families and with the European Court of Human Rights

The applicants complained of interference with their exercise of the right of individual application to the Court in breach of Article 34 of the Convention.

Finally, the applicants complained under Article 1 of Protocol No. 1 to the Convention, of the confiscation of their possessions following the trial.

They submitted that the Moldovan authorities were responsible for the violations they alleged since they had not taken adequate measures to put a stop to them. In their submission, the Russian Federation shared that responsibility as the territory of Transdnistria was under Russia's *de facto* control owing to the stationing of its troops and military equipment there and the support it gave to the separatists.

Held

The Court held that the applicants came within the jurisdiction of the Republic of Moldova (as regards its positive obligations under Article 1), and within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention.

The Court held that it did not have jurisdiction to examine the complaint under Article 6 of the Convention because the proceedings before the "Supreme Court of the MRT" ended on 9 December 1993; Russia did not ratify the Convention until 5 May 1998, and Moldova ratified the Convention on 12 September 1997.

The Court held that it had jurisdiction to examine the complaints under Articles 2, 3, 5 and 8 of the Convention in so far as they concerned events subsequent to 12 September 1997 in the case of the Republic of Moldova and 5 May 1998 in the case of the Russian Federation. The Court further held that it was not required to determine whether it had jurisdiction to examine the complaint under Article 1 of Protocol No. 1 to the Convention.

The Court considered that Mr Ilaşcu's complaint under Article 2 of the Convention regarding the death penalty would be more appropriately examined under Article 3.

The Court held that there had been a violation of Article 3 of the Convention by the Russian Federation on account of the ill-treatment inflicted on Mr Ilaşcu and the conditions in which he was detained while under the threat of execution, and that these must be termed torture within the meaning of that provision. The Court found no violation of Article 3 by Moldova in respect of the same treatment inflicted on Mr Ilaşcu.

The Court held that there had been a violation of Article 3 of the Convention by the Russian Federation on account of the ill treatment inflicted on Mr Ivanţoc and the conditions in which he has been detained, and that these must be termed torture within the meaning of that provision. The Court found Moldova responsible for the same violation of Article 3 in respect of Mr Ivanţoc since May 2001.

The Court held that there had been a violation of Article 3 of the Convention by the Russian Federation on account of the ill treatment inflicted on Mr Leşco and Mr Petrov-Popa and the conditions in which they been detained, and that these must be termed inhuman and degrading treatment within the meaning of that provision. The Court found Moldova responsible for the same violation of Article 3 regarding Mr Leşco and Mr Petrov-Popa since May 2001.

The Court held that there had been and continued to be a violation of Article 5 of the Convention by Moldova on account of the unlawful detention of the second, third and fourth applicants since May 2001, but that there had been no breach by Moldova as regards the first applicant's detention. The Court further held that there had been and continues to be a violation of Article 5 by the Russian Federation as regards the second, third and fourth applicants, and that there had been a violation of Article 5 by the Russian Federation as regards the first applicant until May 2001.

Having considered the applicants' allegations that they were unable to write freely to their families and the Court from prison into account in the context of Article 3, the Court considered it was unnecessary to examine them separately under Article 8.

The Court held by fifteen votes to two that there had been no violation of Article 1 of Protocol No. 1 to the Convention.

The Court held that both Moldova and Russian Federation failed to discharge their obligations under Article 34 of the Convention.

The Court held that the following damages were to be awarded: Moldova was to pay the applicants still detained EUR 60,000 each in respect of pecuniary and non-pecuniary damages; EUR 3,000 to

each applicants in respect of non-pecuniary damage sustained on account of the breach of Article 34; and the overall sum of EUR 7,000 for costs and expenses. The Russian Federation was to pay Mr Ilaşcu EUR 180,000 and each of the other applicants EUR 120,000 in respect of pecuniary and non-pecuniary damages; EUR 7,000 to each applicant in respect of non-pecuniary damage sustained on account of the breach of Article 34; and the overall sum of EUR 14,000 for costs and expenses.

The Court held that the respondent States were to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release; any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46(1) of the Convention to abide by the Court's judgment.

Commentary

The Court considered that the risk of enforcement of the death penalty imposed on Mr Ilaşcu was more hypothetical than real and thus was unlikely to find a violation of Article 2 of the Convention. However, the Court did not dispute that Mr Ilaşcu must have suffered as a consequence both of the death sentence imposed on him and of his conditions of detention while under the threat of execution of that sentence. This enabled the Court to look for a violation under Article 3. In doing this, the Court noted that for any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration was inevitable. Nevertheless, in certain circumstances, the imposition of such a sentence might entail treatment going beyond the threshold set by Article 3. In the present case, the threshold had been breached.

The Court held that the Russian Federation failed to discharge its obligations under Article 34 of the Convention because of the diplomatic note sent by the Russian Federation to the Moldovan authorities requesting they withdraw observations submitted to the Court. The Court felt that such conduct on the part of the Government of the Russian Federation represented a negation of the common heritage of political traditions, ideals, freedom and the rule of law mentioned in the Preamble to the Convention. The Court found a violation of Article 34 by Moldova because of the remarks by the highest authority of a Contracting State, making an improvement in the applicants' situation depend on withdrawal of the application lodged against that State or another Contracting State. These comments represented direct pressure intended to hinder exercise of the right of individual petition.

The following opinions were attached to this judgment: (1) a partly dissenting opinion by Judge Casadevall, joined by Judges Ress, Birsan, Tulkens and Fura-Sandström; (2) a dissenting opinion by Judge Ress; (3) a partly dissenting opinion by Judge Sir Nicolas Bratza, joined by Judges Rozakis,

Hedigan, Thomassen and Pan̄tīru; (4) a partly dissenting opinion by Judge Louciades; and (5) a dissenting opinion by Judge Kovler.

Much of the dissent centred around the judges' differing analyses of the two states' jurisdiction and responsibility. As the opinions are rather lengthy, it is not possible to summarise them here, however they can be obtained from the European Court's website at <http://www.echr.coe.int>.

Right to Private and Family life

Sidabras and Džiautas v Lithuania

(55480/00; 59330/00)

European Court of Human Rights: Judgment of 27 July 2004

Dismissal from position and subjected to legal restrictions - Private and family life - Discrimination - Articles 8, 10 and 14 of the Convention

Facts

The first applicant, Juozas Sidabras, is a Lithuanian national born in 1951 and living in Šiauliai. On 2 June 1999, the first applicant was dismissed from his position at the Inland Revenue on the basis that he had the status of a "former KGB officer" and was consequently subject to restrictions under Article 2 of the Law on the Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Permanent Employees of the Organisation (hereinafter "the Act").

The applicant launched administrative action claiming that he had not been involved in the violation of individual rights by the KGB therefore his dismissal and resultant inability to find employment under Article 2 of the Act were unlawful.

On 9 September 1999 the Higher Administrative Court found that the first applicant was subject to the restrictions of Article 2 of the Act and had the status of a "former KGB officer" within the meaning of the Act. On 19 October 1999, the Court of Appeal held that the first applicant was not subject to an exception under Article 3 of the act because he did not work solely in criminal investigations at the KGB.

The second applicant, Kestutis Džiautas, is a Lithuanian national born in 1962 and living in Vilnius. On 31 May 1999, the second applicant was dismissed from his job because he was a "former KGB officer" and therefore subject to the restrictions of Article 2 of the Act. The second applicant brought an administrative action against the security intelligence authorities and the Office of the Prosecutor General, claiming that he only studied at a special KGB school in Moscow

and that he had worked as an informer for Lithuanian security and was therefore eligible to benefit from the exceptions listed under Article 3 of the Act.

On 6 August 1999, the Higher Administrative Court concluded that the exceptions under Article 3 applied to the second applicant and therefore his dismissal was unlawful because he had not occupied a political KGB position and had been a secret informer for the Lithuanian security authorities during his time at the KGB.

Following an appeal by the security intelligence authorities, on 25 October 1999 the Court of Appeal quashed the judgment of 6 August 1999, stating that the second applicant's status, as a secret informer was not fully established. The second applicant filed a cassation appeal that was discontinued by the Supreme Court on 20 April 2000 due for want of jurisdiction.

Complaints

The applicants complained under Article 8, taken alone and in conjunction with Article 14 of the Convention, that employment restrictions were imposed on them by reference to their former employment with the KGB, which is a form of discrimination.

The applicants complained that their dismissal from their jobs in State institutions as well as the other restrictions imposed on their finding employment were in breach of Article 10 in conjunction with Article 14 of the Convention.

Held

The Court held that Article 14 taken in conjunction with Article 8 of the Convention was applicable in the present case. The impugned ban affected, to a significant degree, the possibility for the applicants to pursue various professional activities and there were consequential effects on the enjoyment of their right to respect for their "private life". By five votes to two, the Court found a violation of Article 14 taken in conjunction with Article the Court held it was unnecessary to consider whether there had been a violation of Article 8 taken on its own. The ban on the applicants seeking employment in various private sector spheres constituted a disproportionate measure, even having regard to the legitimacy of the aims pursued by that ban.

The Court held that Article 10 was not applicable in the present case; the applicants' dismissals from their positions, respectively, as a tax inspector and a prosecutor, or their alleged inability to find employment according to their academic qualifications, respectively, as a sports instructor and a lawyer, did not amount to a restriction on their ability to express their views or opinions to the same extent as previous cases. Since Article 10 did not apply in the present case, there could be no scope for the application of Article 14 in conjunction with the applicants' complaints under Article 10. Thus there had been no breach of Article 10 of the Convention, taken alone or in conjunction with Article 14.

The Court awarded each applicant EUR 7,000 in pecuniary damages and EUR 5,000 in costs and expenses.

Commentary

Two judges published partly dissenting opinions in *Sidabras* (Judges Loucaides and Thomassen) and one published a partly concurring opinion (Judge Mularoni). All three separate opinions concerned the application of Article 14 in the case.

Judge Mularoni would have preferred the Court to examine the applicants' complaints under Article 8 of the Convention taken alone and to have concluded that it was unnecessary for it to rule on their complaint under Article 14 of the Convention taken in conjunction with Article 8. He pointed out that the applicants never contested the activities of the KGB were contrary to the principles guaranteed by the Lithuanian Constitution or the Convention. In his opinion, everyone must accept the consequences of his/her actions in life and the argument using Article 14 that they were stigmatised by society on account of their past association with an oppressive regime had nothing to do with the respondent State's responsibility for the violation of Article 8 of the Convention. Nevertheless, Judge Mularoni voted with the majority as he considered it important to rule that Article 8 was violated. The fact that the applicants were prevented from seeking employment in various private-sector spheres on account of the statutory ban constituted a disproportionate measure, even having regard to the legitimacy of the aims pursued by that ban.

Judge Loucaides noted that to succeed in claiming a violation of Article 14, it has to be established that the situation of the alleged victim can be considered "similar", "analogous" or "relevantly similar" to that of persons who have been better treated. The law in question imposed restrictions on the professional activities of person who in the past worked for the KGB and whose activities were contrary to the principles of the Lithuanian Constitution and the Convention. The law's objective was the protection of national security, public order and the rights and freedoms of others, by avoiding a repetition of the previous experience through activities similar to those of the KGB by people who had worked for that organisation. Therefore, the impugned restrictions provided by the law in question were directly connected to the status of former KGB officers like the applicants. In light of this, Judge Loucaides could not see how the people who had not worked for the KGB were in an "analogous" or "similar" situation to those who had, therefore disagreeing with the majority finding that Article 14 was applicable because the applicants were treated differently from other persons in Lithuania who had not worked for the KGB.

Despite this, Judge Loucaides felt the restrictions imposed on the professional activities of the applicants to be so onerous and disproportionate to the aim pursued that they amounted to an unjustified interference with the private life of the applicants and consequently there had been a breach of Article 8 of the Convention

Judge Thomassen voted against a finding that there had been a violation of Article 14 taken in conjunction with Article 8. He stated that the principle of non discrimination refers above all to a denial of opportunities on grounds of personal choices in so far as these choices should be respected as elements of someone's personality, such as religion, political opinion, sexual orientation and gender identity, or, on the contrary, on grounds of personal features in respect of which no choice at all can be made, such as sex, race, disability and age. In his opinion, working for the KGB did not fall into either of these categories.

Judge Thomassen also had problems in examining the justification of the measures taken in respect of former employees of the KGB in terms of "discrimination". If former KGB employees were treated differently from "other persons in Lithuania who had not worked for the KGB", this difference did not come within the scope of Article 14 in so far as it relates to access to particular professions, the right to a free choice of professions not being guaranteed by the Convention. However, he agreed with the other judges that the application of the law, which in itself pursued a legitimate aim, was of such a general character that it affected the applicants' ability to develop relationships with the outside world as protected by Article 8, to a significant extent and therefore interfered with their private life

Freedom of Religion

*Zeynep Tekin v Turkey*¹⁷³

(41556/98)

European Court of Human Rights: Judgment of 29 June 2004

Wearing of Islamic headscarf - Freedom of Religion - Article 9 of the Convention and Article 2 of Protocol No.1 to the Convention - Strike out

Facts

The applicant, Zeynep Tekin, is a Turkish national who was born in 1975 and lives in Izmir. At the material time, she was a second year student at nursing college at the University of Ege.

