

Kurdish Human Rights Project

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# LEGAL REVIEW

Kurdish Human Rights Project

**KHRP**

Established 1992

(2009) 16 KHRP LR







## **The Kurdish Human Rights Project**

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

### **AIMS**

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

### **METHODS**

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



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## Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CoE	Council of Europe
CoM	Committee of Ministers
CPT	Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ECRI	Commission against Racism and Intolerance
EEC	European Economic Community
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICJ	International Court of Justice
KHRP	Kurdish Human Rights Project
OPCAT	Optional Protocol to the Convention against Torture
RSD	Refugee Status Determination
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner on Refugees



# Relevant Articles of the European Convention on Human Rights

- Article 1: Obligation to respect human rights
- Article 2: Right to life
- Article 3: Prohibition of torture and ill-treatment
- Article 5: Right to liberty and security
- Article 6: Right to fair trial
- 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 35: Admissibility criteria
- Article 38: Examination of the case and friendly settlement proceedings
- Article 41: Just satisfaction to the injured party in the event of a breach of the Convention
- Article 43: Referral to the Grand Chamber
- Article 44: Final judgments

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

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

## **Protocol No. 7 to the Convention**

- Article 2: Right of appeal in criminal matters



## Section 1: Legal Developments and News





## CEDAW's list of issues sent to Turkey reflects many of KHRP's concerns

The United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 as an international bill of rights for women. Nation-states that accept the Convention pledge to adopt laws, policies, and other measures to end discrimination against women. And those that have ratified it are bound to put into practice the various provisions of the convention.

Turkey became a signatory to CEDAW on 20 December, 1985 and ratified the Convention on 19 January, 1986. Despite Turkey's poor human rights record, the Turkish government supported CEDAW from the early stages of its inception. As a result, there have been tangible changes that Turkey has made in order to ensure that its laws and policies comply with the Convention. However, as demonstrated the draft shadow report submitted by KHRP to CEDAW,<sup>1</sup> there are many aspects of women's lives that could be significantly improved by further change within Turkey.

As it prepares to review Turkey's sixth periodic report on its compliance with CEDAW at its 46th session in July 2010, the UN Committee on the Elimination of Discrimination against Women has given Turkey a list of issues and questions to address.<sup>2</sup> Both KHRP's draft shadow report and the list of issues prepared by CEDAW cover violence against women, trafficking and exploitation of women, education, health and employment.

KHRP's draft shadow report requests, 'Turkey to address the specific measures that it has taken to overcome the culture of indifference toward domestic violence and women's issues,' which is still considered to be pervasive among many officials in all levels of law enforcement and the criminal justice system. The list of issues prepared by CEDAW reflects this request calling upon the 'State party to intensify its efforts to prevent and combat violence against women, including domestic violence' and asking the Turkish government to describe the steps taken to develop 'a comprehensive strategy to combat all forms of violence against women, including prosecution of perpetrators, provision of assistance to victims and implementation of capacity-building and awareness-raising programmes for various groups (such as the police, lawyers, health and social workers and the judiciary) and the public at large.

However, the KHRP draft shadow report also highlights the inability and difficulty of non-Turkish speaking women (most commonly Kurdish), to report domestic violence cases to the authorities. This is an area of urgent concern to many non-governmental organisations, as 'domestic violence disproportionately affects Kurdish women since many do not speak Turkish and are unable to gain protection and justice.' Therefore, this dimension of domestic violence must be addressed by the Turkish government.

In both KHRP's draft shadow report and CEDAW's list of issues, education is given high importance and a substantial number of questions are dedicated to effective implementation of measures, in order to eliminate discrimination against women in the educational sphere. The issues raised include priority that is given by families to male children with regard to education

1 This report is available to download from [www.khrp.org](http://www.khrp.org).

2 CEDAW/C/TUR/Q/6 available at <http://www2.ohchr.org/english/bodies/cedaw/docs/>.

and the government is asked how it will overcome such stereotypical attitudes. Another area of concern raised by both documents is the disadvantages faced by girls and women belonging to diverse ethnic groups and those whose mother tongue is not Turkish. This is one of the dominant reasons why there is such a high drop-out percentage, and the fact that many of the 90 per cent who drop-out are illiterate. The documents request the Turkish government to: 'include statistical information on how many women and girls whose mother tongue is not Turkish are benefitting from educational programs' (CEDAW list of issues); expand the programme of teaching Turkish to non-Turkish speaking school children, to fully address the issues facing Kurdish girls' (KHRP draft shadow report); and raise the awareness on the 'importance of education for women's equality and economic opportunities' (both documents).

Additionally, both documents highlight the need for improvement in the area of sexual education. Questions in both documents, point to the lack of measures, policies and programmes to not only educate the use of contraceptive options for (Kurdish) women, and teenage pregnancy and its impact on educational achievement. The documents also refer to the lack of information about support programmes for pregnant adolescents or young mothers to continue their education.

The CEDAW list of issues fails to address the Turkish government's implementation of the ÇATOMs. ÇATOMs are community centres working with women and young children in the Kurdish area of Turkey's south-eastern Anatolia region. The overall objective of ÇATOMs is to enhance the status of women and the young population, by working together with schools and providing them with not only education, but also a number of students with scholarships who would have been unable to continue their education due to financial constraints. KHRP calls on the government of Turkey to make these permanent measures and also increase their accessibility.

The issue of health is dealt with in detail by both documents. In common with each other, KHRP and CEDAW request that the 'government propose a cohesive strategy to increase the availability and prevalence of health care providers and centres in the largely Kurdish regions of southeast Turkey'. The CEDAW list of issues refers to the 'various programmes that are being implemented to deliver health services to women and request specific information on how the government intends to follow these programmes through, the number of women that could possibly benefit from these programmes. Further issues addressed by KHRP and CEDAW include mental health (KHRP), suicide, health and social and economic status, HIV/AIDS, reproductive health services (CEDAW).

Both documents highlight the issue of inequality in the work force and request further information on the implementation of policies aimed at eradicating this and increasing women's employability prospects. Employment inequality links with education, as many women struggle to find employment due problems of poor education including illiteracy.

The KHRP draft shadow report points to the honour killings that are taking place in the south-eastern Kurdish region of Turkey requests asks government to address the targeted action it has taken to resolve this problem. CEDAW urges the Turkish government to 'provide detailed information on the number of honour killings that have occurred during the period under review, how many perpetrators of these crimes have been brought to justice and how many have been prosecuted.'

In short, it is clear that the list of issues put forward by the CEDAW committee reflects many of the concerns highlighted by KHRP's draft shadow report. Finally, CEDAW have requested Turkey to provide more information on the measures being taken and efforts made in relation to the issues raised. The UN Committee on the Elimination of Discrimination against Women will review Turkey's sixth periodic report on its compliance with CEDAW at its 46th session in July 2010.

## The European Union's 2009 Progress Report on Turkey's bid towards accession

On 15 October 2009, the European Commission issued its Progress Report on Turkey, confirming the need for further advancements to be made in order for Turkey to meet the criteria for EU accession.<sup>3</sup>

The Commission welcomed efforts made by Turkey in fulfilling a number of requirements established under the Copenhagen criteria but warned that the pace of reforms had to increase. It noted that Turkey still faced important challenges in complying with EU requirements regarding democracy and the rule of law, human rights, the protection of minorities, and its observance of international human rights instruments.

In relation to democracy and the rule of law, the report welcomed the positive steps taken in undertaking reforms of the judiciary in the form of the August 2009 Judicial Reform Strategy, and the increasingly open stance with regards to the Kurdish issue. The report considered that the investigation of criminal charges against military officers and nationalist circles in the Ergenekon trial provided a great opportunity for Turkey to strengthen its commitment to democracy and the rule of law. The report also concluded that new legislation providing for the civilian oversight of security forces presented a positive step forward for Turkey. The new legislation - adopted in June 2009 - allows for civilian courts to try military personnel for crimes committed in peacetime, subjected to the jurisdiction of the Heavy Penal Court, and lifts the remaining powers of military courts to try civilians. The report acknowledged, however, that an appeal was pending before the Constitutional Court that sought an annulment of the new legislation. The report remarked that, despite such positive steps, the armed forces continued to exercise undue influence in the political sphere, contrary to EU requirements, and full parliamentary oversight of defence expenditure had yet to be implemented.

Regarding Turkey's record on human rights and the protection of minorities, the report concluded that the country's legal framework was inadequately aligned with EU *acquis communautaire* and international human rights law. Evaluating Turkey's application of the European Convention on Human Rights (ECHR), the report observed that new applications to the European Court of Human Rights (ECtHR) referred mainly to violations of the right to a fair trial and to the protection of property rights, with 11 per cent of cases concerning freedom of expression, and 5 per cent concerning torture and ill-treatment. Over the reported period a total of 381 judgments found Turkey to have violated the ECHR. The report criticised the lack of legislative measures implementing the European Court judgments and highlighted the adverse consequences for individuals and groups concerned. Non-implementation of judgments in the cases of Hülki

<sup>3</sup> The report is available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2009/tr\\_report\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_report_2009_en.pdf).

Güneş, Göçmen and Söylemez has resulted in the applicants' continued deprivation of liberty without due process of law. In assessing the promotion and enforcement of human rights, the report observed that this had been undertaken through several state bodies and had included the provision of training for public officials, judges or prosecutors. However, the report criticised the fact that human rights defenders continued to face criminal proceedings in relation to their work and the failure to establish an Ombudsman to oversee compliance with ECtHR judgments.

The report expressed concern that, despite safeguards against torture and ill-treatment, efforts to implement the government's zero tolerance policy on such treatment had been limited. The *de facto* monopoly of the Council of Forensic Medicine (ATK) also received criticism as the only agency recognised by the courts as competent to give evidence of physical abuse suffered in custody. The report cited the Parliamentary Human Rights Investigation Committee's report in June 2009 as evidence of the failure to fight against impunity, observing that out of 35 lawsuits filed against 431 members of the İstanbul police for ill-treatment and torture, none of them had resulted in a conviction, while only 2 per cent of members had been subjected to disciplinary sanctions. The report concluded that such evidence lead to suspicions about the effectiveness of the criminal justice system and that therefore a great deal of expectation was to be place on the outcome of the trial of 60 officials implicated in the death of human rights activist Engin Çeber.

Concerning freedom of expression, which represented 11 per cent of the cases in front of the ECtHR, the report welcomed the revision of Article 301 of the Turkish Criminal Code (TCC) and the increasingly open and free debate in Turkish society. In the view of the European Commission, the revision of Article 301 had led to a significant decline in prosecutions on this basis. However, the report expressed concern about remaining restrictions on freedom of expression, including other provisions of the TCC that were being used to prosecute offences such those against dignity, public order, state security, constitutional order. It is especially noticed that prosecutions and convictions continue on the Law on Crimes against Atatürk, as well as the Law on Accepting and Applying the Turkish Alphabet and that it is possible to suspend either several periodicals unilaterally under Anti-Terror Law amended in 2006 or the entire website instead of filtering out unwanted content. For instance the report reminded that u-tube is banned since May 2008, and other cases against Facebook, Google sites or other sites are still pending. The impact of this legislation is considered in the report as a risk of prosecutions for writers, journalists, and academics.

The report further highlighted that there are still problems on the issue of the use of force by security forces during demonstration which raises concerns regarding freedom of assembly. The report points that the Southeast region is particularly concerned by investigation and video-taping of NGO's and demonstrations marked by violence. However, it welcomes that Newroz (the Kurdish New Year) passed by peacefully overall.

Above freedom of assembly, the question of freedom of association has been observed by the European Commission. Although improvements have been noted, for instance with the annulment of a circular restricting professors' right of association, or with the Court of Cassation ruled against the closure of the lesbian, gay, bisexual, transgender, and transvestite (LGBTT) lambda İstanbul Solidarity Association, the legality of the association has been conditioned by the non-encouragement of gay behaviour with the aim of spreading such sexual orientation – which is incompatible with the EU's rejection of homophobia and anti-discrimination standards - and several organisations have been closed or subjected to overburden investigations or obligations.

The report pointed for instance the closure case against the Özgür-Der Association for freedom of thought and right to education based on a press statement which expressed its opposition to the national security classes offered by military officers in schools.

The question of freedom of religion had been observed in the report which has demanded further efforts to create an environment which fully respect freedom of religion as attacks against religious minority still occur. It has been especially reminded that religious culture and ethnics' classes remain compulsory in primary and secondary education according to Article 24 of the Turkish Constitution and Article 12 of the national education basic law, which despite a decision of the ECtHR in October 2007 which required Turkey to bring its educational system into line with Article 2 of Protocol 1 to the ECHR, have not been legislatively modified yet.

The report also scrutinised the issue of women's rights and children's rights and asserts that there are strong concerns about the compliance with EU's *acquis*. The report affirmed that strong efforts still have to be enhanced as gender equality as required by the *acquis* is far from being turn into reality and remain a major challenge for Turkey. Despite awareness-raising activities, gender sensitivity training programmes for public service and health personnel and even the establishment of a consultative parliamentary Committee on Equal Opportunities for men and women, women's actual situation shows that their political representation – either at the local or national level - as well as their participation in the labour market is very low. These statements are also complemented with their lowest access to education within European Union's (EU) members and OECD countries. But the strongest concern noted by the report is the importance of domestic violence, honour killings, and forced marriages. The observations of the report toward women's rights concluded that even the legal framework guaranteeing women's rights and gender equality is in place, it is not turn yet into reality. It further noted an effective lack of awareness about the issue of women's rights among law enforcement forces and public administrations and the lack of dialogue between civil organisations and the government.

The issue of children's rights is especially regarded by the European Commission as one of great concerns. Apart from the regional disparities, the absence of progress on combating child labour, the issue of juvenile justice is pointed as definitely non-aligned with international human rights and EU's requirements. Even though children are supposed to be protected under the 2005 Law on Child Protection, the amendment made to Anti-Terror in 2006, and Article 220 and 314 of the Criminal Code, has permitted for children between 15 and 18 to be tried as adults. Moreover, the number of cases lodged against children on this basis has increased considerably. The minors participating in demonstrations particularly in the Southeast face charges of 'membership of a terrorist organisation' and disproportionate long prison sentences. The Commission states that 'cases of juveniles tried as adults and facing disproportionate sentences raise serious concerns'.

Concerning anti-discrimination standards, the report noted that even though the principle is integrated in the Constitution the legal framework is not adequately aligned with the EU *acquis*. The non-alignment is especially observed in regard of sexual orientation. According to the report, not only Turkish armed forces legislation defines homosexuality as a psychological illness which does not fit with military service, but homophobia has also resulted in physical and sexual violence, and the killing of transsexuals and transvestites.

The report welcomed the advancement made concerning cultural rights. The fact that channel TRT-6 has started to operate and to broadcast in Kurdish, and the decision from the Higher Education Board (YOK) to endorse the application from Artuklu University in Mardin to establish a 'living languages institute' which would provide postgraduate education in Kurdish are good steps. Furthermore, no legal action has been launched against politicians and political parties who used Kurdish in their activities during the local election campaign. However, criminal convictions against DTP members of the *Demokratik Toplum Partisi* (Democratic Society Party, DTP) members are pending, political debates programmes in Kurdish are impossible on private television channels, and the use of Kurdish language in prison may be problematic. Outside the question of cultural rights for people with a Kurdish background, the report highlighted the severe social exclusion and marginalisation of Roma. According to the report, progress has been made but they are still facing systematic discrimination and demolitions of Roma districts without alternative housing.

The report noted that compensation of internally displaced persons (IDPs) continued but warned they have little access to health care, education, and social services, that their return is still prevented and that they face limitations on their access to procedural rights in detention. The report has noted besides a lack of an overall national strategy to address this issue.

Further efforts also need to be made in other areas where socially vulnerable persons and/ or persons with disabilities are concerned in order to ensure that they are given the opportunity to consent to or refuse treatment, as well as areas concerned by labour rights and trade unions – in particular with the right to organise, strike and bargain collectively- and property rights – especially in regard of the problems encountered by Greek nationals and all non-Muslims religious communities in inheriting and registering property. Above all, the three main areas of concern in Turkey's compliance to human rights standards pointed in the report remain the non-implementation of ECtHR judgments, the extent use made of anti-terror legislation, and the juvenile justice.

Besides, and concerning the situation in the East and Southeast, the report reassessed its support to Turkey in the fight against terrorism, welcomed the government's rapprochement with Iraq and the Kurdish Regional Government as well as the announcement to complete the Southeast Anatolian Regional Development Project (GAP). The report welcomed Turkey's support to the ongoing negotiations between the Cypriot leaders but stated that no progress has been made on normalizing its bilateral relationships with the Republic of Cyprus. The adoption of the Law on the De-mining of the Turkish-Syrian border in June 2009 is also welcomed even if the report expressed the fact that land mines remain a security concern. Furthermore, the report denounced that no steps have been taken to abolish the system of village guards and that limited progress can be reported in the field of migration and asylum. However, the report does not address the consequences of ongoing cross-border operations in Iraq made by Turkey is its fight against terrorism as regard of international humanitarian law and European law.

## Diplomatic relations established between Turkey and Armenia

On Saturday 10 October 2009, Turkey and Armenia signed two protocols - the 'Protocol on the Establishment of Diplomatic Relations' and the 'Protocol on the Development of Bilateral Relations' – at a Swiss-mediated ceremony in Zurich, thereby establishing diplomatic relations

between the two countries. The two protocols restore ties between the two countries and open without preconditions the shared border closed since 1993.

The signing has been warmly welcomed by the international community. Secretary of the Council of Europe (CoE), Maud de Boer-Buquicchio, sees this agreement as a 'historic event for both countries and the region' and is seen by the CoE as the path to improve the stability in this part of Europe. This view is endorsed by the UN Secretary General, Ban Ki-moon through a statement issued by a spokesperson for UN Secretary-General Ban Ki-moon which states that 'this historic decision constitutes a milestone toward the establishment of good neighbourly relations and the development of bilateral cooperation between both countries. The secretary-general is confident that this development will also contribute to peace, security and stability in the South Caucasus'.

However, the parties have now to ratify the protocols, and have been urged to do so by the UN secretary-general. The fact is that both parliaments have to face a strong opposition from nationalists. Opposition groups in Turkey have criticised the agreement as a 'step backward' in Turkish fundamental foreign policy. Even though Turkey was one of the first countries to recognise Armenia, because of the 1993 Armenian invasion of Azerbaijan's Nagorno-Karabakh – when Azerbaijan was at war with Armenian backed ethnic Armenians in this region - the two countries never established diplomatic relations and sealed their border. Therefore, the opposition's view is that the withdrawal of Armenia from Azerbaijani territory has to be a precondition to a process of normalisation with Armenia and include in the protocols texts. According to CHP Deputy Chairman Onur Öymen, member of the main opposition Republican People's Party (CHP), non-reference to the Nagorno-Karabakh territorial dispute between Armenia and Azerbaijan in the agreement will lead to damage in Turkish-Azerbaijani relations. Indeed, this agreement 'a shadow over the spirit of brotherly relations between Azerbaijan and Turkey, built on deep historical roots,' the Azerbaijani Foreign Ministry said in a written statement. On the Armenian side, it is also expected from the Armenian diaspora that Turkey recognises the Armenian genocide which occurred during World War I.

This first step gives hope to normalisation between the two countries. The second is the ratification of the protocols by both parliaments, which will of great importance for the stability in the region.

## 'Landmark' deal between Turkey and Syria

In October 2009 the two countries signed an agreement in Gaziantep, the 'High-Level Strategic Cooperation Council Agreement', to end visa requirements between the two neighbours. This decision marks a significant milestone in bilateral relations between the two countries after decades of war and tension.

## Commissioner for Human Rights publishes report concerning minority rights, refugees and asylum seekers in Turkey

After a mission from 28 June to 3 July in Turkey, the Council of Europe (CoE) Commissioner for Human Rights, Thomas Hammarberg, published a report on 1 October 2009, concerning minorities' rights, refugees and asylum seekers.



This report highlights many aspects of the situation of the Kurds as well as other minorities, children, asylum seekers or refugees. As a starting point the report recommends promoting the dialogue with all minority groups including the Kurds.

Concerning minority languages and freedom of expression – as the ‘freedom of expression may be exercised through free use in private and in public of one’s mother tongue’ - the Commissioner is concerned by the obligation of pupils ‘to read daily an oath beginning with “I am a Turk” and ending with “Happy is the person who says ‘I am a Turk”, the impossibility for minorities to pay fees to attend classes private schools which teach in their mother tongues, the inexistence of public schools which teach their mother tongue, and also the climate of intolerance towards proposals of teaching the Kurdish language in the University.’

It also criticises the persistent prosecution and conviction of persons who have issued non-violent opinions on Kurdish issues on the basis of the Law on the Fight against Terrorism and of the Criminal Code. However, the Commissioner welcomes the launch of a multilingual TV channel which started to broadcast on January 2009 24 hours a day, 7 days a week in Kurmanji as well as in Zaza and Sorani dialect.

In relation to the right to freedom of association, the Commissioner is concerned by the electoral laws which provide that a political party cannot win a parliament seat if it does not get at least 10 per cent of the votes. The Commissioner recommends promoting dialogue with religious minority leaders. Despite some advancement in the legislation toward the right to property the Commissioner remains concerned about a tendency to marginalise religious minorities.

The report focuses also on the plight of Internally Displaced Person (IDPs) – mainly of Kurdish origin – not effectively protected, especially regarding their right to voluntary return, voluntary settlement, or local integration. Further recommendations have been made on the abolishment of the system of village guards as well as the clearance of mined areas especially those near the IDPs areas.

The report also focused on the marginalisation of Roma, the state and police they face, and their difficult access to basic social and civil rights.

The Commissioner recommends the creation of an effective national human rights institution and comprehensible anti- discrimination legislation also through the ratification of Protocol No.12 to the European Convention on Human Rights and the access to the Framework Convention for the Protection of National Minorities. More specifically, the Commissioner focused on the plight of refugees and asylum seekers by recommending the international community to assist Turkey in the management of migration flows, and Turkey to cooperate strongly with the United Nations High Commissioner on Refugees (UNHCR) and comply with CoE and international standards through the adoption of new asylum legislation. The report stated explicitly the importance of well-informed asylum seekers about their rights, the giving of clear instructions and good training to all border officials, the improvement of access to health care and work, the use of detention as an exceptional and short measure, a full implementation of the principle of *non refoulement*, the application of the benefit of doubt in age assessment coupled with the assignation of a personal guardian to children, as well as education and medical service (in application of the principle of ‘the best interest of the child’ under refugee law). At the end, the Commissioner reminded Turkey



to ratify the CoE Convention on Action against Trafficking in Human Beings, even though some progresses have been made.

This report constitutes a very complete and well-referenced overview of Turkish domestic legislation evolution, improvements, and concerned non-compliance regarding human rights international and European standards related to minorities, asylum seekers, refugees and also children. It also demonstrates Turkey's good move toward deeper dialogue with the CoE and improves its compliance to human rights standards, even though Turkey had not complied yet with many decisions of the European Court of Human Rights.

## Democratic initiative

Interior Minister Beşir Atalay held a press conference on 29 July to outline government plans to solve the Kurdish problem in Turkey. Atalay explained that the government believed the problem to be solvable 'by improving and enhancing the democratic rights of our citizens and ensuring that all see themselves as free and equal citizens.' Atalay explained that the issue would be resolved with 'more freedom and more democracy', and that the issue 'is vital for Turkey's future'.

Measures proposed include: allowing Kurdish political campaigns, removing barriers to education in the Kurdish language, removing barriers to speaking Kurdish in prison, reinstating the Kurdish names for towns and villages, establishing Kurdish institutes, ensuring that children are not treated as adults in relation to counter terrorism operations, enacting further amnesty laws, expanding freedom of expression while prohibiting hate speech and hate crimes and re-instating citizenship rights. The proposed plans have generated heated debate within the Turkish and Kurdish political sphere.

## Public prosecutor's office calls off trial for teaching Kurdish

The Diyarbakır Chief Public Prosecutor's Office has decided to drop the trial against Durre and Kazım Örmek, parents of 10-year-old M.Ö., and the Diyarbakır Sur district Mayor Abdullah Demirbaş, who were charged with allegedly 'opening an illegal educational institution'. They were thought to be giving Kurdish lessons to other children at their home, but were in fact pursuing the Multilingual Municipality project called 'Sere seve Cirokek u her malek Dibistane,' (A Story for each night and every house is a School). This programme was implemented by Mayor Demirbaş, whose intention for this project was to place emphasis on and preserve the Kurdish culture and language, which the Turkish state has long prohibited.

The accusation was directed at the Örmeks on behalf of their 10-year-old daughter, whose friends had asked for her help since they did not understand Kurdish. Durre Örmek, the child's Mother commented that 'she had not started a course; she was just helping her friends.' Mr Örmek added that 'the help given by the Örmeks was not in a systematic manner, resembling a course.'

While the decision not to continue with the prosecution is to be welcomed, KHRP urges public prosecutors to apply an 'interests of justice' test in deciding whether to prosecute as the intimidating effect of launching prosecutions even where they do not result in conviction has a chilling effect on freedom of expression and in itself can constitute a violation of an individual's human rights.

## Turkish Parliament extends military mandate in Iraq

The Turkish Parliament extended the Government's mandate to launch cross border military operations in Kurdistan, Iraq. The motion that was backed by 452 lawmakers will give the government another yearlong mandate until October 17 2010, to order military strikes against terrorist threats, from Kurdistan, Iraq

All Parliamentary parties gave solid support to the extension of the mandate, except the *Demokratik Toplum Partisi* (Democratic Society Party, DTP). The DTP argued that the motion was contrary to the Government's plan to introduce greater democratic reforms and end bloodshed, since the Turkish military has carried out several air and land operations killing hundreds of PKK terrorists.

The DTP leader Ahmet Türk expressed his concern by saying that 'Parliament should work to produce peace instead of clashes and problems. But our Parliament has been put under [military] tutelage once more with the mandate. The extension of the mandate will make access to peace even more difficult.'

## Lawyers seek trial of former Chief of General Staff in Şemdinli case

In May 2008, the Supreme Court of Appeal overturned a judgment by the Van Special Court, in which the latter court had sentenced Şemdinli suspects Ali Kaya and Özcan İldeniz to 39 years' imprisonment each. The Special Court of Appeal found that the case did not involve a 'gang established to commit crimes against the state', declaring the civil case a mistrial and transferring it to the military courts. The military court subsequently released the suspects while their trial was ongoing.

Following a recent change in the Turkish Penal Code (TCK) allowing the trial of military personnel in civilian courts, on 13 July 2009, a group of lawyers has submitted a petition to the Van Military Court to return the controversial Şemdinli case to the civilian courts and pave the way for trial proceedings against former Chief of General Staff Gen. Yaşar Büyükanıt.

Selçuk Kozağaçlı, chair of the Contemporary Law Association, explained that the Civil Court's jurisdiction did not cover claims against military personnel when the Şemdinli indictment was prepared. This meant that Büyükanıt was taken under military court's instead. Kozağaçlı stated that the military prosecutors did not expressly determine whether the claims need to be investigated or not, and, as a result, an application has been issued to the effect of transferring the Büyükanıt case from the military court to the civilian courts.

Kozağaçlı suggests that the fact that the Special Court of Appeal found the case not to involve a 'gang established to commit crimes against the state' might mean the military court may refer the case to the lesser court in Hakkari, rather than the Van Special Court.

President Abdullah Gül, has also underlined that further regulations are needed to delineate the jurisdiction of military and civilian courts, including in relation to trials of high-ranking military officials. This view is somewhat enforced by retired military judge Ümit Kardaş, who believes the recent amendment means that Chiefs of General Staff could now also be tried in civilian courts.

## Third indictment in Ergenekon case to shed light on controversial events

On 21 July 2009, the İstanbul Prosecutor's Office submitted a third indictment to the İstanbul Higher Criminal Court concerning the trial of suspects connected with Ergenekon, a clandestine terrorist organisation accused of plotting to overthrow the Turkish government. The 1,454 page document indicts 52 people, including İbrahim Şahin, former head of the National Police Department's Special Operations Unit; and, former Başkent University Rector Mehmet Haberal; 37 of the 52 indicted are currently in detention.

The suspects are charged with numerous crimes, including, *inter alia*, setting up and leading a terrorist organisation; attempting to destroy the government of the Republic of Turkey; attempting to destroy the Turkish Parliament; destroying, distorting, stealing and acquiring secret documents on national security; and, firing weapons that may pose a threat to people's lives.

Media sources had earlier reported that the indictment will address the murder of 35 people killed in a fire at the Madımak Hotel in Sivas on 2 July 1993. The victims had gone to Sivas to attend the Pir Sultan Abdal Festival, but they died after their hotel was set alight following unrest. Aziz Nesin, the alleged primary target of the attack, was wounded, as were 50 other people. It was also claimed that the Başbağlar massacre on 6 July 1993 would be addressed in the third indictment. Here, 33 people were killed after a group of armed people attacked the village of Başbağlar. Turkey blamed the PKK for the massacre, although the PKK denied any involvement. The İstanbul Prosecutor's Office statement did not specifically divulge whether these events would be included in the third indictment.

On 6 August 2009, the İstanbul 13th High Criminal Court accepted the third indictment in the Ergenekon case and decided to merge it to the second indictment. Therefore, the second and third indictments are part of the same trial, which brings to 108 the number of accused. The first hearing of the third indictment was held behind closed doors on 7 September 2009. The accused are mainly charged with attempts at a coup d'état. Five of the suspects standing trial have been released by the Court as a result of the 20th hearing which was held on 24 November 2009. The trial has been adjourned until 14 December 2009.

## Ergenekon case documents reveal link between JİTEM and Hrant Dink Assassination

Turkish-Armenian journalist Hrant Dink was assassinated at the hands of the secret gendarmerie intelligence unit JİTEM, according to a document in the case file to the third indictment in the Ergenekon case. The informative document was obtained from Turhan Çömez's computer, the former deputy of Justice and Development Party (AK Party) and a suspect in the Ergenekon trial. Turkish officials vehemently deny the existence of JİTEM, yet, Yusuf Ziyad, a Kurd living in Kurdistan (Northern Iraq), explains in the aforementioned document that the assassination plot was orchestrated by JİTEM, the National Police Department and former General Veli Küçük. Former General Veli Küçük is also standing trial under the Ergenekon investigation.

Within the document, it is also claimed that Küçük and another former General (H.K.) conducted a number of murders and terrorist activities in northern Iraq which still remain unsolved. Indeed,

the document defines a list of individuals alleged to have organised the aforementioned murders and terrorist activities. Included in the list are Turhan Çömez and General Hurşit Tolon, whom are both suspects in the Ergenekon trials. Also included in the list is National Police Department Special Operations Unit Deputy Chairman İbrahim Şahin, former General Şener Eruygur, former Captain Muzaffer Tekin, lawyer Kemal Kerinçsiz, former Organised Crime Unit Director Adil Serdar Saçan, journalist Yalçın Küçük, and Workers' Party (İP) Chairman Doğu Perinçek.