On 22 December 1988, the Higher Education Authority issued a circular requiring student nurses to wear special headwear during clinical training.

In December 1993, the applicant was reprimanded for wearing an Islamic headscarf instead of the regulation headwear and was subsequently caught wearing an Islamic headscarf on several other occasions. On 23 December 1993, the applicant was suspended from her course for 15 days in accordance with the circular of 22 December 1988.

The applicant appealed against this disciplinary action to the administrative court, which

dismissed her appeal on the grounds that the principle of secularism established by Article 2 of the Constitution prevailed. On 16 October 1997 the Supreme Administrative Court issued a judgment upholding the lower court's judgment.

Complaint

The applicant complained that the prohibition on wearing the Islamic headscarf was a violation of her freedom of religion under Article 9 of the Convention.

The applicant complained under Article 2 of Protocol No.1 to the Convention of an unjustified interference with her right to education.

Held

On 19 February 2003, the applicant informed the Court by letter that she wished to withdraw her application. She offered no explanation and did not reply to a letter from the Court requesting further information about the reasons for her decision. The Turkish Government did not comment. The Court found that it was no longer justified to continue the examination of the application within the meaning of Article 37 of the Convention and decided unanimously to strike the case out of the list.

Leyla Sahin v Turkey

(44774/98)

European Court of Human Rights: Judgment of 29 June 2004

Wearing of Islamic headscarf - Freedom of Religion - Articles 8, 9, 10 and 14 of the Convention and Article 2 of Protocol No. 1 to the Convention

Facts¹⁷⁴

The applicant, is a Turkish national who was born in 1973. She has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf. At the material time she was a fifth-year student at the faculty of medicine of the University of Istanbul.

On 23 February 1998 the Vice-Chancellor of the University issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials.

In March 1998 the applicant was denied access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf. Subsequently the university

authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a term for taking part in an unauthorised assembly that had gathered to protest against them. All the disciplinary penalties imposed on the applicant were revoked under an amnesty law.

Complaints

The applicant complained that the prohibition on wearing the Islamic headscarf was a violation of her freedom of religion under Article 9 of the Convention.

The applicant complained under Article 2 of Protocol No.1 to the Convention of an unjustified interference with her right to education.

The applicant further complained of a violation of Article 14, taken together with Article 9 of the Convention, arguing that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers.

The applicant also complained under Articles 8 and 10 of the Convention.

Held

The Court found that there had been no violation of Article 9 of the Convention. Having regard to the context in which the contested regulations had been introduced and with respect to the margin of appreciation afforded to the respondent State, no violation of Article 9 had been shown.

The Court found that no separate question arose under Articles 8, 10, 14 of the Convention and Article 2 of Protocol No.1 to the Convention, as the relevant circumstances were the same as those it had examined in relation to Article 9 of the Convention.

Commentary

The regulations in issue constituted an interference with the applicant's right to manifest her religion; that interference was based on principles of secularism and equality and primarily pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.

The regulations must be intended to achieve the legitimate aims of the State, which was to preserve pluralism within the university. The Court stated,

“The principle of secularism was the paramount consideration underlining the ban on the wearing of insignia in universities. It was understandable in such a context where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women,

are being taught and applied in practice, that the relevant authorities would consider that it ran counter to the furtherance of such values to accept the wearing of religious insignia, including as in the present case, that women students cover their heads with a headscarf while on university premises.”¹⁷⁵

Furthermore, the Court considered the impact which wearing such a symbol may have on those who choose not to wear it. The issue at stake included the protection of the “rights and freedoms of others” and the “maintenance of public order” in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. The Court felt that placing limits on freedoms in this sphere could be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially given the political significance this particular religious symbol had taken on within the respondent State.

In light of these considerations and the margin of appreciation left to the respondent State, the Court held that the university regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle, proportionate to the aims pursued and consequently could be regarded as “necessary in a democratic society”.

Sahin and previous ECHR case law on this issue indicate a reluctance on the part of the Court to rule that prohibiting women from wearing the Islamic headscarf is inconsistent with Article 9 of the Convention. In *Karaduman v Turkey* (No. 16278/90, 3 May 1993) and *Bulut v Turkey* (No. 19793/91, 3 May 1993), there was a feeling that by virtue of a student enrolling at a secular university, they, the students, had agreed to neglect their religious beliefs, and to abide by the regulations of the university in question. The case law on this issue indicates that the headscarf itself is seen as a sense of discrimination, and a showing of inequality. In the case of *Dahlab v Switzerland* (No. 42393/98, 15 February 2001) the Court stated in their findings that ‘it is difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination.’

The debate concerning the wearing of the Islamic headscarf has intensified following the September 11 terrorist attacks in New York and Washington. The issue is especially controversial in France, where the National Assembly approved a bill on 10 February 2004 regulating, pursuant to the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in State primary and secondary schools. Even in the UK, famous for its tolerance, a recent high Court judgment held that 1 15-year-old girl did not have a legal right to wear a jilbab, a long, flowing gown covering her entire body except her hands and face. The judge in that case stated that the limits the school imposed on what pupils could wear were proportionate and could not be deemed a breach of human rights.

In addition to the protection of religious freedom, lawyers are concerned that young Muslim

women who choose to wear headscarves continue to be denied their right to education in breach of article 26(1) of the Universal Declaration of Human Rights and article 13 of The International Covenant on Economic, Social and Cultural Rights (ICESCR). There is concern that government's interference in universities, taken together with a strict ban on headscarves for students and teachers, will inevitably inhibit academic freedom.

Freedom of Expression

Ayşenur Zarakolu and Others v Turkey

(26971/95, 37933/97)

European Court of Human Rights: Judgment of 13 July 2004

Conviction for spreading separatist propaganda and subsequent confiscation of books - Fair trial - Freedom of expression - Articles 6, 10 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention

Facts

This is a KHRP assisted case. The application was lodged by Ayşenur Zarakolu, a Turkish national, on her behalf and on the behalf of the publishing house Belge Uluslararası Yayıncılık, of which she was the owner at the material time. In January 2002 the applicant died, but the Court gave her husband and two sons leave to continue the present proceedings.

The applicant was prosecuted for spreading separatist propaganda after publishing a book entitled "Our Ferhat, the anatomy of a murder" (Bizim Ferhat, bir cinayetin anatomisi) about the murder of the journalist Ferhat Tepe. An order was made under the urgent-applications procedure for copies of the book to be seized. The book denounced alleged human-rights violations in "Kurdistan" and was fiercely critical of the authorities, whom it accused of brutally repressing the Kurdish people's fight for freedom.

In a judgment of 29 December 1995, the Istanbul State Security Court sentenced the applicant to five months' imprisonment, which it commuted to a fine and ordered confiscation of the book. It found that the book contained expressions that were intended to destroy the territorial integrity of the State (by calling part of the territory "Kurdistan" and identifying the insurrectionary movements in the region with a Kurdish nationalist struggle). The judgment was upheld by the Court of Cassation on 11 March 1997.

Complaints

The applicant complained under Article 10 that the seizure of the book and her subsequent criminal conviction violated the applicant's freedom of expression.

The applicant complained under Article 6 that the presence of a military judge in the State Security Court which tried and convicted her violated her right to an independent and impartial tribunal.

The applicant complained under Article 13 and Article 1 of Protocol No.1 to the Convention due to her inability to challenge the confiscation of her property.

Held

The Court found that the reasons given by the domestic courts could not be regarded as sufficient by themselves to justify the interference with the applicant's right to freedom of expression. The confiscation order and the applicant's sentence were disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society". There had therefore been a violation of Article 10 of the Convention.

The Court unanimously held that there had been a violation of Article 6(1); a civilian who had to answer to criminal charges in a State Security Court that included a military judge in its ranks had legitimate grounds for fearing that the tribunal was not independent and impartial.

Having regard to its findings under Article 10, the Court did not consider any separate examination of the applicant's allegations under Article 13 and Article 1 of Protocol No. 1 to be necessary.

Under Article 41 the Court awarded the applicant's heirs EUR 5,000 for non-pecuniary damage and EUR 2,500 for costs and expenses.

Ertugrul Kürkçü v Turkey

(43996/98)

European Court of Human Rights: Judgment of 27 July 2004

Custodial sentence for translating report containing analysis of human rights violations in Turkey - Freedom of Expression - Article 10 of the Convention

Facts

The applicant, Ertugrul Kürkçü, is a Turkish national born in 1948 and living in Istanbul. The applicant translated a report by Human Rights Watch entitled 'Arms Project', which contained eye-witness accounts by former soldiers who had taken part in missions in south-east Turkey and an analysis of certain instances of human rights violations that had occurred in the area.

Following publication of the report in Istanbul in May 1996, the applicant as translator, and A.Z. the owner of Belge, the publishing company that had published the report, were charged with insulting and vilifying state military forces.

On 14 March 1997, both were sentenced by the Istanbul Assises Court to ten months' imprisonment. The court converted the publisher's sentence into a fine and decided to stay execution of the applicant's sentence. It also ordered all copies of the book in question to be seized. On 17 February 1998, the Court of Cassation confirmed the judgment of 14 March 1997.

Complaints

The applicant complained under Article 10 of the Convention that his conviction infringed his right to freedom of expression.

Held

The Court found that the grounds on which the domestic courts had based their decision could not be considered as sufficient in themselves to justify the interference with the applicant's right to freedom of expression under Article 10(2) of the Convention. The Court considered that the applicant's conviction was disproportionate to the aims pursued and not "necessary in a democratic society". There had been a violation of Article 10 of the Convention.

The court awarded the applicant EUR 3,000 for non-pecuniary damage and EUR 2,500 for costs and expenses, under Article 41.

Commentary

In *Gündüz v Turkey* (see (2004) 5 KHRP LR, p.164), the Court concluded that in principle it can be regarded as necessary in a democratic society under Article 10(2) of the Convention to sanction or even to prevent all forms of expression which justify, or constitute propaganda for, hatred based on intolerance if the "restrictions", "conditions", "formalities" or "sanctions" imposed are proportional to the legitimate aim. Expression constituting hate speech may attack particular groups and therefore may not benefit from the protection of Article 10 of the Convention.

The above cases, together with additional cases referred to below, show the Court continuing to place emphasis on "hate speech" in determining whether there has been a violation of Article 10.

In *Feridun Yazar and Others v Turkey* (42713/98, 23 September 2004) the four applicants, founder members of the People's Labour Party (HEP), were prosecuted and sentenced to between one and two years' imprisonment for speeches they had made in 1991 and 1992 at the HEP's first and second extraordinary congresses. In *Haydar Yıldırım and Others v Turkey* (42920/98, 15 July 2004) the four applicants, members of the Freedom and Solidarity Party, were prosecuted and sentenced to two years' imprisonment for after being found in possession of a pamphlet published by the party containing an article entitled "Peace Now". In *Okutan v Turkey* (43995/98, 29 July 2004) the applicant, vice-secretary general of the political party HEP, was charged and sentenced to three years' imprisonment for the content of political speeches he made which strongly criticised the manner in which the security forces were conducting their fight against acts of terrorism in south-

east Turkey. Finally, in *Varlı and Others v Turkey* (38586/97, 19 October 2004) the six applicants were leaders or members of Diyarbakır trade unions. Following a statement which they issued in 1993, criticizing the government for failing to protect fundamental rights and associating itself with a practice of extermination, the applicants were found guilty of disseminating propaganda against the indivisibility of the State and sentenced to ten months' imprisonment, suspended on probation.

In *Yazar, Yildirim and Okutan*, the Court noted, firstly, that the applicants in these cases had expressed their opinions as politicians and actors on the Turkish political stage. In all five cases, the crucial point for the Court was that none of the applicants had incited people to use violence, to resort to armed resistance or uprising and neither had they engaged in hate speech - the crucial factor for the Court in each case.¹⁷⁶ In each case, the Court found the applicants' sentences to be disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society" according to Article 10(2) of the Convention.

Freedom of Assembly and Association

Vatan v Russia

(47978/99)

European Court of Human Rights: Judgment of 7 October 2004

Suspension of political organisation's activities- Freedom of thought, expression and assembly - Discrimination - Articles 9, 10, 11 and 14 of the Convention

Facts

The applicant association, the People's Democratic Party Vatan, is a political party which was registered by the Russian Ministry of Justice in 1994.

The applicant association was founded "to support the renaissance of the Tartar nation, to enhance the latter's political activity and to protect Tartars' political, socio-economic and cultural rights". The name "Tartar" applies to people of Turkic origin who speak a language which belongs to the Ural-Altai language family. Four-fifths of the Tartars (about 5.5 million people) live in Russia. They are Muslims.

On 12 August 1994 the Simbirsk (Ulyanovsk) Regional Organisation of the People's Democratic Party Vatan ("the Regional Organisation") was registered with the Ulyanovsk Regional Department of Justice. The applicant claims that this was a branch of its party.

On 3 June 1998 the prosecutor of the Ulyanovsk Region applied to suspend activities of the

Regional Organisation of the People's Democratic Party Vatan on the ground that it had advocated violence, contrary to federal legislation and the constitution.

The court found that the Regional Organisation openly called for violation of the integrity of Russia, for violent alteration of the foundations of constitutional governance and for the creation of an Islamic State in the Volga Region. The activities and opinions of the Regional Organisation's leaders and members were of an extreme nationalist nature, inciting people to national and religious discord and denigrating the Russian speaking population and non-adherents of Islam. The regional organisation's activities were consequently suspended for six months. It was, among other things, prohibited from holding meetings or demonstrations or taking part in elections.

Upon an appeal, the Supreme Court of Russia upheld the first instance judgment. An application for supervisory review was dismissed by the same court on 13 October 1998.

On 12 January 2000 Ulyanovsk Regional Court allowed a claim by the Department of Justice of the Ulyanovsk Regional Administration to dissolve the Regional Organisation on account of its failure to bring its Charter in compliance with new legislation. This decision has not been appealed against.

Complaints

The applicant complained that the court decisions to suspend the Regional Organisation's activities had violated its freedom to hold opinions and to impart information and ideas, its freedom of association and the party members' right to manifest their religion. It referred to Articles 9, 10, 11 and 14 of the Convention.

Held

The Court held that the case was inadmissible; the Russian Government's preliminary objection that the applicant could not claim to be the victim of a violation within the meaning of Article 34 of the Convention was well-founded and the Court could not consider the merits of the case.

Commentary

The Court noted that the applicant and the Regional Organisation were two different legal entities. The Regional Organisation's charter left open the question of whether it was structurally dependent on the applicant association in terms of decision-making. In addition, it was not prevented from pursuing political goals other than those approved by the applicant and there was no suggestion that the actions and statements which gave rise to the regional organisation's suspension were prompted or authorised by the applicant. Neither did the applicant association's president take part in the domestic court proceedings in the capacity of head of the entire party. The Court could not therefore conclude that the applicant and the Regional Organisation were one political party which could constitute a single non-governmental organisation within the meaning of Article 34.

Also, the body directly affected by the domestic measure was the Regional Organisation. The focus of the applicant association's concern appeared to be the fact that it could not rely on the regional organisation to convey its political ideas in the Ulyanovsk region for six months. The injunction in question did not impose any limitations on the applicant itself, hence there was nothing to stop the applicant association from pursuing its activities in its own name, for example through individual party members. The Court also observed that it was open to the Regional Organisation itself to lodge an application with the European Court.

There were no exceptional circumstances which could entitle the applicant itself to claim to be a victim of the disputed suspension. Even if the applicant association could claim to be a victim of the suspension, as it had never pursued any domestic proceedings in its own name in respect of the alleged violations, its application would in any event be inadmissible on account of a failure to exhaust domestic remedies. Finally, there was no suggestion that the applicant represented the Regional Organisation in the proceedings before the Court.

Judges Ress and Cabral Barreto appended a concurring opinion to the judgment. In their view, there was a *prima facie* presumption that, in the case of a political party, the legal personality of a non-governmental organisation extends to the party as a whole and creates a single political entity. Whilst different legal personalities may exist under Russian law, a broad approach was preferred in order to protect the existence of political parties and freedom of political expression under Articles 10 and 11 of the Convention.

The applicant should have had standing under the Convention in its alleged capacity as a "party as a whole". The Court's decision to accept the splitting up of a political party into different legal personalities, as permitted under the domestic legal system, makes it difficult for a political party to defend its rights against interference by the different state organs. This is particularly true when, as is the case here, a party's regional organisation is subject to interference that may affect the party as a whole. The applicant was itself a victim for the purpose of Article 34.

Judges Ress and Cabral Barreto did not believe that the question whether there was exhaustion of domestic remedies was convincingly answered in the judgment. If the regional organisation acts in a broader perspective, representing the interest of the party as a whole as well as its own interests, then it did not seem justified even to contemplate rejection of the applicant's application on the ground that it failed to institute parallel proceedings before the domestic courts.

However, the judges would in any event have found the application to be inadmissible because it was manifestly ill-founded. They considered the conclusions of the regional court to be well-founded; the Regional Organisation had openly called for violent alterations to the foundations of constitutional governance and called for a brigade of "courageous and resistant" people to fight for national liberation and the decolonisation of Russia. The reference to the Russian Federation as a

“war party” whose arms should be “shortened” and to Russian institutions as “Nazis” overstepped the boundary of permissible freedom of expression within the meaning of Article 10. Judges Ress and Cabral Barreto would have preferred to base the conclusion on these considerations.

Advisory Opinion

Request for an Advisory Opinion on the Co-Existence of the CIS Convention and the European Convention

European Court of Human Rights: Grand Chamber Decision of 2 June 2004

On 2 June 2004, the Grand Chamber of the European Court of Human Rights delivered its decision concerning the first request to the Court for an advisory opinion under Article 47 of the Convention.

Facts

The Commonwealth of Independent States (CIS) was established in 1991 by a number of former Soviet Republics and at present has 12 members. On 26 May 1995, the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (the CIS Convention) was opened for signature; it entered into force on 11 August 1998 and provided for the establishment of a Human Rights Commission of the Commonwealth of Independent States (the CIS Commission) to monitor the fulfilment of the human rights obligations entered into by States.

In May 2001 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1519 (2001); this recommended that the Committee of Ministers request the Court to give an advisory opinion on whether the CIS Commission should be regarded as “another procedure of international investigation or settlement” within the meaning of Article 35(2)(b) of the European Convention on Human Rights.

Accepting the advice of the Parliamentary Assembly, on 9 January 2002 the Committee of Ministers requested the Court to give an advisory opinion on “the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights”.

Decision

The Court concluded that the request for an advisory opinion did not come within its advisory competence.

The Court considered that the request for an advisory opinion related essentially to the specific question whether the CIS Commission could be regarded as “another procedure of international investigation or settlement” within the meaning of Article 35(2)(b) of the Convention and was satisfied that the request related to a legal question concerning the interpretation of the Convention, as required by Article 47(1).

It was, however, necessary to examine whether the Court’s competence was excluded by Article 47(2), on the ground that the request raised a “question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention”. The Court considered that “proceedings” in this context referred to those relating to applications lodged with it by States or individuals under Articles 33 and 34 of the Convention respectively and that the term “question” extended to issues concerning the admissibility of applications under Article 35 of the Convention. It went on to observe that the question whether an individual application should be declared inadmissible on the ground that the matter had already been submitted to “another procedure of international investigation or settlement” had been addressed in a number of concrete cases in the past, in particular by the former European Commission of Human Rights.

In that connection, the Court endorsed the Commission’s approach, which showed that the examination of this question was not limited to a formal verification of whether the matter had been submitted to another procedure but extended, where appropriate, to an assessment of the nature of the supervisory body concerned, its procedure and the effect of its decisions. The question whether a particular procedure fell within the scope of Article 35(2)(b) was therefore one which the Court might have to consider in consequences of proceedings instituted under the Convention, so that its competence to give an advisory opinion was in principle excluded.

As far as the CIS Convention procedure was concerned, the Court noted that several States Parties to the Convention were members of the CIS and that three had signed and one had ratified the CIS Convention. Moreover, the rights set out in the CIS Convention were broadly similar to those in the Convention. It could not therefore be excluded that the Court might have to consider in the context of a future individual application whether the CIS procedure was “another procedure of international investigation or settlement” under Article 35(2)(b).

Commentary

This is the first request for an advisory opinion under Article 47 since the Convention was first introduced. This lack of advisory opinions is caused by the restrictive framing of the conditions under which the Court may issue such opinions. Under Article 47(2), such opinions cannot deal with questions relating to the content or scope of the rights or freedoms defined in Section I of the Convention and its Protocols; nor are they able to deal with other questions the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such

proceedings as could be instituted in accordance with the Convention - the reason why the request for an advisory opinion was turned down in the present situation.

It is unfortunate that the restrictive framing of Article 47 has thus far prevented any advisory opinions from being given, in comparison to the wide range of advisory opinions given by other courts including the Inter-American Court of Human Rights and the International Court of Justice. However, considering how overloaded the Court appears to be at present with thousands of applicants alleging Convention violations, one suspects the Court is unlikely to complain too loudly about its inability to give advisory opinions.

Enjoyment of Property

Broniowski v Poland

(31443/96)

European Court of Human Rights: Grand Chamber Judgment of 22 June 2004

Repeated failure to provide compensation for abandoned property - Right to enjoy property - Article 1 of Protocol No.1 to the Convention - Article 46 of the Convention

Facts

The applicant, Jerry Broniowski, is a Polish national who was born in 1944 and lives in Wieliczka, Poland.

Following the Second World War, the Polish State undertook to compensate persons who had been “repatriated” from the so-called “territories beyond the Bug River”, which no longer formed part of Poland, in respect of property which they had been forced to abandon there. Such persons were entitled to have the value of the abandoned property deducted either from the price of immovable property purchased from the State or from the fee for “perpetual use” (a maximum period of 99 years) of State property.

The estimated number of claimants was in the high tens of thousands. In 1968, the applicant’s mother inherited the estate of his grandmother, who had abandoned a plot of land and a house when repatriated. The applicant’s mother was subsequently granted the right of “perpetual use” (for a fee of PLZ 38,808). In June 2002 an expert commissioned by the Government established that the value of this transaction corresponded to 2% of the compensation to which the applicant’s family was entitled.

After inheriting his mother’s estate, the applicant requested payment of the remainder of the compensation due. He was informed that as a result of the enactment of the local Self Government

Act in 1990, by which most State land had been transferred to the local authorities, it was not possible to satisfy his claim.

On 12 October 1994, the Supreme Administrative Court dismissed the applicant's complaint about the Government's alleged inactivity in failing to introduce legislation dealing with such claims. Between 1993 and 2001, several laws were passed which further reduced the already small stock of property designated for compensating repatriated persons.

On 19 December 2002, the Constitutional Court declared unconstitutional various statutory provisions restricting the possibility of satisfying entitlement to compensation for abandoned property. The court considered that by excluding particular types of State-owned land, the legislation had rendered the "right to credit" illusory. In practice, claimants had to participate in auctions of State-owned property and were frequently excluded as a result of additional conditions being imposed. Furthermore, following the Constitutional Court's judgment the State Agricultural and Military Property Agencies suspended auctions pending the adoption of new legislation.

Subsequently, a law of December 2003 provided that the respondent State's obligations towards persons who, like the applicant, had obtained some compensatory property under the previous statutes, were considered to have been discharged.

Complaints

The applicant alleged a breach of Article 1 of Protocol No. 1 to the Convention in that the respondent State, having conferred on him an entitlement to compensatory property, subsequently made it impossible for him, by obstruction and inaction, both legislative and administrative, and by extralegal practices - to benefit from that entitlement and that, ultimately, by virtue of the recent legislation, it extinguished his legal interest

Held

The Court held that the applicant's right to credit (entitlement to obtain compensatory property) constituted a "possession" within the meaning of Article 1 of Protocol No.1.

The Court held that there had been a violation of Article 1 of Protocol No. 1 in the applicant's case. Having regard to all the factors and in particular to the impact on the applicant over many years of the Bug River legislative scheme as operated in practice, the Court concluded that, as an individual, he had to bear a disproportionate and excessive burden which could not be justified in terms of the legitimate general community interest pursued by the authorities.

The Court concluded that the above violation originated in a systemic problem, connected with the malfunctioning of domestic legislation and administrative practice caused by the failure to set up an effective mechanism to implement the "right to credit" of Bug River claimants. These

deficiencies in national law and practice could give rise to numerous subsequent well-founded applications; the failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims had affected nearly 80,000 people and there were already 167 applications pending before the Court brought by Bug River claimants. This was not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represented a threat to the future effectiveness of the Convention machinery.

The Court noted that under Article 46 of the Convention that the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. Combining this with the Committee of Ministers' Resolution of 12 May 2004 (Res(2004)3) and Recommendation of 12 May 2004, the Court observed that general measures at national level were called for in order to remedy the systemic defect underlying the Court's finding of a violation. As regards general measures to be taken, the Court considered that the State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1.

In the circumstances of the case, the Court considered that the question of compensation for pecuniary and/or non-pecuniary damage was not ready for decision. The Court awarded EUR 12,000 in costs and expenses less EUR 2,409 received under the Court's legal aid scheme.

Pending the implementation of the relevant general measures, which should be adopted within a reasonable time, the Court adjourned its consideration of applications deriving from the same general cause.

Commentary

On 31 August 2004, a press release from the Registrar announced that the European Court of Human Rights had decided that all similar applications should be adjourned pending the outcome of the leading case and the adoption of measures to be taken at national level

The Court stated that at the beginning of the period under consideration, the applicant had the entitlement to obtain, further to the application he had made to that effect, compensatory property corresponding to the remainder of the property lost by his family. However, as ascertained by the Polish courts and confirmed by the Court's analysis of the respondent State's conduct, the authorities had imposed successive limitations on the exercise of the applicant's right to credit and wholly extinguished his entitlement by the December 2003 legislation.