Furthermore, a telephone conversation cited in the indictment appears to shed further light on the perpetrators of the assassination of Dink. In the conversation, associate professor Emin Gürses (currently under arrest in the Ergenekon investigation) informs Lieutenant Colonel Mustafa Dönmez (an Ergenekon suspect), that 'The murder of Hrant Dink has been a good kind of warning to those people.'

## Prosecutor demands nine life sentences for 'Death Well' Colonel

Trial proceedings commenced in July against Kayseri Provincial Gendarmerie Battalion Commander Colonel Cemal Temizöz, former Cizre Mayor Kamil Atak, Major Atak's son Temer Atak, Major Atak's brother Kukel Atak, and PKK informants Adem Yakin, Hıdır Altuğ and Abdülhakim Güven. The proceedings suggest the suspects are all charged with involvement in a string of murders committed between 1993 and 1997 in south-eastern Turkey. The trials stem from investigations into human remains found in wells in Şırnak's Silopi and Cizre districts, and requests for Temizöz to be charged with establishing an organisation aimed at committing criminal acts and inciting murder.

The indictment states that 55 unidentified murders were committed in Cizre between 1993 and 1997. The murders were committed by unknown perpetrators, but their bodies were dumped in wells belonging to the state-owned Turkish Pipeline Organisations (BOTAŞ). The indictment holds the suspects responsible for the killings of 20 people, charging them with committing murder, inciting murder, and establishing an organisation with the aim of criminal acts. Some can expect one life sentence, whereas others, such as Temizöz may receive up to nine.

The indictment contains important information on the 'dark period' in Cizre based on information released by two secret witnesses. Whilst their identities are confidential, media reports suggest that the witnesses are none other than Hıdır Altuğ and Abdülhakim Güven, two of the suspects charged under the indictment.

The indictment, explains that Temizöz (codenamed 'Metin' within the group) established the JİTEM group after he was assigned to Cizre in 1993. The group, named 'struggling against terrorism', took people they believed to be assisting the PKK, or people whom they had personal problems into custody. The witnesses explain that some abductees were subsequently killed by Kalashnikov or a gun after questioning, and were then buried under eight to ten centimetres of soil. Their identification documents were removed and given to Temizöz directly, meaning that the victims would not be identified, and their cases would be considered 'unidentified murders'. The indictment also alleges the group to have committed the murders whilst utilising state resources.

## Kurdish language approved in Turkish Universities

Turkey's Higher Education Board agreed in August to allow Turkey's ethnic Kurds the freedom to use their language in Turkish universities for the first time. Under the scheme, the Mardin Artuklu University; situated in the Kurdish-populated southeast, will set up a postgraduate institute that will teach language studies in Kurdish, as well as Farsi, Arabic and Syriac.

## Proceedings brought against sellers of Saddam's chemical weapons

On 9 April 2009, the law suit *Aziz et al v. Republic of Iraq et al* was filed before the U.S. District Court in Baltimore, Maryland, by five Kurdish survivors of a mustard gas attack on ethnic Kurds in Iraq in 1988 and the Kurdish National Congress of North America, against the government of Iraq and three American chemical makers companies. The Applicants are represented by attorneys Jeffrey David Katz, Stanley Todman, and Kenneth F. McCallion.

Judge Marvin J. Garbis has been assigned to hear the Applicants' complaint which has been made not only on their behalf but on the behalf of all 'Kurdish people who were injured or killed as a result of chemical attacks during Saddam Hussein's Anfal campaign and their family members and heirs, as well as minor children born with birth defects or diagnosed with genetic defects.'

The defendant companies are Alcolac Inc., of Cumberland, Md., VWR International LLC of West Chester, Pa. and laboratory equipment supplier Thermo Fisher Scientific Inc., of Waltham, Mass.

The plaintiffs claim that the Geneva Conventions were violated when materials for making chemical weapons that were used against Iraqi Kurds in 1998 were sold to Saddam Hussein regime. The lawsuit alleges that the chemical precursors and compounds of the poison gases used in the six-month long 'Operation Anfal' and Operation Halabja were sold by those companies, contrary to international law. They have been charged with negligence and wrongful conduct in violation of national export laws, federal and international law. Regarding international law, the charges include violations of the Geneva Conventions, and UN Security Council Resolutions 582, 588, 596, 612, and 620. Both the defendants companies and the Republic of Iraq have also been charged among other things with crimes against humanity and genocide.

However, only charges against the Republic of Iraq and Alcolac Inc. remain as Judge Garbis has dismissed the claims against the other companies for lack of evidence.

The Applicants' attorney Kenneth McCallion of New York, said he filed the complaint because Alcolac pleaded guilty in 1989 to knowingly violating export laws by shipping a mustard-gas ingredient that ultimately went to Iran.

The defendants claim the company has sent the components through an intermediary company based in Holland which was the subject of court proceedings in Holland earlier this year. In June 2009 the Dutch Supreme Court upheld the conviction of businessman Frans van Anraat for complicity to war crimes for selling the chemicals products to Saddam Hussein. Mr. van Anraat was acquitted of complicity in the crime of genocide. However, the claims for damages brought by 16 victims in that case were rejected by the Court. It was been judged too complicated especially where Iraqi and Iranian law would apply.

The Dutch Supreme Court declared that *'the suspect knew (...) the TDG he was delivering was being used for mustard gas (...) that the poison gas would be used in the (Iran-Iraq) war'*. Judge Leo Van Dorst also insisted that Frans van Anraat was the only supplier of the gas during the 1980s. Therefore, this involvement was an essential contribution to the chemical weapons programme of Saddam Hussein's regime which made the regime capable of carrying out a large number of attacks with mustard gas on the civilian population both in Iraq and Iran. According to the Supreme Court: *'...It has been established that the accused, consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare program of Iraq during the nineteen eighties. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians. These attacks represent very serious war crimes...'*<sup>4</sup> While the Dutch District Court and the Court of Appeals stated that the mass chemical killings in 1988 constituted 'genocide' contrary to the Convention on the Prevention and Punishment of the Crime of Genocide, the Supreme Court did not rule on the question of whether the Iraqi government committed genocide.

## Two mass graves containing the remains of Kurds discovered in Diwaniya

In a joint press conference on 9 August 2009, Wijdan Mikhail, Federal Government Human Rights Minister, and, Chnar Saad, Kurdistan Regional Government Minister of Martyrs and Anfal Affairs, revealed the discovery of two mass graves in Diwaniya containing hundreds of remains of Kurdish victims of the Anfal Campaigns.

Mikhail indicated that a three-stage plan had been established, including the allocation of an information bank to define the number of victims across Iraq. Mikhail also informed the press that two ministers had agreed with the DNA testing laboratory in Erbil, to conduct the necessary tests in cooperation with the Forensic Medicine Institute in Baghdad.

## Ex-Saddam Hussein aides imprisoned for seven years for expelling Kurds

Two of Saddam Hussein's aides in the campaign against the Kurds in the late 1980's have been sentenced to seven years imprisonment for their roles in expelling the Kurds during this time. The Iraqi High Tribunal court told Tariq Aziz and Ali Hassan al-Majid (also known as 'Chemical Ali') they 'committed the crime of forced displacement against the Kurds, the court has decided to sentence you to seven years in prison'.

Aziz was sentenced to 15 years imprisonment in March 2009 for his involvement in the killing of 42 Kurdish merchants alleged to have broken state price controls in 1992. Lawyers in the case have confirmed that 73 year old Aziz's sentences shall be combined, meaning he shall serve the next 22 years in prison.

Al-Majid's sentence for seven years resultant from his role in the expulsion of the Kurds in the late 1980's comes in addition to a life sentence for genocide given against him in June 2007 for the Anfal campaign. Al-Majid was deemed to have ordering the deaths of tens of thousands of Kurds,

4 Section 17 of Judgment LJN: AX6406, Rechtbank's-Gravenhage, 09/751003-04.

when villagers were bombed with poison gas. Political disputes have so far delayed al-Majid's execution.

## Execution of a minor offender in Tehran

A minor offender, called Behnood Shojaei, was executed on Sunday 11 October 2009, early in the morning in Tehran's Evin prison. He was accused of committing a crime during a street fight involving over a dozen boys when he was 17 years old.

At first, the victim's family required a 'diyeh' (so-called 'blood money') over 2 million dollars. This amount was reduced after months of negotiation but the offender has not means to afford it. Several Iran's prominent movie directors and actors attempted to help him by opening a joint account to raise the money required for his 'diyeh'. However, the Iranian judiciary froze and bank account and threatened the artists of prosecution under Iranian criminal law. This measure has been considered as 'unprecedented' by Iranian human rights network. At the end, the juvenile accused was executed as the victim's mother did not grant him pardon.

This execution was halted five times (four times in 2008, and once in 2009) due to pressure from the international community, the UN, the European Union, human rights organisations and defendants, as well as his lawyers and many protesters.

## Human rights situation worsens in Syria

Four Syrian Kurdish men have been detained by State Security officers since September and October 2008. Since then, no information has been disclosed by the authorities regarding their place of detention, whether prosecution will be forthcoming or under what charges they are being held.

Among them, Abdelbaqi Khalaf was known to have frequent contacts with Kurdish parties and to advocate for democracy in Syria. Prior to their arrest, Munther, Nedal and Riad Ahmed had been engaged in establishing an organisation to promote Kurdish culture through books, magazines and cultural events. Since 1992 they had been operating an unofficial library which lent out books on Kurdish issues in both Arabic and Kurdish and, in a limited number of cases, printed books which authors writing on Kurdish matters were unable to publish elsewhere. The four men are among a dozen Syrian Kurds to have been arrested and held incommunicado in the last year. It is a common situation for Syrian Kurds to be held incommunicado for months at the security branches, tortured while in detention, and without any contact with the outside world.

KHRP believes that this method of arbitrary detention towards persons forcibly returned to Syria with a Kurdish background too is an area of increasing concern. For instance, the Syrian Kurd Khaled Kenjo was forcibly returned from Germany to Syria in September and was held incommunicado for over 3 weeks. He has now been charged under Article 287 of the Syrian Penal Code 'with spreading "false" news abroad that could harm the reputation of the state'. Berzani Karro has also been held incommunicado since his arrest by Syrian Security Forces in June after he was forcibly returned from Cyprus. On 26 October 2009, KHRP submitted a letter for Urgent Action to the UN Special Rapporteurs on behalf of Syrian Kurds held incommunicado after being forcibly returned.

In another extremely worrying case, in July, human rights lawyer and President of the Syrian Human Rights Organisation (SHRO), Muhanad Al-Hasani was arrested and detained on the grounds of 'weakening national sentiment' and 'spreading false or exaggerated information' on 28 July 2009. On 18 and 25 August 2009, Al-Hasani was brought handcuffed from Adra prison, before a disciplinary board of the Bar Association in Damascus, accused of 'being the President of the Syrian Organisation for Human Rights, which has been established without an official licence and without obtaining the Bar Association's approval', of 'having the organisation carry out its activities in a way that is harmful to Syria', and of 'publishing false and exaggerated information that weakens the state and its reputation abroad'. The grounds of the referral also include the accusation that Al-Hasani 'has attended and documented the proceedings of the SSSC without being the lawyer of those involved in these proceedings; and that his actions violate the law governing this profession as well as the [Bar Association's] internal rules [statute], and harm the dignity, honour and traditions of this profession.'

The Bar Association has been examining the case since 11 August 2009, and it is understood a ruling is due to be issued in late November 2009. If found guilty, Al-Hasani, could face a termination of his membership of the Bar Association and a ban on practising law.

Since SHRO was established in 2004, it has been refused permission to register as an authorised organisation in Syria, and, Al-Hasani has received multiple threats of judicial prosecution and imprisonment for running an unauthorised organisation.

## United Nations Commission of Inquiry begins investigation into mass killing in Guinea

In late November, a three-person commission began its investigation into the violent suppression that took place during a pro-democracy demonstration in Guinea's national football stadium on 28 September 2009.

It is widely believed that soldiers, including members of the Presidential Guard, were responsible for opening fire on unarmed civilians who had been holding a rally calling on the military government to leave power. The military government leader, Captain Moussa Dadis Camara, who seized power in a coup in December 2008, has denied responsibility and has publicly stated that he only partially control of the armed forces. Though the junta has promised full co-operation with the UN enquiry, it is not clear what steps could be taken should the commission's work be blocked in any way.

## U.S. likely to be last holdout on Rights of the Child

2009 marks the 20th anniversary of the adoption of the UN Convention on the Rights of the Child (CRC). To mark the occasion Sudan, one of only two remaining member states not to have ratified the Convention, announced in October its intention to proceed with ratification, potentially leaving the United States as the last holdout. The number of state parties to the CRC stands currently at 193, making it the most widely subscribed international human rights treaty. Despite President Clinton signing the CRC in 1995, no U.S. president has yet formally submitted the treaty to the Senate for ratification.



During his election campaign in October 2008, President Obama described the failure to ratify the Convention as ‘embarrassing’ and promised a review of the treaty’s implementation. The commitment led to the formation of an interagency group by the U.S. State Department in early 2009 to begin implementation work, though many observers have concluded that the chances of ratification in the near future are low given the likely position of the CRC on the Obama Administration’s treaty priority list and the backlog of other international treaties yet to be considered by the Senate.

## U.S. participates for the first time in ICC Conference at The Hague

The United States has taken an important step toward reengagement with the International Criminal Court (ICC) by attending for the first time a meeting of the ICC’s Assembly of State Parties. The U.S. participated as an observer in the Eighth Session of the Assembly that took place between 18-26 November in The Hague. U.S. Ambassador-at-Large for War Crimes Issues, Stephen Rapp, addressed the General Debate of the Assembly on 19 November, stating:

‘Our presence at this meeting, and the contacts that our delegates will seek with as many of you as possible, reflects our interest in gaining a better understanding of the issues being considered here and the workings of the Court.’

The Eighth Session constitutes an important preparatory meeting for state parties to agree an agenda for the ICC’s Review Conference on the Rome Statute to be held in Kampala, Uganda between 31 May and 11 June 2010. The U.S.’s participation in the session marks the opening of a new chapter in improving relations between the country and the Court. To date the Obama Administration has made no formal policy decision regarding the U.S.’s possible future membership of the ICC.

## UK closes ICC legal loophole

On 12 November 2009 the Coroners and Justice Act received Royal Assent. In addition to numerous other modifications to the criminal law, the Act makes several important amendments to the International Criminal Court Act 2001 (‘the ICC Act’). The first amendment (s.65A) extends the retrospective application of the ICC Act, with the effect that UK citizens and residents suspected of committing genocide, war crimes and crimes against humanity on or after January 1991 would be liable for prosecution for these crimes. Prior to this amendment the ICC Act only allowed for the prosecution of such crimes committed after 2001, when the ICC’s Rome Statute came into force in the UK. The second major amendment widens the scope of those deemed to be ‘resident’ in the UK, and includes an individual whose immigration status is pending (s.67A).

The status of the law before the amendments meant that up to a 100 UK residents suspected of such serious crimes could not be tried domestically. On 8 April 2009, the High Court ruled on such a case and held that four Rwandans, living in the UK and suspected of involvement in the 1994 Rwanda genocide, could not be prosecuted in the UK nor extradited to Rwanda as there was a ‘real risk’ the suspects would suffer ‘flagrant denial[s] of justice’ if returned. The new provisions to the ICC Act would now allow for such prosecutions to proceed in the UK courts.

## Public hearings at ICJ on Kosovo's Declaration of Independence

The International Court of Justice (ICJ) has announced that it will hold public hearings on the legality of Kosovo's Declaration of Independence from 1-11 December 2009. The full title of the case is 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)'.

The territory of Kosovo is the subject of a dispute between Serbia and the Provisional Institutions of Self-Government of Kosovo. On 8 October 2008, the UN General Assembly voted to refer the dispute to the ICJ, asking the court to give an advisory opinion on the legality of Kosovo's declaration of independence from Serbia. The case is the first of its kind regarding the unilateral secession to be brought before the international Court. While the ICJ's opinion will only be advisory it will certainly be an influence judgment providing guidance on statehood and the right to self-determination.

Thirty states have announced their intention to participate in the hearings. Three states, Spain, Romania and Cyprus, have so far stated their intention to testify opposing independence for Kosovo; while Germany, France, the United Kingdom, and the United States, are scheduled to testify in favour of independence for Kosovo.

## Optional Protocol to ICESCR opens for signature

The new Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted by the U.N. General Assembly on December 10 2008 (A/RES/63/117), opened for signature on 24 September 2009 at the United Nations in New York. At the signing ceremony 29 member states signed the Protocol, including Armenia and Azerbaijan. The Protocol provides the Committee on Economic, Social and Cultural Rights (CESCR) - the body of independent experts that monitors implementation of the ICESCR - the competence to receive and consider individuals' complaints regarding alleged state violations of rights contained in the Covenant.

## Permanent Court of Arbitration issue decision on border dispute between Sudan and the People's Liberation Movement Army

On July 22 2009, the Permanent Court of Arbitration rendered their award in a complex arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army. The award determines the boundaries of Sudan's autonomous Abyei region, an area marred by political turmoil and violence between northern and southern troops who razed the area and forced thousands to flee in May 2008.

The region's autonomous status was a condition of a peace agreement reached between the Sudan People's Liberation Movement/Army and the Government of Sudan in January 2005 that marked the official ending of the second Sudanese civil war.

The international court's ruling has been largely welcomed by both the Government of Sudan in the north and the Autonomous Government of Southern Sudan. The Court ruled, inter alia, that

the major oil field at Heglig is not be part of Southern Sudan (as an earlier arbitration court had ruled), but will remain a part of the Republic of Sudan. The ruling also allows the Misseriya Arabs, nomadic cattle herders, grazing rights in the region. The people of Abyei will vote in referendum in 2011 on whether the region joins Southern Sudan or remains part of the Republic of Sudan.

## UN Special Tribunal for Lebanon opens into assassination of former Lebanese Prime Minister, Rafiq Hariri

The Special Tribunal for Lebanon (STL), based in The Hague, began its work on 1 March 2009. The hybrid body, created jointly by the UN and Lebanon, is mandated to try those allegedly responsible for assassinating the former Lebanese Prime Minister, Rafiq Hariri, and other high-profile political figures in Lebanon.

Prime Minister Hariri, a main opponent of Syrian occupation, was one of 23 people killed in a bomb blast in Beirut on 14 February 2005. His murder came amid a series of political assassinations during 2004-2005, and spurred the international community to pay more attention to events taking place in the country. At the Government of Lebanon's request, the Security Council passed Resolution 1664 (2006), which undertook to create an independent tribunal 'of international character based on the highest international standards of criminal justice' to being those responsible for the murders to justice.

The STL comprises a mix of Lebanese and international judges and will apply both the Lebanese penal code (excepting death penalty and forced labour provisions) and international criminal law during the trial process. The STL is the first international tribunal specifically created to prosecute 'terrorist' crimes committed against specific individuals. While other special tribunals have dealt with war crimes and crimes against humanity, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (ECCC), it will be the first time that an international court tries political crimes that targeted a specific person.

## Universal Jurisdiction case in Spain concerning the killing of Iranian refugees in camp Ashraf

For the first time after reform of the law limiting the scope of Universal Jurisdiction, Judge Fernando Andreu of the 'Audiencia Nacional' (Spanish National Court) accepted the court's competence to investigate the deaths of Iranian refugees in Ashraf camp (Iraq) in 2009.

It is alleged that the deaths occurred on 28 and 29 July 2009 when the Iraqi armed forces, police and security forces were responsible for the deaths of 11 people living in camp Ashraf. It is further alleged that the operation left 450 people injured and resulted in the detention of 36 people.

The National Court's judge sent a letter rogatory to the Iraqi judicial authorities requesting information on whether they have initiated any investigations. In the event that no investigation has been launched, Spain has the duty under Geneva Conventions to prosecute those responsible for the deaths and injuries under the fourth Geneva Convention which relates to the protection of civilians persons in time of war.

However, the last reform of Spanish domestic law issued on 15 October 2009 established that a relevant connection between the facts that occurred in other country's jurisdiction and Spain - for instance the fact that victims are Spanish nationals - is required to exercise Universal Jurisdiction, such limitation can be overridden in case non-investigation by the Spanish authorities could violate Spain's conventional obligations. Therefore, the reasoning of the National court was that the allegations if proven would amount to a grave breach of Geneva IV which triggers the application of Article 146 of Geneva IV<sup>5</sup> under which Spain has the duty to prevent impunity for those responsible of serious breaches of the Convention and to try them under Spanish jurisdiction.

Such interpretation of the recently adopted law has been criticised in particular by the Public Prosecutor, who opposed himself to the admissibility of the case. According to him, the total absence of link between the relevant facts of the case and Spain as well as the absence of evidences regarding the fact that the Iraqi judicial authorities are not investigating the case prevent the Spanish judicial authorities to exercise jurisdiction over it.

The admissibility decision by the Spanish domestic court is seen by many as a major step in the advancement of universal jurisdiction principles, in the fight against impunity in circumstances of massive violations of human rights.

5 Article 46 of Geneva IV states as follows that: 'each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'

## Section 2: Articles

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



Catriona Vine and Bruce Chen<sup>1</sup>

## Beyond the ECHR – Human Rights Complaints and the Council of Europe

### Abstract

*The Article looks at the extent of the Council of Europe's contribution to the enforcement of human rights in Europe. In particular, the Article focuses on the impact of international treaties adopted by the Council, and the role and contribution of the less known human rights bodies falling within the Council's remit, mainly created by the aforementioned international treaties. The Article also critiques the likely utility and effectiveness of individual complaints' or otherwise mechanisms created under the aforementioned bodies.*

For the past sixty-five years, the 47-member Council of Europe (CoE) has built up considerable powers on the subject of human rights. These powers encompass standards pertaining mainly to civil and political rights, social rights, minority rights, treatment of persons deprived of their liberty and the fight against racism. Additionally, the CoE has powers concerned with the active monitoring of these standards by its member states. This monitoring is done by several well-established human rights bodies with recognised expertise and professionalism. The monitoring is done on a country-by-country basis. Also, the monitoring is increasingly done with the common feature that the monitoring bodies are mutually independent. One of the primary aims of the Council is the protection of human rights. Consequently, it has adopted several international treaties which permit individuals to bring claims against the State, alleging violations of their human rights before both international and regional bodies. The European Court of Human Rights in Strasbourg is the primary institution of the CoE that provides a legal basis for matters concerning the violation of human rights.

However, the aim of this Article is not to analyse the impact of the European Court on European human rights legislation, nor to analyse the effectiveness of the European Convention for the Protection of Human Rights. Rather, this Article will focus on the numerous other treaties and institutions associated with the CoE. The analysis undertaken in this Article is comprised of two main components. The first part of this Article will provide an overview of the other international treaties adopted by the CoE. This entails identifying the content and particular rights protected by each treaty, and consideration of their impact in terms of the monitoring and the protection of human rights. Secondly, the latter half of this Article will consider those lesser-known institutions falling within the CoE's human rights remit, the majority of which are established by the aforementioned treaties. These institutions are the European Committee of Social Rights (ECSR), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment acts, the Group of Experts on Action against Trafficking in Human Beings, the Standing Committee on Transfrontier Television, the European Commission against Racism and Intolerance, the Steering Committee for Equality between Women and Men and,

1 Catriona Vine is KHRP's Legal Director. Bruce Chen is a Solicitor (Australia).

lastly, the Commissioner for Human Rights. By examining each of these institutions in turn, it will be possible to look at how their mandates vary from arbitrating human rights complaints, to the broader protection and monitoring of human rights themselves. The Article will seek to clarify which of these institutions operate via mechanisms providing for individual remedy or otherwise, and critique the likely utility and effectiveness of each.<sup>2</sup>

## INTRODUCTION TO THE COUNCIL OF EUROPE

The Council of Europe (CoE) was established in 1949 as the first intergovernmental organisation to be created in Europe. It was established following the advocacy of British Prime Minister Winston Churchill for a 'United States of Europe' that was 'free and happy'. The Council was thus formed by the Treaty of London 1949, now known as the Statute of the CoE. Its stated aim was the achievement of 'a greater unity' between member States, realisation of common ideals and principles, and facilitation of the progress of member States both in economic and social terms. Originally comprising ten member states, the membership of the CoE is now considered pan-European, particularly with the integration of central and Eastern Europe (namely, Romania, Poland and the former Soviet Union). There are currently 47 member States.

One of the Council's primary aims is the protection of human rights, the rule of law and pluralist democracy, under the mandate defined by the third Summit of Heads of State and Government in Warsaw in 2005. The Council's work has thus far resulted in approximately 200 international treaties, most notably, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>3</sup> The CoE is comprised of four main institutions: the Committee of Ministers; Parliamentary Assembly; Congress of Local and Regional Authorities; and Secretary General.

The Committee of Ministers (CoM) is the Council's executive and decision-making body. It is comprised of the Foreign Affairs Ministers from each member State. The Committee meets at annual sessions, to collectively discuss all matters of mutual interest to member States (except national defence). The Committee's role includes admitting, suspending or terminating member States, monitoring state respect for CoE commitments, adopting international treaties and non-binding recommendations to member States, and supervising the execution of judgments handed down by the European Court of Human Rights (ECtHR).

The Parliamentary Assembly of the CoE (PACE) is a political forum of the Council. It consists of over 600 members, either appointed or elected by their respective national parliaments (two to 18 delegates from each member State). The PACE meets for quarterly sessions to debate and consider relevant issues, such as human rights and democracy. Its role includes visiting and monitoring member States and drafting Assembly reports, providing consultation on the drafting of CoE international treaties, electing judges to sit on the ECtHR, and adopting resolutions and opinions, as well as recommendations to the CoM.

2 For a table of signatories and ratifications of member States for each treaty discussed, please refer to the Council's website at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

3 Opened for signature 4/11/1950, entry into force 3/9/1953.



The Congress of Local and Regional Authorities of Europe was initially established as the Conference of Local Authorities of Europe in 1957. It was replaced in 1994 by the Congress of Local and Regional Authorities. The Congress is considered the local and regional arm of the CoE. It is a political assembly of representatives from over 200,000 local and regional authorities of the member States, which meets on an annual basis. There are presently 318 full and 318 substitute members (the number of representatives from each member State ranges between two and 18). The Congress consists of the Chamber of Regions (representatives from authorities operating between state and local authority level) and Chamber of Local Authorities (representatives from other territorial authorities). The mandate of the Congress is to promote and monitor both local and regional democracy and governance.

The Secretariat of the CoE serves both the CoM and Parliamentary Assembly. The Secretary General, together with the Deputy Secretary General and other required staff, comprises the Secretariat. Under the Statute of the CoE, the Secretary General is responsible to the CoM for the day-to-day work of the Secretariat. The Secretary General must also provide secretariat assistance where required by the Parliamentary Assembly. Furthermore, the Secretary General is responsible for the strategic management of the CoE's budgetary expenditure and financial reporting. The Secretary General is elected by the Parliamentary Assembly for a five year term.

### **European Convention for Protection of Human Rights and Fundamental Freedoms**

Without doubt, the CoE's most significant achievement was the adoption by member States of the European Convention for Protection of Human Rights and Fundamental Freedoms in 1950.<sup>4</sup> The ECHR created a right of individual petition, whereby individuals could take a case challenging a member State initially to the European Commission of Human Rights (established in 1954) and subsequently to the European Court of Human Rights (established in 1959). Members of the CoE must accept the principles of the rule of law and enjoyment of human rights and fundamental freedoms.<sup>5</sup> Thus, for new member States the signing and ratification of the ECHR and its Protocols within a specified timeframe is one of the conditions for entry into the CoE. The majority of member States have incorporated the Convention into their domestic legal system, thus enabling the domestic courts to invoke the ECHR principles and ECtHR case law.

A practical discussion of the ECHR and the ECtHR can be found in *Taking Cases to the European Court of Human Rights: A Manual* (KHRP 2006).<sup>6</sup> This Article is concerned with other international treaties which have been adopted by the CoE, and their impact on the protection of human rights and monitoring of human rights violations.<sup>7</sup>

4 Opened for signature 4/11/1950, entry into force 3/9/1953.

5 Article 3, Statute of the Council of Europe.

6 This publication can be downloaded for free from <http://www.khrp.org>.

7 For a table of signatures and ratifications of member States for each treaty discussed visit the Council's website at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

## COUNCIL OF EUROPE HUMAN RIGHTS TREATIES

### Social and Economic Rights

The European Social Charter (adopted in 1961 and revised in 1996) guarantees the protection of economic and social rights. The Charter acknowledges those rights not protected under the ECHR, which focuses primarily on civil and political rights. The Charter has proven successful on two accounts. Firstly, the concept of economic and social rights have obtained widespread acceptance under the Charter (only two member States have not signed the revised Charter).<sup>8</sup> Secondly, it has led to the establishment of a collective complaints procedure to the ECSR, under the Additional Protocol to the European Social Charter of 1995<sup>9</sup> (ratified by 12 member States).<sup>10</sup>

In the drafting of the Social Charter, the members States recognised that one of the main aims of the Council of Europe (CoE) was ‘facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms.’<sup>11</sup> The original European Social Charter<sup>12</sup> provided for the protection of an extensive number of rights, including: the right to work (Article 1); the right to just conditions of work, including reasonable working hours, paid public holidays, and paid annual leave (Article 2); the right to safe and healthy working conditions (Article 3); the right to fair remuneration, including the right of men and women workers to equal pay (Article 4); the right to freedom of association for workers and employers (Article 5); the right to collective bargaining, and to collective action such as the right to strike (Article 6); the right to protection of health (Article 11); the right to social security (Article 12); the right to social and medical assistance (Article 13); and the right to economic, legal and social protection for development of family (Article 16).

The revised European Social Charter of 1996<sup>13</sup> is presently awaiting ratification by a number of member States.<sup>14</sup> Notably, it has been ratified by Turkey<sup>15</sup> and Armenia<sup>16</sup>. The revised Charter consolidates the original Charter and provides additional rights, including: the right to equal opportunities and treatment in employment without discrimination on grounds of sex (Article 20); equal opportunities and treatment for workers with family responsibilities, including maternity and parental leave (Article 27); the right to protection against termination of employment (Article

8 Namely, Switzerland and Liechtenstein.

9 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, opened for signature 9 November 1995, entry into force 1 July 1998.

10 Namely, Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Sweden.

11 Original Charter, **preamble**.

12 Opened for signature 18/10/1961, entry into force 26/2/1965.

13 **Opened for signature 3/5/1996, entry into force 1/7/1999.**

14 Namely, Azerbaijan, Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, Monaco, Montenegro, Poland, San Marino, Spain, the former Yugoslav Republic of Macedonia, United Kingdom.

15 **Signed 6 October 2004, ratified 27 June 2007, entry into force 1 August 2007.** Reservations: bound by art 1, art 2(1), (2), (4)-(7), art 3, art 4(2)-(5), and arts 7 to 31.

16 **Signed 18 October 2001, ratified 21 January 2004, entry into force 1 March 2004.** Reservations: bound by art 1, art 2(1)-(6), art 3(1), art 4(2)-(5), art 5, art 6, art 7, art 8, art 12(1), (3), art 13(1)-(2), art 14(2), art 15(2)-(3), arts 17-20, art 22, art 24, art 27, and art 28.

24); the right to protection of all workers' dignity at work, including the prevention of sexual harassment (Article 26); the right to protection against poverty and social exclusion (Article 30); and the right to housing (Article 31). The Charter provides further rights for the elderly (Article 23), women (Article 8), children (Articles 7 and 17), disabled persons (Article 15) and migrants (Article 19).

## Torture

Article 3 of the ECHR provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. While the ECHR recognised both the right of protection itself and created a right of individual petition for violation of Article 3, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987<sup>17</sup> sought to complement the ECHR. In the preamble to the Convention, explicit reference is made to Article 3 of the ECHR. The preamble continues on by stating that member States are: 'convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventative character based on visits'. Such non-judicial means include the establishment of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which 'by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment' (Article 1). The Convention has been ratified by all member States, notably Armenia,<sup>18</sup> Azerbaijan<sup>19</sup> and Turkey.<sup>20</sup>

## Minority Rights

The Framework Convention for the Protection of National Minorities of 1995 was established to recognise the protection of national minorities.<sup>21</sup> It has been ratified by the majority of member States including Armenia<sup>22</sup> and Azerbaijan,<sup>23</sup> but not Turkey. The Framework Convention is considered the 'first legally binding multilateral instrument devoted to the protection of national minorities in general'.<sup>24</sup> However, it has been criticised on a number of fronts.<sup>25</sup> For instance, the Framework Convention eschews from defining the phrase 'national minority'. It also fails

17 Opened for signature 26/11/1987, entry into force 1/2/1989.

18 Signed 11 May 2001, ratified 18 June 2002, entry into force 1 October 2002.

19 Signed 21 December 2001, ratified 15 April 2002, entry into force 1 August 2002. Reservations: 'it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation ...'

20 Signed 11 January 1988, ratified 26 February 1988, entry into force 1 February 1989.

21 Opened for signature 1 February 1995, entry into force 1 February 1998.

22 Signed 25 July 1997, ratified 20 July 1998, entry into force 1 November 1998.

23 Acceded 26 June 2000, entry into force 1 October 2000. Reservations: ratification does 'not imply any right to engage in any activity violating the territorial integrity and sovereignty, or internal and international security of the Republic of Azerbaijan'.

24 Council of Europe, Explanatory Memorandum, Framework Convention for the Protection of National Minorities <<http://conventions.coe.int/Treaty/EN/Reports/Html/157.htm>>.

25 See, for example, Geoff Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 *Human Rights Quarterly* 160; Council of Europe, Parliamentary Assembly, Recommendation 1255 (1995) on the protection of the rights of national minorities, adopted 31 January 1995.

to establish an international enforcement mechanism, rather relying on a discretion-oriented monitoring mechanism. Furthermore, the Framework Convention's objectives and principles have been described as 'vaguely defined'.

In relation to the phrase 'national minority', it could be said that its meaning may be implicitly read from the Convention (particularly from Articles 5 and 6) as being a minority group in possession of a distinct cultural and territorial identity. The Framework Convention provides the following rights for persons belonging to a national minority: the right to exercise and enjoy their rights and freedoms, either individually or as a community (Article 3.2); the right to equality before the law and equal protection of the law (Article 4.1); the full and effective equality in all areas of economic, social, political and cultural life (Article 4.2); protection against threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity (Article 6.2); and the right to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion (Article 7). The Framework Convention also provides that the CoM will monitor the treaty's implementation (Article 24).

In addition, the European Charter for Regional or Minority Languages of 1992<sup>26</sup> provides for the protection and promotion of minority languages, as an element of cultural heritage. This Charter has been ratified by Armenia<sup>27</sup> but not Azerbaijan,<sup>28</sup> and remains unsigned by Turkey. The rights under the Charter particularly relate to persons in territories where a regional or minority language is used. For instance, the Charter provides that for: the elimination of discrimination against the use of a regional or minority language, where it is intended to discourage or endanger that language's maintenance or development (Article 7.2); the right to an education in the regional or minority language or teaching of that language as part of the curriculum, for all levels of education (Article 8); the right to have court proceedings conducted in a regional or minority language, or to use that language or present documents and evidence in that language (Article 9); the creation of media stations and publications which use the regional or minority language and ensure the freedom of direct broadcasting reception, freedom of expression, and free circulation of information (Article 11); and encouragement, fostering, and promotion of cultural activities and facilities in the regional or minority language (Article 12).

## Racism and Intolerance

The CoE has sought to provide for the protection of persons from discrimination, racism and intolerance under various international conventions. Under the ECHR, Article 14 states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

26 Opened for signature 5 November 1992, entry into force 1 March 1998.

27 Signed 11 May 2001, ratified 25 January 2002, entry into force 1 May 2002. **Reservations:** minority languages in Armenia are Assyrian, Yezidi, Greek, Russian and Kurdish languages. Bound by art 9(1)(a)(ii)-(iv), (1)(b)(ii), (1)(c)(ii)-(iii), (1)(d), (3), art 10(1)(a)(iv) and (v), (1)(b), (2)(b), (2)(f), (2)(g), (3)(c), (4)(c), (5), art 11(1)(a)(iii), (1)(b)(ii), (1)(c)(ii), (1)(e), (2)-(3), art 12(1)(a), (1)(d), (1)(f), (2)-(3), art 13(1)(b), (1)(c), (1)(d), (2)(b), (2)(c), art 14(a)-(b).

28 Signed 21 December 2001.

However, it must be noted that the above Article falls short of establishing a free-standing right to protection from discrimination. This limitation was sought to be remedied by Protocol No. 12 to the ECHR,<sup>29</sup> which provides for a general prohibition of discrimination. Article 1 of Protocol No. 12 provides:

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The Protocol has been supported by the signature of the majority of member States (including Armenia,<sup>30</sup> Azerbaijan<sup>31</sup> and Turkey)<sup>32</sup>. However, considerable attention has been drawn to the United Kingdom's failure to sign the protocol, said to be due to the ambiguity of and potentially wide application of the phrase, 'any right set forth by law', and uncertainty over whether the Protocol allows for a defence of objective and reasonable justification.<sup>33</sup>

Another CoE treaty of significance is the Additional Protocol to the Convention on Cyber-crime of 2003.<sup>34</sup> This Additional Protocol has been signed and ratified by Armenia.<sup>35</sup> The Convention itself has yet to be ratified by Azerbaijan or Turkey. The Additional Protocol criminalises acts of a racist and xenophobic nature which are committed through computer systems. Article 2.1 of the Convention defines 'racist and xenophobic material' as:

any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

The Additional Protocol provides that member States will ensure the criminalisation of acts conducted through a computer system which involve the dissemination of racist and xenophobic material (Article 3), threats or insults motivated by racism and xenophobia (Article 4-5), and the distribution of material which denies, grossly minimises, approves or justifies acts of genocide or crimes against humanity (Article 6).

29 Opened for signature 4 November 2000, entry into force 1 April 2005.

30 Signed 18 June 2004, ratified 17 December 2004, entry into force 1 April 2005.

31 Signed 12 November 2003.

32 Signed 18 April 2001.

33 See, for example, United Kingdom, Joint Committee on Human Rights, *Seventeenth Report (2005)*; Professor Sandra Fredman, 'Why the UK Government should Sign and Ratify Protocol 12' (2002) <http://www.justice.org.uk/images/pdfs/protocol12.pdf>.

34 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Opened for signature 28 January 2003, entry into force 1 March 2006.

35 Signed 28 January 2003, ratified 12 October 2006, entry into force 1 February 2007.

In addition, it may be recalled that the European Social Charter guarantees the protection of economic and social rights, which are deemed to be enjoyed by all persons without discrimination on any grounds, including race, colour, national extraction, or association with a national minority (Article E). As previously discussed, the Framework Convention for the Protection of National Minorities and European Charter for Regional or Minority Languages also apply to the combating of discrimination, racism and intolerance.

Other CoE treaties include the Convention on the Participation of Foreigners in the Public Life at Local Level of 1992<sup>36</sup> and European Convention on Nationality of 1997.<sup>37</sup> However, neither Convention has been signed by Azerbaijan, Armenia or Turkey. The Convention on the Participation of Foreigners in particular has failed to obtain widespread support, with only 13 signatures and 8 ratifications at present. The Convention deals with the protection of participation in public life for persons who are not nationals of the member State, but who lawfully reside on its territory. It ensures equal terms of protection for the right to freedom of expression, freedom of peaceful assembly and freedom of association (Article 3), as well as certain voting rights and the right to stand for local authority elections (Article 6). The Convention on Nationality ensures that each member State, in determining its own rules on nationality, must be guided by a principle of non-discrimination between persons who are nationals by birth or those who have subsequently acquired nationality (Article 5).

### **Gender Equality and Domestic Violence**

Article 14 of the ECHR and Article 1 of Protocol No. 12 are just as applicable to gender equality as they are to racism and intolerance. The European Social Charter also resonates with the promotion of gender equality and protection against domestic violence. The Charter protects the right of workers to equal opportunities and treatment without discrimination on grounds of sex (Article 20), the right to fair remuneration, including equal pay for men and women (Article 4(3)), the right of workers with family responsibilities (Article 27), the right of employed women to protection of maternity (Article 8), and the right to dignity at work, including promoting against sexual harassment (Article 26).

Moreover, the CoM has made recommendations to member States on gender equality matters. For example, Recommendation Rec(2002)5 provides a set of guidelines for member States in relation to the protection of women against violence.<sup>38</sup> ‘Violence against women’ is defined as ‘any act of gender-based violence, which 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 private life’ (Appendix, (1)(a)-(d)). Recommendation No R(98)14 promotes the strategy of ‘gender mainstreaming’.<sup>39</sup> That is, the ‘(re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-

36 Opened for signature 5 February 1992, entry into force 1 May 1997.

37 Opened for signature 6 November 1997, entry into force 1 March 2000.

38 Adopted 30 April 2002.

39 Adopted 7 October 1998.

making.<sup>40</sup> Recommendation Rec(2003)3 relates to the balanced participation of women and men in political and public decision making.<sup>41</sup> Finally, Recommendation Rec(2007)17 promotes the implementation of gender equality standards and mechanisms.<sup>42</sup> However, it must be noted that these recommendations are adopted texts, and therefore not legally binding on member States.

### **Trafficking in Human Beings**

The Convention on Action against Trafficking in Human Beings of 2005<sup>43</sup> deals with the prevention and combating of trafficking, protection of victims' human rights, and prosecution of traffickers. The Convention has been ratified by Armenia<sup>44</sup> and was signed by Turkey earlier in 2009,<sup>45</sup> but remains unsigned by Azerbaijan. The preamble to the Convention recognises that trafficking in human beings is an 'offence to the dignity and the integrity of the human being' and may result in slavery. The Convention defines 'trafficking in human beings' as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' (Article 4(a)).

The Convention goes on to define 'exploitation' to 'include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' (Article 4(a)).

The Convention provides for the following guarantees: measures to prevent and combat trafficking in human beings, and to discourage demand for all forms of exploitation (Articles 5-6); legislative measures which establish that trafficking is a criminal offence (Articles 18-20); measures to identify victims of trafficking, who are entitled to certain rights to residence and assistance (Article 10); the right of victims of trafficking to a 30 day period of recovery and reflection, during which they are authorised to remain in the State's territory, and upon which they may reach an informed decision on cooperating with public authorities (Article 13); the right of victims to be issued with a renewable residence permit, where their stay is necessary due to their personal situation or for co-operation with public authorities (Article 14.1); the right of victims to psychological and emergency medical treatment, counselling, and appropriate accommodation (Article 12.1); the right of victims to compensation and legal remedy (Article 15); and the right to protection of private life and the identity of victims (Article 11). The Convention also provides for the establishment of a group of experts to monitor the implementation of the treaty (Article 36).

40 Council of Europe, Directorate General of Human Rights, 'Gender Mainstreaming: conceptual framework, methodology and presentation of good practices' (2004).

41 Adopted 12 March 2003.

42 Adopted 21 November 2007.

43 Opened for signature 16 May 2005, entry into force 1 February 2008.

44 Signed 16 May 2005, ratified 14 April 2008, entry into force 1 August 2008.

45 Signed 19 March 2009.

## Freedom of Expression and Media

An extensive body of jurisprudence has been developed in relation to the right to freedom of expression, under Article 10 of the ECHR. It may be lesser known that the right to freedom of expression and media, in the context of international broadcasting, is promoted by the European Convention on Transfrontier Television of 1989.<sup>46</sup> This Convention has been ratified by Turkey,<sup>47</sup> but remains unsigned by Armenia and Azerbaijan. In the preamble to the Convention on Transfrontier Television, reference is made to Article 10 of the ECHR. Article 10 is described as 'one of the essential principles of a democratic society and one of the basic conditions for its progress'.

The Convention applies only to international broadcasting of television programme services (as per Article 3). Article 4 provides that the member State shall guarantee freedom of reception and retransmission of programme services. Conversely, the Convention places responsibilities on the broadcaster to ensure the presentation and content of programme services respect the dignity of human beings and fundamental rights (Article 7(1)). Such programme services shall not be indecent and, in particular, contain pornography, or give undue prominence to violence or be likely to incite racial hatred (Article 7(1)). The broadcaster must also ensure that the news presents the facts and events fairly, and encourages the free formation of opinions (Article 7(3)). The establishment of the Standing Committee on Transfrontier Television is also provided by the Convention (Article 20).

A Draft Second Protocol amending the Convention is in the process of being forwarded to the CoM for adoption and opening for signature.<sup>48</sup> The Draft Second Protocol<sup>49</sup> seeks to revise the Convention, in response to technological, societal and economic developments in television broadcasting.<sup>50</sup> Under the Draft Second Protocol, the Convention is to be renamed as the CoE Convention on Transfrontier Audiovisual Media Services.<sup>51</sup> It broadens the scope of the

46 Opened for signature 5 May 1989, entry into force 1 May 1993.

47 Signed 7 September 1992, ratified 21 January 1994, entry into force 1 May 1994. Declarations: the designated Central Authority is Radio and Television Supreme Council, Bilkent-Ankara.

48 Council of Europe, Standing Committee on Transfrontier Television, Report of 44<sup>th</sup> meeting, T-TT(2009)12, 11 and 12 June 2009.

49 Draft Second Protocol Amending the European Convention on Transfrontier Television and its Explanatory Report, T-TT(2009)007FIN\_en, 24 September 2009.

50 Draft Second Protocol, preamble.

51 Ibid, Article 1.



Convention to 'audiovisual media services'.<sup>52</sup> The responsibilities of 'media service providers'<sup>53</sup> are broadened to include a prohibition on services which contain any incitement based not just on race, but also sex, religion and nationality. The general prohibition on pornography is now framed in terms of the protection of minors (such programmes are permissible at times not normally accessed by minors). A new provision states that contracting States ought to encourage media service providers to ensure improved access for persons with a visual or hearing disability.<sup>54</sup>

## INSTITUTIONS OF THE COUNCIL OF EUROPE

The primary institution of the Council of Europe (CoE) providing for legal remedy for the violation of human rights is the European Court of Human Rights (ECtHR). An individual may lodge a complaint with the ECtHR for an alleged breach of the Convention by a contracting State, following the exhaustion of domestic legal avenues. The ECtHR is, however, but one of numerous CoE institutions involved in the upholding of human rights. Their mandates vary from deciding upon human rights complaints, to the broader protection and monitoring of human rights. The former is illustrated by the ECSR, which receives collective complaints about State violations of the European Social Charter.

As to the other institutions, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment acts as a non-judicial preventative mechanism, empowered with the ability to inspect places of detention within contracting States. The CoM possesses the mandate to evaluate reports by contracting States on the implementation of the Framework Convention for the Protection of National Minorities. The Group of Experts on Action against Trafficking in Human Beings also evaluates State reporting on the implementation of the Convention on Action against Trafficking in Human Beings. Similarly, the Standing Committee on Transfrontier Television monitors the implementation of the European Convention on Transfrontier Television. The European Commission against Racism and Intolerance monitors contracting States and makes State-specific recommendations on racism and intolerance issues.

52 Proposed revised Convention, Article 1.

53 *Ibid*, Article 6 – Responsibilities of media service providers:

1. The presentation and content of audiovisual media services shall respect the dignity of the human being and the fundamental rights of others.

In particular they shall not:

*a.* contain any incitement to hatred based on race, sex, religion or nationality;  
*b.* give undue prominence to violence.

2. Broadcasters shall ensure that news programmes fairly present facts and encourage the free formation of opinions.

3. Media service providers shall ensure the adequate protection of minors. In particular, they will ensure that:

– television broadcasts do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall be extended to other television programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical means, that minors in the area of transmission will not normally hear or see such broadcasts;  
– on-demand services which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand services.

54 *Ibid*, Article 7.

The Steering Committee for Equality between Women and Men exercises a broad mandate in dealing with gender equality and domestic violence issues. Finally, the Commissioner for Human Rights deals generally with the promotion of human rights and measures for reform.

### **The European Committee of Social Rights**

The European Committee of Social Rights (ECSR) was established to monitor the compliance of contracting States to the European Social Charter. The ECSR consists of 15 expert members<sup>55</sup> elected by the CoM, who remain independent and impartial. The Committee's Bureau comprises of an elected President, Vice-President or Vice-Presidents, and General Rapporteur.<sup>56</sup> The Committee has three main functions. Firstly, to reach 'decisions' on collective complaints which allege violations by contracting States of the Charter.<sup>57</sup> Secondly, to adopt 'conclusions' on each contracting State's implementation of the Charter under a reporting procedure.<sup>58</sup> And generally, to rule 'on the conformity of the situation' of contracting States.<sup>59</sup>

The collective complaints procedure is established under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, presently ratified by 12 member States. The collective complaints procedure applies to the original Charter, and the revised Charter of 1996 (as per Article D of the revised Charter).

A collective complaint may only be lodged with the ECSR by:

1. International organisations of employers and trade unions;<sup>60</sup>
2. 'Representative' national employers' organisations and trade unions within the contracting State;<sup>61</sup>
3. International non-governmental organisations (INGOs) with CoE consultative status, which are included on the Governmental Committee of the European Social Charter's list of INGOs entitled to lodge collective complaints;<sup>62</sup> and
4. National non-governmental organisations, where declared as having been recognised by the relevant contracting State.<sup>63</sup>

55 Rules of the European Committee of Social Rights, Rule 1.

56 Ibid, Rule 8.1.

57 Ibid, Rule 2.2.

58 Ibid.

59 Ibid, Rule 2.1.

60 Additional Protocol, Article 1(a); and European Social Charter 1961, Article 27(2). At present, this category is exclusive to the European Trade Union Confederation, BUSINESSSEUROPE, and International Organisation of Employers.

61 Additional Protocol, Article 1(c). The ECSR considers the notion of 'representativity' to be an 'autonomous concept'. Although domestic laws of the contracting State may deem an organisation or trade union to be 'representative', it does not necessarily follow that it will fall within the Article 1(c) criteria: see complaint No. 9/2000 From the *Confédération française de l'Encadrement CFE-CGC* against France.

62 Additional Protocol, Article 1(b). See [http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOList2009rev\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/INGOList2009rev_en.pdf).

63 Additional Protocol, Article 2.

For lodgement purposes, there is no set format for a collective complaint. The complaint should include the name and contact details of the complainant organisation, the contracting State against whom the complaint is directed. There is no fee for lodging the complaint.

So as to be considered admissible, a collective complaint must be in writing (Additional Protocol, Article 4). It must also indicate how the contracting State has not ensured the 'satisfactory application' of the Charter provisions in question (Article 4). That is, the subject matter of the complaint. The Rules of the ECSR also provide that a collective complaint must be submitted in either English or French, but only where the complainants are international organisations of employers or trade unions, or other international non-governmental organisations with consultative status (Rule 24). The complaint is to be addressed to the 'Executive Secretary acting on behalf of the Secretary General of the CoE' (Rule 23.1). The complaint must also be signed by the person or persons with competence to represent the complainant organisation (Rule 23.2).

Complaints are registered with the Secretariat of the ECSR in a chronological order of receipt. The ECSR deals with each complaint as they become ready for examination. However, precedence may be given to a particular complaint (Rule 26). The President may request that the contracting State provide written information and observations on the complaint's admissibility (Rule 28.1 and Rule 29.1). A similar request may be made of the complainant to provide a response to the State's observations (Rule 28.1 and Rule 29.3). The President is responsible for setting a time limit for responses to its requests (Rule 28.2 and Additional Protocol, Article 6). The ECSR has the power to strike out a pending complaint if the conditions upholding the complaint are no longer met (Rule 39).

For each complaint, a member from the ECSR is appointed as Rapporteur (Rule 27.1). The Rapporteur is responsible for drafting a preliminary decision on admissibility of the complaint (Rule 27.3). They must do this 'within the shortest possible time' (Rule 30.1). The admissibility of a complaint is considered by the ECSR at periodically-convened sessions (Rule 14.1), which are presently held seven times a year. Otherwise, the President may convene additional sessions to ensure a complaint is dealt with within a reasonable time (Rules 28.4). At the session, the Committee examines the Rapporteur's draft decision on admissibility, before reaching a final decision by majority vote (Rule 16.1). The decision is signed and accompanied by reasons, including any dissenting opinions (Rule 30.2). The contracting State and complainant are notified of the decision (Rule 30.3), which is also made available to the public (Rule 30.5).

If the petition is declared admissible, an exchange of written procedure between the parties takes place. Firstly, the ECSR requests that the contracting State make written submissions on the merits of the complaint (Rule 31.1). That is, whether it has ensured the 'satisfactory application' of one or more specific provisions of the European Social Charter as raised by the complainant. The President then invites the complainant submit a response to these submissions (Rule 31.2). Finally, the President may invite the contracting Party to submit a further response (Rule 31.3). Once the written procedure is closed, no further documents may be submitted unless 'with good reason' (Rule 31.4). Third parties (ie. other contracting States and entitled organisations) may also intervene by submitting comments or observations during the written procedure (Rule 32).

The ECSR may further arrange a hearing to examine the complaint's merits, either on its own initiative or at the request of one of the parties (Rule 33.1 and Article 7.4). The hearings are

usually held in public (Rule 33.3), at which the contracting State, complainant and intervening third parties are invited to attend (Rule 33.2 and 33.4). The Committee then reaches a decision on the merits by majority vote (Rule 16.1). The decision is contained within a report drawn up by the Committee (Article 8.1). The decision is signed and accompanied by reasons, including any dissenting opinions (Rule 35.1). This report is transmitted to the parties involved (Rule 35.2 and Article 8.2), and the CoM (Rule 35.3 and Article 8.2). The CoM may then adopt a resolution concerning the report at one of its sessions. If the ECSR in its decision has found a violation against the contracting State, the CoM may, by two-thirds majority vote, adopt a recommendation addressed to that State (Article 9.1). The ECSR's decision is then made available to the public (Rule 35.4 and Rule 35.5).<sup>64</sup>

The implication of a finding being made against a contracting State, for violation of particular provisions of the European Social Charter, is that the State must present in subsequent national reports to the ECSR (where relevant to the theme of the report) the measures taken to 'bring the situation into conformity' (Rule 36).

A contracting State is obligated to report on its application of Charter rights, accepted at the time of ratification. The 1961 Charter provides that national reports are to be sent to the Secretary General on a two yearly interval (Article 21). However, since October 2007, the Charter provisions have been divided into four thematic groups for reporting purposes: (1) employment training and equal opportunities;<sup>65</sup> (2) health, social security and social protection;<sup>66</sup> (3) labour rights;<sup>67</sup> and (4) children, families and migrants.<sup>68</sup> National reports are provided on an annual basis, rotating between thematic groups. States thereby report on each theme every four years.<sup>69</sup> These reports are also forwarded to representative national organisations, and international organisations of employers and trade unions for comment (Article 23). The ECSR examines the reports, together with the comments made (Article 24). Its role is to reach conclusions on whether the practices of the contracting State are in conformity with the Charter. These conclusions are transmitted to the Parliamentary Assembly, which in turn communicates its views to the CoM (Article 28).

The national reports are also submitted to a Governmental Committee for examination (Article 27.1). The Governmental Committee is comprised of representatives from each contracting State (Article 27.2). Its role is to examine the conclusions of the ECSR regarding non-conformity of the States, on a provision by provision basis. The Governmental Committee may, by two-thirds majority vote, propose to make a recommendation to the contracting State requesting that it bring its practices into conformity with the Charter. If this is not reached, it may nevertheless obtain a two-thirds majority vote to issue a warning that it may propose to make a recommendation

64 The ECSR's decisions on admissibility and the merits, as well as the Committee of Ministers' resolutions and recommendations may be retrieved from the ECSR online database: <http://hudoc.esc.coe.int/esc2008/query.asp?language=en>.

65 Articles 1, 9, 10, 15, 18, 20, 24 and 25.

66 Article 3, 11, 12, 13, 14, 23 and 30.

67 Articles 2, 4, 5, 6, 21, 22, 26, 28 and 29.

68 Articles 7, 8, 16, 17, 19, 27 and 31.

69 Council of Europe, Committee of Ministers, New system for the presentation of reports on the application of the European Social Charter: Proposal of the Governmental Committee, 963<sup>rd</sup> meeting, CM(2006)53, 3 May 2006.

upon next examination (Article 14A, Rules). The Governmental Committee drafts a report which includes any proposed recommendations, which is sent to the Committee of Ministers (Article 27.3). Finally, the CoM may on the basis of the Governmental Committee's report, and by two-thirds majority vote, make any necessary recommendations (Article 29).

Under the revised Charter, the implementation of Charter rights is submitted to the same supervisory process as the original Charter (1996 Charter, Article C).

The ECSR has made a notable contribution to the recognition, understanding and protection of economic and social rights, particularly under the collective complaints mechanism. Where it makes 'decisions' on collective complaints, the ECSR is effectively a quasi-judicial body. The Committee considers live complaints against contracting States, arising from a set of factual circumstances. It receives written submissions from the parties, and conducts public hearings before them when it so chooses. The ECSR interprets and applies the provisions of the Charter, publishing its decisions with reasons (including any dissenting opinions). However, the Committee is comprised not of judicial officers, but rather of elected experts. It lacks the power to order remedies. While an independent body, its findings are nevertheless subject to adoption by the CoM – a political body. A further limitation of its role is its inability to consider complaints lodged by an individual, only by a recognised organisation, trade union or non-governmental organisation.

Regardless, the ECSR's role in developing a body of 'jurisprudence' is of much significance. In the realm of the United Nations, the member States only last year adopted an Optional Protocol which establishes an individual complaints mechanism for economic, social and cultural rights.<sup>70</sup> This is despite the fact that the International Covenant recognising such rights had been adopted many decades ago, in 1966.<sup>71</sup> The Optional Protocol is yet to come into force.<sup>72</sup> This lapse of time is perhaps illustrative of a lack of political will in supporting economic and social rights. To this day, the recognition and justiciability of such rights is disputed by governments<sup>73</sup> and legal academia alike.<sup>74</sup> Thus, the operation of a European collective complaints mechanism since 1998 is all the more commendable. The decisions of the ECSR will increasingly be turned to, as courts give consideration to the protection of economic and social rights where enshrined in national constitutions or bills of rights.<sup>75</sup>

70 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted 10 December 2008, opened for signature 24 September 2009.

71 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entry into force 3 January 1976.

72 It will enter into force when ratified by 10 contracting States.

73 United Kingdom, Joint Committee on Human Rights, *Twenty-Ninth Report* (2008), [147]-[152].

74 See, for example, Martha Jackman, 'What's Wrong with Social and Economic Rights' (1999-2000) 11 *National Journal of Constitutional Law* 235; Gaile McGregor, 'The International Covenant on Social, Economic, and Cultural Rights: Will it Get its Day in Court?' (2002) 28 *Manitoba Law Journal* 321, 331.

75 See, for example, the *Constitution of the Republic of South Africa* 1996 – ss 26 (right to housing) and 27 (right to access to health care, food, water and social security).

## The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The mandate of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is to 'by means of visits, examine the treatment of persons deprived of their liberty, with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment'.<sup>76</sup> The CPT should be distinguished from the Committee Against Torture (CAT) of the Office of the United Nations High Commissioner for Human Rights, which monitors State implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The CPT is made up of members from each contracting State (Article 4.1 and 4.3). Members of the Committee are elected by the CoM, following a nomination process by the contracting States (Article 5.1). They are said to be persons 'of high moral character', and 'known for their competence' in human rights or 'having professional experience' in the prevention of torture and inhuman or degrading treatment or punishment (Article 4.2). The present members of the CPT are lawyers, medical doctors, psychiatrists, psychologists, criminologists, sociologists, political scientists, mathematicians, and a prison chaplain. One of the reasons behind the success of the CPT is that members of this multi-disciplinary committee serve in their individual capacity, and remain independent and impartial (Article 4.4).

Another fundamental reason for the CPT's effectiveness is the largely unrestricted mandate conferred upon it by the Convention. A delegation of the CPT may organise visits to places of detention on either a periodic or ad hoc basis.<sup>77</sup> The CPT need only notify the government of the contracting State of its intention to conduct a visit (Article 8.1). The State is then obliged to provide the CPT with: access to its territory and the right to travel without restriction; full information on the places where persons deprived of liberty are being held; unlimited access to such places, including the right to move inside these places without restriction; and any other available information which is necessary to the Committee, such as medical files (Article 8.2). The CPT may interview detained persons in private (Article 8.3), and communicated freely with any person who can supply relevant information, such as on-duty police officers and non-governmental organisations (Article 8.4). The contracting State may only object to a visit in 'exceptional circumstances', on grounds of national defence, public safety, serious disorder, a medical condition of a person, or an urgent interrogation relating to a serious crime in progress (Article 9).

The CPT's functions have been described as 'unique', and the 'most intrusive of any of the mechanisms available'.<sup>78</sup> They transcend the notion of state sovereignty. Following each visit, the CPT drafts a confidential report which consists of the facts obtained, observations of the contracting State, and the Committee's recommendations (Article 10.1). These recommendations may be directed at the improvement of detention conditions, the detention regime, or the extent of legal safeguards. The reports of the CPT are confidential (Article 11.1), although in reality

76 Article 1, European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

77 Article 7: 'Apart from periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances'.

78 KHRP, *An Ongoing Practice: Torture in Turkey* (2007).

contracting States usually permit the reports' publication. Failure by contracting States to cooperate with the Committee or refuse to improve the situation as recommended may lead to the making of a public statement by the CPT (Article 10.2).