In situations such as this involving legislative reform with significant economic impact for the

country as a whole, the national authorities had considerable discretion in selecting measures and the appropriate time for their implementation. The choice of measures may necessarily involve decisions restricting compensation for the taking or restitution of property to a level below its market value. Thus, Article 1 of Protocol No. 1 did not guarantee a right to full compensation in all circumstances and a wide margin of appreciation should be accorded to the respondent State. Nevertheless, that margin was not unlimited and the exercise of the respondent State's discretion could not entail consequences at variance with Convention standards.

Considering the conduct of the respondent State authorities over many years, which involved a deliberate attempt to prevent the implementation of a final and enforceable judgment that was tolerated if not tacitly approved, by the executive and legislative branch of the respondent State, the Court held the respondent State had not been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it had continuously failed over many years to implement an entitlement conferred on the applicant and thousands of other Bug River claimants by Polish legislation. Consequently, the Court found that Article 1 of Protocol No.1 had been violated.

According to 2003 Report of the Steering Committee for Human Rights (CDDH), 17.915 decisions were taken declaring an application inadmissible in 2002 and the Court delivered 844 judgments of which some 65% concerned repetitive cases.¹⁷⁷ The CDDH found the workload problems of the Court lay in two main areas: firstly in dealing with the numerous individual applications that, for various reasons are terminated without a ruling on the merits of the case; and secondly dealing with individual applications which constitute repeats of earlier applications in which a violation was found (repetitive case following a pilot case).

Protocol No. 14 to the European Convention of Human Rights¹⁷⁸ was adopted by the Council of Europe's Committee of Ministers on 14 May 2004. The measures in the Protocol are aimed at maintaining and reinforcing the effectiveness of the European Court of Human Rights in the context of an ever-increasing number of individual complaints. They focus on three main areas: preventing violations at national level and improving domestic remedies, making the filtering and processing of applications as efficient as possible and, finally, improving and speeding up the execution of the Court's decisions.

At the same time as adopting Protocol No. 14, the Committee of Ministers adopted various Resolutions and Recommendations to further reduce the burden on the Court. The Committee's Resolution (2004)3 of 12 May 2004 was aimed at judgments revealing an underlying systematic problem, where the Court faced numerous well-founded applications as a consequence. Noting Article 46 of the Convention, the Committee invited the Court to identify what it considers to be an underlying systematic problem and the source of the problem in such judgments; and to specifically notify any judgment containing indications of the existence of a systemic problem and

of the source of this problem to the state concerned, the Committee of Ministers, the Parliamentary Assembly and other Council of Europe bodies and to highlight such judgments in an appropriate manner in the database of the Court.

Committee Recommendation (2004)6 regarding the improvement of domestic remedies was also adopted on 12 May 2004. The Committee considered that the availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier. One of the three recommendations made by the Committee was that member states should review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court.

Broniowski v Poland is one of the first cases to be decided under the "pilot" judgment procedure. In *Broniowski*, the Court found a violation of Article 1 of Protocol No.1, which originated in a widespread problem resulting from a malfunctioning of Polish legislation and administrative practice; it noted that the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications. Referring to the package of measures to guarantee the effectiveness of Convention machinery, particularly Res (2004)3 and Rec (2004)6, the Court noted that in the present case, the failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims had affected nearly 80,000 people; there were, moreover, already 167 applications pending before the Court brought by Bug River claimants.

In view of the systematic situation it had identified, the Court observed that general measures at national level were undoubtedly called for in execution of the present judgment and proceeded to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case. It held that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu.

In theory, the Court thus ensured that all 80,000 affected claimants were provided with an effective remedy whilst also removing the need for any to come to court. However, having already acknowledged that the financial and political considerations facing states would affect how a state chose to fulfil obligations, the Court failed to even comment on where Poland would obtain the huge sums of money it would now be faced with paying out following the Court's judgment. More worryingly, the Court also failed to consider the political ramifications of ordering Poland as to the

general measures it was required to take. Reparations for war damages have been a complicated issue in Eastern European countries ever since the end of the Second World War. Both Germany and Poland lost land - in Poland's case, having lost the Bug River territory, it was given German land to compensate and around 2.5 million Germans were moved off this land. Both Poland and Germany have avoided asking for damages from each other, but since the *Broniowski* judgment was handed down, the issue has begun to rear its head again.¹⁷⁹

Ironically, in attempting to prevent 80,000 applications to the Court, the Court may instead have stirred up a "hornet's nest" of up several hundred thousand Germans who may also apply to Strasbourg. Even if their cases are determined to be inadmissible, the Court must still deal with the initial applications and political tensions between Poland and Germany would still escalate. The Court would do well to consider this before handing down another pilot judgment on such a complex issue.

Doğan and Others v Turkey

(8803-8811/02, 8813/02 and 8815-8819/02)

European Court of Human Rights: Judgment of 29 June 2004

Forced eviction from homes and refusal to permit return - State failure to secure Convention rights and freedoms - Discrimination - Peaceful enjoyment of property - Private and family life - Articles 1, 6, 7, 8, 13 14 and 17 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

This case was lodged with the Court by Mr Abdullah Doğan, Mr Cemal Doğan, Mr Ali Rıza Doğan, Mr Ahmet Doğan, Mr Ali Murat Doğan, Mr Hasan Yıldız, Mr Hıdır Balık, Mr İhsan Balık, Mr Kazım Balık, Mr Mehmet Doğan, Mr Müslüm Yıldız, Mr Hüseyin Doğan, Mr Yusuf Doğan, Mr Hüseyin Doğan and Mr Ali Rıza Doğan, (the applicants) all fifteen of whom were Turkish nationals.

Until October 1994, the applicants all lived in Boydaş, a village of Hozat district in Tunceli province, in the then state-of-emergency region of Turkey. The applicants both owned houses and land or cultivated land and lived in houses owned by their fathers. Due to a violent conflict between the security forces and sections of the Kurdish population in favour of Kurdish autonomy, in particular members of the PKK that, since the 1980s, had been ongoing in the region, many people from in and around Boydas village had been displaced.

The facts of the case are disputed.

According to the applicants, in October 1994 they were forcibly evicted from their village by security

forces on account of the disturbances in the region. The security forces destroyed their homes with a view to forcing them to leave the village, thus the applicants and their families moved to safer areas in Elazığ and Istanbul where they currently live in poor conditions.

Between 29 November 1994 and 15 August 2001, the applicants petitioned various authorities complaining about the forced evacuation of their village by security forces and requesting permission to return to their village and use their property. No response was given to the authorities except letters in reply sent to Abdullah, Ahmet, Mehmet and Hüseyin Doğan. The letter sent to Abdullah Doğan on 5 May 2000, by the District Governor of Hozat, referred to a Project aimed at facilitating the re-settlement of inhabitants who unwillingly left their land due to terrorist incidents and stated that in this context his petition had been taken into consideration.

The letters addressed to Ahmet, Mehmet and Hüseyin Doğan from the state-of-emergency office attached to the Tunceli Governor's office, stated that return to Boydaş village was forbidden for security reasons, that they could however return and reside in other villages; and that their petition would be considered under the same 'Return to the Village and Rehabilitation Project' as mentioned to Abdullah Doğan.

According to the Government, a terrorist campaign waged by the PKK since the 1980s had focused on the south-east provinces of Turkey, with those who refused to join the terrorist organisation being intimidated with random killings and village massacres. This campaign resulted in a drastic movement of population from the area to more secure areas of the country, although a number of settlements might have been evacuated by the local authorities to ensure the safety of the population as a precaution. Official records indicated that the inhabitants of Boydaş evacuated the village because of the PKK intimidation. They were not forced to leave the village by the security forces.

Complaints

The applicants alleged under Article 1 of the Convention that the respondent State had failed to secure to those within its jurisdiction rights and freedoms set out in the Convention and its protocols.

The applicants complained under Article 6 of the Convention that they had been denied access to court to challenge the decisions of the administrative authorities.

The applicants complained that the authorities' refusal to allow them to return to their village and to have access to their property amounted to a violation of Article 7 of the Convention.

The applicants contended under Article 8 of the Convention that their right to respect for their family life and home had been violated as they had been forcibly displaced from their village and

had been prevented from returning.

The applicants complained under Article 13 of the Convention that they had no effective remedy for their various Convention grievances.

The applicants complained under Article 17 of the Convention that the respondent State had applied restrictions to their rights in violation of the Convention, particularly in the state of emergency region.

The applicants alleged that their forced eviction from their village by the security forces and the refusal of the authorities to allow them to return to their homes and land had amounted to a breach of Article 1 of Protocol No. 1 to the Convention. They maintained under Article 1 of Protocol No. 1 that they had lost the possibility of using and enjoying their property on account of the restrictions imposed by the authorities on their return to their village

Finally, the applicants complained under Article 14 of the Convention in conjunction with Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No.1 that they had been discriminated against on the basis of their birthplace.

Held

The Court dismissed the Government's objection of failure to comply with the six-month rule; in the circumstances of the case, the six-month rule did not run until 22 July 2003 when the applicants were told that there was no obstacle to their return to their homes in Boydaş village.

Article 1 of the Convention contains an entirely general obligation; it should not be seen as a provision which can be the subject of a separate breach, even if invoked at the same time and in conjunction with other Articles. Thus, it was unnecessary to examine this aspect of the application separately.

The Court decided to examine the applicants' complaint under Article 6 from the standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention.

The Court rejected the applicants' complaint under Article 7 of the Convention; the alleged eviction from their homes and the restriction on their return to their village did not concern a "criminal charge" against the applicants and thus the events and measures complained of did not concern a "criminal offence".

The Court considered the applicant's allegations in respect of Article 14 and 17 of the Convention to be unsubstantiated and rejected their complaint.

The Court found that Article 1 of Protocol No.1 to the Convention had been violated. The economic resources of the applicants and the revenue derived from them counted as “possessions” for the purposes of Article 1 of Protocol No.1 to the Convention. The authorities had been compelled to take extraordinary measures to maintain security within the state of emergency region, however, in the circumstances of the case the applicants had to bear an individual and excessive burden which upset the fair balance to be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one’s possessions.

The refusal of access to the applicants’ homes and livelihood, in addition to giving rise to a violation of Article 1 of Protocol No. 1, constituted at the same time a serious and unjustified interference with the right to respect for family lives and homes. Accordingly, there had been a violation of Article 8 of the Convention.

The Court concluded that no effective remedy was available to the applicants in respect of the denial of access to their homes and possessions in Boydaš village; accordingly there had been a violation of Article 13 of the Convention.

The Court held that that the question of the application of Article 41 of the Convention was not ready for decision.

Right to vote and stand in elections

Ždanoka v Latvia

(58278/00)

European Court of Human Rights: Judgment of 17 June 2004

Applicant denied opportunity to stand in election due to previous membership of dissolved political party - Freedom of expression – Freedom of assembly - Articles 10 and 11 of the Convention and Article 3 of Protocol No.1 to the Convention

Facts

The applicant, Tatjana Ždanoka, is a Latvian national who was born in 1950 and lives in Riga. In 1971 the applicant became a member of the Communist Party of Latvia (PCL), a regional branch of the Communist Party of the Soviet Union, initially as an activist, then later in a more active role by taking an important post in the organisation.

Latvia declared its independence on 4 May 1990, whilst the applicant was a member of the Supreme Council of the Socialist Soviet Republic of Latvia. A period of transition was introduced with a view to gradual restoration of State sovereignty; this period ended on 21 August 1991 with the

proclamation of the country's absolute and immediate independence.

On account of its participation in two attempted coups d'état during the transition period, the PCL was declared unconstitutional and dissolved in September 1991. In 1994, the Latvian Parliament adopted two laws on municipal and parliamentary elections respectively, stating that persons who had actively participated in the PCL's activities after 13 January 1991 (the date of the first coup d'état supported by the party) could not stand for election; such participation was to be established by the courts on an application by the prosecutor-general.

In 1997 the applicant was able to stand in local elections and was elected to Riga City Council, but was obliged to withdraw her candidacy for the 1998 parliamentary elections. In 1999, on an application by the prosecutor-general's office, the national courts held that the applicant had personally been involved in the PCL's activities after 13 January 1991. As a result, the applicant was automatically prevented from standing for election and lost her seat on the City Council.

An appeal on points of law by the applicant was declared inadmissible in February 2000. The applicant's name was removed from the list of candidates submitted for the 2002 parliamentary elections.

Complaints

Relying on Article 3 of Protocol No. 1 to the Convention, the applicant complained of an infringement of her right to stand as a candidate in elections as a result of the ruling that she was ineligible. She further submitted that her ineligibility as regards both the parliament and municipal council elections had been contrary to Articles 10 and 11 of the Convention.

Held

The Court held that there had been a violation of Article 3 of Protocol No.1 to the Convention. The applicant's permanent ineligibility to stand for election to the Latvian parliament was not proportionate to the legitimate aims it pursued, it curtailed her electoral rights to such an extent as to impair their very essence and its necessity in a democratic society had not been established.

The Court held that there had been a violation of Article 11 of the Convention. The applicant's ineligibility was based on her past political activity and not on her present conduct, and her current public activities did not indicate any failure to respect the fundamental values of the Convention. The ban on standing for election, seemed disproportionate to the aim pursued and accordingly unnecessary in a democratic society.