The CPT has on two occasions made public statements about Turkey, arising out of visits there between 1990 and 1992, and in September 1996. In a statement published in December 1992, the CPT concluded that the practice of torture and other severe ill-treatment of criminal suspects and persons held under anti-terrorism provisions remained widespread.<sup>79</sup> In its latter statement of December 1996, the CPT concluded that despite 'some progress', it had 'once again' found 'clear evidence' of the practice of torture and other severe ill-treatment by Turkish police. It castigated the Turkish authorities for 'failing to acknowledge the gravity of the situation'.<sup>80</sup> For a discussion of the CPT's findings on torture practices in Turkey, the authors cite the publication, *An Ongoing Practice: Torture in Turkey* (KHRP 2007).<sup>81</sup>

It is necessary to emphasise that the CPT does not officially deal with individual complaints. Nevertheless, forwarding specific information to the CPT about the inadequate conditions of imprisonment may assist with preventing torture and ill-treatment, in the Committee's role as a preventative and monitoring mechanism. Indeed, the CoE publicly encourages non-governmental organisations to do so. KHRP has for many years been involved in sending information to the CPT on conditions of detention, not least in the case of Abdullah Ocalan. Such information has led to a number of visits by the CPT to visit places of detention in Turkey.

The CPT, over the course of undertaking its reporting obligations, has developed a set of standards relating to the detainment of persons.<sup>82</sup> These standards are not formally enforceable, and again, there is no capacity for dealing with individual complaints. However, the CPT standards are intended by the Committee to provide an indication of its views on assessing such matters. The CPT should be lauded for developing a comprehensive body of standards.

In relation to persons in police custody, the CPT has recognised the following rights as fundamental: the right to have their detention notified to a third party of their choice; the right of access to a lawyer; and the right to request a medical examination by a doctor of their choice.<sup>83</sup> The expected standards for imprisonment include: ready access to proper toilet facilities, and adequate access to shower or bathing facilities;<sup>84</sup> natural light and fresh air, as basic elements of life;<sup>85</sup> to be offered without exception the possibility to undertake daily outdoor exercise;<sup>86</sup> to be able to maintain

79 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Public Statement on Turkey, CPT/Inf (93) 1, 15 December 1992.

80 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Public Statement on Turkey, CPT/Inf (96) 34, 6 December 1996.

81 This publication can be downloaded for free from <http://www.khrp.org>.

82 See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'The CPT standards: 'substantive' sections of the CPT's General Reports' (revised 2006) <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

83 2nd General Report [CPT/Inf (92) 3], para 36.

84 *Ibid*, para 49.

85 11th General Report [CPT/Inf (2001) 16], para 30.

86 2nd General Report, para 48.



contact with the outside world;<sup>87</sup> and owed a duty of care for protection from other prisoner inmates who wish to cause harm.<sup>88</sup> The standards also recognise that solitary confinement, continuous moving of a prisoner from one establishment to another, or prison overcrowding may in certain circumstances amount to inhuman and degrading treatment.<sup>89</sup> With regards to health care, the general principle is that all prisoners possess the fundamental right of an individual to the same level of medical care as persons living in the community at large.<sup>90</sup>

The CPT standards also provide specifically for juveniles and women in detention. For juveniles, they should as a matter of principle be accommodated separately from adults<sup>91</sup> and be detained in centres specifically designed for juveniles, offering regimes tailored to their needs and staffed by suitably-trained personnel.<sup>92</sup> Furthermore, the standards state that: any restrictions on contact with the outside world must never be used as a disciplinary measure,<sup>93</sup> the use of solitary confinement must be regarded as highly exceptional, and should never be used as a punishment;<sup>94</sup> and all forms of physical chastisement must be formally prohibited and avoided in practice.<sup>95</sup> The special requirements of women in detention dictate that their accommodation should as a matter of principle be physically separate from men,<sup>96</sup> and they are owed a duty of care for protection from other prisoners, particularly regarding sexual harassment.<sup>97</sup> Pregnant prisoners should be able to give birth outside of prison,<sup>98</sup> and the physical restraint of pregnant women during gynaecological examinations or birth delivery is recognised as possibly amounting to inhuman and degrading treatment.<sup>99</sup> The welfare of the child must be the governing consideration for female prisoners with babies or young children.<sup>100</sup>

Similar standards on the suitability of accommodation are provided to those in immigration detainment and psychiatric establishments. Most pertinent to persons in immigration detainment is their entitlement to inform a person of their choice of the situation, right to access to a lawyer, and to be expressly informed of their rights and the applicable procedures (without delay and in a language they understand).<sup>101</sup> Moreover, detained persons should be entitled to maintain contact with the outside world, including access to a telephone and visits from relatives and representatives

87 *Ibid*, para 51.

88 11th General Report, para 27.

89 2nd General Report, paras 56-57; 7th General Report [CPT/Inf (97) 10], paras 12-15.

90 3rd General Report [CPT/Inf (93) 12], para 31.

91 9th General Report [CPT/Inf (99) 12], para 25.

92 *Ibid*, para 28.

93 *Ibid*, para 34.

94 *Ibid*, para 35.

95 *Ibid*, para 24.

96 10th General Report [CPT/Inf (2000) 13], para 24.

97 *Ibid*.

98 *Ibid*, para 27.

99 *Ibid*.

100 *Ibid*, para 29.

101 7th General Report, para 30.



of relevant organisations.<sup>102</sup> Any use of force to expulse a foreign national should be no more than is reasonably necessary.<sup>103</sup> As to patients in psychiatric establishments, they should as a matter of principle be placed in a position to give free and informed consent to treatment, based on full, accurate and comprehensible information.<sup>104</sup> They have the right to bring court proceedings challenging the lawfulness of their involuntary detention,<sup>105</sup> and be able to maintain contact with the outside world, including confidential access to a lawyer.<sup>106</sup> Any restraint of agitated or violent patients should be non-physical, but where necessary, be by a method most proportionate to the situation.<sup>107</sup> Finally, solitary confinement or 'seclusion' should never be used as a punishment.<sup>108</sup>

### **The Committee of Ministers: Framework Convention for the Protection of National Minorities**

The CoE's CoM evaluates reports submitted by each Contracting State, on whether it has taken adequate measures to implement the Framework Convention. These reports are received by the Secretary General of the CoE, then made available to the public, and forwarded to the CoM (Article 25.3).

Each of these reports must contain 'full information' on the legislative and other measures undertaken by the Contracting State to implement the Framework Convention (Article 25.1). An initial report must be submitted within one year of the Framework Convention coming into force for the Contracting Party (Article 25.1). Subsequent reports are submitted on a periodic basis (every five years), or where requested by the CoM (Article 25.2).

The CoM is assisted by an Advisory Committee (Article 26), which examines the State reports and prepares its opinions in response. The Advisory Committee is comprised of 18 members (appointed independent and impartial experts). Once the Advisory Committee has prepared its opinion, the CoM may adopt conclusions on the matter and make recommendations to the Contracting Party.

Sources other than the Contracting State, including non-governmental organisations, may submit relevant information to the Advisory Committee. However, the Advisory Committee and CoM cannot specifically deal with individual complaints.

### **The European Commission against Racism and Intolerance (ECRI)**

The European Commission against Racism and Intolerance was established as an independent human rights monitoring body combating racism, xenophobia, anti-Semitism and intolerance in greater Europe. The ECRI is comprised of members from each member State of the CoE (appointed independent and impartial experts). There are currently 45 members on the ECRI.

102 Ibid, para 31.

103 Ibid, para 36.

104 8th General Report, para 41.

105 Ibid, para 52.

106 Ibid, para 54.

107 16th General Report, paras 37-39.

108 8th General Report, para 49.

The ECRI has three main functions: to visit, examine, and report on the situation in each member State, including the proposal of suitable recommendations (country-by-country approach); to work on general themes in combating racism and intolerance, particularly the forming of general policy recommendations addressed to all member States; and to engage in activities with civil society to promote against racism and intolerance.

Non-governmental organisations may actively co-operate with the ECRI by exchanging information relating to its functions, and attending thematic and co-operation meetings. However, the ECRI cannot specifically deal with individual complaints.

### **The Steering Committee for Equality between Women and Men (CDEG)**

The Steering Committee for Equality between Women and Men was established as an intergovernmental body for defending, stimulating and conducting the promotion of equality between the genders. The CDEG is comprised of members from each member State of the CoE (appointed high-level policy or other experts). Its mandate is assigned by the CoE's CoM. The CDEG itself may set up temporary committees of experts or groups of specialists to implement its role.

The CDEG's current main functions include: to promote gender equality standards, mechanisms and policies; to prevent and combat violence against women and trafficking; to promote co-operation between member States; to prepare ministerial conferences on gender equality; and to promote and develop the concept of 'gender mainstreaming'.

A Gender Equality Grouping has been established which consists of international non-governmental organisations (INGOs) with participatory status with the CoE. The Grouping has observer status within the CDEG and is represented at CDEG meetings. However, the CDEG cannot specifically deal with individual complaints.

The list of INGO members of the Gender Equality Grouping may be viewed on the Council website at: <http://www.coe.int/t/e/ngo/public/Membership%20Equality.asp#TopOfPage>.

### **The Group of Experts on Action against Trafficking in Human Beings (GRETA)**

The CoE Convention on Action against Trafficking in Human Beings entered into force on 1 February 2008.<sup>109</sup> The Convention was ratified by Slovenia on 3 September 2009.

The GRETA is a technical body which monitors the implementation of the Convention on Action against Trafficking in Human Beings. It will evaluate each Contracting State on a rounds-basis, in relation to pre-selected provisions of the Convention (Article 38.1). This process will involve the drafting and adoption of reports addressed to each State, containing suggestions and proposals for the Convention's implementation (Article 38.5). The GRETA may organise country visits to

109 For Slovenia the Convention will enter into force on 1 January 2010. The Convention has been ratified by Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, France, Georgia, Latvia, Luxembourg, Malta, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, 'the former Yugoslav Republic of Macedonia' and the United Kingdom. It has also been signed but not yet ratified by another 15 Council of Europe member states: Andorra, Finland, Germany, Greece, Hungary, Iceland, Italy, Ireland, Lithuania, Netherlands, San Marino, Sweden, Switzerland, Turkey and Ukraine.

States to fulfil its role (Article 38.4). The State has an opportunity to submit comments in response, which are published together with the GRETA report (Article 38.5-38.6).

The GRETA will be comprised of ten to 15 members (independent and impartial experts), under Article 36.2. Members will be elected by a Committee of the Parties. The Committee of the Parties is a political body, which shall be comprised of representatives from the CoM. It will adopt certain recommendations addressed to each particular State, on the basis of GRETA's report (Article 38.7). The GRETA will involve civil society by submitting requests for information, including to non-governmental organisations (Article 38.3). The Convention also expressly seeks to encourage and facilitate co-operation between Contracting States and non-governmental organisations (Article 35). However, the Convention does not provide specifically for dealing with individual complaints.

### **The Standing Committee on Transfrontier Television**

The Standing Committee on Transfrontier Television was established as a Convention body for monitoring the implementation of the European Convention on Transfrontier Television. It is comprised of one or more appointed delegates from each Contracting State (Article 20.2).

The Standing Committee's main functions include: to make recommendations on application of the Convention; to facilitate friendly settlement of Convention-related disputes between States; to give opinions on the abuse of rights provided under the Convention; to suggest and examine proposals for modifications of the Convention; and to examine questions on the Convention's interpretation (Article 21.1).

For example, the Standing Committee has expounded that Article 7 (respect the dignity of human beings and fundamental rights) further applies to homophobic and xenophobic television programme content.<sup>110</sup> It has also expressed that Article 4 (freedom of retransmission) may be restricted for the protection of the rights of others, such as in relation to copyright.<sup>111</sup>

The Standing Committee may seek expert advice from non-governmental organisations to fulfil its role, and invite representatives of such organisations to attend its meetings (Article 20.4). However, the Standing Committee does not have competency to deal with requests or complaints lodged by individuals and non-governmental organisations, and the Convention has no direct legal effect on individuals.

The opinions, recommendations and statements adopted by the Standing Committee may be viewed on the Council website at

[http://www.coe.int/t/e/human\\_rights/media/2\\_transfrontier\\_television/T-TT\(2006\)012\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/2_transfrontier_television/T-TT(2006)012_en.asp#TopOfPage).

110 Statement No.1 (2002), On Human Dignity and the Fundamental Rights of Others (Article 7) (adopted by the Standing Committee on Transfrontier Television at its 31st Meeting (12-13 September 2002)).

111 Opinion No. 10 (2006), On Freedom of Retransmission (ARTICLE 4), (adopted by the Standing Committee on Transfrontier Television at its 40th meeting (10-11 April 2006)).

## **The Commissioner for Human Rights**

The Commissioner for Human Rights is an independent, non-judicial institution within the Council. Its mandate involves fostering the observance of human rights and assisting with the implementation of human rights standards, promoting education and awareness, identifying potential shortcomings in law and practice, facilitating the activities of national human rights structures including ombudsman institutions, and providing advice and information.

In carrying out its mandate, the Commissioner co-operates, for example, with the United Nations, European Union, OSCE, and human rights non-governmental organisations. Non-governmental organisations may provide reliable information on individual human rights violations, which inform and provide impetus for the Commission to encourage wider reform in certain aspects of human rights. However, the Commissioner cannot specifically deal with individual complaints.

## **CONCLUSION**

While the European Court of Human Rights has developed an unrivalled standing as the primary European human rights institution, this Article has sought to illustrate the existence of those lesser known human rights bodies of the Council of Europe (CoE). It has demonstrated how these institutions vary greatly in mandate, between adjudicating on human rights complaints to the broader protection and monitoring of human rights.

It was explained in the section on the European Committee of Social Rights that the ECSR has established its ability to act as an effective quasi-judicial body. Its role and practices under the Additional Protocol Providing for a System of Collective Complaints is now similar to that of other international human rights tribunals. However, the Additional Protocol somewhat limits the capacity for development of the ECSR's quasi-judicial role. Being a system of collective complaints, with strict limitations on who can make a complaint, the Additional Protocol does not empower the ECSR with competence to order remedies, merely to declare situations to be incompatible with the Charter. More problematic still is the inherent level of political supervision by the CoM, particularly the fact that the ECSR's decisions are not made public until political supervision is complete. Nonetheless, the ECSR has established itself as the sole European body with the competence to provide authoritative legal interpretations of the Charter both in the reporting and complaints processes.

However, the 'case law' under the Additional Protocol is not well known, and deserves closer examination than it has often received. As social rights receive greater attention both internationally and in national constitutions, the success of the ECSR in developing a coherent jurisprudence of economic and social rights is valuable for understanding how such rights can be interpreted judicially.

As the section on the Committee for the Prevention of Torture has clarified, the CPT cannot and is not designed to provide individual remedies. It is thus of limited utility to provide redress for individual grievances, even if an organisation of sufficient standing can be convinced to lodge a complaint. Any action taken by the contracting State seeking to rectify the situation will almost certainly not be retrospective in effect and will seek only to ensure that the prohibition on torture and inhuman or degrading treatment or punishment is not breached in future, no matter the degree of detriment already suffered by an individual. By contrast, there is the possibility of an

individual remedy under, for example, ECHR and EU law. However, as discussed above, one of the fundamental reasons for the CPT's effectiveness is the largely unrestricted mandate conferred upon it by the European Convention for the Prevention of Torture.

To ensure a better protection of human rights, the effectiveness of most systems providing for petitions or communications on the part of victims of human rights violations clearly needs to be enhanced. This would essentially require that institutions adhering to the treaty be given more recourse regarding their decisions. These aforementioned institutions of the CoE are the Standing Committee on Transfrontier Television, the ECRI, the CoM and GRETA and these institutions are empowered to make recommendations. The contribution that these institutions make to the effective protection of human rights should not be over-emphasised, especially since many member states do not comply with their obligations to submit reports.

Furthermore, these institutions are greatly encumbered by administrative duties, mainly in the form of reports. One can reach the paradoxical conclusion that timely examination of reports is only possible because many States fail to submit them, and therefore the conduct of those states cannot be properly monitored. However, the procedure does serve some useful purposes so much so that it is an important addition to the ECHR (the ECHR does not provide a general monitoring system, it only gives the CoM the task of supervising the execution of the Court's judgment). In playing their monitoring role, these institutions also serve another vital purpose. As demonstrated in the latest section, they can be tasked to examine the state reports, which give them an opportunity to consider those issues within a wider context, after an extensive analysis of practice concerning all member states.

The Commissioner's role is to encourage reforming measures to enable the achievement of tangible improvements in the areas of human rights protection and promotion. Being a non-judicial institution, the Commissioner is able to take more far-reaching measures when confronted with information on human rights violations suffered by individuals, as long as this information is reliable.



Jessica Simor<sup>1</sup>

## Procedural Aspects of Convention Rights<sup>2</sup>

### INTRODUCTION

Article 6 of the Convention is of course entirely procedural, as is Article 5(4). In the context of absolute rights (Articles 2 and 3), procedural rights in the form of investigative obligations have been implied to render those rights 'effective'. In the context of qualified rights, procedural rights, including the right to be involved in decision making that potentially affects one's rights and the right of access to information, have either been implied into the right or have been held to be relevant to an assessment of the legitimacy of the interference.

After looking briefly at procedural aspects of a qualified right: Article 8, this paper will concentrate on the procedural 'investigative' obligations that have been implied by the Court into the absolute rights protected by Articles 2 and 3 and the application of that case law by the domestic courts. It will then consider some recent jurisprudence of the Court in Strasbourg concerning those procedural rights in the context of allegations of racism, which appears to have given rise to procedural obligations within Article 14.

### Article 8 Procedural Rights

The reason for implying a procedural obligation into a Convention right is that it is necessary to do so in order to ensure 'effective' respect for whichever right is at issue. In the context of Article 8, the absence of procedural safeguards has been held to be sufficient in itself to constitute a 'lack of respect' for family, home or private life. In *McMichael v United Kingdom* (1995) 20 EHRR 205 §§91-92, which concerned child custody, the Government argued that while the failure to disclose documents in custody proceedings breached Article 6, there was no separate issue under Article 8. The Court rejected that approach holding that:

Article 6 affords a procedural safeguard, namely the 'right to a court' in the determination of one's 'civil rights and obligations'; whereas not only does the procedural requirement inherent in Article 8 cover administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuing respect for, inter alia, family life. The difference between the purpose pursued by the respective safeguards afforded by Articles 6(1) and 8 may, in the light of the particular circumstances, justify the examination of the same set of facts under both Articles.

Similarly, decisions to take children into care necessarily require procedural protection for the parents' rights if those decisions are not to breach Article 8. This requires not only that the parents' views are taken into account but that the proceedings are conducted expeditiously since delay in determining custody or care proceedings could itself be de facto determinative of the issue. In *W v United Kingdom* (1987) 10 EHRR 29 §§64-65 the Court of Human Rights held:

1 The author is a KHRP legal team member and Barrister at Matrix Chambers.

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...what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8 (art. 8).

Contrary to the Government's submission, the Court considers that in conducting its review in the context of Article 8 (art. 8) it may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings. As the Commission has rightly pointed out, in cases of this kind there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing. And an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.

The right to respect for family life (and the implicit procedural rights involved), were said by Hale LJ in *R (S) v Plymouth City Council* [2002] 1 WLR 583 to add a new dimension to the common law entitlement of access to information in the context of legal proceedings: §48. In that case, C was an adult who was in the guardianship of the local authority under the Mental Health Act 1983. The claimant was C's mother and his nearest relative for the purposes of the Act. In order to decide whether to exercise her power to discharge the guardianship she requested the information and evidence on which the guardianship order had been made. The local authority refused on the ground that the information sought was covered by a common law obligation of confidence and C lacked the capacity to consent to disclosure. Ultimately however:

48...both the common law and the Convention require that a balance be struck between the various interests involved. These are the confidentiality of the information sought; the proper administration of justice; the mother's right of access to legal advice to enable her to decide whether or not to exercise a right which is likely to lead to legal proceedings against her if she does so; the rights of both C and his mother to respect for their family life and adequate involvement in decision-making processes about it; C's right to respect for his private life; and the protection of C's health and welfare. In some cases there might also be an interest in the protection of other people, but that has not been seriously suggested here.

In other cases the existence of procedural safeguards has been held to be relevant to the determination of whether the interference is justified as necessary and proportionate. In *Connors v United Kingdom* No. 66746/01 (2005) 40 EHRR 9 §83/ 92,<sup>3</sup> which concerned the lack of protection afforded to gypsies prior to their eviction, the Court considered that 'the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference

3 The central issue in the case was whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights. The Court held that it did not: §95.



with his rights' such that it could not be 'justified by a 'pressing social need' or proportionate to the legitimate aim being pursued.'

The Court has also held that the existence/absence of procedural safeguards can be relevant to whether the decision is within the State's margin of appreciation. In *Hatton v United Kingdom* No. 36022/97 judgment of 8 July 2003 (airport noise) the Grand Chamber overturned the decision of the Chamber holding that the fact that the Applicants had been able to be involved in a consultation process and could have challenged the subsequent decision, was relevant in assessing whether the State had overstepped its margin of appreciation: §128-129. In *Giacomelli v Italy* App no 59909/00 judgment 2 November 2006, which concerned the grant of licences for a waste treatment plant close to the Applicant's home, the Court stated the following:

83. A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (see *Hatton v UK* [2003] ECHR 36022/97 at para 128). The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, mutatis mutandis, *Guerra v Italy* [1998] ECHR 14967/89 at para 60, and *McGinley and Egan v UK* [1998] ECHR 21825/93 at para 97). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, mutatis mutandis, *Hatton v UK* [2003] ECHR 36022/97 at para 128, and *Taskin v Turkey* [2004] ECHR 46117/99 at paras 118-19).

Failure to grant access to information may also give rise to a violation of Article 8, even where the individual is not seeking that information in order to enforce a civil right, or where no 'civil right' exists. In *Roche v United Kingdom* 32555/96 judgment 19 October 2005, the applicant alleged that he was suffering from the effects of his exposure to toxic chemicals during tests carried out on him at Porton Down barracks in 1962 and 1963. He complained under Articles 8 and 10 of the Convention that he had had inadequate access to information about the tests and, under Article 6 § 1, that he had not had adequate access to a court as a result of the certificate issued by the Secretary of State under section 10 of the Crown Proceedings Act 1947. His primary argument was that the State, in breach of its positive obligation to respect his private and family life, failed to provide him with information about his test participation, which was necessary to allay his fears. The submission that the right of access to information was a free-standing procedural right under Article 8 was based on the Court's judgments in *Gaskin v. the United Kingdom* (1989) 12 EHRR 36, *Guerra and Others v. Italy* (1998) 26 EHRR 357 and *McGinley and Egan* (1998) 27 EHRR 1. In addition, he argued that:

...the procedures and systems surrounding the tests did not fulfil the procedural requirements inherent in respect for private life, so that the Government had failed adequately to secure and respect his Article 8 interests (see *W. v. the United Kingdom*,

judgment of 8 July 1987, Series A no. 121, and *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307 B).

Secondly, he argued that the Government had failed to secure his Article 8 rights in that they had failed to adequately investigate and research (or, alternatively, to put in place an adequate system to investigate and research) the potential risks to which they had chosen to expose him. Just as Articles 2 and 3 implied an investigatory requirement (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324; *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99 ECHR 2002-II; and *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003 V), so a similar obligation arose under Article 8 of the Convention.<sup>4</sup>

The Court did not determine those two latter contentions but re-confirmed its previous jurisprudence that Article 8 included a separate procedural obligation to disclose information where that was necessary to ensure effective respect for private/family life, in addition to any disclosure obligation that might exist in the context of civil proceedings:

165. The Court's judgment in *McGinley and Egan* did not imply that a disclosure procedure linked to litigation could, as a matter of principle, fulfil the positive obligation of disclosure to an individual, such as the present applicant, who has consistently pursued such disclosure independently of any litigation. Consistently with judgments in *Guerra and Others* and *Gaskin* and as the applicant argued, it is an obligation of disclosure (of the nature summarised in paragraph 162 above) not requiring the individual to litigate to obtain it.

That obligation, as described in paragraph 162, is: 'a positive obligation...to provide an 'effective and accessible procedure' enabling the applicant to have access to 'all relevant and appropriate information.' This appears to come close to an investigative obligation.

In the case of *M.C. v Bulgaria* No. 39272/98 judgment 4 March 2004 §51 the Court did hold that Article 8 may include an investigative obligation on the state in certain circumstances:

151. In a number of cases, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I).

152. Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, p. 3164, § 128).

153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

<sup>4</sup> §148.

## The investigative obligation under Articles 2/3

*The reason an investigative obligation has been implied*

The implied investigative obligation in Articles 2 and 3 derives to a large extent from the obligation on the State to ensure that the criminal or disciplinary law enacted to penalise acts or omissions of private individuals (as well as State agents), that cause death or harm above the Article 3 threshold,<sup>5</sup> is enforced effectively. In that regard, Article 2 explicitly requires that the right to life be protected by law. Article 3, whilst containing no such explicit requirement, nevertheless also obliges the state to enact legislation prohibiting such treatment by private individuals: *A v United Kingdom* (1998) 27 EHRR 611; *X and Y v Netherlands* (1985) 8 EHRR 235 (in an Article 8 context); and/or providing for civil remedies in respect of it: *McGlinchey v United Kingdom* Application no. 50390/99 judgment of 29 July 2003 §63 (Article 13 right to non-pecuniary damages). Were no investigations carried out into assaults or killings, there would be little purpose in having offences prohibiting those acts on the statute book; without proper investigations into such offences, the right to life, or the right not to be subject to ill treatment would not be 'effectively' protected by law. Nor in many cases, would the possibility of bringing civil proceedings be effective in the absence of an investigation.

Thus, even where there is no evidence of state agent involvement, the State is under an obligation to investigate deaths or treatment that meets the Article 3 threshold: *Ergi v. Turkey* judgment of 28 July 1998, Reports 1998-IV, p. 1778, § 82; *Yasa v Turkey* (1999) 28 EHRR 18 §100; *R (Gentle) v Prime Minister* [2007] QB 689 at 724 §§77-78 referring to *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461 §38 (and further considered in *R (L) v Home Secretary* [2008] 1 WLR 158 at 177 §§53-55, see also § 31; *Secic v Croatia* App. No. 40116/02 judgment 31 May 2007 (obligation to investigate ill-treatment at hands of private individuals).

The obligation to investigate is therefore a separate procedural obligation ('an obligation of means not result') with a corollary right of individuals to an investigation, implied into Articles 2 and 3 (and 8 – see paragraph 0 above) in order for the State to meet its overarching obligation under Article 1 of the Convention to provide 'effective' protection for those Convention rights to everyone within its jurisdiction.

A distinction can be drawn however, between the type of investigation required when the state is potentially involved or responsible for the death or harm (such that there is an arguable breach of Articles 2/3 by the State) and the type where there is no potential involvement or responsibility, since the objectives in those two contexts will differ. Where the state is potentially involved an investigation must meet the additional objectives of ensuring State accountability and preventing recurrence. Those additional objectives lead to the need for the investigation to (a) be commenced by the State of its own motion, (b) for the investigation to be 'public' (to ensure accountability and secure confidence in the administration of justice); and (c) for the investigation to be independent of the State body/individual potentially involved. Those additional requirements have been held to give rise to what in the domestic courts has been called an 'enhanced' investigation: *R (JL) v Secretary of State for the Home Department* [2007] EWC Civ 767 per Waller LJ.

5 Technically, only the State can 'breach' an individual's rights under Articles 2 or 3 and it is only therefore possible for an 'arguable' breach of Article 2 or 3 to arise where the State is potentially implicated in the death or harm.

*The 'enhanced' investigative obligation under Articles 2 and 3*

In *McCann v United Kingdom* [1995] 21 EHRR 97 (the first case in which a procedural obligation was implied) the Court noted that a general prohibition on arbitrary killing by state agents would be ineffective in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State agents: §161.<sup>6</sup> At paragraph 105 of *Jordan v United Kingdom*, judgment 4 May 2001 the Court explained that:

The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

Lord Bingham in *R (Amin) v Home Secretary* [2004] 1 AC 653 at 672 §31 explained that:

The purposes of such an investigation are clear: to ensure, so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learnt from his death may save the lives of others.

In *K and others v Home Secretary* [2008] EWHC 1598 Mitting J. said that in the context of alleged Article 3 treatment where no death resulted the last sub-sentence of Lord Bingham's statement:

can be rephrased to read: '...and that those how have been ill-treated may at least the satisfaction of knowing that their ill-treatment has been acknowledged, and may save others from ill-treatment in the future.

*An 'enhanced' investigation will always be necessary where the harm occurred in detention.*

Deaths or injuries that take place in detention have been said to fall within a distinct category for the purposes of the state's investigative obligation: *R (Takoushis) v Inner London Coroner* [2006] 1 WLR 461 at 493 § 105. The reason for that distinction is twofold. First, any individual held in detention is necessarily in a 'vulnerable' position vis a vis the State (or its officers). Secondly, the State is obliged under Articles 2 and 3 not only not to subject the individual in its detention to risk of death or ill treatment (the negative obligation) but also to ensure that he/she is not subjected to such treatment by fellow detainees and is moreover, protected from self-harm (the positive obligation). Where there is death or injury in custody, the presumption is therefore that the State bears some responsibility, it having on the face of it failed to protect the individual from harm: see for example *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111, and *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V. There is necessarily therefore, an arguable breach of Articles 2 or 3 wherever someone dies or suffers serious harm in

6 The Court did not go on and decide what such an inquiry required because it was satisfied in that case that the 19 day public inquest, where the Applicants had been represented and able to cross examine and examine the 79 witnesses, including the police and military personnel involved in the planning and conduct of the operation, was sufficient to meet the requirements of a thorough and impartial investigation. The Court noted that the question of whether an entitlement to bring civil proceedings could be inferred into Article 2 was more appropriately examined under Articles 6 and 13, which the Applicants had not invoked: §160.

custody. Since the events that caused the relevant harm in the custody context lie wholly, or in large part, within the exclusive knowledge of the authorities, it is essential that the investigation is independent and open to public scrutiny: *Jordan v United Kingdom*, judgment 4 May 2001 (§§103 and 113); *Salman v Turkey* Application no. 21986/93 judgment Eur. Court H.R. 27 June 2000 (§ 100).

Such an investigation serves the purpose referred to by Lord Bingham in *Amin* of allaying fears that the individual suffered ill-treatment or neglect and preventing its recurrence.