The finding of a violation of Article 11 made it unnecessary for the Court to rule separately on the question of compliance with the requirements of Article 10.

By five votes to two the Court awarded the applicant LVL 2,236.50 for pecuniary damages, EUR 10,000 for non-pecuniary damages and EUR 10,000 for costs and expenses.

Commentary

The Court accepted that the ruling that the applicant was ineligible pursued at least three legitimate aims, namely protection of the respondent State's independence, the democratic regime and national security. Whilst accepting the legitimacy of a punitive measure, the Court considered such a measure should in general be temporary in order to be proportionate; in the present case the restriction imposed on the applicant was of indefinite duration and would continue until the relevant legislation was repealed.

Whilst not excluding the possibility that the restrictions could have been justified and proportionate during the first years after the re-establishment of Latvia's independence, as time went on it was necessary to ascertain whether other factors continued to justify the restrictions; Latvian legislation did not allow the courts to assess whether a person really represented a threat to the current democratic regime. The Court considered that such rigidity was striking, in that it deprived the domestic courts of the power to rule whether the candidate's ineligibility remained proportionate as time went by.

The Court concluded that the applicant's individual conduct in 1991 had not reached such a level of seriousness as to justify her continued ineligibility in the present; the Government had not supplied information about any specific act by the applicant capable of endangering the Latvian State, its national security or its democratic order at the present time. Consequently, the permanent ban on the applicant standing for election was unnecessary in a democratic society.

The applicant's disqualification from standing for election amounted to an interference with her right to freedom of association which had been prescribed by law and pursued a legitimate aim (protection of national security). The party of which the applicant had been a member could not have been regarded as "illegal" between 13 January 1991 and August 1991 and the Government had not supplied information about any specific act by the applicant aimed at destroying the newly-restored Republic of Latvia or its democratic order. The applicant's ineligibility was based on her past political activity and not on her present conduct, and her current public activities did not indicate any failure to respect the fundamental values of the Convention. Consequently, the applicant's ineligibility to stand for election to parliament or to municipal councils on account of her active participation in the PCL, which was still in force more than ten years after the events for which that party had been held responsible, seemed disproportionate to the aim pursued and accordingly unnecessary in a democratic society.

Aziz v Cyprus

(69949/01)

European Court of Justice: Judgment of 22 June 2004

Refusal to register applicant on electoral roll - Discrimination - Right to vote - Article 14 of the Convention and Article 3 of Protocol No.1 to the Convention

Facts

The applicant, Mr Ibrahim Aziz, is a Cypriot national of Turkish origin who was born in 1938 and lives in Nicosia. On 30 January 2001, the applicant applied to be registered in the electoral roll with a view to voting in the parliamentary elections of May 2001.

On 8 February 2001 the Ministry of the Interior refused the applicant's request, explaining that under the Constitution members of his community could not be registered on the Greek-Cypriot electoral role.

The applicant applied to the Supreme Court against the refusal, arguing that the Cypriot Government had failed to set up two electoral lists in order to protect the electoral rights of members of both communities.

On 23 May 2001, the Supreme Court dismissed the appeal, holding that under the Cypriot Constitution and relevant electoral legislation, members of the Turkish community residing in the Republic of Cyprus could not vote in parliamentary elections and that it could not intervene to fill a legislative gap which existed in this respect.

Complaints

The applicant complained under Article 3 of Protocol No.1 to the Convention that he had been prevented from exercising his voting rights.

The applicant complained under Article 14 in conjunction with Article 3 of Protocol No.1 to the Convention that he was prevented from exercising his voting rights on the grounds of national origin and/or association with a national minority.

Held

The Court held that there had been a violation of Article 3 of Protocol No.1 to the Convention. Although Article 3 of Protocol No.1 guarantees individual rights, including the right to vote and to stand for election, these rights are not absolute and may be subject to limitations. In the circumstances of the present case, the very essence of the applicant's right to vote as guaranteed by Article 3 of Protocol No.1 was denied.

The Court further held that there was a violation of Article 14 in conjunction with Article 3 of Protocol No.1 to the Convention; this difference in treatment had resulted from the very fact that the applicant was a Turkish Cypriot.

Other than an award of EUR 3,500 in respect of cost and expenses, the Court dismissed the applicant's claim for damages, considering that its findings, combined with the inevitable reform of measures by the Cypriot Government, constituted just satisfaction.

Commentary

Although Article 3 of Protocol No.1 to the Convention rights may be limited, the Court had to satisfy itself that any such limitations imposed by a Contracting State did not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they were imposed in pursuit of a legitimate aim; and that the means employed were not disproportionate.

From 1963 onwards, the relevant articles of the Cypriot Constitution providing for the parliamentary representation of the Turkish-Cypriot community and the quotas to be adhered to by the two communities became impossible to implement in practice. Consequently, the applicant, as a member of the Turkish-Cypriot community living in the Government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived. In light of these circumstances, the Court was prepared to find a violation of Article 3 of Protocol No.1.

In the present case, the applicant was a Cypriot national, resident in the Government-controlled area of Cyprus. The difference in treatment resulted from the very fact that he was a Turkish Cypriot; it emanated from the constitutional provisions regulating the voting rights between members of the Greek-Cypriot and Turkish-Cypriot communities, that had become impossible to implement in practice. Arguments advanced by the Government could not justify this difference on reasonable and objective grounds, particularly in the light of the fact that Turkish Cypriots in the applicant's situation were prevented from voting at any parliamentary election. Therefore a clear violation of Article 14 conjunction with Article 3 of Protocol No.1 to the Convention in had been shown.

Right not to be tried twice

Aleksandr Konstantinovich Nikitin v Russia

(50178/99)

European Court of Human Rights: Judgment of 20 July 2004

Supervisory review conducted after final acquittal - Right to a fair hearing and to not be tried twice for the same events - Article 6(1) of the Convention and Article 4 of Protocol 7 to the Convention

Facts

The applicant, Aleksandr Konstantinovich Nikitin, is a Russian national who was born in 1952 and lives in St Petersburg. The applicant was a former naval officer against whom criminal proceedings were initiated by the authorities of the respondent State whilst he was working on an environmental project run by a Norwegian non-governmental organisation, "Bellona".

On 20 October 1998 the applicant's trial commenced; he was charged with treason through espionage and a count of aggravated disclosure of an official secret. On 29 October 1998, the court remitted the case for further investigation, ordering the prosecution to take several steps to complete the investigation. The prosecution appealed against this decision, claiming that the case was clear enough for a court determination and that there was no need for further investigation.

On 23 November 1999 the St. Petersburg City Court resumed the applicant's trial on the same counts and on 29 December 1999 the applicant was acquitted of all charges by the court. This judgment became final in April 2000 after the Supreme Court of the Russian Federation upheld the acquittal.

On 30 May 2000, the Prosecutor General lodged a request for the case to be reviewed in supervisory proceedings on the grounds that the law governing official secrets had been wrongfully applied and that there had been defects in the criminal investigation. That request was subsequently dismissed by the Presidium of the Supreme Court on 13 September 2000, which acknowledged that the investigation had been tainted with flaws and shortfalls but found that the prosecution could not rely on them as it had been within the prosecution's control to redress them at earlier stages of proceedings.

The applicant's challenge to the law allowing supervisory review was considered by the Constitutional Court in July 2002, when it was held that the legislative provisions permitting the re-examination and quashing of an acquittal on the grounds of a prejudicial or incomplete investigation or court hearing, or on the grounds of a wrong assessment of the facts of the case, were incompatible with the Constitution. The exception to that decision concerned cases in which there had been new evidence or a fundamental defect in the previous proceedings.

Complaints

The applicant complained that the supervisory review conducted after his final acquittal constituted a violation of his right to a fair trial under Article 6(1) of the Convention.

Invoking Article 4 of Protocol No.7 to the Convention, the applicant alleged that the supervisory review constituted a violation of his right not to be tried again in criminal proceedings for an offence of which he had been finally acquitted.

Held

The Court held that the judgment given in April 2000, whereby the applicant's acquittal acquired final force, was the final decision referred to in Article 4 of Protocol No.7 to the Convention.

The Court found that as the application for supervisory review was not accepted by the Presidium, the applicant was not "tried again" within the meaning of Article 4 of Protocol No.7. The proceedings aimed at bringing about a supervisory review were an attempt to have the proceedings re-opened rather than an attempted to secure a "second trial".

The Court held that there had been no violation of Article 4 of Protocol No.7. The requirements of legal certainty were not absolute and must be read in conjunction with, for example, the provisions of Article 4(2) of Protocol No.7 which allowed for a case to be re-opened in certain circumstances. The authorities conducting supervisory review had not failed to strike a fair balance between the interests of the applicant and the need to ensure the proper administration of justice.

Furthermore, as the Presidium's decision was in the applicant's favour, he could not claim to be the victim of a violation of the right to a fair hearing. There had not been a breach of Article 6(1) of the Convention.

Footnotes

¹⁶⁷ Previously reported in (2004) 5 KHRP LR 94

¹⁶⁸ Judgment, *Vo v France* (53924/00), paras 75-79.

¹⁶⁹ Judgment, *Vo v France* (53924/00), para 80.

¹⁷⁰ Judgment, *Vo v France* (53924/00), paras 82-85.

¹⁷¹ Judgment, *Vo v France* (53924/00), paras 90-84.

¹⁷² (2004) 5 KHRP LR

¹⁷³ See also (2003) 4 KHRP LR

¹⁷⁴ See also (2003) 3 KHRP LR, p. 96 et seq.

¹⁷⁵ Judgment, *Leyla Sahin v Turkey* (44774/98), para. 110.

¹⁷⁶ The exception was one applicant in *Yazar*; the Court noted that the terms used by Mr Gezici in his speech made his stance on the issue of recourse to force for separatist ends ambiguous. The penalty imposed in his case could accordingly reasonably be regarded as meeting a "pressing social need". However, the Court also stated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of the interference. Having done this, it found the sentence to be disproportionate.

¹⁷⁷ Guaranteeing the long-term effectiveness of the European Court of Human Rights: Final report containing proposals of the CDDH CM(2003)55, 8 April 2003

¹⁷⁸ As mentioned in (2004) 5 KHRP LR, p.26.

¹⁷⁹ In September 2004, the Polish Parliament voted for a resolution calling on Germany to pay for war damages. (<http://www.euobserver.com/?aid=17262>). This non-binding resolution appeared to be partly a response to the Strasbourg ruling and partly a response to threats by small groups of some of the estimated 2.5 million Germans, who lost property when Poland's borders shifted westwards, to take their claims for compensation to the Court. Although the Polish Prime Minister refused to demand damages from Germany (<http://news.bbc.co.uk/1/hi/world/europe/3657144.stm>), many Germans then became angry at the Poles over their demands and in response, their threats to go to Strasbourg intensified. Following official talks on 27 September 2004, the German Chancellor Gerhard Schroeder and Polish Prime Minister Marek Belka agreed to set up a bilateral committee of legal experts to fight the lawsuits (<http://news.bbc.co.uk/1/hi/world/europe/3692444.stm>).

Section 3: Appendices

1. Table of cases brought before the ECtHR against Turkey invoking a violation of Article 6 of the Convention (May 2004 - October 2004)

Application No:	Applicant (s):	Date of decision:	Outcome of the case:
59759/00	<i>Akçakale v Turkey</i>	25 May 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * No violation of Article 6(1) in relation to length of proceedings
36110/97	<i>Yalman and Others v Turkey</i>	3 June 2004	* Violation of Article 6(1), length of proceedings
32580/96	<i>Koç v Turkey</i>	22 June 2004	* Violation of Article 6(1), right to an independent & impartial tribunal; length of proceedings
39678/98	<i>Acar v Turkey</i>	22 June 2004	* Violation of Article 6(1), right to an independent & impartial tribunal
48992/99	<i>Yılmaz v Turkey</i>	24 June 2004	* Violation of Article 6(1), right to an independent & impartial tribunal
50193/99; 50197/99	<i>Doğan and Keser v Turkey</i>	24 June 2004	* Violation of Article 6(1), right to an independent & impartial tribunal
54335/00	<i>Kaya and Others v Turkey</i>	24 June 2004	* Violation of Article 6(1), right to an independent & impartial tribunal; length of proceedings * Unnecessary to examine other complaints under Article 6
50249/99	<i>Yeşil v Turkey</i>	1 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Unnecessary to examine other complaints under Article 6
53530/99; 52898/99	<i>Çolak v Turkey (No.1) & (No.2)</i>	15 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal

42920/98	<i>Haydar Yildirim v Turkey</i>	15 July 2004	* Violation of Article 10, freedom of expression * Violation of Article 6(1), right to an independent & impartial tribunal * Unnecessary to examine other complaints under Article 6
41956/98	<i>Aksaç v Turkey</i>	15 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Unnecessary to examine complaint in relation to Article 6(3)(b)
58057/00	<i>Irey v Turkey</i>	27 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Unnecessary to examine other complaints under Article 6
43995/98	<i>Okutan v Turkey</i>	29 July 2004	* Violation of Article 10 * Violation of Article 6(1), right to an independent & impartial tribunal
55812/00	<i>Caloglu v Turkey</i>	29 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal
57250/00	<i>İbrahim Ülger v Turkey</i>	29 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Violation of Article 10
40518/98	<i>Süleyman Yildirim v Turkey</i>	29 July 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Violation of Article 5(3), length of detention
40498/98	<i>Murat Kılıç v. Turkey</i>	30 September 2004	* Violation of Article 6(1), right to an independent & impartial tribunal
42552/98	<i>Mehmet Bülent Yılmaz and Şahin Yılmaz v Turkey</i>	7 October 2004	* Violation of Article 6(1), right to an independent & impartial tribunal * Unnecessary to examine other complaints under Article 6
46506/99; 46569/99; 46570/99; 46939/99	<i>Durmaz and Others v Turkey</i>	14 October 2004	* Violation of Article 6(1), right to an independent & impartial tribunal

46284/99	<i>Yanikođlu v. Turkey</i>	14 October 2004	* Violation of Article 6(1), right to an independent & impartial tribunal; length of proceedings
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2. Table of cases brought before the ECtHR against Turkey involving a violation of Article 1 of Protocol No.1 to the Convention (May 2004 - October 2004)

Application No:	Applicant:	Date of decision:	Type of decision
45630/99	<i>Mehmet Salih and Abdülsamet Çakmak v Turkey</i>	29 April 2004	* Violation of Article 1 of Protocol No.1 * Unnecessary to examine complaints in relation to Articles 8 and 13
48990/99	<i>Dönmez v Turkey</i>	29 April 2004	* Violation of Article 1 of Protocol No.1
42432/98	<i>Koçak and Others v Turkey</i>	19 May 2004	* Violation of Article 1 of Protocol No.1
49659/99	<i>Cibir v Turkey</i>	19 May 2004	* Violation of Article 1 of Protocol No.1
36564/97	<i>Kaya and Others v Turkey</i>	27 May 2004	* Violation of Article 1 of Protocol No.1 * Unnecessary to examine complaints in relation to Article 6(1)
38420/97	<i>İ.I. v Turkey</i>	27 May 2004	* Violation of Article 1 of Protocol No.1 * Unnecessary to examine complaints in relation to Article 6(1)
38883/97	<i>H.B and Others v Turkey</i>	27 May 2004	* Violation of Article 1 of Protocol No.1 * Unnecessary to examine complaints in relation to Article 6(1)
41578/98	<i>Baransel and Others v Turkey</i>	27 May 2004	* Violation of Article 1 of Protocol No.1
42559/98	<i>Öner and Çavuşoğlu v Turkey</i>	24 June 2004	* Violation of Article 1 of Protocol No.1

40261/98	<i>Asuman Aydin v Turkey</i>	15 July 2004	* Violation of Article 1 of Protocol No.1
26338/95	<i>I.R.S. and others v Turkey</i>	20 July 2004	* Violation of Article 1 of Protocol No.1
36973/97	<i>Muhey Yaşar and Others v Turkey</i>	22 July 2004	* Violation of Article 1 of Protocol No.1 * Unnecessary to examine complaint under Article 6(1)
50728/99	<i>Çebi v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
50732/99	<i>Çiftçi v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
50741/99	<i>Gürkan and Aktan v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
49718/99	<i>Kapucu v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
49698/99	<i>Kartal Makina Sanayi ve Ticaret Koll.Şti. v Turkey (no. 1)</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
50011/99	<i>Kartal Makina Sanayi ve Ticaret Koll.Şti. v Turkey (no. 2)</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
49923/99	<i>Koçyiğit and Uzuner v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
49762/99	<i>Önk and Others v. Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
51482/99	<i>Penbe Demir and Others v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
50042/99	<i>Seçenler Kauçuk ve Plastik San ve Tic. A.Ş. v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
51488/99	<i>Telli and Others v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
51485/99	<i>Turan v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1

49690/99	<i>Uğur and Others v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
51481/99	<i>Velioğlu and Others v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
49751/99	<i>Verep v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
51483/99	<i>Yazar v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1
50730/99	<i>Yurtkuran and Others v Turkey</i>	7 October 2004	* Violation of Article 1 of Protocol No.1

3. Conclusions of the European Commission Regular Report on Turkey

(taken from the Annex of the European Commission Recommendation, 6 October 2004)

When the European Council of December 1999 decided that Turkey is a candidate for accession, Turkey was considered to have the basic features of a democratic system while at the same time displaying serious shortcomings in terms of human rights and protection of minorities. In 2002, the Commission noted in its Regular Report that the decision on the candidate status of Turkey had encouraged the country to make noticeable progress with the adoption of a series of fundamental, but still limited, reforms. At that time, it was clear that most of those measures had yet to be implemented and that many other issues required to meet the Copenhagen political criteria had yet to be addressed. On that basis, the European Council decided in December 2002 to re-examine Turkey's fulfilment of the political criteria at the end of 2004.

Political reforms, in line with the priorities in the Accession Partnership, have been introduced by means of a series of constitutional and legislative changes adopted over a period of three years (2001-2004). There have been two major constitutional reforms in 2001 and 2004 and eight legislative packages were adopted by Parliament between February 2002 and July 2004. New codes have been adopted, including a Civil Code and a Penal Code. Numerous other laws, regulations, decrees and circulars outlining the application of these reforms were issued. The government undertook major steps to achieve better implementation of the reforms. The Reform Monitoring Group, a body set up under the chairmanship of the deputy Prime Minister responsible for Human Rights, was established to supervise the reforms across the board and to solve practical problems. Significant progress took place also on the ground; however, the implementation of reforms remains uneven.

On civil-military relations, the government has increasingly asserted its control over the military. In order to enhance budgetary transparency the Court of Auditors was granted permission to audit military and defence expenditures. Extra-budgetary funds have been included in the general budget, allowing for full parliamentary control. In August 2004, for the first time a civilian was appointed Secretary General of the National Security Council. The process of fully aligning civil-military relations with EU practice is underway; nevertheless, the armed forces in Turkey continue to exercise influence through a series of informal mechanisms.

The independence and efficiency of the judiciary were strengthened, State Security Courts were abolished and some of their competencies were transferred to the newly-created Serious Felony Courts. The legislation to establish Intermediate Courts of Appeal was recently adopted, but the

draft new Code of Criminal Procedure, the draft Laws on the Establishment of the Judicial Police and on the Execution of Punishments still await adoption.

Since 1 January 2004, Turkey has been a member of the Council of Europe's Group of States Against Corruption (GRECO). A number of anti-corruption measures have been adopted, in particular by establishing ethical rules for public servants. However, despite these legislative developments, corruption remains a serious problem in almost all areas of the economy and public affairs.

Concerning the general framework for the respect of human rights and the exercise of fundamental freedoms, Turkey has acceded to most relevant international and European conventions and the principle of the supremacy of these international human rights conventions over domestic law was enshrined in the Constitution. Since 2002 Turkey has increased its efforts to execute decisions of the European Court of Human Rights. Higher judicial bodies such as the Court of Cassation have issued a number of judgments interpreting the reforms in accordance with the standards of the European Court, including in cases related to the use of the Kurdish language, torture and freedom of expression. Retrials have taken place, leading to a number of acquittals. Leyla Zana and her former colleagues, who were released from prison in June 2004, are to face a further retrial, following a decision by the Court of Cassation.

The death penalty was abolished in all circumstances according to Protocol No 13 to the European Convention on Human Rights, which Turkey signed in January 2004. Remaining references to the death penalty in existing legislation were removed. Further efforts have been made to strengthen the fight against torture and ill-treatment, including provisions in the new Penal Code. Pre-trial detention procedures have been aligned with European standards, although detainees are not always made aware of their rights by law enforcement officers. The authorities have adopted a zero tolerance policy towards torture and a number of perpetrators of torture have been punished. Torture is no longer systematic, but numerous cases of ill treatment including torture still continue to occur and further efforts will be required to eradicate such practices.

As regards freedom of expression, the situation has improved significantly, but several problems remain. The situation of individuals sentenced for non-violent expression of opinion is now being addressed and several persons sentenced under the old provisions were either acquitted or released. Constitutional amendments and a new press law have increased press freedoms. The new law abrogates sanctions such as the closure of publications, the halting of distribution and the confiscation of printing machines. However, in a number of cases journalists and other citizens expressing non-violent opinion continue to be prosecuted. The new Penal Code provides only limited progress as regards freedom of expression.

If adopted, the new Law on Associations, initially passed in July 2004 and then vetoed by the President, will be significant in terms of reducing the possibility of state interference in the activities

of associations and will contribute towards the strengthening of civil society. Despite measures taken to ease restrictions on demonstrations, there are still reports of the use of disproportionate force against demonstrators.

Although freedom of religious belief is guaranteed by the Constitution, and freedom to worship is largely unhampered, non-Muslim religious communities continue to experience difficulties connected with legal personality, property rights, training of clergy, schools and internal management. Appropriate legislation could remedy these difficulties. Alevi are still not recognised as a Muslim minority.

As regards economic and social rights, the principle of gender equality has been strengthened in the Civil Code and the Constitution. Under the new Penal Code, perpetrators of “honour killings” should be sentenced to life imprisonment, virginity tests will be prohibited without a court order and sexual assault in marriage will qualify as a criminal offence. The situation of women is still unsatisfactory; discrimination and violence against women, including “honour killings”, remain a major problem. Children’s rights were strengthened, but child labour remains an issue of serious concern. Trade union rights still fall short of ILO standards.

As far as the protection of minorities and the exercise of cultural rights are concerned, the Constitution was amended to lift the ban on the use of Kurdish and other languages. Several Kurdish language schools recently opened in the Southeast of Turkey. Broadcasting in Kurdish and other languages and dialects is now permitted and broadcasts have started, although on a restricted scale. There has been greater tolerance for the expression of Kurdish culture in its different forms. The measures adopted in the area of cultural rights represent only a starting point. There are still considerable restrictions, in particular in the area of broadcasting and education in minority languages.

The state of emergency, which had been in force for 15 years in some provinces of the Southeast, was completely lifted in 2002. Provisions used to restrict pre-trial detention rights under emergency rule were amended. Turkey began a dialogue with a number of international organisations, including the Commission, on the question of internally displaced persons. A Law on Compensation of Losses Resulting from Terrorist Acts was approved. Although work is underway to define a more systematic approach towards the region, no integrated strategy with a view to reducing regional disparities and addressing the economic, social and cultural needs of the local population has yet been adopted. The return of internally displaced persons in the Southeast has been limited and hampered by the village guard system and by a lack of material support. Future measures should address specifically the recommendations of the UN Secretary General’s Special Representative for Displaced Persons.

In conclusion, Turkey has achieved significant legislative progress in many areas, through

further reform packages, constitutional changes and the adoption of a new Penal Code, and in particular in those identified as priorities in last year's report and in the Accession Partnership. Important progress was made in the implementation of political reforms, but these need to be further consolidated and broadened. This applies to the strengthening and full implementation of provisions related to the respect of fundamental freedoms and protection of human rights, including women's rights, trade union rights, minority rights and problems faced by non-Muslim religious communities. Civilian control over the military needs to be asserted, and law enforcement and judicial practice aligned with the spirit of the reforms. The fight against corruption should be pursued. The policy of zero tolerance towards torture should be reinforced through determined efforts at all levels of the Turkish state. The normalisation of the situation in the Southeast should be pursued through the return of displaced persons, a strategy for socio-economic development and the establishment of conditions for the full enjoyment of rights and freedoms by the Kurds. The changes to the Turkish political and legal system over the past years are part of a longer process and it will take time before the spirit of the reforms is fully reflected in the attitudes of executive and judicial bodies, at all levels and throughout the country. A steady determination will be required in order to tackle outstanding challenges and overcome bureaucratic hurdles. Political reform will continue to be closely monitored.

As regards the enhanced political dialogue, relations with Greece developed positively. A series of bilateral agreements were signed and several confidence building measures adopted. A process of exploratory talks has continued. On Cyprus, over the last year Turkey has supported and continues to support the efforts of the UN Secretary General to achieve a comprehensive settlement of the Cyprus problem. The European Council of June 2004 invited Turkey to conclude negotiations with the Commission on behalf of the Community and its 25 Member States on the adaptation of the Ankara Agreement to take account of the accession of the new Member States. The Commission expects a positive reply to the draft protocol on the necessary adaptations transmitted to Turkey in July 2004.

Turkey has made further considerable progress towards being a functioning market economy, in particular by reducing its macroeconomic imbalances. Turkey should also be able to cope with competitive pressure and market forces within the Union, provided that it firmly maintains its stabilisation policy and takes further decisive steps towards structural reforms.

Economic stability and predictability have been substantially improved since the 2001 economic crisis. Previously high inflation has come down to historic lows, political interference has been reduced and the institutional and regulatory framework has been brought closer to international standards. Thus, an important change towards a stable and rulebased economy has taken place. Key economic vulnerabilities, such as financial sector imbalances, have been tackled. Financial sector supervision has been strengthened. As a result, the shock resilience of the Turkish economy has significantly increased. Important progress has been achieved in increasing the transparency

and efficiency of public administration, including public finances. Furthermore, important steps have been taken in facilitating the inflow of FDI and in improving the legal framework for privatisation.