*What is the trigger for the 'enhanced' investigatory obligation?*

The obligation to carry out an 'enhanced' investigation arises wherever there is knowledge of an arguable breach or credible assertion of an arguable breach of Articles 2 or 3. An arguable breach of Articles 2 or 3 by the State may arise where:

- a) An individual may have died at the hands of a state agent, for example in the course of a security operation.
- b) The State may in some way be implicated in the death, despite not having directly killed the individual, for example, the individual dies in custody, such that the question arises as to whether the individual died as a result of a failure of the state authorities to discharge their positive obligation to protect the individual.
- c) An individual is injured or suffers harm in custody, such that the question arises as to whether the State is directly or indirectly responsible.

Whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They 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: *Jordan* §105; *Ilhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63. In *Bati and others v Turkey* No. 33097/96 judgment 3 September 2004 in the context of a complaint under Article 13 regarding an alleged breach of Article 3 (which also includes an investigative obligation), the Court stated:

However, whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used (see, among other authorities, *Özbey v. Turkey* (dec.), no. 31883/96, 8 March 2001; see also the *Istanbul Protocol*, paragraph 100 above). The authorities must take into account the particularly vulnerable situation of victims of torture and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint (see Aksoy, cited above, pp. 2286-87, §§ 97-98).

In the context of death or serious harm in prison, the trigger for an 'enhanced' investigation is that 'it is not plain that the state or its agents can bear no responsibility' *R (JL) v Secretary of State for the Home Department* [2007] EWC Civ 767 §§ 33 per Waller LJ.<sup>7</sup> In that case Waller LJ noted at paragraphs 32-33 that:

<sup>7</sup> The appeal in *J.L* is being heard by the House of Lords from 6 October 2008.

It may well be that where the state is not accountable in that sense e.g. where the allegation is as in the *Osman* case, or in the *Plymouth* case, that the state is in breach of its substantive protective obligation without the starting point of the state being accountable because the deceased was in prison or killed by state agents, arguable case is the right trigger but those are different cases. In the light of the accountability of the state, it makes no sense to allow the state to be the judge as to whether an investigation should commence on the basis of whether there is an arguable case against it before an investigation has been carried out as to what the facts are.

As regards the nature of the investigation it seems to me that a death or near death in custody ipso facto means that the state must commence an investigation by a person independent of those implicated in the facts. The extent to which there must then be some further inquiry in the nature of a public hearing in which the next of kin or the injured person can play a part will depend on the circumstances. In the case of a death there will be an inquest, and the coroner may have to decide whether the circumstances are such as to require something containing all the *Amin* ingredients. In cases of serious injury the nature of the further inquiry necessary will depend on the facts as discovered by the independent investigator. It is at this stage that I would accept something more than the mere fact that the death or serious injury was in custody will dictate the extent of the necessity to hold a full D -type inquiry. But my emphasis is to stress that in my view where the death or suicide or near suicide is in custody the something is not best expressed in the words 'an arguable case', but in the language favoured by the judge 'that the state or its agents potentially bear responsibility' and that in the particular circumstances ascertained by the independent investigator 'it is not plain that the state or its agents can bear no responsibility.

There is an obligation to re-start an investigation even after the close of criminal proceedings in the light of new evidence: *Brecknell v United Kingdom* (2008) EHRR 957.

In the recent case of *K and others v Home Secretary* [2008] EWHC 1598 Mitting J. found that because the complaint (in the form of the letter before action) had not been made until 5 months after the alleged treatment, it was no longer possible any investigation into what happened to the Claimants, who were detainees in Harmondsworth Immigration Removal Centre prior to and during the disturbance of November 28-29 2006, to be effective. This was despite the fact that the Home Secretary had argued that a police investigation could still, as at the date of the hearing, be effective. Mitting J. held that the only way the individuals could obtain knowledge as to what happened would be by taking civil proceedings, although he accepted that the availability of civil proceedings could not discharge the obligation of the state to investigate credible allegations of Article 2/3 treatment. He found there to be no breach in refusing or failing to investigate further but granted permission to appeal.

#### *The requirements of an 'enhanced investigation'*

In order to meeting the additional purposes of ensuring 'accountability' and preventing recurrence 'enhanced' investigation must meet certain standards of independence and 'accessibility': *R (JL) v Home Secretary* [2008] 1 WLR 158 at 161 §2 per Waller LJ. Whilst there is no single method of investigation that must be followed in order to discharge the obligation, the following minimum requirements apply:

- i) the investigation must be independent;
- ii) effective (that is 'thorough');
- iii) prompt; and
- iv) there must be a sufficient element of public scrutiny;
- v) the next of kin must be involved to an appropriate extent:

See *R (Amin) v Home Secretary* [2004] 1 AC 653 at 668 §20 per Lord Bingham; *Jordan v United* (2001) 37 EHRR 52 §§106-109.

The same minimum requirements necessarily apply in relation to an investigation into Article 3 treatment for which the state potentially bears responsibility: *R (Green) v Police Complaints Authority* [2004] 1 WLR 725 §59. This is confirmed by the Court in Strasbourg in the recent case of *Chitayev v Russia* (Application no. 59334/00) judgment 18 January 2007 in which the Court at paragraph 163 stated:

Where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible (see *Assenov and Others*, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102, and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §§ 208-213, 24 February 2005).

Indeed, the only distinction that can possibly be drawn between Articles 2 and 3 is the fact that in the context of an Article 3 investigation, the victim *may* still be alive and so may be better able to explain what he/she believed happened. That cannot be relevant to the existence of any investigative obligation or the scope of that investigation for several obvious reasons. First, where the individual is alive, the objectives of the investigation remain the same: the State must ensure that the right to life and the right not to be subjected to ill-treatment are 'effectively' protected by law, that there is state accountability where relevant and that recurrence is prevented. Secondly, it is incorrect to say that the victim will be alive in Article 3 cases but not in Article 2 cases. A death may result not from any arguable breach of Article 2 by the State but rather from an arguable breach of Article 3: see for example *Keenan v United Kingdom* (2001) 33 EHRR 913 (prison suicide constituted breach of Article 3 not 2); *R (Wright) v Home Secretary* [2001] EWHC Admin 520 (failure to give medical treatment resulting in death was possible breach of 2 or 3). Similarly, there may be an arguable breach of Article 2 even where the individual does not die because the treatment put him/her at serious risk to his life: *R (JL) v Home Secretary* [2008] 1 WLR 158; *R (D) v Home Secretary* [2006] EWCA Civ 143. Thirdly, Articles 2 and 3 are both absolute rights, Article 3 allowing for no derogation. They have equal status under the Convention and it cannot be said that a violation of Article 3 is necessarily less serious than a violation of Article 2.



*The scope/content of the requisite elements of 'an enhanced' investigation*

The obligations of effectiveness, independence, promptitude, public scrutiny and victim/family accessibility have been set out above. There are no strict rules as to what they require in practice; it will differ from case to case. Nevertheless, some broad principles apply.

In order to be effective the investigation must be capable of leading to the identification and punishment of those responsible: *Asenov v Bulgaria* (1998) 28 E.H.R.R. 653 § 102. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible risks falling foul of this standard: *Jordan* §§107 and 115). It must be effective in practice as well as in law and in particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities: *Keenan v United Kingdom* § 122. In that regard, it is incumbent on the State authorities to gather the necessary forensic evidence, get medical reports, carry out ballistic tests if necessary etc: *Dedovskiy v Russia* (Application No. 7178/03), judgment of 15 May 2008 § 87. Failure to do so can render the investigation 'ineffective'.

In order to be prompt and reasonably expeditious it must be commenced as soon as the State has knowledge of the possible breach. The need for expedition is implicit in the requirement that the investigation be 'effective', since evidence will be lost if steps are not taken to collect it as soon as that is possible: *Jordan* §108.

In order for it to meet the requirements of independence, it must be carried out by someone independent of those potentially responsible. There must be a lack of hierarchical or institutional connection, as well as independence in practice: *Jordan v United Kingdom*, (para. 106). In *JL v SSHD* [2007] EWCA Civ 767 §. 57, the Court of Appeal held that an investigation by a former prison governor into an attempted suicide could not have the degree of independence required.

In relation to the obligation that the investigation be open to public scrutiny and that the victim have access to the investigation, the Court of Appeal accepted in *R (D) v Home Secretary* [2006] EWCA Civ 143 that the investigation into an attempted suicide in a prison had to have the following procedural elements:

- a) The inquiry had to be held in public, save where there are Convention compatible reasons to hear the evidence of a particular witness, or other parts of the hearing, in private. This did not mean that the whole process had to be in public, rather, the investigator would make the evidence and any written submissions public and take oral evidence in public. The investigator would of course decide what oral evidence to call and whether to hear oral submissions: §24-25.
- b) The inquiry had to be capable of compelling the attendance of witnesses if this became necessary for the inquiry to be effective, and this power must be capable of being exercised without undue delay: §43-45 and §13.
- c) There was no inherent right on the part of the victim or his representative to cross examine witnesses. The victim must in general be entitled to see written evidence, to be present during oral evidence and to make appropriate submissions, including submissions as to what lines of inquiry should be adopted, what questions asked and indeed, who should be permitted to ask witnesses what: §42.



- d) The victim's representative had to be given reasonable access to all relevant evidence in advance: §46. See also *R (Smith) v Deputy Coroner for Oxfordshire and the Ministry of Defence* [2008] EWHC 694 (Admin) §37.
- e) Adequate funding for the victim's representative had to be made available without inappropriate conditions attached and the funding had to be at such a level as to allow the victim to be involved in the investigative procedure to the extent necessary to satisfy his legitimate interests: §47, see also *Jordan* §§131-132 and *R (Khan) v Secretary of State for Health* [2004] 1 WLR 971 §98. However, see also *R (Green) v Police Complaints Authority* [2004] 1 WLR 725 (no disclosure obligation in respect of witness statements in context of PCA investigation, where a criminal prosecution or disciplinary charge may be brought against the Officer against whom the complaint was made).

#### *Investigations into potential breaches of Articles 2/3 overseas*

Provided the arguable breach of Articles 2 or 3 takes place within the jurisdiction of the United Kingdom, the investigatory obligation will arise. In the recent case of *R (Al-Skeini and others) v Secretary of State for Defence* [2007] 3 WLR 33 the House of Lords held by a majority that those detained on a British military base were within the jurisdiction of the United Kingdom. Accordingly, the United Kingdom was under a positive obligation to carry out an investigation into the death of Mr. Baha Moussa (the sixth Claimant) who had died whilst in detention as a result of brutal beatings by British troops. It might have been said that the Court Martial by which those involved in Mr. Moussa's death were tried was sufficient to meet the investigative obligation implicit in Article 2. However, that trial did not result in a conviction (save for one guilty plea) and did not ultimately find out who was responsible for the death. In the light of the facts of that case, that alone would have been likely to mean that the criminal trial and the preceding investigation did not discharge the investigatory obligation under Article 2: cf. *Bekos and Koutropoulos v Greece* App. No. 15250/02 judgment of 13 December 2005 §53-54; *Oneryildiz v Turkey* (2005) 41 EHRR 20 §§115-116. Moreover, there was no inquest. A public inquiry is going to take place in 2009.

In *R (Gentle) v Prime Minister* [2008] UKHL 20 the House of Lords rejected the claims of two deceased soldiers' mothers that they were entitled to a public inquiry into the legality of the war. Put at its simplest, the majority held that the investigatory obligation under Article 2 would not extend to that question since Article 2 did not prohibit a decision to participate in a war that was not authorised by the United Nations charter.

All British soldiers serving overseas have however, been held to fall within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention, wherever they are based, such that they are entitled to rely on the Human Rights Act 1998 wherever they are based. It follows that if they die or suffer harm as a result of an arguable breach of Articles 2 or 3, there is an obligation to provide an effective ('enhanced') investigation into what happened: *R (Smith) v Deputy Coroner for Oxfordshire and the Ministry of Defence* [2008] EWHC 694 (Admin). The Secretary of State has appealed that decision, which will be heard in March 2009.

### **Article 14 and the Investigatory Obligation under Articles 2 And 3: the Requirement for Special Vigilance where Racism is at Issue**

The Court in Strasbourg has recently produced several judgments in which it has held that the failure to carry out particularly rigorous investigations where the motive for the harm may have been racism gives rise to a violation of Article 14, irrespective of there being any 'comparator'. In the context of racially motivated violence the Court has found that there is an obligation to take different measures in order to meet the objectives of Article 14. In *Cobzaru v Romania* App. No. 48254/99 judgment 26 July 2007 the Court stated that:

88. The Court's case law on art 14 establishes that discrimination means treating differently, without objective and reasonable justification, persons in relevantly similar situations . . . Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby enforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.
89. The court further recalls that when investigating violent incidents, state authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.
90. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of act that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with art 14 of the convention . . . [Emphasis added]

Thus Article 14 of the Convention imposes an 'additional duty' on States when violent incidents are motivated by racism. This applies equally to violent incidents by non-state agents. In *Secic v Croatia* App. No. 40116/02 judgment 31 May 2007, the allegation was that the applicant, who was of Roma origin, was attacked and severely injured in an apparently racist attack, in which no state agent was alleged to be involved. Addressing the procedural obligation under Article 3, read in conjunction with Article 14, the Court stated:

66. The court recalls that when investigating violent incidents, state authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficulty in practice. The respondent state's obligation to investigate possible racist overtones is an obligation to use best endeavours and not absolute; the authorities must do what is reasonable in the circumstances of the case (see *Nachova v Bulgaria* (2005) 19 BHRC 1 at para 160).

67. The court considers the foregoing necessarily true in cases where the treatment contrary to art 3 of the Convention was inflicted by private individuals. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with art 14 of the Convention.

## CONCLUSION

What precisely that case law means for discrimination generally under Article 14 is unclear. It may be that the case law can be read to accord with the duty under section 71 of the Race Relations Act 1976 (as amended), which requires public bodies (specified in Schedule 1A) in carrying out their functions to have regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups. This is described as 'the General Duty' and is a duty to take steps to 'promote equality'.<sup>8</sup> However, it appears to go much further than this. The expressions of the Court suggest that Article 14 requires a more rigorous investigation of racially motivated crimes (causing loss of life or harm above the Article 3 threshold) than non-racially motivated crimes, whether carried out by the State or private individuals. While it is understandable that the Court should read into Article 14 a positive obligation to take steps to prevent or deal with discrimination, it is more difficult to see how for example, a police force could justify taking less rigorous steps in a murder investigation where there was no potential racial motive for the crime than those taken in a case where there was such a potential motive.

8 See Karon Monaghan's paper for ALBA summer conference 26 July 2008.



Sezgin Tanrikulu<sup>1</sup>

## Democratic Opening: Law and Justice in the Kurdish Issue<sup>2</sup>

### Abstract

*Turkey has been grappling with the Kurdish issue since the foundation of the Republic three-quarters of a century ago. Turkey's relationship with its Kurdish population has sadly been one marred by armed conflict over the last 25 years, and yet efforts at a resolution have focused almost exclusively on public order-oriented policies. Far from providing solutions to the issue, however, such policies have further complicated the matter. When it was understood that the Kurdish issue could not be resolved merely through a security oriented approach, the Government embarked on a process to find alternative solutions. The efficacy of the Government's policy -referred to initially as the 'Kurdish Opening' and later as the 'Democratic Opening' - is assessed in this Article. It is argued that this policy is a valuable and significant one as it has launched a debate on the legal, freedom and justice dimension of the issue among wide segments of society.*

*The Article explores the dual dimensions to any potential solution to the Kurdish issue: democracy and justice. It is argued that all efforts to seek a solution should aim at reinforcing democracy and providing justice for all. In order to reinforce democracy and eliminate injustices, however, there are issues of priority to be addresses on both constitutional and legal platforms.*

### CONSTITUTIONAL PRIORITIES IN THE KURDISH ISSUE

The Kurdish issue stems, above all, from the deprivation of Kurds' fundamental, democratic rights. If the Kurdish issue has resulted from a lack of democracy, any resolution must ensure that democracy is instilled within all institutions and values. In this respect, it is evident that a new constitution, which takes equality and freedom as a basis, prioritises a democratic approach, upholds the rule of law for all and accepts different cultures, would largely facilitate a solution. A new constitution such as this, incorporating cultural rights including education in the mother tongue, citizenship, political participation and local administrations would undoubtedly pave the way for a settlement for Kurds in Turkey.

An analysis of Kurdish demands in Turkey reveals three main, important demands at the constitutional level: firstly, a constitutional recognition and safeguarding of education in the Kurdish mother tongue, secondly, an amendment to the definition of citizenship based on the 'Turkish' ethnic identity and its replacement with a concept giving equal recognition to all ethnic identities in Turkey, and finally, the empowerment of local administrations. To meet these demands, there is need for a framework for settlement that takes democracy as a basis.

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Such a settlement framework needs to be based on five core principles: (1) rejection of ethnic partiality, (2) recognition of cultural diversity, (3) cultural rights, (4) administrative decentralisation, and (5) strengthening of democratic participation.<sup>3</sup> Only a constitution that is built on the understanding of a constitutional citizenship can respond to the settlement framework.

In constitutional citizenship, it is not any ethnic or religious value that ensures the citizens' allegiance to the State, but the democratic and civil rights that are enshrined in the constitution. Hence, starting from its preamble, a constitution upholding constitutional citizenship should be purged of all Articles making reference to ethnicity and identity, and instead, contain a respect for different cultures in the society, embedded in every line of the constitution.

### **Preamble**

Constitutions represent, as a whole, a wide series of political values and ideals. These values, which stand as an expression of national ideals, are usually enshrined in the preambles of constitutions. Depending on the political regime of a country, such ideals may vary from the enforcement of democracy, freedom or a welfare state; to socialism, federalism or a religious faith.<sup>4</sup> The preamble of a Constitution upholding constitutional citizenship should remain committed to excluding national ethnic or religious references, and instead should contain expressions that recognise, protect and safeguard the multi-cultural aspect of the society.

### **Citizenship**

In the constitutions of the Turkish Republic, citizenship has been drafted in a nationalist perspective that does not reconcile with the pluralistic structure of the society. The definition of citizenship takes as a basis the expression 'Turk' which is an ethnic identity and 'excludes' various segments of the society rather than being 'inclusive'. Today, this understanding of citizenship constitutes one of the biggest obstacles to social stability. Therefore, a constitution targeting the peaceful co-habitation of individuals forming the society should foresee - above all - an alteration of this citizenship understanding and should regulate a constitutional citizenship.

Constitutional citizenship has two fundamental characteristics: firstly, it forbids public authorities from pursuing either explicitly or implicitly policies that wipe out differences and assimilate them. In this approach, citizenship is not construed as an instrument homogenizing the society; on the contrary, it becomes a protective shield that legally safeguards differences. In that respect, it lays the foundations of democratic politics, paving the way for the constitutional safeguarding of civil and political rights of individuals, the recognition of their rights relating to their identities, and a democratic debate of their internal problems without resorting to violence.

The second characteristic of constitutional citizenship is that the definition of citizenship be free from all forms of ethnic, religious or cultural connotations. In constitutional citizenship, citizenship is not attributed to any ethnic, religious or cultural identity and as a natural outcome of this situation; it does not privilege someone/some people over the other/others in a pluralistic society where there are differences. In this understanding, the constitution contains pluralistic

3 Mustafa Erdoğan, A framework for a Democratic Solution, Star Daily, 29.08.2009.

4 Andrew Heywood, Politics, Liberte Publications, 2006, p. 427-428.

values and stands at an equal distance to the groups forming the society; thus, all differences are safeguarded in the constitution and the path is cleared for them to sustain and develop their existence.<sup>5</sup>

The definition of ‘Constitutional Citizenship’ does not necessarily need to indicate in the constitution who a citizen is. Instead, it can state that constitutional citizenship is a right and the acquisition or forfeiture of this right will be regulated in a code, that no one can be arbitrarily deprived of citizenship, and that citizens cannot be deported or prohibited from entering the country. The particular Article concerning citizenship can be regulated in this manner:

Citizenship is a fundamental right. No religious, linguistic, racial, ethnic or similar other discrimination shall be made in the holding, exercise and forfeiture of this right. The principles governing the acquisition of citizenship right shall be regulated in a code.<sup>6</sup>

### **Cultural Diversity and Cultural Values**

It is imperative that cultural diversity is recognised, first of all, in the preamble of the constitution. Contemporary constitutions contain provisions on this matter. Examples include Article 22 of the new Charter of Fundamental Rights of the European Union which mandates that the ‘Union shall respect cultural, religious and linguistic diversity’, and Article 27 of the Canadian Rights and Freedoms Charter which states the following: ‘The Charter shall be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of the Canadians’. However, the recognition of cultural diversity in the constitution is not sufficient per se. In addition, cultural rights should also be safeguarded.<sup>7</sup>

Foremost among those cultural rights, is the right to education in one’s mother tongue. A democratic constitution should state explicitly and without room for any hesitation that everyone is entitled to the right to education in their mother tongue. This right should apply to the entire education cycle.

Political participation can be made possible by opening democratic mechanisms for the use of all and by abolishing the structures that undermine the decision-making process.

Although the current constitution enshrines the principle of ‘justice in representation’, it triggers a serious problem of representation in the country as a whole, and in the densely Kurdish populated areas in particular, due to the existing 10 per cent election threshold. If the voters of a political party that has garnered millions of votes cannot send a representative to parliament due to the election threshold, then they will feel aggrieved and not be represented in the system. When faced with the reality that they are not being represented by the persons for whom they voted and by whom they wanted their demands to be conveyed to the parliament, they will no longer trust the problem-solving function of politics and will lose confidence. In the long term this, corrodes

5 Çoşkun, *Constitutional Citizenship*, p.146.

6 Çoşkun, *Constitutional Citizenship*, p. 151.

7 Erdoğan, a.g.m.

the democratic structure.<sup>8</sup> For this reason, lifting of the election threshold is the best option for democratic political participation.

### **Empowerment of Local Administrations**

Turkey is one of the most centralised countries of the world. This strictly centralised structure has turned the current relationship between the central government and local administrations into a relationship based on inequality and dependence that functions to the disadvantage of local administrations. Such a relationship prevents, on the one hand, the rendering of public services to the local people in an appropriate manner and obstructs the communication of local people's demands to the central authority, on the other. As a result, people feel that democracy is being fully disregarded, consequently; they have less confidence in the state/government and their sense of belonging is weakened. Turkey needs a much more decentralised and democratic administrative structure in order to redress such weaknesses. This condition can also be met by devolution of enhanced powers to local administrations in the field of law enforcement, health and education and by equipping them with increased financial resources. The constitutional proposal adopted and made public by the Board of the Turkish Union of Bar Associations advocates, with strong justifications, that there should be a regional administration in the administrative structure of Turkey.<sup>9</sup> It is widely accepted that legally and financially empowered local/regional administrations can also contribute to the strengthening of democracy as they will create further alternatives for the solution of people's problems at local level and within democratic processes.

If a new constitution contains provisions that recognise and safeguard differences according to the principle of constitutional citizenship alongside environmental, economic, social rights and etc., then Turkey will have achieved important progress in the settlement of the Kurdish issue.

### **REALITY AND JUSTICE IN THE KURDISH ISSUE:**

The institutions and rules that emerged with the 12 September 1980 military coup and after 1984, the year in which armed clashes began, led to unprecedented injustice in the Kurdish issue beyond the current injustices. The actions to be taken so as to remedy these injustices can be summarised under the below headings:

#### **The System of Temporary Village Guards**

The system has been put in place by amending Article 74 of the Village Code No: 442 through Code No: 3715 dated 26.03.1985; with the aim of ensuring life and property security of citizens residing in areas that are not easily accessible by the security forces or where security forces fail to provide sufficient physical protection.

According to the paragraph added to Article 74 of the said code through Article 1 of Code No: 3175 dated 26.03.1985: 'If there are serious indications of circumstances requiring state of emergency or acts of violence in villages or their surrounding, or if attacks on villagers' life and property

8 For the problems stemming from the 10 per cent threshold pls see Vahap Coşkun; *The Barrier to Democratic Demands*:10 per cent, Mavi terazi, Issue 3, January-February 2007.

9 The Constitution proposal of the Turkish Union of Bar Associations, II. Edition. 2001, TBB publications No:14. p. 79-80.



increases, then temporary village guards may be employed in provinces to be determined by the CoM, upon the proposal of the Governor and the approval of the Minister of Interior.<sup>7</sup>

Temporary Village Guard System began to be implemented in 1985 in the Eastern and South-eastern Anatolia region under the Cabinet decision dated 27 June 1985 and no. 9632. Under the scope of the Temporary Village Guard System which currently applies to 22 provinces, there are in total 58,511 temporary village guards with 5274 village guards in Diyarbakır, 6835 in Şırnak, 2943 in Batman, 2533 in Bingöl, 3.796 in Bitlis, 3360 in Mardin, 1918 in Muş, 4.680 in Siirt, 7365 in Van, 7643 in Hakkari, 386 in Tunceli, 1510 in Adıyaman, 1881 in Ağrı, 96 in Ardahan, 2115 in Elazığ, 565 in Gaziantep, 374 in Iğdır, 2267 in Kahramanmaraş, 578 in Kars, 34 in Kilis, 1392 in Malatya, 966 in Şanlıurfa.<sup>10</sup> This number reached 71,907 by 20 March 2009.<sup>11</sup>

The offences committed by the village guards and the number of those who were dismissed due to those offences amount to several thousands.<sup>12</sup> Finally, the acts which happened in Zangırt (Bilge) village and which amounted to massacre, appalling the entire society, have been perpetrated by village guards and the weapons used are those allotted for them. It is unimpeachable that such security services be provided by the actual civil servants of the State in states governed by the rule of law. The system must be disbanded through legislative amendment.

### Ownership of Property

In this mainframe, one of the areas which is subject of extensive violations is far-reaching interventions in the right to ownership of property associated with the evacuated settlements. According to a report drafted in 1997 by an investigation committee of the TGNA, the number of settlements evacuated and ravaged in the region (villages, hamlets, and farms) is about 3428. Similarly, it has been found out that at least two million people have been subject to forced migration in these settlements and conflict zones.<sup>13</sup>

Turkey displayed its will for integration to the EU through the 'National Program' penned as part of the Accession Partnership (AP) endorsed by the European Council; in this mainframe, 'National Program for the Adoption of the European Union *Acquis*' adopted through the Cabinet decision dated 19 March 2001 and no. 2001/2129 was published in the Official Gazette of 24 March 2001 and became effective.

10 For further information, see M. Sezgin Tanrıku - Serdar Yavuz, İnsan Hakları Açısından Olağanüstü Hal'in Bilânçosu, Sosyal Bilimler Araştırma Dergisi, (The Toll of State of Emergency as regards Human Rights, Journal of Social Sciences Studies) September 2005, Issue 6, Page 493-521.

11 The response dated 20.03.2009 and no. 532.02-294 of the Interior Ministry to the parliamentary question.

12 According to the 'Special Report on the Human Rights Violations by Village Guards during the period January 1999 - March 2009' dated 08.05.2009 of HRA, temporary village guards have committed in total 1613 human rights violations during the period January 1999 - March 2009, among which 38 acts of burning villages, 14 acts of village evacuation, 12 acts of harassment and rape, 22 acts of kidnapping, 294 armed assaults, 183 killings, 259 acts of causing injury, 2 people missing, 50 executions, 70 extortions, 562 acts of torture and maltreatment, 59 acts of custody, 9 acts of causing suicide, 17 acts of burning down woods.

13 The report drafted by the TGNA 'Committee for Investigating the Migration Problem and Evacuated Villages in the South-East' and submitted to the Presidency of the Parliament on 15.01.1998.

Turkey displayed its will – in its National program - for introducing a legislative amendment for compensating damages arising from counter-terrorism and thereby remedying the unjust treatments which occurred, and pledged to put this amendment into practise in 2004 in the National Program.

For this purpose, TGNA adopted, on 11 July 2004, the Code no. 5233 on Compensation of Damages Resulting from the Terror and Fight against Terror and this Code entered into force after being published in the Official Gazette dated 27 July 2004<sup>14</sup>. After the duration for application of the provisional Article 1 of the Code expired on 25 July 2005, the Code no. 5442 was adopted on 28 December 2005 and deadline for filing application was extended until 3 January 2007.<sup>15</sup>

The Code no. 5666<sup>16</sup> which was adopted after the termination of this period extended the period for filing applications for another 1 year as from 30 May 2007, which is the date of entry into force of this code<sup>17</sup>. Through the Cabinet decision no. 2009/15347, the period for processing the applications filed under the Code was extended for one year as from the expiry of the periods extended through the Cabinet Decision dated 14 July 2008 and no. 2008/13935.<sup>18</sup>

The failure to finalise the outcomes of the applications despite five years having past after the date the Code became effective indicates, on its own, that the compensatory nature of the Code has declined. For this reason, a new adjustment should be made to extend compensation in cash and in kind including pecuniary damages.

The past quarter of a century in Turkey became stage to thousands of violations of rights which could be alternately considered as crime against humanity. One of the grave traumas sustained in this context is murders with unknown assailants and missing persons. Three organs of the State have displayed differing attitudes towards these rights violations. The legislature set up investigation committees on different dates. These committees cited, in their reports, important findings and valuable proposals for measures to be taken for settlement. Governments have mostly protected institutions and individuals who committed these violations of rights instead of taking measures required for preventing violations; thereby they shared the responsibility of commission of violations as a policy. Judicial bodies, on the other hand, have deemed it adequate to conduct post-mortem, issue decisions of non-competence, non-prosecution and to drop cases filed due to statute of limitation.<sup>19</sup> In the Public Prosecutors' Offices, there are still thousands of investigation files pending the apprehension of the perpetrators.

14 Official Gazette; dated 27.07.2004 and No.25535.

15 Official Gazette; dated 03.01.2006 and No.26042.

16 Official Gazette; dated 30.05.2007 and No.26537.

17 For further information, see İç Hukuk Yollarının Tüketilmesi Kuralı ve İHAS'ın 13. Maddesi Bağlamında 'Etkili Başvuru Hakkı' Çerçevesinde Türkiye'de 5233 sayılı Yasa Uyarınca Oluşturulan Zarar Tespit Komisyonlarının Hukuki Yapısı, Hukuk ve Adalet Eleştirel Hukuk Dergisi, (The rule of exhaustion of domestic remedies and the legal structure of the Committees for Determination of Damages set up in Turkey under the Code 5233 in the mainframe of 'Right to Effective Appeals' in connection with Article 13 of ECHR, Journal of Critical Law, Year 4, Issue 19, Spring 2007, p.233-261).

18 Official Gazette; dated 03.09.2009 and No.27338.

19 <sup>17</sup> Lawyer M. Sezgin Tanrikulu, Devlet Kayıtlarında JİTEM- Ergenekon (Yasama - Yürütme - Yargı), Gencil Hukuk, (JİTEM - Ergenekon in State registers (Legislative - Executive - Judiciary), Journal of Current Law - March-2009, Issue: 3/63.

Another difficulty is having access to evidence in connection with murders with unknown assailants and people missing. Accused people frequently wait for the statute of limitation foreseen in the Code to expire before they make themselves known.<sup>20</sup>

Criticism has been expressed regarding the exemption applicable for certain offences committed abroad and crime of genocide cited in Article 76 of the TPC as it does not equally apply to crimes committed at home.<sup>21</sup>

The problem is either the failure to identify perpetrators or the failure to arrest the perpetrators once they have been identified. Concerning this problem related to the statute of limitation in court cases, a step must be taken to add an Article of exception in statute of limitation to the Article 66 of the TPC no. 5237 governing the statute of limitation in court cases. Indeed, files of murders with unknown assailants and of missing people committed before 1 June 2005 will be subject to a statute of limitation within 15 years as per Article 102/2 of the Turkish Penal Code no. 765, and files of those committed after the date of entry into force of the TPC no. 5237 within 25 years as per Article 66/1-6 of the said Code.

### **Truth Commissions**

Truth commissions are defined as bodies established in order to investigate the gross violations of human rights committed by the army or other state powers or armed opposition organisations in a given country. Truth commissions are typically established during a transitional period in a society. National truth commissions are established and supported mostly by the executive body and rarely by the legislature of the state<sup>22</sup>. If the incidents sustained are considered from this point of view, the conflict aspect of the issue which led to a devastation-trauma which approaches to the extent of an internal conflict can be thoroughly handled only along with truth commissions independently from/in connection with this issue. Before any legislative amendment, given that parliamentary investigation committees set up under Article 98/2 of the Constitution are assigned solely with conducting inquiries into a certain issue, TGNA should take a position to establish commissions which will be composed of experts from within and outside the legislative organ and which will be solely in charge of investigating and unveiling the truth as well as submitting proposals to render justice.

### **Diyarbakır Prison**

Diyarbakır prison became the symbol of persecution after 1980. Although this persecution culminated in the torture of thousands and the deaths of dozens of prisoners between 1980 and 1984, this prison has always been gruesome in terms of violations of human rights. As such, it has been cited among the worst prisons in the world. The judiciary has not yet shed light on the incidents of death of 10 prisoners and grave injuries sustained by 23 prisoners on 24 September

20 One of the latest similar examples is the arrival of Mehmet Şener, one of the people accused of Abdi İpekçi murder, to Turkey after 30 years. 'Karanlıkta Kalan Sorular', Belma Akçura, Milliyet, 19.08.2009.

21 Artuk-Gökçen-Yeni Dünya, TCK Şerhi, Issue 2, Page 1722, Turhan Publishing House, Ankara, 2009.

22 For further information see Prof. Dr. Mithat Sancar, Geçmişle Hesaplaşma (Settling with the Past), İletişim Publications, 1st Edition, 2007.

1996. It has been noted by different segments of society that the incidents which occurred in that prison caused the onset of armed conflict process which is still going on.

Among the first compensatory steps to be taken instilling a new democratic process is doubtlessly putting an end to the gross violations perpetrated at Diyarbakır prison. By taking onboard the calls in this direction, Diyarbakır prison should be turned into a human rights museum to house many functions under its roof.<sup>23</sup>

### **Legislative Amendment Concerning Political Crimes**

Another step that should be taken along with the democratic opening is a legislative amendment concerning political crimes and for peace and reconciliation in way to span ongoing trials and finalised convictions as well. The practises have clearly shown that amendments dubbed as codes of 'repentance' and implemented so far did not contribute to the settlement of the problem. The provision governing 'effective repentance' cited in Article 221 of the TPC no. 5237 falls short of the requirements of a durable settlement. As the word 'amnesty' is not a concept to unblock this process, a legislative amendment to be called 'the Code for Equal and Free Participation in Political and Social Life' - which will remove all the consequences of political crimes - should be taken up at the end of this process, which may take another a few years.<sup>24</sup>

### **Children's Trial**

The trial of children, who are arrested, detained and punished on charges of attending meetings and demonstrations, causes deep fractures in the society as a whole and these unjust practises are widely questioned by the public. The first step to address this situation should be to propose solutions outside of the criminal justice system. The practises of subjecting children to the trial system are almost irrevocable. The action which should be initially taken before other amendments is to ensure that the bill which was submitted to the TGNA presidency and which foresees amending Articles 9 and 13 of the Anti-Terror Code becomes a code.<sup>25</sup>

## **LEGISLATIVE PRIORITIES IN THE KURDISH ISSUE**

In addition to mechanisms and arrangements to remedy grievances, legislative arrangements that will contribute in the settlement of the issue should also be taken up as a priority.

### **Freedom of Expression**

The decisions of the judiciary have very clearly manifested the impacts of negative amendments on freedom of expression introduced to TPC no: 5237 that was put into effect on 1 June 2005. The Diyarbakır Bar has stated, prior to the adoption of TPC, that Articles 215, 216, 220/8, 288, 301 and 305 should not be adopted in their current versions. The Diyarbakır Bar has expressed the following view:

23 Diyarbakır'a İnsan Hakları Müzesi (Human Rights Museum for Diyarbakır), Diyarbakır Cezaevi Gerçekleri Araştırma ve Adalet Komisyonu (Commission for Diyarbakır Prison, Investigating the Truth and Justice), Radikal İki, 13.09.2009, No: 674.

24 Attorney.M.Sezgin Tanrıku, 'Türkiye Modelini Arıyor' (Turkey Searching for Its Model), series of Articles Milliyet, 06.08.2009.

25 Bill amending the Anti-Terror Code introduced on 12.02.2009.

The draft bearing an ambiguous and abstract content, does not introduce any novelties to freedom of expression; it is in favour of a system that restricts freedom of thought and expression, attempts to recast political and societal opposition into a narrow frame and abolishes the pluralism principle of democracy; the current version of the draft sanctifies authority; it would pave the way for an atmosphere prone to subjective assessments of enforcement bodies for the definition of crime has not been made clearly which would evidently yield new problems in terms of freedom of thought-expression.<sup>26</sup>

Although TPC Article 301 - which led to trials and sentences regarding freedom of expression that were also reflected to the public opinion - have been later amended,<sup>27</sup> the real problems with regards to the Kurdish issue stem from the abovementioned arrangements in the TPC in addition to Article 301 and the restricting arrangements in Article 7/2.

Freedom of expression should have priority in terms of the legislative arrangements of democratic opening because there are hundreds of sentences still being executed, as well as judicial decisions waiting to be upheld and trials still ongoing. Full freedom of expression is one of the major problems in the discussions on the settlement of the issue. Therefore in the context of a democratic opening the priority action to be taken should be the reform of freedom of expression putting forward the consequences of the current implementation.

### **Names in Kurdish**

The following second sentence in paragraph four of Article 16 of the Population Act of 05.05.1972 with no: 1587 states:

However names which offend the public opinion or do not represent the national culture, moral values, traditions and customs may not be given. The born child shall bear his father's surname whereas if the child is born out of wedlock he shall bear his mother's surname.' was amended through Article 5 of the 'Law Amending Several Laws' with no: 4928 put into effect following its publication in the Official Gazette of 19.07.2003 with no: 25173, to read as follows; 'However names which offend the public opinion or do not represent moral values may not be given. The born child shall bear his father's surname whereas if the child is born out of wedlock he shall bear his mother's surname.

The Population Act no: 1587 was repealed through Article 71 of The Population Services Law no: 5490 published in the Official Gazette of 29.04.2006 with no: 26153. The abovementioned provision was not included in the Law no: 5490. Therefore there is no prohibition in the legislation currently in effect regarding the choice of names.

However it is widely known that the names of thousands of people have not yet been recorded, and that their names known to their neighbourhood and those officially registered are different. Doubtless it is possible to launch a lawsuit to change the name however finding a solution without the need for the citizens to deal with the judiciary should be one of the priorities of a democratic opening. Therefore a legislative amendment in the form of an additional provision to the Population Law should be introduced in order to facilitate those who are, for any reason, not

26 <sup>24</sup> Press release of Diyarbakır Bar dated 20.11. 2006 with no: 2006/1226.

27 <sup>25</sup> Official Gazette; Date: 08.08.2008, No: 26870.

able to use the names they want, to apply to directorates of birth registry, and change and register their names.

### **Surname Act**

The way the Surname Act has been drafted is also problematic.<sup>28</sup>

Taking into consideration the fact that it is not possible to take new surnames except for those recently admitted to citizenship, the problem is mostly observed in changing surnames through judicial bodies. According to the legislation currently in effect, any individual can apply to the Courts in order to change his/her surname into a Turkish-origin name without any legal problems. Whereas the demands of individuals who apply to the Courts in order to use a surname with a non-Turkish origin which does not bear any meaning contrary to public order, are rejected. Thus individuals with same legal status may be subjected to different procedures. The application of a Syriac citizen who applied to Midyat Court of First Instance in order to change his surname was found worth examination and the plea was taken to the Constitutional Court which ruled to take up the claim of 'constitutional violation' on the merits of the case<sup>29</sup>.

In the premises, a new arrangement should be introduced in order to delete the phrase 'foreign names of races and nations' in Article 3 of the Surname Act no: 2525, regardless of the final decision of the Constitutional Court.

### **Names of Villages**

As a result of the amendment of Article 1 of the Law of 11.05.1959 with no: 7267 the following phrase has been added to the 2nd sub-paragraph under paragraph 'd' of Article 2 of Provincial Administration Law no: 5442 put into effect following its promulgation in the official gazette of 18.06.1949 with no: 7236 which regulates the changing of non-Turkish names of villages: 'However; non-Turkish names which lead to ambiguity shall be changed as soon as possible by the Ministry of Interior following the consent of the relevant Provincial Standing Committee'. Pursuant to this provision names of thousands of settlement units were changed in the last fifty years. Names are one important symbols of cultural heritage and cultural difference. In a democratic state governed by the rule of law these differences should be respected and preserved.

Respecting these differences, Diyarbakır Provincial Council had taken a decision to use the names of districts in Diyarbakır together with their previous names that were changed, however this decision had been delivered to judicial bodies upon objection of Diyarbakır Governorate. The Council of State agreed that the Provincial Council was not entitled to decide on this matter and thus upheld the decision of Diyarbakır Administrative Court which ruled to cancel the Council's decision<sup>30</sup>. With respect to this problem, Article 2 of the Law no. 5442 should be amended. It should be ensured that the names of settlement units and other geographical locations changed

28 Official Gazette; Date: 02.07.1934, No: 2741.

29 Application of Midyat Court of First Instance regarding objection through plea dated 10.06.2009 with no: 2009/71, is being discussed on the merits of the case on the basis of the Constitutional Court's file with case no. 2009/47.

30 Judgment of 8<sup>th</sup> Chamber of Council of State, dated 10.06.2009 with case no. 2007/8635 decision no.2009/4200.

after the adoption of law of 11.05.1959 with no: 7267 are used without the need for any specific demands.

### **The Letter Problem**

Article 2 of the 'Law on the Adoption and Application of Turkish Letters' with no: 1353 which regulates that it is imperative to adopt and process writings in Turkish letters in companies, societies and private organisations, and Article 4 of the same which regulates that newspapers, journals and books should be written and published in Turkish letters, are still in effect.<sup>31</sup>

Moreover, although the Law does not stipulate any sanctions, Article 222 of TPC with no: 5237 foresees a penal sanction for any practices contrary to this law. It is a known fact that many lawsuits have been launched with respect to this provision some of which are still ongoing.<sup>32</sup>

Adding sounds that do not exist in Turkish into the Turkish alphabet is not the right action to be taken. Instead, the arrangements which prohibit the application of letters representing the letters which do not exist in Turkish should be abolished.<sup>33</sup>

### **'Kurdology Institute' and 'Department of Kurdish Language and Literature'**

Establishment of Kurdology Institutes and Departments of Kurdish language and Literature at universities have been once again delivered to the agenda with the democratic opening in connection with the Kurdish issue.

There are Institutes and Departments on various societies and their languages from Far Eastern to Western countries at the universities. In most of the countries where Kurds live, other than Turkey, such institutions are available and for the Kurds living in Federal State of Iraq a senior level of institutionalisation and training opportunities have been provided. In a democratic Turkey these institutions would contribute to the development of a pluralistic democratic culture and societal peace. Integration of the Kurds into a pluralistic democratic culture would be possible through the active operation of such institutions.

If preparations are launched for the establishment of Kurdology Institutes and Departments of Kurdish language and Literature, common misunderstandings of the Kurdish peoples in Turkey would largely be eliminated. Studies on Kurdish language, history, literature, ethnography and in general Kurdish culture and sociological heritage would not only contribute to developing a better

31 Article 2 of the 'Law on the Adoption and Application of Turkish Letters' with no: 1353 published in the Official Gazette of 03.11.1928 with no: 1030: 'Communication of any kind in all governmental offices and institutions and companies, associations and private communities shall be with Turkish letters'. Article 4: 'Applications written in Arabic letters shall be accepted until the beginning of June 1929. As from the beginning of February 1928 all private and official news, statements, declarations, cinema advertisement and all newspapers, publications and periodicals shall be published in Turkish'.

32 Indictment issued by Diyarbakır Public Prosecutor's Office with regards to the diary published by Diyarbakır Bar in Turkish and Kurdish and distributed to its members.

33 Attorney M. Sezgin Tanrıku, TRT 6 ve Kürtçeyi Kullanma Hakkı (TRT 6 and Right to Use Kurdish), Radikal Daily, 15 January 2009.



dialogue with other Turkish citizens living in Turkey but also reinforce the feeling of belonging among citizens of Kurdish origin.<sup>34</sup>

Contrary to what is commonly known, there is no legislative barrier before the establishment of the said institutes and departments at universities.<sup>35</sup>

Thus an application filed by Mardin Artuklu Institute on this matter to YÖK has been accepted after the name and composition of institution has been changed to the 'Institute of Living Languages'. This decision which does not respond to the request of the applicant university reveals that despite the absence of a legislative barrier there's a strong resistance to it. Therefore this matter should also be regulated in the short term.

### **Broadcasting**

An addition has been made to Paragraph 1 of Article 4 of Law no 3984 on 'Law on the Establishment of Radio and Television Enterprises and their Broadcasts', which reads:

Radio, television and data broadcasts shall be conducted within a spirit of public service, in compliance with the supremacy of law, the general principles of the Constitution, fundamental rights and freedom, national security and general moral values. The broadcasts shall be in Turkish language. However, there may also be broadcasts for the purpose of teaching foreign languages, which may have contribution to the formation of universal culture and scientific works, or [for the purpose of] transmitting music or news in those languages.

And through Article 8 of Law no 4771 entitled 'Law amending Certain laws' published on 9 August 2002 in the Official Gazette no 24841, which reads:

Furthermore, there may be broadcasts in the different languages and dialects used traditionally by Turkish citizens in their daily lives. Such broadcasts shall not contradict the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation. The principles and procedures governing these broadcasts as well as their supervision shall be laid down through a regulation to be issued by the Supreme Board [RTÜK].

34 Decision of Board of Directors of Diyarbakır Bar dated 10.09.2008 with no: 2008/283 and press release of Diyarbakır Bar Assoc. dated 15.10.2008 with no: 2008/1360.

35 Additional Article 30 of the Law on the Organisation of Higher Education Institutions no: 2809; 'The Council of Ministers shall be entitled to establish, combine, close down faculties, institutes and colleges attached to universities or change the names of the same upon the proposal of YÖK and MoNE; the cadres, immovables and inventory stocks belonging to the units whose universities are changed shall be transferred to the universities they are attached to without the need for further procedures.' According to Article 11 of the heading 'Institutes' under the Regulation on Academic Organisation at Universities; 'Institutes established at universities and faculties, are units which provide post-graduate studies and carry out scientific research and applications in multiple disciplines that are similar and relevant, and they shall be established pursuant to laws. Institutes shall be composed of several departments. Post-graduate studies at universities shall be organised by institutes that are established for this purpose.' According to Article 16 'Departments and Art Departments' of Regulation on Academic Organisation at Universities; 'Department and Art Department' is an academic unit where education-training is carried out in at least one branch of science or arts. YÖK shall decide about establishing, abolishing or consolidating departments either directly or on the basis of proposals from universities.'



Nevertheless the regulation published by RTÜK following this law, has made it impossible to make broadcasts although it infringes the said law.<sup>36</sup>

With the aforementioned Regulation, the right to broadcast had been granted exclusively to TRT, even though it had not been enshrined in the law. Besides, the content and the length of the broadcasts have also been limited. After this regulation became effective, TRT - stating that it is a separate, autonomous broadcasting corporation with a specific law of itself - filed a cancellation suit stating that RTÜK could not assign such a duty to TRT through a regulation, and suspended the execution on its own record. However, the court case filed on the same issue by Diyarbakır Bar Association has been rejected on the grounds of unauthorisation (lack of competence).<sup>37</sup>

Since the law has been rendered ineffective through a regulation and vis-à-vis TRT's resistance to broadcast, the fourth sentence of paragraph 1 of Article 4 of Law no. 3984 amended through Law no. 4771 has been rearranged as the following pursuant to Article 14 of Law no. 4928 promulgated in the Official Gazette no. 25173 of 19.07.2003: *'Furthermore, public and private radio and television enterprises can broadcast in languages and dialects used traditionally by Turkish citizens in their daily lives.'*

36 Articles 4 and 5, and sub-Articles 2, 3 and 6 entitled 'Language of the Broadcasts' under the 'Regulation concerning the Languages of Radio and Television Broadcasts' published in the Official Gazette no 24967 and dated 18 December 2002, reads as follows: 'The main language of broadcasts is Turkish. In the broadcasts, it must be ensured that Turkish is used as a language of communication without distorting its characteristics and rules and that Turkish is promoted as a modern language of culture, education and science.'

Paragraph 2 of Article 5 entitled 'Broadcasts in Languages and Dialects Traditionally used by Turkish Citizens in their Daily Lives' and demanded for cancellation reads: 'Broadcasts in languages and dialects traditionally used by Turkish Citizens in their daily lives shall be conducted by Turkish Radio and Television [TRT].'

Paragraph 3 of Article 5 of the said Regulation reads: 'In these languages and dialects, broadcasts can be made for adults on news, music and culture in one or more than one language or dialects. Broadcasts can not be made to teach these languages and dialects.'

First sentence of paragraph 6 of Article 5 of the Regulation reads: 'Radio broadcasts in these languages and dialects cannot be longer than 45 minutes per day and total of 4 hours per week whereas TV broadcasts cannot be longer than 30 minutes per day and two hours per week.'

37 Council of State, General Assembly of Chambers of Administrative Cases Decision no 2004/13 of 15.01.2004 Merits no: 2003/511.

Following this legal arrangement, RTÜK issued another regulation, which limits the content and length of the broadcast as well as the nature/features of the broadcasting enterprises/institutions.<sup>38</sup> Following the publication of this regulation, since the broadcasting permissions of local and regional enterprises has been rendered conditional upon identification of viewer profiles, and since this research has not been conducted within almost five years since then, no developments have been observed in this area despite the legal arrangement.

What should be done in order for private broadcasting enterprises to broadcast at national, regional and local level in different languages and dialects is the abolition of this regulation, which is in violation of the Constitution and the laws.

### **Law No. 2954: ‘Radio and Television Law of Turkey’**

Along with its title, the provision enshrined in the Article entitled ‘Broadcasts related to the Turkish Grand National Assembly’ reads:

Turkish Radio and Television Corporation [TRT] shall transmit a summary of the general assembly meetings of the TGNA through the radio in a balanced and impartial manner. TRT may broadcast TGNA general assembly meetings live (inauguration, oath-taking ceremony etc.). In this regard, the Corporation shall be subject to the restrictions laid down in the TGNA bylaw.

38 Articles 4, 5 and 6, and sub-Article ‘Language of the Broadcasts’ under Provisional Article 1 of the ‘Regulation concerning Radio and Television Broadcasts in Languages and Dialects used traditionally by Turkish Citizens in their Daily Lives’ published in the Official Gazette no 25357 and dated 25 January 2004, reads as follows: ‘The main language of broadcasts is Turkish. In the broadcasts, it must be ensured that Turkish is used as a language of communication without distorting its characteristics and rules and that Turkish is promoted as a modern language of culture, education and science. Exclusively no other broadcast can be done in language and dialects other than Turkish.’

Paragraph 2 of Article 5 entitled ‘Principles of broadcasts in the different languages and dialects traditionally used by Turkish citizens in their daily lives’, which is sought for cancellation, encompasses the following provision: ‘In these languages and dialects, broadcasts can be made for adults on news, music and culture.’; paragraph 3 of Article 5 of the said Regulation reads: ‘No broadcasts can be made towards the teaching of these languages and dialects.’; paragraph 4 of Article 5 of the same Regulation reads: ‘Radio and television institutions that own a public and private national broadcasting license can broadcast in these languages and dialects, re-transmission broadcasts included; radio institutions shall not exceed 60 minutes per day and a total 5 hours per week, television institutions shall not exceed 45 minutes per day and a total of 4 hours per week.’ Sub-paragraph (a) of Article 6 of the same Regulation with the title ‘Application’ reads: ‘Public and private radio and television institutions shall make an application to RTÜK along with the decision of their executive boards concerning the language(s) and/or dialect(s) and the types of programs they wish to broadcast as well as their positioning in the daily broadcasts and monthly and annual broadcasting plans’. Provisional Article 1 under Section 5 captioned ‘Miscellaneous’ reads: ‘Till the viewer-listener profile of the different languages and dialects traditionally used by Turkish citizens in their daily lives is determined, only public and special national broadcasting institutions can broadcast in these languages and dialects.’

This has been amended through Article 6 of Law no 5767 of 11.06.2008 entitled 'Law Amending the Radio and Television Law of Turkey and the Law on the Establishment of Radio and Television Enterprises and their Broadcasts'.<sup>39</sup>

With this legal arrangement, TRT as an institution has been granted the authorisation to broadcast in different languages and dialects other than Turkish. This prospect, which had been possible in view of the legislation even before the amendment to TRT's own law, could only be possible on 1 October 2009, with TRT ŞEŞ. However, there is no guarantee that this costly broadcast will continue in the long term. In terms of sustainability, this amendment to the TRT Law should have been penned with such precision and clear expressions that it would be interpreted as a public service, not leaving any discretion to the TRT bureaucracy.

### **Law No. 2820: 'Law on Political Parties'**

Article 43 of this law indicates that no languages other than Turkish shall be used orally or in writing; and Articles such as Article 81 which states:

[political parties] can not claim the presence of minorities based on the differences in national or religious culture or sect or race or language [in the territories of the Turkish Republic]; can not pursue a goal to destroy the integrity of the nation by means of protecting, developing or disseminating languages and cultures other than the Turkish language and culture, nor can they carry out any activities to this end; cannot use any language other than Turkish in the publication and broadcasting of their statutes and programs, in

<sup>39</sup> The new legal arrangement introduced through Article 21 of Law no 5767 published in the Official Gazette no 26918 of 26 June 2008 entitled 'Turkish Grand National Assembly and Distant Education broadcasts and broadcasts of education and training purposes as well as other broadcasts' reads: 'Turkish Radio and Television Corporation shall transmit a summary of the general assembly meetings of the TGNA through the radio in a balanced and impartial manner. Being one of the TV channels allocated to TRT, TRT 3 TGNA TV shall broadcast the activities of the Grand Assembly. The issue to what extent the activities of the TGNA will be broadcast shall be determined in a protocol to be concluded between the TGNA Presidency and DG of TRT. No fees shall be received from such broadcasts. Distant education broadcasts as well as other broadcasts with education or training purposes shall be transmitted through a TV channel allocated to and deemed appropriate by the TRT. The fees and other issues related to transmission shall be determined through a protocol to be concluded between DG of TRT and the relevant institutions. TRT can conduct broadcast in a language or dialect other than Turkish.'

their congresses, in-door or out-door meetings, demonstrations and propaganda are still applicable.<sup>40</sup>

Apart from these issues, there are other arrangements of restrictive nature in the Political Parties Law. What is to be done is not amending merely these two Articles but the Law in its entirety.

### **Law No. 298 on ‘Basic Provisions on Elections and Voter Registers’**

Article 58 of this law, which prohibits the use of languages other than Turkish in electioneering broadcasts on radio and television - and in other ways of electioneering - is still in effect.<sup>41</sup> In terms of this law as well, this provision, which has been null and void in a sense, should be abolished so as not to provide grounds for different practices.

### **Law No. 805 on ‘Mandatory use of Turkish language in Economic Enterprises’**

Article 1 of this law, which rules the extension of the mandatory use of Turkish language also to relations (transactions, contracts, and communications) among individuals, is still in effect.<sup>42</sup> It should also be taken into account that a holistic democratic opening should also cover this kind of legal arrangements that are still in effect and the implementation of which is/may be vague.

## **CONCLUSION**

Efforts have been exerted to provide the reader with limited number of examples on what can be and what should be done within the framework of a democratic opening. There is no doubt that this is a non-exhaustive list. What have been raised in this Article are merely proposals. The current dimension of the problem reveals that Turkey is very well experienced in doing things that

40 Political parties Law no 2820 promulgated in the Official Gazette no 18027 of 24.04.1983, ‘Article 43- Pre-candidates shall not make any commitments at a national, local or professional level other than those stated in the party program, decisions of the grand congress and authorised central organs and the election statement of the party and shall not use a language other than Turkish orally or in writing.’, ‘Article 81 –Political Parties: a) can not claim the presence of minorities based on the differences in national or religious culture or sect or race or language in the territories of the Turkish Republic. b) can not pursue a goal to destroy the integrity of the nation by means of protecting, developing or disseminating languages and cultures other than the Turkish language and culture, nor can they carry out any activities to this end. c) cannot use any language other than Turkish in the publication and broadcasting of their statutes and programs, in their congresses, in-door or out-door meetings, demonstrations and propaganda; they cannot use and distribute placards, signs, albums, audio and image recordings, brochures and declarations in languages other than Turkish; and cannot remain indifferent where such acts and actions are performed by others. However, they can translate their statute and programs to languages other than the ones prohibited by law.’

41 Law no 298 on Basic Provisions on Elections and Voter Registers promulgated in the Official Gazette no 10796 of 02.05.1961, Article 58 - (Amended by Article 1 of Law No. 2234 on 17.5.1979) It is forbidden to print Turkish flag and religious statements on handouts and all kinds of printed material used for electioneering purposes. It is forbidden to use any language other than Turkish in electioneering broadcasts on radio and television, and in other electioneering activities.

42 Law no 805 on ‘Mandatory use of Turkish language in Economic Enterprises’ promulgated in the Official Gazette no 353 of 22.04.1926, Article 1 – All kinds of companies and enterprises of Turkish origin shall keep their account books in Turkish and use Turkish in all their transactions, contracts, and correspondences within Turkey.’ <http://www.mevzuat.adalet.gov.tr/html/405.html>.

should not be done, and not doing those that should have been done. In order for the democratic opening to be meaningful, it should be a non-hesitant democracy project accompanied by sufficient political will and determination to realise it. We should be able to use the tools of law and justice without diminishing hope and confidence in the realisation of peace and compromise in Turkey.



Kerim Yıldız and Saadiya Chaudary<sup>1</sup>

## Threatening the Protection of Human Rights: Turkey's Anti-Terror Laws

### Abstract

*In June 2006, Turkey amended its anti-terror laws and enacted a series of draconian provisions which fail to meet its human rights obligations under international law and have in practice been used to violate the human rights of its citizens. In common with anti-terror laws in other states, the amendments were enacted in response to an 'escalation of terrorism' and are therefore aimed at addressing a security agenda rather than protecting individual rights and freedoms. This Article looks at the particularly controversial aspects of Turkey's Anti-Terror Laws, how these have been applied and interpreted domestically and at the effect that this legislation has had on Turkey's international obligations to promote and protect human rights.*

### INTRODUCTION

In June 2006, Turkey adopted new Anti-Terror Laws amending the Law on the Fight against Terrorism (Act 3713), which was first passed in 1991.<sup>2</sup> The amendments were purportedly enacted in response to heightened security concerns; however the practical effects of the new law have led to, among other things, arbitrary hindrance of the right to freedom of expression and association, violations of fair trial guarantees and the increased prosecution of children for terrorism related offences. The amendments have been used to prosecute and harass national minority groups, members of the media, students, human rights defenders and political dissidents who are not in any way linked to terrorism but who can now fall under the broad and sometimes ambiguous provisions of the Anti-Terror Law.<sup>3</sup>

The legislation itself has been applied arbitrarily by judges and has resulted in protracted, burdensome and unfair trials for those accused.<sup>4</sup> This Article will look at the most controversial aspects of Turkey's Anti-Terror Law, problems with interpretation and implementation of this legislation and consequent effects on Turkey's international obligations, in particular, under the European Convention on Human Rights ('the Convention').

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2 The Law on the Fight Against Terrorism was amended by Law No. 5532 on 29 June 2006. The amended legislation will be referred to throughout this Article as the Anti-Terror Law.

3 See, for example, KHRP FFM Report 'Reform and Regression: Freedom of the Media in Turkey' (KHRP, London, October 2007); Amnesty International 'Turkey Justice Delayed and Denied: The persistence of protracted and unfair trials for those charged under anti-terrorism legislation.

4 See KHRP Trial Observation Report *Publishers on Trial: Freedom of Expression in Turkey in the Context of EU Accession*, May 2007.

## AN UNACCEPTABLY BROAD DEFINITION OF TERRORISM

Article 1 of the amended Anti-Terror Law defines terrorism as:

...any kind of act done by one or more persons belonging to an organisation with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat.<sup>5</sup>

This definition is extremely wide and it dramatically increases the number and range of crimes which may be considered terrorist offences to now include sexual harassment and prostitution.<sup>6</sup> Such a broad definition and vast classification of actions not only violates the principle of legal certainty but also leaves the law wide open to potential abuse and arbitrary application. The latter is of great concern in a state where, historically, citizens and organisations have been prosecuted simply because of their ethnicity or dissident political opinions.

Further, the law does not provide that, to be convicted of a 'terrorist' offence, a person must intend to incite violence; nor does it state that such propaganda must have caused a clear and present danger that such an offence would be committed.<sup>7</sup> This leaves the law wide open to potential abuse, with the consequence that an individual completely opposed to the use of violence may be convicted as a terrorist just for voicing or publishing a dissenting opinion. The European Commission noted in its 2006 progress report that the definition of these crimes under Turkish law is not in line with the CoE Convention for the Prevention of Terrorism, and expressed concern that freedom of the press and media could be undermined by these provisions.<sup>8</sup>

Besides being unsafe and difficult, the wide definition included in the amended Anti-Terror Law is also redundant since all crimes that fall under this definition are already accounted for by the Turkish Penal Code. Around sixty crimes defined in the Turkish Penal Code are replicated in the new anti-terror legislation, yet the latter imposes heavier sentences and longer imprisonment. This creates a twin-track system of justice; suspects and defendants are often left in the dark about the due process rights which they will be afforded (which are significantly decreased if charged with offences under the Anti-Terror Law) until the supposed motive behind their alleged acts are decided upon by prosecutors.