In order to transform the current positive dynamics into sustained growth and stability, it is of crucial importance to continue the ongoing reform process. Maintaining a stability-oriented economic policy is a key element in this respect. In particular, fiscal imbalances have to be reduced and the disinflation process has to be maintained. The business climate would be improved by streamlining administrative procedures and strengthening the rule of law.

Improving the efficiency of the commercial judiciary is of particular importance in this context. The banking sector's surveillance and prudential rules should continue to be aligned with international standards. The privatisation of state-owned banks and enterprises should be accelerated. Sufficient public and private investment and devoting particular attention to education are important to increase the competitiveness and the growth potential of the economy. The inflow of foreign direct investment has to be encouraged by removing remaining barriers.

Turkey's alignment has progressed in many areas but remains at an early stage for most chapters. Further work is required in all areas, new legislation should not move away from the *acquis*, and discrimination against non-Turkish service providers, or products should be discontinued. Administrative capacity needs to be reinforced. Moreover no Member State should be excluded from the mutual benefits deriving from the alignment with the *acquis*.

On the *free movement of goods*, overall transposition of the *acquis* is advancing steadily, but is not complete, while implementation remains uneven. There has been progress in the area of horizontal and procedural measures, and sector specific legislation, in particular in new approach areas, where substantial progress has taken place concerning conformity assessment and market surveillance. The public procurement Law still contains discrepancies with the *acquis*. Turkey should speed up the efforts to remove technical barriers to trade, and to increase compliance with the Decision 1/95 of the Association Council establishing the Customs Union, and to take the necessary steps to implement free circulation of products in the non-harmonised areas.

No progress has taken place concerning the *free movement of persons*, and overall legislative alignment is still at a very early stage. The administrative capacity needs thorough upgrading.

Concerning the *freedom to provide services*, some progress could be recorded for financial services, except for insurance, but no development took place in the area of non-financial services. Market access restrictions are in place in particular in the area of non-financial services. In the field of professional services, no progress has been made since the previous Report. The alignment with the *acquis* on personal data protection needs to be achieved. An authority dealing with personal

data protection should be established and the independence of the existing financial services supervisory authorities should be safeguarded. Limitations for foreigners should also be lifted. Alignment remains limited with the *acquis* on the *free movement of capital*. The priority should be the adoption of anti-money laundering provisions, and the removal of restrictions to investment by foreigners. Improvements in this area would contribute to facilitate inflow of foreign direct investment.

In the area of *company law*, the alignment with the *acquis* remains very limited. However, important efforts have been undertaken to fight piracy with regards protection of intellectual and industrial property rights, but insufficient administrative capacity prevents remains a constraint. Concerning *competition policy*, the alignment with the *acquis* on anti-trust legislation is significant and progress continues in a satisfactory manner. On the contrary, alignment with state aid *acquis* is very limited, in spite of its inclusion in the Customs Union.

The adoption of the state aid Law and the establishment of the state aid monitoring authority are crucial issues. Further efforts are also necessary to prepare an acceptable restructuring programme for the steel sector.

Little progress can be recorded since the previous Report in the area of *agriculture*, and overall alignment with the *acquis* remains limited. Progress has taken place concerning in particular veterinary, phytosanitary and food, but transposition and administrative capacity are still insufficient to ensure effective implementation. Rural development, eradication of animal diseases and upgrading of the Administrations concerned should be regarded as priorities.

Progress has been very limited concerning *fisheries*. It is necessary to increase the efforts concerning resources management, as well as to reinforce the inspection and control capacities.

Some progress could be recorded in all *transport* modes, excepted air transport, but overall alignment remains limited and all modes present problematic issues. Concerning in particular maritime transport, the detention rate remains much higher than the EU average, and Turkey remains in the black list of the secretariat of the Paris Memorandum of Understanding on Port State controls. Cypriot vessels or vessels having landed in Cyprus are still not allowed in Turkish ports. Transposition of the *acquis* should take place in parallel with adherence to international agreements. The staff and capacity of the Ministry of Transport needs to be strengthened substantially.

As regards *taxation*, there has been limited progress in the area of *indirect taxation*, while no progress could be reported on direct taxation, or administrative co-operation. Overall, the Turkish fiscal regime remains partly aligned with the *acquis*, and important efforts remain necessary on all areas under this chapter. Alignment is necessary in particular concerning VAT, the scope of

exemptions and applied rates. With regards to indirect taxation, excise duties should not penalise imported products. Also, administrative capacity requires a substantial strengthening, in particular to improve tax collection.

No progress can be recorded concerning *economic and monetary union* since the previous Report, and the overall level of alignment is limited. The most important issues to be addressed are the independence of the central bank and the remaining possibilities of privileged access to the financial sector to finance the budget.

In the area of *statistics*, there has been steady progress, but the alignment remains still limited. Therefore substantial efforts are still needed concerning statistical development. To this end, the new Statistical Law should be given priority. On *social policy and employment*, progress has been made since the last report, in particular as concerns health and safety at work. Nevertheless, the main problematic areas remain gender equality, labour law, anti discrimination, and social dialogue. Enforcement and full implementation of the legislation also appear as major challenges.

Turkey has made some progress in the *energy* chapter, while the degree of alignment remains limited and uneven across the different areas covered by the *acquis*. Effective implementation of the *acquis* requires a reinforcement of the administrative capacity. Sector restructuring including privatisation and the elimination of price distortions should continue.

In the area of *industrial policy*, there is a large alignment with the EC principles of *industrial policy*. Turkey has adopted an industrial strategy, but privatisation and restructuring are not progressing as planned. Steel sector and state owned banks in particular needs to be restructured. Despite progress in the framework legislation, foreign direct investment remains low. Concerning *small and medium sided enterprises*, access to finance has improved, and the Turkish policy is broadly in line with the EU enterprise policy. Nevertheless, further efforts remain necessary to improve SMEs' access to finance, and the business environment. In particular, a more effective treatment of the commercial court cases should be ensured. The definition of SME used by Turkey is not in line with the relevant Commission recommendations.

Some progress has been made in the area of *science and research*. The framework for cooperation is established, and representatives of Turkey participate as observers in the Committees preparing the 6th Framework Programme. To achieve full and effective participation to the Framework Programme requires that Turkey further upgrades its research related administrative capacity. Similarly, some progress has been achieved concerning *education and training*, especially concerning the enrolment of girls in less favoured regions. The participation of Turkey to the EC programmes is satisfactory, but the investment remains below the EU average. Reforms and reinforcement of the training and education policies and institutions should continue, including the role of the High Education Board (YÖK), and the links between the labour market and the education should be improved.

In the *telecommunications* sector, fixed telephony services has been fully liberalised in 2004, and competition in internet services market has increased. There is overall a certain level of alignment with the *acquis*, but since the previous Report, very limited further progress has been made. Further efforts are in particular necessary to complete the legal framework and effectively implement the rules, including an adequate empowerment of the Telecom Authority, and to ensure an adequate level of competition in all telecommunication services.

Turkey's alignment with the *acquis in culture and audiovisual policy* remains limited, but some progress has been made through adoption of the regulation concerning radio and television broadcasts in languages and dialects used traditionally by Turkish citizens. The regulation has started to be implemented and broadcasts in Kurdish and other languages have started on national and regional basis. However, the conditions attached the regulation are still restrictive and substantial efforts continue to be necessary to achieve alignment with the *acquis*.

The *acquis concerning regional policy* is relevant for the implementation of Structural and Cohesion Funds. Very limited development has been made and the overall level of alignment with the *acquis* is limited. Substantial efforts would therefore be necessary to make appropriate use of the EU's structural instruments. Necessary institutions need to be created and administrative capacity to be reinforced.

Some progress has taken place concerning the *environment*, and the administrative capacity has been reinforced. However, the overall transposition of the environment *acquis* remains low. Administrative capacity needs further reinforcement and improved co-ordination among the administrations involved. The most intense efforts are needed for horizontal legislation, air and water quality, waste management, nature protection, industrial pollution and risk management. In the area of *consumers and health protection*, efforts to align with the *acquis* have continued, in particular concerning market surveillance. Overall alignment is uneven throughout the different components of consumers protection, and is more advanced concerning non-safety related measures. The efforts to ensure an effective transposition and implementation of the *acquis* on product liability and to improve administrative capacity should be pursued.

Turkey has continued to make efforts to align with the *acquis* in the area of *justice and home affairs*. Nevertheless, progress is required in important areas such as the reform of the judiciary and the fight against corruption. Co-operation both at national level among all relevant administrative bodies and with the EU should be improved on issues such as illegal migration and trafficking, including through the negotiation of a readmission agreement. The geographic limitation to the Geneva Convention on refugees should be lifted and co-operation among the relevant institutions should be improved.

Concerning the *acquis* in the area of *customs union*, there has been some progress since the previous

Regular Report, the administrative capacity has been further strengthened and the overall level alignment is high, with exceptions in specific areas. The alignment of non customs provisions applied in free zones continues to diverge from the *acquis* and need to be corrected.

The overall level of alignment concerning *external relations* is already high, and some further progress has taken place. The adoption of most of the EC Generalised System of Preferences in particular is a welcome development. Certain discrepancies with the *acquis* still exist, concerning special regimes under the GSP, and other derive from the difficulties met in the negotiations with certain third Countries. Turkey is encouraged to continue its efforts in this area. As regards, *common foreign and security policy*, Turkey's foreign policy continues to be broadly in line with that of the EU, though less so when Turkey's neighbouring countries are concerned. Turkey's track record could be improved by ensuring a higher alignment with EU positions in international fora, and by ensuring the applicability of the sanctions or restrictive measures agreed.

Some progress can be reported since last year's Report regarding *financial control*. In particular, the adoption of the Public Financial Management and Control Law constitutes a significant step but the law will only be entirely implemented as from 2008. Turkey should further reinforce its administration and the capacity to protect the financial interests of the EC.

In addition, significant progress has taken place concerning national budget formulation and execution, in the area of *financial and budgetary provisions*. However, there has been no improvement in the application of provisions on own resources. Further efforts are therefore necessary concerning the adoption of the necessary legislation and its implementation.

Implementation of legislation formally aligned with the *acquis* continues to be insufficient. Administrative capacity in most areas needs to be strengthened to ensure that the *acquis* is implemented and enforced effectively. In some cases, administrative reform should entail the establishment of new structures, for example in the field of state aid and regional development. Where regulatory bodies have been set up, they should be adequately empowered to perform their tasks, including adequate staffing and resources, and to ensure that their decisions are enforced. To this end, their autonomy should be safeguarded. Improved co-operation between the Commission and the Turkish administration in areas such as conformity assessment should be extended to other areas.

4. Resolution 1405 (2004) of the Parliamentary Assembly of the Council of Europe, on the Implementation of Resolutions 1361 (2004) and 1374 (2004) on the honouring of obligations and commitments by Armenia

Text adopted at Assembly debate on 7 October 2004 (31st sitting)

1. Armenia was the subject of Assembly debates on its democratic future on 27 January 2004 and 28 April 2004 respectively and the country embarked upon further reforms following Resolutions 1361 (2004) and 1374 (2004).

2. The Parliamentary Assembly expresses satisfaction at its excellent co-operation with the Armenian authorities, their open-minded attitude and the quality of the ongoing dialogue on compliance with obligations and commitments.

3. The Assembly is pleased to note that Armenia has complied with the request to submit a report on paragraphs 9.i to 9.vi of Resolution 1374 (2004) and takes note that:

i. Authorities have refrained from interfering with the conduct of assemblies and, after the law “On gatherings, assemblies, rallies and demonstrations” entered into force, a legal basis has been established for holding them only by notification;

ii. The Constitution guarantees freedom of movement and laws provide for maintenance of public order;

iii. The investigations on the incidents and human rights abuses reported during the recent events, including assaults on journalists and human rights activists, were led and information was provided to the Assembly on a case of legal action against persons responsible for assaults against journalists;

iv. The persons detained for their participation in the demonstrations were released and an end to the practice of administrative detention is expected as the Administrative Code is in the process of being amended;

v. In this period one frequency has been freed, without contest, on the basis of an intergovernmental agreement and within the framework of the law “On Television and Radio”, a frequency which was given to the Russian “Kultura” TV Channel for rebroadcasting;

vi. The authorities have taken note of the fact that the immunities of members of the Parliamentary Assembly of the Council of Europe are valid for the whole year (Resolution 1325 (2003) and Recommendation 1602 (2003)).

4. Despite Armenia’s declared wish to reach a peaceful solution with Azerbaijan to the Nagorno-

Karabakh situation, the Assembly is forced to conclude that no tangible progress has been achieved for the past year, whether at the level of the direct talks between the presidents of the two countries, which are continuing, or at the level of the Minsk Group.

5. The Assembly recalls that it had asked for a thorough investigation into electoral fraud in the 2003 elections and for an end to the judicial impunity of those responsible. In this connection, the Assembly considers that it has not received a convincing reply from the authorities. It is confident, however, that the process of revising the Electoral Code will soon be completed, in keeping with the recommendations of the Venice Commission.