5 All references to Turkey's Anti-terror law provisions in this Article are based on unofficial translations.

6 By virtue of Article 4 of the Anti-Terror Law read in conjunction with Article 1. Article 4 provides for certain offences listed under the Turkish Penal Code to be 'terrorist offences' if they are 'committed for terrorist purposes as described in Article 1'.

7 Article 5 Council of Europe Convention on the Prevention of Terrorism; Article 7 European Convention on Human Rights.

8 Commission of the European Communities, Turkey 2006 Progress Report (COM (2006) 649 Final) 6, available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/tr\\_sec\\_1390\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/tr_sec_1390_en.pdf).



Furthermore, whilst maintaining a very broad definition of terrorism by non-state agents, the law fails to address the concept of 'state terror'. In the late 1980s and 1990s, Turkish security forces forcibly evacuated and destroyed 3,500 towns and villages in the Kurdish regions of Turkey, and illegal detention, torture and extra-judicial killing were also common.<sup>9</sup> Security forces still maintain a strong presence in the Southeast of the country and violent conflicts between the Kurdistan Workers' Party (PKK) and security forces have increased in the past year. Concerns that the security situation might further deteriorate and that the Anti-Terror Law might be used to justify this state violence are all the more pressing, given that the Turkish government has also begun to pursue its anti-terror activities outside its own borders. Since October 2007, Turkey has conducted a number of major military incursions into Kurdistan, Iraq, which threaten to hinder the development of democracy and human rights reforms there.

### **RESTRICTIONS ON FREEDOM OF THOUGHT, EXPRESSION, COMMUNICATION AND THE PRESS**

As identified above, the Anti-Terror Law contains a broad and ambiguous definition of key terms, with the result that legitimate criticism of the state or politicians may be labelled 'terrorist propaganda'. Punishment for this offence has been increased from fines to imprisonment of 1 to 5 years.<sup>10</sup> Where members of the press or media publish 'terrorist propaganda', this penalty is increased by half, representing the reintroduction of custodial sentences for the media.<sup>11</sup> Such 'terrorist propaganda' can include simply revealing the identities of officials engaged in counter-terrorism operations<sup>12</sup> and printing declarations by terrorist organisations.

Where a periodical has published material which is found to praise crimes and criminals in the framework of a terrorist organisation's activities or which has 'the quality of terrorist organisation propaganda', the periodical can be temporarily closed under Article 6 of the Anti-Terror Law, thus further restricting the media's ability to operate freely and independently.<sup>13</sup> Security forces can request that prosecutors shut down publications for up to one month, raising serious concerns about the extension of powers of security forces which now clearly impact upon and threaten the rule of law. This new system of control and through Anti-Terror legislation contrasts strongly with the situation in the 1990s, when closure and confiscation notices against newspapers and broadcasters could only be effected by a court decision and therefore following visible legal process, rather than simply on the orders of a prosecutor. Turkey's regression from the position in the 1990's has significantly reversed the progress made by Turkey under the EU Accession Process up until 2005, when there had been welcome indications of the state's willingness to take steps towards protecting fundamental rights.

9 KHRP Report The Internally Displaced Kurds of Turkey: Ongoing Issues of Responsibility, Redress and Resettlement, September 2007.

10 Article 7(2) Anti-Terror Law.

11 Article 7(5) Anti-Terror Law.

12 Article 6(1) Anti-Terror Law.

13 Article 6 Anti-Terror Law.

A KHRP mission in July 2007 found that the Anti-Terror Law had been used to close down five pro-Kurdish newspapers in one month alone.<sup>14</sup> Use of Article 7 of the Anti-Terror Law has also been extensive; on 13 May 2007, 25 students were investigated on the basis that they were reading and distributing the Kurdish newspaper 'Dengê Welat'. The investigation was carried out by the Chancellor of the students' university who considers that Dengê Welat newspaper was making propaganda of an illegal organisation under Article 7/2 of the Anti-Terror law. The students were consequently open to investigation under this law as they had set up a stall to sell this newspaper.<sup>15</sup>

In October 2007, the Diyarbakir Yenisehir Municipality Children's Choir was invited to the World Music Festival organised in San Francisco at which they sang songs in a total of eight different languages. The Diyarbakir Public Prosecutor subsequently initiated an investigation against children as the choir had sang the Kurdish national anthem in response to a request to do so. The Diyarbakir Public Prosecutor opened an investigation accusing the children of spreading propaganda of an illegal organisation in violation of the Anti-Terror Law.<sup>16</sup> Again in 2007, the Diyarbakir Kayapinar District Mayor and four other members of staff were accused with spreading propaganda of illegal organisation in connection with a pool which was constructed in the shape of the Kurdistan map in Medya park in Diyarbakir. On 27 November 2007 the mayor and staff were acquitted after their trial by Diyarbakir 6th Heavy Penal Court.<sup>17</sup>

In addition to students, a children's choir and the local mayor, singers have also been investigated under Turkey's Anti-Terror Law provisions. Ali Gülsever was arrested in 2007 for singing Kurdish songs at a wedding ceremony in Diyarbakir. He was charged with spreading propaganda of an illegal organisation and on 5 November 2007 he was subsequently sentenced to 10 months imprisonment by Diyarbakir 4th Heavy penal Court.<sup>18</sup> Singer, Xemgin Birhat (Zülfü Kızıldemir) was accused of the same offence after singing a Kurdish song during the Newroz celebration in Sanliurfa on 21 March 2007. Xemgin was sentenced to 1 year and 3 months imprisonment by Diyarbakir 6th Heavy Penal Court on 19 June 2007.<sup>19</sup>

The introduction of such harsh penalties is having a chilling effect not only on freedom of expression but also the right to impart information. The amendments to Turkey's anti-terror legislation have also led to the establishment of 'chain liability' whereby, for example, it is not only the author of a disputed text who may be prosecuted, but also those responsible for its publication. On 2 February 2008, Haftaya Bakis newspaper, which started publishing on 1st December 2007, was closed for one month by İstanbul 12th Heavy Penal Court once again on grounds of 'making propaganda of an illegal organisation' under the Anti-Terror Law. The Articles published by Haftaya Bakis between 2 and 8 February 2008 entitled 'Kurds Marching to mountains', '15 February Plot' and 'If Turkey enters to the South, she can not get out' were held by the Court to be the causes of the

14 KHRP FFM Report Reform and Regression: Freedom of the Media in Turkey, October 2007, 57.

15 [http://www.mazlumder.org/ms\\_word.asp?haber=886#BASIN](http://www.mazlumder.org/ms_word.asp?haber=886#BASIN).

16 [http://www.keditor.com/haber\\_1698.html](http://www.keditor.com/haber_1698.html).

17 <http://www.haberler.com/dtp-li-kayapinar-belediye-baskani-beraat-etti-haberi/>.

18 <http://www.kurdshow.com/default.asp?sf=haber&haberid=8594&ktg=1570.5.11.2007>.

19 <http://www.samanyoluhaber.com/haber-54583.html>.

offending act. The newspaper had been previously closed on 8 December 2007 for one month on the same grounds.<sup>20</sup>

In an even more bizarre case, the Diyarbakir 6th Heavy Penal Court sentenced seven people to 70 months imprisonment in total for the offence of making propaganda of an illegal organisation because they had whistled during a press release which took place in Kosuyolu Park, Diyarbakir.<sup>21</sup> In another case, on 5 January 2008 the İstanbul 9th Heavy Penal Court sentenced Fatih Taş, former owner of Aram Publishers to 5 months imprisonment and 285.00 TRY fine under Article 7/2 of Anti-terror law for publication of the book 'Kırbaşı Baskını: PKK'nın Doğum Gecesi' by Aram Publishing House.<sup>22</sup>

Prosecutions under Article 6 of the Anti-Terror Law, which provides for the offence of announcing 'that the crimes of a terrorist organisation are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets' and of printing or publishing 'leaflets and declarations of terrorist organisations,' have also been numerous and equally arbitrary. The first daily Kurdish newspaper in Turkey, Azadiya Welat, was closed for one month by İstanbul 12th High Criminal Court for publishing a statement and announcement made by PKK/KONGRA-GEL in violation of Article 6 and 7 of the Anti-Terror Law.<sup>23</sup> Weekly newspaper Toplumsal Demokrasi was also shut down for one month this time by İstanbul 11th High Criminal Court on the basis of Articles published in the issue dated 5-11th January entitled 'Kurdish Plan is being heated in London,' 'Correspondence post from Kandil' and '2008 will be the year of great struggle'.<sup>24</sup>

Although freedom of expression is not an absolute right, in a democratic society and according to international standards any restriction to this right made, as in the case of Turkey, on grounds of national security, must be necessary and proportionate to the aim<sup>25</sup> and should also be unambiguous and precise.<sup>26</sup> The broad definitions included in the Anti-Terror Law in relation to freedom of expression clearly fail to meet the criteria set out under Article 10 of the Convention. The European Court of Human Rights (ECtHR) has found a violation of Article 10 of the Convention in a number of cases against Turkey in which the circumstances have been similar to those illustrated above. In all cases, the ECtHR has stressed the need for the judges to consider the allegedly offending words in any publication in the context of the Article or publication as a whole and to assess whether, in publishing the Article, there was in fact an intention to incite hatred or violence as is generally required in terrorism related offences.

20 [http://www.tihv.org.tr/tihv/index.php?option=com\\_content&view=Article&id=1477&catid=20%3Asubat-2008&Itemid=14&lang=tr](http://www.tihv.org.tr/tihv/index.php?option=com_content&view=Article&id=1477&catid=20%3Asubat-2008&Itemid=14&lang=tr).

21 <http://www.rojaciwan.com/haber-31382.html>.

22 [http://www.tuerkeiforum.net/trw/index.php/Hafta\\_02/2008\\_Raporu](http://www.tuerkeiforum.net/trw/index.php/Hafta_02/2008_Raporu).

23 <http://www.mkmbakur.com/2008/10/07/ilk-kurtce-gunluk-gazete-azadiya-welat-kapa-tildi/>

24 [http://www.tuerkeiforum.net/trw/index.php/Hafta\\_02/2008\\_Raporu](http://www.tuerkeiforum.net/trw/index.php/Hafta_02/2008_Raporu).

25 Article 10 European Convention on Human Rights.

26 Principle 1.1 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39.

Turkey has been found by the ECtHR to have violated Article 10 through its application of Articles 4 and 6 of the Anti-Terror Law. Article 4 of the Anti-Terror Law provides for various offences listed under the Turkish Penal Code (TPC) to constitute terrorist offences when '*they have been committed for the purposes described in Article 1 under the scope of the activities of a terrorist organisation established with the purpose of committing crimes*'. This in itself is rather broad, yet becomes even broader when read in conjunction with Article 1 which, as set out above, is an extremely wide ranging provision in itself.

Article 4 of the Anti-terror law effectively allows for offences such as sexual harassment, prostitution and the deliberate setting on fire of forests to constitute a terrorist offence. Moreover, the publication of declarations by terrorist organisations has also resulted in the commission of an offence under this Article. In *Demrel and Ateş v. Turkey* (No.2) (31080/02)<sup>27</sup>, the applicants had published an interview with Çemil Bayık, one of the leaders of the PKK. They were subsequently found guilty of 'publishing a declaration by a terrorist organisation' under Article 4 and 6 Anti-terror Law as a result of which the applicants were fined and the newspaper was closed for 15 days. In its judgment in this case, the European Court of Human Rights (ECtHR) did not consider the interview to have incited violence, armed resistance or insurrections, and it did not constitute hate speech. The interference with the applicants' right to freedom of expression was not necessary in a democratic society and therefore constituted a violation of Article 10 of the Convention.

Similarly, in *Demrel and Ateş v. Turkey* (No.3) (11976/03)<sup>28</sup>, the applicants were again fined and the newspaper was suspended after it was published containing an Article on Abdullah Öcalan's response to Akçam's opinion on the development of the PKK. In this judgment the ECtHR was particularly critical of the Turkey's domestic judges, as they had failed to look at the content of the Article and had instead convicted the applicants on the basis that the Article made reference to the PKK. The ECtHR also criticised Article 6(2) of the Anti-Terror Law, explicitly finding that the provisions of the Article '*falls short of the Convention requirements*'<sup>29</sup> and that the publication of interviews or statements made by organisations '*cannot in itself justify a blanket ban on the exercise of freedom of expression*'<sup>30</sup>.

In the case of *Saygılı and Falakaoğlu v Turkey* (39457/03)<sup>31</sup>, the applicants published an Article in their newspaper claiming that Şırnak Gendarme Brigade Colonel L.E. was responsible for the disappearance of two HADEP members. The applicants were convicted under Article 6(1) of the Anti-Terror Law on the grounds that they had disclosed the identity of public officials involved in anti-terrorist operations, thereby threatening such person's lives. The ECtHR again found a violation of Article 10. They stated that the trial court had failed to take account of the accusations against Colonel L.E, whether his name and the accusation was already in the public domain, and whether he was actually in danger as a result of the publication. Indeed, the Article could not be said to incite violence against Colonel L.E., nor could it be said to generate a significant risk of physical violence being inflicted upon him. The interference with the applicants' freedom of

27 Judgment of 29 November 2007.

28 Judgment of 9 December 2008.

29 *Demrel and Ateş v. Turkey* (No.3) (11976/03), Judgment of 9 December 2008 at para. 27.

30 *Demrel and Ateş v. Turkey* (No.3) (11976/03), Judgment of 9 December 2008 at para. 27.

31 Judgment of 21 October 2008.

expression by the judges (under direction of Article 6(1) Anti-Terror Law) was therefore not 'necessary in a democratic society' and in violation of Article 10 of the Convention.

Free press, the right to free thought, speech and expression is essential in any democratic society and is necessary to ensure respect for basic rights. The approach of Turkey's domestic judges is of great concern as the popular approach has been to convict anyone who so much as mentions a terrorist organisation, such as the PKK, even in a benign manner. Limited, if any, investigation is made by the courts in assessing the context and medium in which such phrases are used or mentioned and consequently the requirement for proportionality in restricting rights under Article 10 is not given due regard in media cases tried under Turkey's Anti-Terror Law. In *Kanat and Bozan v Turkey* (13799/04)<sup>32</sup>, the ECtHR was very explicit in stating that the mere fact of a member of a proscribed organisation making a statement cannot in itself justify an interference with the media's right to freedom of expression. In this case the applicants published an Article in their monthly review which contained a declaration from Abdullah Öcalan, in which he explained the historical position of women in Turkey as well as the current condition of women and the importance of education in improving their situation. They were convicted under Article 4 and 6(2) for publishing declarations by a terrorist organisation and were fined and the newspaper was closed for 7 days.

These cases represent a small collection of the judgments already rendered against Turkey concerning the provisions of the Anti-Terror Law which violate the right to freedom of expression under Article 10 of the Convention. There continue to be a substantial number of other Article 10 cases against Turkey which are currently pending before the ECtHR. Many of these cases complain of the application of Article 6(5) of the Anti-Terror Law, where newspapers and other publications may be suspended from publication, where numerous copies of publications have been seized and fines imposed of up to 90 per cent of the sales received from publishing the prohibited material. Some applicants have had their publications closed for up to one month at a time. The publications were closed on various dates between May 2002<sup>33</sup> and October 2008<sup>34</sup>. In a case communicated on 4 September 2009, the applicants complained that newspaper was closed as recently as 20 March 2009.<sup>35</sup> In several applications, the publications were closed consistently for months on end.<sup>36</sup>

## **THREATS TO FREEDOMS OF BELIEF AND CONSCIENCE, ASSEMBLY, ASSOCIATION AND THE RIGHT TO PROTEST**

The amendments to the Anti-Terror Law mean that the following offences can now be punished on the grounds that they indicate membership or support for armed organisations:

32 Judgment dated 21 November 2008.

33 See: *Aslan and Sezen v Turkey* (15066/05).

34 See: *Turgay* (29572/08) *Düşün* (55180/08), *Düşün* (II) (55427/08), *Düşün* (III) (56294/08), *Düşün* and Others (III) (60443/08), *Düşün* and Others (IV) (61438/08) *v Turkey*.

35 See: *Ölmez and Turgay v Turkey* (2318/09, 12616/09, 23563/09, 26801/09, 26837/09, 26846/09, 26851/09 and 26859/09).

36 See: *Ürper and Others* (14526/07), *Balci* (14747/07), *Balci and Others* (15022/07), *Gürbüz* (15737/07), *Ürper and Others* (II) (36137/07), *Ürper and Others* (III) (47245/07), *Ürper and Others* (IV) (50371/07), *Ürper and Samur* (50372/07), and, *Bektaş* (54637/07) *v Turkey*.

- The carrying of emblems and signs belonging to a terrorist organisation and the wearing of uniforms bearing these emblems or signs;<sup>37</sup>
- The carrying of banners and leaflets and the shouting or broadcasting of slogans via sound systems.<sup>38</sup>

These provisions criminalise such behaviour as wearing a headscarf or the red head strap of the Alevi youth. In the absence of direct mention of incitement to violence, decisions about whether to count forms of dress as evidence of ‘propaganda for a terrorist organisation or its aims’ are again open to an excessively wide margin of interpretation, amounting to a disproportionate interference with freedom of assembly and freedom of conscience. Similarly, the law provides that ‘conscientious objection’, a right in other CoE countries, is a ‘terrorist offence’<sup>39</sup>, further interfering with the right to freedom of conscience.

Article 7 of the new law targets the right of individuals to hold political meetings and demonstrations, both of which are necessary in the realisation of the right to freedom of association and freedom of assembly. Political meetings are threatened by the fact that any ‘terrorist offence’ committed on the premises of political parties, trade unions or student dormitories will receive double the usual penalty. The law also makes it an offence to ‘willingly’ provide funds ‘directly or indirectly’ for the financing of a terrorist organisation.<sup>40</sup> The wording of this offence is ambiguous and has been extended to include funding of a large number of unconnected crimes and organisations.

Many of those targeted under these Anti-Terror Laws have been children, generally between the age of 15 and 18 years of age although some have been as young as 12 years of age, who have attended demonstrations held in support of the PKK. There are almost daily reports of young boys who have received custodial sentences as a result of terrorism charges and who will have to serve the sentence in adult penitentiary institutions. The Anti-Terror Law makes specific provision to try teenagers from the age of 15 years as adults for offences committed under this law. Article 9 of the Anti-Terror Law provides that:

Crimes included within the scope of this Law shall be tried in heavy penal courts specified in paragraph one of Article 250 under the Code on Criminal Procedures of 04/12/2004 with no: 5271. Court cases launched against children over the age of 15 in relation to these crimes are also handed in these courts.

Furthermore Article 13 of the Anti-Terror Law prevents prison sentences from being postponed, providing that the ‘*[p]enalty of imprisonment given in the context of these crimes cannot be transferred to optional sanctions and remitted*’. The Court of Cassation ruled in a decision dated 4 March 2008, that individuals (whether adults or children) need only be in attendance at a terrorist demonstration in order to commit an offence under the Anti-Terror Law.<sup>41</sup> Therefore, even where the individual has never been identified as a member of a terrorist organisation, his attendance at a relevant demonstration shall render him a member of such an organisation under the application

37 Article 7/b Anti-Terror Law.

38 Article 7/b Anti-Terror Law.

39 Article 3 Anti-Terror Law.

40 Article 8 Anti-Terror Law.

41 When the offence is committed under Article 222/6 Turkish Penal Code.

of Turkey's Anti-Terror Law. This ruling has led to a voluminous number of children being arrested, detained, tried and convicted of terrorist offences after simply attending terrorist organisation demonstrations. The demonstrations have been in support of Kurds in particular, including commemorations held on the anniversary of PKK leader Abdullah Öcalan's conviction.

Earlier this year, a 15-year-old boy was sentenced to over three years in prison for taking part in a protest organised by the PKK during which he allegedly threw stones at police officers. The teen was charged with committing a crime on behalf of an illegal organisation.<sup>42</sup> Sixteen year old Hasan Dündar was picked up by police when walking through a Kurdish neighbourhood in Adana where there had been clashes between security forces and Kurdish youths earlier in the day. Hasan was put into an armoured van along with other youth who had been arrested and was beaten by officers. He was then taken to Kurkcüler prison where the beatings continued.<sup>43</sup>

The Justice for Children Initiative in Turkey<sup>44</sup> observed that over 800 children under the age of 18 have been arrested, detained, tried and imprisoned for offences under the Anti-Terror Law.<sup>45</sup> Between 2006 and 2007, 1056 children aged between 12 and 18 were tried in the Penal Courts and Specially Authorised Heavy Penal Courts on allegations that they had violated the provisions of the Anti-Terror Law; 208 of these were sentenced to imprisonment, and 445 were given non-custodial sentences.<sup>46</sup> The Ministry of Justice has indicated that 1,572 children were put on trial for 'terrorist offences' committed during 2006 and 2007.<sup>47</sup> The problem continues to persist well into 2009 with at least 31 children being brought before the Diyarbakır and Adana Courts in August 2009 alone.<sup>48</sup>

## TURKEY'S OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The approach adopted by Turkey to child 'terrorists' is in direct contravention of the UN Convention on the Rights of the Child (UNCRC).<sup>49</sup> Article 2 UNCRC states that all children<sup>50</sup> must be afforded all rights within the UNCRC '*without any discrimination based on the children's...*

42 [http://www.ifex.org/turkey/2009/03/04/children\\_being\\_jailed\\_under\\_anti/](http://www.ifex.org/turkey/2009/03/04/children_being_jailed_under_anti/).

43 <http://www.voanews.com/english/2009-10-26-voa44.cfm>

44 The organisation is made up of rights activists, trade unionists, bar and professional associations and families of victims.

45 Justice for Children Initiative in Turkey, Report to the UN Committee on the Rights of the Child on Juvenile Justice and Armed Conflict in Turkey, April 2009 (available at: <http://www.crin.org/resources/InfoDetail.asp?ID=20633>).

46 Justice for Children Initiative in Turkey, Report to the UN Committee on the Rights of the Child on Juvenile Justice and Armed Conflict in Turkey, April 2009 (available at: <http://www.crin.org/resources/InfoDetail.asp?ID=20633>).

47 See: <http://bianet.org/english/children/115514-child-released-after-8-month-in-detention-for-stoning-the-pm>.

48 See: <http://www.kurdish-info.eu/News-sid-31-Children-Tried-Under-Charges-of-Terrorism-13548.html>.

49 Turkey ratified the UNCRC on 4 April 1995, and only makes a reservation from Articles 17, 29 and 30 (made upon signature and confirmed at ratification).

50 Under Article 1 UNCRC, the term 'child' is defined as any person under the age of 18 unless domestic law specifies otherwise.



*political or otherwise opinions*’. Turkey is violating this provision by affording children accused of non-terrorist offences with more protection under the UNCRC than those children accused of terrorist offences.

Article 40(3) UNCRC states that ‘*States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law*’. Through Article 9 of the Anti-Terror Law, Turkey allows children accused of terrorist offences to be tried in Heavy Penal Courts, normally reserved for offences committed by adults, in direct contravention of this provision. Similarly, Article 37 UNCRC provides that the arrest, detention and imprisonment of a child must be ‘*used only as a measure of last resort and for the shortest appropriate period of time*’, and where such imprisonment does occur, the child ‘*shall be separated from adults unless it is considered in his best interests not to do so*’.<sup>51</sup>

Since 2006, the practice which has emerged from Turkish courts in relation to children charged with terrorist offences has been to order detention and, if the child is found guilty, to impose a custodial sentence. This is case where the alleged offence was based simply on the throwing of a stone. Indeed, Article 13 of the Anti-Terror Law specifically requires the Turkish Courts to imprison 16-18 year-olds that have committed an offence under this law. It is apparent that Turkey is not placing children in prisons because it considers it to be in the child’s ‘best interests’, but due to their alleged allegiance with the PKK. This is not only in direct contradiction with the above Articles of the UNCRC, but also with Article 90 of the Constitution of the Republic of Turkey which provides:

Appropriately enacted International Treaties are valid as Acts of Parliament. No application can be made to the Constitutional Court to claim that they are at discord with the Constitution...If a law, which is a subject of a properly implemented international treaty regarding fundamental rights and freedoms is in dispute, the rulings of the international treaty will prevail.

The continuing prosecution of children, specifically in Kurdish populated areas, has also been noted by the European Commission which summarised the position in its recent report:

minors participating in demonstrations, particularly in the South-East, face charges of ‘membership of a terrorist organisation’ and, hence, disproportionate, long prison sentences. Judgments are often based on statements by police officers and are not backed by firm evidence. Children have been allegedly ill-treated after their arrest and before being taken to the prosecutor.<sup>52</sup>

## **OBSTRUCTING THE RULE OF LAW**

The new Anti-Terror Law reduces vital procedural safeguards for suspects of terrorist offences, through legitimising extended pre-trial detention, thus exposing those arrested to a greater risk of torture and ill-treatment, and undermining the rule of law. Under Article 10/b of the Anti-Terror

51 Article 37(c) UNCRC.

52 European Commission Progress Report on Turkey 2009, at p.25 available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2009/tr\\_rapport\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf).



law, a judge may delay legal advice for the first 24 hours of detention, thus restricting the right of detainees suspected of committing a terrorist offence to have access to a lawyer. Such actions would also place the individual at high risk of torture.

The right to immediate access to legal counsel had only recently been introduced in Turkey as part of the reform process<sup>53</sup> and this provision therefore represents a major step backwards. It is particularly alarming given the use of torture and ill-treatment in police custody, which was particularly widespread in the past but continues to this day. The European Commission has also noted in its 2009 Progress Report on Turkey that ‘children from 15 to 18 years of age detained under the anti-terror law for participating in demonstrations have not always had access to a lawyer immediately after detention.’<sup>54</sup>

A further concern is that lawyers are prevented from examining the contents of the file about a suspect and obtaining copies of documents, where it is judged that full access to this file might endanger the aims of the investigation.<sup>55</sup> In practice, a recent KHRP fact-finding mission heard evidence that detainees remained uninformed of the accusation and legal basis of their detention for periods of up to nine months.<sup>56</sup> This is a clear violation of the principle of equality of arms, as enshrined in Article 6 of the European Convention on Human Rights, and is very likely to compromise the detainee’s right to a fair trial. In addition, where there is evidence of a defence lawyer acting as an intermediary between an organisation and a suspect, an official can be present during meetings between a detainee and his lawyer, and a judge can examine documents passing between them.<sup>57</sup> A detainee’s right to confidential meetings with his lawyer is enshrined in principles 8 and 22 of UN Basic Principles on the Role of Lawyers.

Persons suspected of terrorist offences are limited to just one lawyer, as opposed to a potential three for non-terror related crimes.<sup>58</sup> The law does not specify that counsel in cases involving terror charges must be paid by the state, in contrast with cases involving alleged crimes by law enforcement officers, where the state is to cover the legal fees of three defence lawyers.<sup>59</sup> These restrictions on access to legal counsel provide for the unequal treatment of terror suspects, when it is very likely that the latter would greatly benefit from the defence of more than one lawyer. Such provisions further violate the principle of equality of arms.

The ECtHR has found numerous violations by Turkey of the due process and fair trial rights contained in Article 6 of the Convention which have occurred in the trials of those indicted under Anti-Terror Law provisions. For example, in *Salduz v Turkey* (36391/02)<sup>60</sup>, the applicant had allegedly taken part in a demonstration in support of the PKK in April 2001. He was convicted on the grounds that he had aided and abetted the PKK, in contravention of Article 5 of the Anti-

53 Article 149 Code of Criminal Procedure (Law No. 5271) 4 December 2004.

54 European Commission Progress Report on Turkey 2009, at p.16 available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2009/tr\\_rapport\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf).

55 Article 10/d Anti-Terror Law.

56 KHRP FFM Report *Reform and Regression: Freedom of the Media in Turkey*, October 2007, 37.

57 Article 10/e Anti-Terror Law.

58 Article 10/c Anti-Terror Law.

59 Article 15 Anti-Terror Law.

60 Grand Chamber Judgment of 27 November 2008.

Terror Law. During his appeal the applicant was unable to respond to the written observations of the Public Prosecutor at the Court of Cassation. Consequently, the ECtHR held there to have been a violation of Article 6 of the Convention on the grounds that his right to adversarial proceedings had not afforded to him. The Court also found a violation of Article 6(3)(c) as the applicant had been convicted on the basis of a statement he had given to police officers, which was obtained whilst he was denied access to a lawyer. The ECtHR found violations of Article 6(1) and 6(3)(c) in the similar case *Seythan Demur v Turkey* (25381/02)<sup>61</sup>.

Turkey's Anti-Terror Law also rests uneasily with its obligations under the European Convention on Human Rights in relation to Article 8 of the Convention. The right of detainees to have access to family members is restricted. If the purpose of an investigation is under risk, a public prosecutor may order that only one member of the detainee's family is to be informed of his or her detention, or the extension of the detention period.<sup>62</sup> Furthermore, under Article 5 of the Anti-Terror Law, limits on the maximum length of the sentence that can be given to an individual are removed, so that prison sentences can now be indefinite.

In *Resul Sadak and Others v Turkey* (74318/01)<sup>63</sup>, the applicant was the leader of the Peoples' Democracy Party (*Halkin Demokrasi Partisi (HADEP)*) in the Şırnak province. He was arrested on 23 September 2000 on suspicion of aiding and abetting a terrorist organisation in contravention of Article 5 of the Anti-Terror Law. The applicant was eventually brought before a judge on 1 October 2000 and was acquitted of all charges at a later date. Nonetheless, the ECtHR observed that he had been detained for a period of 8 days before being brought before a judge, which was sufficient to constitute a violation of his right to be brought before a judge 'promptly'. A similar judgment was found in the case of *Saraçoğlu and Others v Turkey* (4489/02)<sup>64</sup> where the applicant was again held for 8 days without being brought before a judge.

More alarmingly, Turkey held one victim alleged of committing crimes under its Anti-Terror Law in detention for almost 11 years.<sup>65</sup> The victim was detained on suspicion of being involved in the bombing of shops and cars, thefts and causing bodily injury to others. Throughout the numerous hearings in the case which followed, the applicant's request to be released from detention were consistently rejected on the grounds that the nature of the offence, the state of the evidence and the content of the case-file all warranted her continued detention. The ECtHR held that even by taking account of the seriousness of the allegations against the applicant, that the reasons given by the domestic courts to refuse her requests for release were neither 'sufficient' nor 'relevant' to justify a detention of 11 years. As such, there had been a violation of Article 5 of the Convention.