6. It notes that legislative measures have been taken in order to introduce into the Criminal Code a provision on conditional release for all persons convicted of serious offences, including persons with life sentences.

7. It notes that the constitutional revision needed to ensure that certain commitments are fully honoured is making good progress. It asks that the authorities should rapidly prepare draft amendments to the Constitution, present them to the Council of Europe in 2004 for expert appraisal and organise a referendum as soon as possible and in any event by June 2005 at the latest.

8. The Assembly takes note of the timetable for effective implementation of the basic reforms concerning the judicial system and the independence of the judiciary and of the intention to adopt the law on the status of judges, the law on the judicial council and the law on the judiciary before the end of 2004.

9. The Assembly notes that the last amendments to the Law on Radio and Television request that the National Broadcasting Commission should add arguments when awarding broadcasting licenses, thus preventing the adoption of arbitrary decisions.

10. With regard to its other requests, the Assembly notes the steps taken to:

- i. Continue discussion of the question of administrative detention in the Administrative Code in co-operation with the Council of Europe's experts in order to end administrative detention;
- ii. Adopt a law on demonstrations and public assemblies in co-operation with the experts of the Council of Europe and the Venice Commission;
- iii. Amend the Criminal Code in order to introduce the possibility of conditional release for prisoners serving life sentences;
- iv. Revise, in co-operation with the Council of Europe's experts and with due regard to the recommendations already made and those yet to be made, Articles 135, 136 and 318 of the

Criminal Code in order to remove any possibility of making insult and defamation subject to a prison sentence ;

- v. Revise the law on the police in co-operation with the Council of Europe's experts;
- vi. Adopt a law on the status of Yerevan, a law on territorial autonomy, a law on local government staff and a law on local self-government;
- vii. Combat corruption and sign the Civil Law Convention on Corruption; it asks that this Convention be ratified within the shortest possible time;
- viii. Grant an amnesty to conscientious objectors who are serving prison sentences and release those who refused to perform military service.

11. Furthermore, the Assembly is expecting rapid progress concerning:

- i. The revision of the Code of Criminal Procedure, in accordance with the standards of the Council of Europe;
- ii. Improvements to conditions of detention and, in that connection, the implementation of the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
- iii. The developments in the media sector in Armenia: it expects that, on the basis of the recent amendments to the Law on Radio and Television, the composition of the National Broadcasting Commission will be renewed as soon as possible and that fair conditions for awarding broadcasting licenses to televisions, in particular to A1+ television channel, will be created;
- iv. The excessive length of the period of alternative civilian service, which has been set at 42 months;
- v. The registration of the association of Jehovah's Witnesses;
- vi. The creation of an independent body representing all Armenia's religious organisations and communities;
- vii. In accordance with Resolution 1374 (2004), paragraph 9.iv, the end to the practice of administrative detention until the Administrative Code is amended;
- viii. The amendment, no later than March 2005, of the law on demonstrations and public assemblies to bring it into full conformity with Council of Europe standards to ensure freedom of assembly in practice.

12. In the light of the foregoing, the Assembly calls on the Armenian authorities to continue to take appropriate measures to honour the remaining obligations and commitments set out in Resolutions 1361 (2004) and 1374 (2004).

5. KHRP Publications 2001-2004

CODE	TITLE	PUBLISHER	PRICE/ISBN
REPORTS			
2004			
	The Kurds of Syria	KHRP	Forthcoming
04/H	Turkey: The Situation of Kurdish Children	KHRP	ISBN 1 900175 77 0 £5.00
04/G	The Kurds: Culture and Language Rights	KHRP	ISBN 1 900075 74 6 £8.00
04/F	Taking Human Rights Complaints to UN Mechanisms – A Manual (Turkish Language)	KHRP	<i>Available on www.khrp.org</i>
04/E	Linguistic and Cultural Rights of Kurds under International Law (Turkish language)	KHRP	<i>Only available in Turkey and on www.khrp.org</i>
04/D	KHRP Legal Review 5	KHRP June 2004	ISBN 1 900175 72 X £8.00
04/C	Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora	KHRP/ KWP	ISBN 1 900175711 <i>Available www.khrp.org</i>
04/B	Taking Human Rights Complaints to UN Mechanisms - A Manual (Russian language)	KHRP/ BHRC/ Platform	<i>Only available in Armenia and Azerbaijan or www.khrp.org</i>
04/A	Torture in Turkey - the Ongoing Practice of Torture and Ill-treatment	KHRP	ISBN 1 900175 70 3 £8.00
2003			
03/R	Trial Observation Report - Turkey's Shame: Sexual Violence without redress - the plight of Kurdish Women	KHRP	ISBN 1 900175 69X £5.00

03/Q	The Kurds in Iraq; the past, present and future	KHRP	ISBN 1900175 673 £8.00
03/P	KHRP Legal Review 4	KHRP November 2003	ISBN 1900175 681 £8.00
03/O	After the War: Report of the KHRP Fact-Finding Mission to Iraqi Kurdistan	KHRP	ISBN 1900175 665 £5.00
03/K	Internally Displaced Persons: the Kurds in Turkey	KHRP, G�ç- Der, IHD Diyarbakır	ISBN 1900175 657 £8.00
03/J	Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System - <i>Azeri language</i>	KHRP, PLATFORM, the Corner House, Friends of the Earth International, Campagna per la Riforma della Banca Mondiale and CEE Bankwatch	<i>Only available in Azerbaijan</i>
03/I	Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System - <i>Russian language</i>	As above	<i>Only available in Azerbaijan</i>
03/K	Fact-Finding Mission to Iran	KHRP	ISBN 1 900175 649 £5.00
03/J	In the Wake of the Lifting of State of Emergency Rule: Report of a Fact- Finding Mission to Southeast Turkey	KHRP, BHRC, IHD	ISBN 1 900175 622 £5.00
03/I	Turkey's non-implementation of European Court judgments: the Trials of Fikret Baskaya	KHRP, BHRC	ISBN 1 900175 630 £5.00
03/H	Taking human rights complaints to UN mechanisms - A Manual	KHRP	ISBN 1 900175 614 £8.00

03/G	Taking cases to the European Court of Human Rights - A Manual - Turkish language	KHRP	<i>Available in Turkey only</i>
03/F	Taking cases to the European Court of Human Rights - A Manual - Armenian language	KHRP	<i>Available in Armenia only</i>
03/E	Meaningful Consultation and the Ilisu Dam: the Trial of Human Rights Defenders	KHRP, Corner House, BHRC	ISBN 1 900175 606 £5.00
03/D	KHRP Legal Review 3	KHRP June 2003	ISBN 1 900175 58 4 £8.00
03/C	Second International Fact-Finding Mission Baku-Tbilisi-Ceyhan Pipeline - Turkey Section March 16 th -24 th 2003	KHRP, Campagna per la Riforma della Banca Mondiale, Platform, the Cornerhouse	<i>Available online</i>
03/B	“This is the Only Valley Where We Live”: the Impact of the Munzur Dams	KHRP/ the Cornerhouse	ISBN 1900 175 569 £5.00
03/A	The State and Sexual Violence - Turkish Court silences Female Advocate - Trial Observation Report	KHRP/ BHRC January 2003	ISBN 1900 175 56 8 £5.00
2002			
02/S	KHRP Legal Review 2	KHRP December 2002	ISBN 1 900175 55X £8.00
02/R	Ülke İçinde Göç Ettirilen İnsanlar: Kürt Göçü (A Turkish Translation of KHRP's June 2002 Report, “ <i>Internally Displaced Persons: The Kurds in Turkey</i> ”)	KHRP/Goç-Der/Senfoni/IHD	ISBN 9759286181 <i>Available only in Turkey.</i>
02/Q	Dicle-Firat ve Su Sorunu: Türkiye’de Baraj Yapımı Suriye ve Irak’taki Etkileri (A Turkish Translation of KHRP’s August 2002 Report, “ <i>Downstream Impacts of Turkish Dam Construction on Syria and Iraq</i> ”)	KHRP/Senfoni	ISBN 9759286159 <i>Available only in Turkey.</i>

02/P	Türkiyede Kürtçe Hakki (A Turkish Translation of KHRP's June 2002 Report, "Denial of a Language: Kurdish Language Rights in Turkey)	KHRP/ Senfoni/ IHD November 2002	ISBN 9759286165 <i>Available only in Turkey.</i>
02/O	Azeri and Armenian translations of KHRP's September 2002 Publication, "Taking Cases to the European Court of Human Rights: A Manual"	KHRP/HCA/ IBA November 2002	<i>Available only in Armenia and Azerbaijan.</i>
02/N	The Lifting of State of Emergency Rule: A Democratic Future for the Kurds?	KHRP/BHRC/ IHD November 2002	ISBN 1 900175 541 £5.00
02/M	Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System	KHRP/ Platform/ The Corner House/FOE/ CRBM/CEE Bankwatch Network October 2002	ISBN 1 900175 495 £5.00
02/L	Damning Indictment: How the Yusufeli Dam Violates International Standards and People's Rights	KHRP/IDC/ The Corner House/FOE/ Frances Libertes September 2002	ISBN 185750 344 9 £5.00
02/K	'W' and Torture: Two Trial Observations	KHRP/BHRC/ IHD September 2002	ISBN 1900175 533 £5.00
02/J	The Ilisu Dam: Displacement of Communities and the Destruction of Culture	KHRP/IDC/ The Corner House/ University of Ireland, Galway	ISBN 1900175 525 £5.00

02/I	Taking Cases to the European Court of Human Rights: A Manual	KHRP/BHRC September 2002	ISBN 1 900175 509 £5.00
02/H	The Kurdish Human Rights Project Legal Review I	KHRP August 2002	ISBN 1900175 517 £8.00
02/G	Downstream Impacts of Turkish Dam Construction in Syria and Iraq: Joint Report of Fact Finding Mission to Syria and Iraq	KHRP/The Corner House/ Ilisu Dam Campaign August 2002	ISBN 1 900175 487 £5.00
02/F	Sadak & Others v. Turkey: The Right to Free Elections—A Case Report	KHRP/August 2002	ISBN 1 900175 479 £10.00
02/E	The Trial of Students: “Tomorrow the Kurdish Language will be Prosecuted...” -Joint Trial Observation	KHRP/ BHRC/ IHD July 2002	ISBN 1 900175 460 £5.00
02/D	Internally Displaced Persons: The Kurds in Turkey	KHRP/June 2002	ISBN 1 900175 444 £5.00
02/C	Denial of a Language: Kurdish Language Rights in Turkey - KHRP Fact-Finding Mission Report	KHRP/June 2002	ISBN 1 900175 436 £5.00
02/B	AB Yolunda Türkiye: Değişim İçin Fırsat mı? Yoksa Yol Ayrımı mi?	KHRP/ Bumerang Yayinlari/April 2002	ISBN 975831769X <i>Available only in Turkey.</i>
02/A	The Viranşehir Children: The trial of 13 Kurdish children in Diyarbakır State Security Court, Southeast Turkey - KHRP Trial Observation Report	KHRP/January 2002	ISBN 1 900175 428 £5.00
2001			
01/J	State Violence Against Women in Turkey and Attacks on Human Rights Defenders of Victims of Sexual Violence in Custody - KHRP Trial Observation Report	KHRP/ December 2001	ISBN 1900175 41X £5.00

01/I	Salman v Turkey and Ilhan v Turkey: Torture and Extra-Judicial Killing - A Case Report	KHRP/ December 2001	ISBN 1900175 401 £10.00
01/H	The F-Type Prison Crisis and the Repression of Human Rights Defenders in Turkey	KHRP, Euro-Mediterranean Human Rights Network & World Organisation Against Torture/ October 2001	ISBN 1900175398 £5.00
01/G	“Şu nehir bir dolmakalem olaydı...” - Ilisu Barajı, Uluslararası Kampanyası ve Barajlar ve Dünya Komisyonu Değerlendirmeleri Işığında Hazırlanan Bir Rapor (a Turkish translation of KHRP’s March 2001 report, “If the river were a pen...” - <i>The Ilisu Dam, the World Commission on Dams and Export Credit Reform</i>)	KHRP and Scala-Bumerang Yayınları/ October 2001	ISBN 975830755X <i>Available only in Turkey.</i>
01/F	Akduvar davası: Bir dönüm noktası - Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD - Contemporary Journalists Association of Turkey) /July 2001	ISBN 9757866229 <i>Available only in Turkey.</i>
01/E	Özgür Gündem Davası (2) - Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD) /July 2001	ISBN 975866210 <i>Available only in Turkey.</i>

01/D	Özgür Gündem Davası - Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD) /July 2001	ISBN 975866210 <i>Available only in Turkey.</i>
01/C	Kaya v Turkey, Kiliç v Turkey: Failure to Protect Victims at Risk - A Case Report	KHRP/June 2001	ISBN 190017538X £10.00
01/B	Ertak v Turkey, Timurtaş v Turkey: State Responsibility in 'Disappearances' - A Case Report	KHRP/June 2001	ISBN 1900175371 £10.00
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ANNUAL REPORTS			
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“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 Solly QC, *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 Medical Foundation for the Care of Victims of Torture*

“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, *Director Human Rights Watch UK*

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

Can Dunder, *Journalist in Turkey*

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