## THE INFLUENCE OF LAWS IN OTHER JURISDICTIONS

Turkey is of course not alone in enacting draconian anti-terror legislation. In fact, the amended Turkish Anti-Terror Law is lent a false sense of legitimacy by laws in other jurisdictions which

61 Judgment of 28 July 2009. See also *Demirel and Ateş v. Turkey (No.2)* (31080/02) and *Demirel and Ateş v. Turkey (No.3)* (11976/03).

62 Article 10/a Anti-Terror Law.

63 Judgment of 8 January 2008.

64 Judgment of 29 November 2007.

65 See *Özden Bilgin v Turkey* (8610/02).

include similarly questionable provisions. Since the terrorist attacks of September 2001, a number of states, including the UK and the US, have introduced laws which also violate international human rights obligations and which have been widely criticised by international and domestic courts, civil society and nongovernmental organisations (NGOs), amongst others.

The UK has experienced serious terrorist attacks since the 1970s in connection with the Northern Ireland conflict and has long had legislation in place to address issues arising from such threats. However, since 2001, the UK has enacted a further swathe of counter-terror laws. This includes the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Act 2006.

In common with Turkey, UK legislation maintains an inappropriately wide definition of Terrorism.<sup>66</sup> Terrorism is defined as the use or threat of action designed to influence the government or to intimidate the public or a section of the public for the purpose of advancing a political, religious or ideological cause, whilst 'terrorism-related activity' includes the commission, preparation, or instigation of acts of terrorism, facilitating such acts, encouraging such acts, and supporting or assisting those who are engaged in such acts.

UK legislation also threatens freedom of expression by providing for the vague offence of 'encouragement of terrorism'<sup>67</sup>. This covers statements 'likely to be understood... as a direct or indirect encouragement or other inducement to... the commission, preparation or instigation of acts of terrorism', including any statement that 'glorifies the commission or preparation (whether in the past, the future or generally) of such acts'. Yet it is virtually impossible to prove what a third party is likely to understand by a particular statement. Therefore the breadth of this offence means it is unlikely to be necessary and proportionate to the aim, or to comply with the principles of legal certainty.<sup>68</sup> Similarly, Section 2 of the Terrorism Act 2006 makes it a crime to 'disseminate terrorist material'. As with Turkey's laws, the interaction of this section with that on the encouragement of terrorism could have draconian consequences and violate the right to freedom of expression.

Unlike the UK, the U.S. and Turkey, Spain has not introduced new legislation since the terrorist attacks of September 2001, the Madrid attacks of 11 March 2004 or the attacks in London in July 2005.<sup>69</sup> Rather, anti-terrorism measures in Spain have historically been shaped mainly by the activities of the Euskadi Ta Askatasuna (ETA) organisation.

There are no specific anti-terrorism laws in Spain. Instead, terrorism is dealt with almost exclusively through existing criminal justice legislation. The Criminal Code (Código Penal, CP) sets out terrorism-related offences and the Code of Criminal Procedure (Ley de Enjuiciamiento Criminal, LEC) deals with the relevant procedural provisions. In common with the UK and Turkey, Spanish legislation provides a very broad definition of terrorism. The Criminal Code defines terrorists as those 'belonging, acting in the service of or collaborating with armed groups, organisations

66 See the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.

67 Section 1, Terrorism Act 2006.

68 Articles 7 and 10 of the European Convention on Human Rights.

69 Although tougher controls have been introduced on the use and transportation of explosives.

or groups whose objective is to subvert the constitutional order or seriously alter public peace.<sup>70</sup> There is a notable parallel here with Article 1 of Turkey's Anti-Terror law, which provides a wide definition of terrorism that potentially criminalises non-violent activities.

A main concern in relation to Spain's counterterrorism measures is the use of quasi-incommunicado detention which has been widely criticised by NGOs and international bodies. Spain's Code of Criminal Procedure allows for a maximum of thirteen days of quasi-incommunicado detention. Initially, detainees may be held in police custody for five days before being brought before a judge. A judge may then issue an order for a further five days on remand in pre-trial detention. In addition, a final period of three days may follow either consecutively or imposed at a later date.<sup>71</sup>

Serious restrictions are placed on detainees during this quasi-incommunicado detention period. Detainees have the right to be assisted by a duty lawyer but not a lawyer of their choosing, and are not permitted to speak in private with the lawyer appointed on their behalf. The European Committee for the Prevention of Torture has described this as 'most unusual' and has said that 'under such circumstances it is difficult to speak of an effective right of access to legal assistance; the officially appointed lawyer can best be described as an observer.'<sup>72</sup> In addition, the detainee's family or other parties are not informed of the detention or the place of the detention.

These restrictions bear comparison with provisions of the Turkish Anti-Terror law discussed above, particularly those which restrict access of family members to detainees,<sup>73</sup> limit the suspect's access to legal advice and representation,<sup>74</sup> provide for the prevention of the detainee's lawyer from examining his or her file and obtaining copies of relevant documents,<sup>75</sup> and provide for officials to monitor meetings between the detainee and his or her lawyer and examine documents passed between them.<sup>76</sup>

Such restrictive detention regimes lack measures to protect detainees from torture or ill-treatment and can increase the risk of such treatment. The United Nations Special Rapporteur on Torture has stated that 'prolonged incommunicado detention may facilitate the perpetration of torture and could in itself amount to a form of cruel, inhuman or degrading treatment.'<sup>77</sup> Amnesty International has documented several reported cases of torture and ill-treatment in police custody

70 Article 571 Spanish Criminal Code.

71 Article 509 Spanish Code of Criminal Procedure.

72 Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 13 March 2003, (CPT/Inf(2003)22) at para. 51, available at: <http://www.cpt.coe.int/documents/esp/2003-22-inf-eng.htm>

73 Article 10/a Turkey's Anti-Terror Law.

74 Articles 10/b and 10/c Turkey's Anti-Terror Law.

75 Article 10/d Turkey's Anti-Terror Law.

76 Article 10/e Turkey's Anti-Terror Law.

77 Civil and Political Rights Including the Question of Torture and Detention. Report of the Special Rapporteur on the Question of Torture, Theo van Boven, Addendum visit to Spain. E/CN.4/2004/56/Add.2, 6 February 2004 at para. 34.

in Spain.<sup>78</sup> Furthermore, the measures in place in Spain also fail to protect the Spanish authorities from false allegations of abuse.

In a recent visit to Spain<sup>79</sup> the Special Rapporteur highlighted the 'Garzon protocol', which provides for detainees to select a doctor of their own choice for a medical examination, for detainees to receive visits by family members, and for the constant video-surveillance of interrogation rooms and police detention facilities. Although not systematically implemented and used by only some Audiencia Nacional judges on a case by case basis, the protocol is a positive development in Spain's counter-terrorism measures.

## CONCLUSION

Whilst it is acknowledged that all states need to take measures to protect national security, such steps should not be at the expense of the fundamental human rights that Turkey has promised to uphold as a signatory to international treaties. The new Anti-Terror Law enacted by Turkey fails to respect the very basic obligations under these international treaties by containing a definition of terrorism which is too wide and vague, by increasing the range of crimes that can count as terrorist offences, and by posing a serious threat to basic rights including the right to freedom of expression and association, the right to a fair trial, and the prohibition of torture. Of particularly serious concern is the extent to which Turkey's terrorism legislation allows for the arrest, detention, ill-treatment and conviction of children who are regarded as 'terrorists' under these provisions.

The failings of the Anti-Terror Law in terms of human rights standards, and the irrational application of these laws by the domestic courts has been recognised in numerous timely judgments of the European Court of Human Rights and by the European Commission. Turkey must now, in recognition of these judgments and of its international obligations, fundamentally change the way in which it views the fight against terrorism. Its Anti-Terrorism Laws are draconian and ineffective in achieving the aim for which they have been drawn up. Restricting basic freedoms in such a comprehensive manner as Turkey's Anti-Terror Laws, will sadly only serve to breed resentment among its nationals perhaps then truly endangering the country's security.

78 Amnesty International 'Spain. Adding insult to injury: the effective impunity of police officers in cases of torture and other ill-treatment', Doc EUR 41/006/007, November 2007.

79 The United Nations Special Rapporteur conducted an eight-day mission to Spain from 7<sup>th</sup> to 14<sup>th</sup> May 2008.



Martin Jones<sup>1</sup>

## Paying Attention to Refugee Status Determination in the Global South

Refugee Status Determination (RSD) is not mentioned in any of the international instruments that define the international refugee regime. The silence of the regime on RSD is underscored by the fact that the vast majority of the world's refugees have their status determined silently: decisions regarding the status of refugees are most often made en masse, based upon the characteristics of the larger group to which the individual refugee belongs and the capacity (or lack thereof) of the government of the country of asylum or United Nations High Commissioner on Refugees (UNHCR) to perform RSD. These refugees, the overwhelming majority of the world's refugees, receive their status on a prima facie basis or as a result of group status determination. In effect, the decision concerning these refugees is made ex post facto; it is a decision in which the act of mass displacement serves as a necessary and, not infrequently, a sufficient condition of their recognition as refugees. In the Middle East, the majority of Iraqi refugees were given prima facie recognition.<sup>2</sup> In the case of such a process, the debate normally shifts from who is a refugee to who gets registered – as often only a minority of a given refugee population are actually registered and thereby recognised as refugees by UNHCR and governments – again the Iraqis serve as a case in point.<sup>3</sup> Only a minority of the world's refugees become 'asylum seekers', subject to an individualised examination of their reasons for remaining outside of their country of origin.

Despite the fact that asylum seekers are a minority of refugees, they are a sizable population. In 2007, at any given time there were about 750,000 asylum seekers scattered amongst 154 countries. If one were to include failed asylum seekers and refugees who were accorded another status through RSD (for example, granted humanitarian relief or complementary protection) the number would multiply by several fold and be counted in the millions. The status of Kurdish asylum seekers, with a few minor historical exceptions, has almost always been determined through RSD. Even when

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2 *Prima facie* recognition is not without its disadvantages. Often the status which is given is less permanent than formal refugee status (for example, see the EU directive on temporary protection) and the lack of individualised RSD often provides a practical barrier for selection for resettlement (as often possible reasons for resettlement are not discussed during the necessarily brief registration interview).

3 Phillippe Fargues, Saeed El-Masry, Sara Sadek and Azza Shaban 'Iraqis in Egypt: A Statistical Survey in 2008' (Centre for Migration and Refugee Studies, American University in Cairo: Cairo, 2008).

the majority of Iraqi refugees received *prima facie* recognition, Iraqi Kurds still faced individual RSD.<sup>4</sup>

Asylum seekers are subject to a variety of procedures in order to determine their status as refugees. Even within states, procedures vary based upon location, country of origin, and personal history. Despite recent efforts to harmonise RSD procedures, notably in the European Union (EU), there continues to be no single model for RSD and there remains a troubling variation in outcomes in similar cases. For example, the acceptance rates for Iraqi refugees in European states governed by the EU's RSD standards varied between 0 per cent (Greece) and 81 per cent (Sweden).

Studies of outcomes in RSD have linked recognition rates to a variety of seemingly extraneous factors, including government ideology, country of asylum demographics and the number of refugees already in the country of asylum.<sup>5</sup> Recent studies in Canada and the U.S. have shown that the identity of the decision maker in RSD is often the single best predictor of the outcome.<sup>6</sup> Recognition rates have also been linked to refugee movements, with higher recognition rates prompting future population movements. At best, RSD is an imperfect, haphazard and challenging process. Even factoring in successes upon appeals and grants of complementary protection, in 2007 a majority of (55 per cent) of asylum seekers worldwide were refused refugee protection.<sup>7</sup>

In some ways, it is particularly because of the high rejection rates faced by asylum seekers that RSD is so important. If it were otherwise, many of the issues raised by RSD would be relegated to the realm of purely academic consideration. However, the high rejection rates and consequent threat of forced removal from the country of asylum, makes these issues of vital concern to asylum seekers. The role of RSD in developing refugee law makes RSD an important topic even for refugees whose status is not determined individually. Although there are many live issues in RSD today, there are three of concern in all jurisdictions: access to counsel, the increasing trans-nationality of RSD, and underlying problems in the current governance of the international refugee regime. Each of these issues will be discussed in turn below.

In setting out a framework for RSD, the Executive Committee of UNHCR has recommended that '[t]he applicant should be given the necessary facilities, including the services of a

4 UNHCR's guidelines for Iraqi refugees differentiated between Iraqis from the north of Iraq and those from elsewhere. Only the latter received *prima facie* recognition. See UN High Commissioner for Refugees 'Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers' (Geneva: UNHCR, April 2009) and previously UN High Commissioner for Refugees 'Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers' (Geneva: August 2007).

5 See Mary-Anne Kate 'The provision of protection to asylum-seekers in destination Countries (New Issues in Refugee Research Working Paper No 114)' (Geneva: May 2005).

6 See Sean Rehaag 'Troubling Patterns in Canadian Refugee Adjudication', *Ottawa Law Review* Vol. 39, 2008; Andrew I. Schoenholtz, Philip G Schrag & Jaya Ramji-Nogales 'Refugee Roulette: Disparities in Asylum Adjudication', *Stanford Law Review* Vol 61, 295-412, 2007, online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946).

7 See 2007 Global Trends: 'Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons' (UNHCR Annual Statistics for 2007, published 17 June 2008), p.13- 17; online at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4852366f2&query=UNHCR%20Annual%20Statistics%20for%202007>.



competent interpreter' and be allowed 'to contact a representative of UNHCR'.<sup>8</sup> Both of these recommendations help to ensure an outcome that is based on a full understanding of the facts of the case and international law. However, the Executive Committee's conclusions about international protection are conspicuously silent on one issue: the access of asylum seekers to independent counsel.

Access to a representative of UNHCR cannot be a substitute for the provision of or access to independent counsel. This is especially true in the approximately 80 jurisdictions in which UNHCR serves as a decision maker. It has been convincingly argued that self-representation has always served the interests of the state and rarely, if ever, the interests of the individual. Statistics from RSD bear this out: a self-represented asylum seeker has a chance of success almost a scale of magnitude less than if he or she is represented by counsel.<sup>9</sup> Fortunately, the provision of independent legal advice to asylum seekers has recently spread beyond the Global North where such services are well established (though subject to budget cutbacks). In 2007, the Southern Refugee Legal Aid Network (SRLAN) was founded to facilitate representation of asylum seekers in the Global South. A growing number of legal aid organisations now exist in the Global South providing representation to a significant number of asylum seekers, though the overwhelming majority of asylum seekers in the Global South remain without any access to counsel.

In the South, refugee legal aid has typically grown out of refugee advocacy organisations (unlike in the North where refugee legal aid is more commonly an outgrowth of well-established legal aid programs for indigent criminal defendants). The different origins of legal aid in the South present a series of unique challenges, including the frequently expatriate nature of staff and the lack of formal legal qualifications and training of representatives. The SRLAN's first project was to develop standards for professional conduct (the 'Nairobi Code' of February 2007); it is also in the process of developing common training materials for refugee legal aid organisations.

The issue of training of legal aid staff is not without linkages to the second issue facing RSD: the increasingly trans-national nature of the field. Refugee law is inherently trans-national in subject matter insofar as the focus of the inquiry is on events in and the laws of the country of origin. However, refugee law has also become the archetype of a more dynamic form of trans-nationalism. This trans-national characteristic is described in the literature as a 'trans-national legal process' whereby norms developed and elaborated in one jurisdiction are transferred to another jurisdiction. In short, a trans-national legal process occurs when courts in one jurisdiction seek guidance from the jurisprudences of other countries. That the development of refugee law is a trans-national legal process entails that is developing simultaneously in a large number of jurisdictions and constantly cross-referencing itself. This poses a challenge both of information and argument for the advocate.

8 See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees: 'Part Two: Procedures for the Determination of Refugee Status', A.192 (iv), (Reedited, Geneva, January 1992, UNHCR 1979), online at: <http://www1.umn.edu/humanrts/instree/refugeehandbook.pdf>.

9 The scholarship of both Michael Alexander and Michael Kagan on legal aid in Cairo both support this proposition; the Canadian Department of Justice has commissioned similar research which also supports this proposition (though with less of a quantitative methodology).

The increasingly trans-national nature of the jurisprudence means that advocates must now keep themselves up to date on developments in not just a single jurisdiction, but many. Furthermore, the closed logic of the law from a single jurisdiction no longer applies to the development of refugee law in RSD. This problem is not an abstraction, it presents itself every day when a client from County A presents himself to counsel in Country B who received legal training in Country C hoping for resettlement to Country D. Sadly legal education currently provides too little training in refugee law let alone with respect to the trans-nationality of refugee law.

The final issue of concern in RSD today is one of more general concern to the entire refugee regime. The governance of refugee law currently resides with UNHCR under Article 35 of the Refugee Convention and, in turn, effectively with the 76 states who are members of its Executive Committee (and which provide almost all of the voluntary contributions which fund UNHCR's operations). At present UNHCR must both develop refugee law, attempt to secure its application by state parties and apply it in its own RSD operations. In such a situation, the independence of its interpretations of the Refugee Convention in its RSD decisions cannot be guaranteed. The perception of a lack of independence is exacerbated by the fact that UNHCR generally does not provide written reasons for its decisions in RSD nor does it always disclose all of the evidence upon which it bases its decisions.<sup>10</sup> As the European Court noted in the case of *D and others v. Turkey*, this allows governments acting upon UNHCR RSD decisions 'to remain in the shadow of UNHCR' who at times 'vainly attempt to justify itself by referring to certain 'information', that, apparently, was not available except to themselves and, as it appears, turned out to be erroneous.'<sup>11</sup>

Unfortunately, absent extraordinary procedures such as those offered by the European Court, most failed asylum seekers cannot judicially challenge the decisions of UNHCR. Furthermore the UNHCR policy making process is all too often opaque resulting in RSD guidelines that are either not operationally helpful or based upon incomplete information. While UNHCR is working to address these deficiencies that such practices can persist at all is indicative of the problem of having an international agency with legal immunity make such decisions. There is in law both a right to independent decision making and the appearance of independent decision making; the lack of transparency in the decision making – both in RSD and in policy – by UNHCR prevents an asylum seeker from having this right fully realised. Unlike the UN's multilateral human rights treaties, there is no independent supervisory committee which provides disinterested oversight of the Refugee Convention or of UNHCR's decisions (whether they be general policy decisions or individual decisions made in RSD). Instead, disagreements with policy or decisions must usually be addressed as issues of advocacy, an approach that does not encourage either transparency or inclusiveness.

The problems of the current institutional structure have not only been noticed by refugee advocates but also by judges involved in national RSD; the past president of the International Association of Refugee Law Judges (Justice Anthony North of the Australian Federal Court) has suggested the need for the creation of a new international 'refugee commission' to supervise the interpretation of

10 In some cases UNHCR provides a 'check box' status determination form and in other cases it provides a very brief oral 'explanation' of the decision to the failed asylum seeker (which it frequently refuses to repeat in the presence of counsel).

11 *D and others v. Turkey* Application no. 24245/03 (judgment of 22 June 2006) at ¶ 46 [translation from French by author].

refugee law.<sup>12</sup> Scholars, including Prof. James Hathaway,<sup>13</sup> have also suggested that the governance of refugee law must be revisited. The issue has also been the subject of discussion on at least two occasions in recent years at the Global Consultations with NGOs conducted by UNHCR and the International Council of Voluntary Agencies (including most recently in June 2008). There is a growing consensus that the governance of the contemporary refugee regime needs to be revised as it enters its second half-century.

Refugee status determination is a subject about which scant attention was paid as recently as a few decades ago; fortunately, this inattention has abated. Since that time, a network of advocates has established itself to represent asylum seekers. This network has in recent years extended itself to the Global South. However, the subject matter of this network, RSD, is an elusive subject insofar as it poses both informational and structural challenges for advocates. Furthermore, the governance of the law which is applied in RSD is in need of review and reconsideration.

These three issues share in common a solution. B. S. Chimni,<sup>14</sup> has described the reform of the international refugee regime as requiring a 'dialogic process'; what is true of refugee law in general is true of RSD. However, as with any dialogue, the process requires the presence of a dialogic partner who can meaningfully debate the current regime. Trained refugee counsel, aware of and educated about their trans-national position and subject matter, can provide an important dialogic partner. However, only reform of the governance of the refugee regime can allow a real voice to the most important dialogic partner and most important party in all RSD proceedings: the refugees of the world. Nor is the starting of this dialogue in only the interests of refugees or their advocates in the Global South. Despite the best efforts of Fortress Europe, the refugees of the Global South are inevitably the refugees of Europe. To the extent that RSD fails them in the Global South, they will make their appeal through secondary movement northward. Thus the challenges facing RSD in the Global South must be met not simply by a change in attention and behaviour by Southern actors but also by their Northern colleagues.

12 Justice Tony North 'A Proposal for the Establishment of an International Judicial Commission on Refugees', Paper presented at 'Moving On: Forced Migration and Human Rights' Conference (NSW Parliament House, 22 November 2005), online at: <http://www.law.usyd.edu.au/scigl/Documents/North.pdf>; Presentation based on a paper delivered at the 6<sup>th</sup> World Conference of the International Association of Refugee Law Judges (IARLJ) called 'The Asylum Process and the Rule of Law', in Stockholm, Sweden, in April 2005 (Published by Manak Publications PVT Ltd, New Delhi, India), Justice A.M. North and Joyce Chiara, 'Towards Convergence in the Interpretation of the Refugees Convention - A Proposal for the Establishment of an International Refugee Court', online at: [http://www.iarlj.org/general/index.php?option=com\\_content&task=view&id=98&Itemid=58](http://www.iarlj.org/general/index.php?option=com_content&task=view&id=98&Itemid=58).

13 James C. Hathaway *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005.

14 B.S. Chimni, 'Reforming the International Refugee Regime: A Dialogic Model', *Journal of Refugee Studies*, Vol. 14, No. 2, 2001, p. 151-68.



## Section 3: Case Summaries and Commentaries



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

### Right to Life

*Avul & Avul v. Turkey*

(24957/04)

**European Court of Human Rights:** Communicated on 16 September 2009

*Right to life; Prohibition of torture, inhuman and degrading treatment; Right to a fair trial; Right to an effective remedy; Right to enjoyment of personal possessions – Articles 2, 3, 6, and 13 of the Convention, and Article 1 Protocol 1*

#### Facts

The Applicants, Mr Abdullah Avul and Mrs Zümeýran Avul, are Turkish nationals who live in Yukarı Tulgalı village in the Özalp district of Van.

On 29 June 2003, the Applicants' 15-year-old son, Adem Avul, was shot dead 80 metres from the Turkish-Iranian border, on the Turkish side. A post-mortem was conducted on the same day, where a bullet entry wound on Adem's back was observed and an exit wound on his neck. The doctor stated that no autopsy was needed since the cause of death was circulatory insufficiency caused by internal bleeding as a result of disintegration of the internal organs and lungs. The Özalp public prosecutor also conducted an on-site examination on the following day.

On the evening of 29 June 2003, the Yukarı Tulgalı village Mayor explained to the Özalp public prosecutor that he had heard of Adem Avul's death from various villagers. He explained that he then went to the gendarmerie station and took Adem's body to hospital after being asked to by the gendarmerie commander. The Mayor also explained that he did not have any information concerning whether Adem's uncle, F.A., was with Adem at the time of his death.

On 30 June 2003, an examination of the crime scene was conducted. Here, F.A. informed the public prosecutor that he had been with Adem when he had been shot dead. F.A. informed the public prosecutor that he and Adem had left their village on horseback at around 9pm and had travelled to the Turkish-Iranian border to meet an Iranian national who would provide them with fuel to be transported into Turkey illegally. He explained that Adem had been 20 metres in front of him when he heard gunshots from the Iranian side of the border, after which he saw Adem on the ground and called fellow villagers for help. F.A. put Adem on his horse and began travelling back towards the village, where, on his way, villagers met him and placed Adem in a minibus. Upon reaching the village, soldiers took Adem back to the gendarmerie station, then to hospital. F.A. explained that he had not heard gunshots coming from Turkish soldiers and that he had heard individuals talking in Farsi after the gunshots.

During the examination of the crime scene, the military commander, C.C., explained that he saw two riders entering Turkish territory and heard 8-9 gunshots. C.C. also corroborated his forces' actions as suggested by F.A., explaining that he and his team had not opened fire on the two riders.

On 30 June 2003, the Özalp Governor requested the Özalp public prosecutor to provide him with a copy of the documents referring to the investigation into Adem's death, so that the Governor could examine them before the on-site examination to be conducted in cooperation with the Iranian border authorities and during the subsequent interviews.

According to the Applicant's submissions on 26 November 2008, the investigation into Adem Avul's death is still pending.

### Complaints

The Applicants complain that their son was unlawfully killed, in violation of Article 2 of the Convention. They also complain that Adem was not immediately taken to hospital and that he died as a result of being taken to the gendarmerie station first – in violation of Article 3 of the Convention.

The Applicants complain that the investigation into their son's death was not effective, since it was still pending and the perpetrators of his death are yet to be brought to justice. In this regard, the Applicants complain of violations of Articles 6 and 13 of the Convention.

The Applicants also complain that they have suffered financial loss as a result of their son's death, in contravention of Article 1 Protocol 1.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

### ***Cagdavul v. Turkey*** (9542/06)

**European Court of Human Rights:** Communicated on 22 September 2009

*Right to life – Prohibition of inhuman and degrading treatment – Freedom of expression – Freedom of peaceful assembly – Right to an effective remedy – Articles 2(1), 3, 10(1), 11(1) and 13 of the Convention*

This is a KHRP-assisted case.

### Facts

The seventeen Applicants are all Turkish nationals and live in Kars. The Applicants are Kasım Çağdavul, born in 1955; Besrayı Orun, born in 1952; Yavuz Orun, born in 1972; Feyfur Çeberli, born in 1927<sup>1</sup>; Güvercin Geçener, born in 1929; Turgut Geçener, born in 1960; Mehmet Zeki Talan, born in 1973; Tahir Mirze Çağdavul, born in 1941; Hacer Çağdavul, born in 1947; Makbule Çağdavul, born in 1985; Hadi Kesik, born in 1961; Hazal Çalışcı, born in 1965; Kiney Çağdavul, born in 1951; Hüseyin Kerenciler, born in 1929<sup>2</sup>; Nuriye Buğan, born in 1948; Sürmeli Buğan, born in 1939; Yıldız Dalğa, born in 1950.

1 . Feyfur Çeberli died on 20 January 2009. On 25 August 2009 the Applicant's heir Zeki Çeberli, born in 1953, expressed his intention to pursue the application on her behalf.

2 . Hüseyin Kerenciler died on 16 April 2008. On 19 November 2008 the Applicant's heir Yaşar Kerenciler, born in 1964, expressed his intention to pursue the application on his behalf.



On 14 August 1994, inhabitants of several villages in the district of Kars were allegedly forced by PKK's (Kurdistan Workers' Party) members to leave their villages to participate in a march organised by the aforementioned organisation in Digor.

When they arrived at Digor, the crowd was surrounded by security forces. Members of the Special Operations Department of the Kars Security Directorate (*Kars İli Emniyet Müdürlüğü Özel Harekat Şube Müdürlüğü*) were positioned on hills around the road where the crowd was gathered. Despite claims from the Applicants that there were unarmed and not members of the PKK, the Special Operations teams opened fire on the crowd as a result of which seventeen persons died and sixty-six were severely wounded, with among them members of the Applicants' families. The Applicants claim that medical treatment was refused to the wounded who were instead ill-treated by being for instance dragged along by Panzer-type vehicles. Concerning those who died, it is claimed they were buried without any notification given neither to the authorities nor to their families.

On 23 August 1993, a number of politicians filed a petition before the Digor Public Prosecutor and requested him to open investigations. On 22 April 1996, the Kars Public Prosecutor charged eight police officers from the Special Operations teams with attempted manslaughter and manslaughter. The proceedings were joined by a number of the Applicants as civil parties. Proceedings were subsequently instigated against 159 other people but were suspended on 21 January 2001. On 21 February 2006, the Kars Assize Court acquitted the eight police officers as it found evidence that PKK members were in the crowd and that they first shouted at the forces which therefore fired back in self-defence.

After an appeal lodged by the Applicant, the Court of Cassation quashed the judgment on procedural grounds on 7 April 2009. The case remains pending before the Kars Assize Court.

### Complaints

The Applicants, with the exception of Feyfur Çeberli, complained that the killing of their relatives amounted to a violation of their relatives' right to life under 2 Article of the Convention.

A number of the Applicants (Kasım Çağdavul, Yavuz Orun, Feyfur Çeberli, Güvercin Geçener, Mehmet Zeki Talan, Hadi Kesik) complained that the use of force by the security forces put their life at extreme risk. They furthermore complained that the use of force was illegitimate and disproportionate, and that the proceedings against the police officers were ineffective.

The Applicants complained that they – and their relatives – were ill-treated during the demonstration's day, the criminal investigation and the proceedings, and that this treatment amounted to a violation of Article 3 of the Convention. The Applicants alleged that Article 6 of the Convention was violated due to the length of the proceedings against the police officers.

Relying on Article 10 and 11 of the Convention, the Applicants argue that the police intervention and the use of force during the demonstration constituted a breach of their rights to freedom of expression and association.

Finally, the Applicants claimed that they were discriminated in reason of their Kurdish ethnic origin in violation of Article 14 (taken in conjunction with the other Articles pleaded) of the Convention.

## Held

The Court has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

More precisely the Court requested observations of the government on whether the killing and wounding of the Applicant's relatives were 'absolutely necessary'. Furthermore, the Court requested information about how police officers had been trained for the demonstration and the instructions they had received beforehand.

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

### ***Baş v. Turkey***

(38291/07)

**European Court of Human Rights:** Communicated on 10 October 2009

*Prohibition of torture, inhuman and degrading treatment - Right to liberty and security of person - right to effective remedy - Articles 3, 5 and 13 of the Convention*

## Facts

The Applicant, Mr Kemal Baş, is a Turkish national who was born in 1978 and lives in Izmir.

On 27 December 2005, a demonstration began to commemorate the death of a student in the Faculty of Literature building at Ege University the year before. Police officers intervened in the demonstration and attempted to disperse the group. In the process, some police officers began beating a friend of the Applicant. The Applicant, who was not involved in the demonstrations, approached the police to ask why they were beating his friend and was arrested as a result. In the process, the Applicant was punched and kicked in the head and body by police officers, and his glasses were broken. The Applicant was then placed in a police vehicle, where he was beaten again. He was then taken to Bornova First Aid and Traumatology Hospital, where a medical examination reported that the Applicant had erythematic lesions on the right side of his forehead, and that the Applicant complained of pain in his feet and legs. Following the examination, the Applicant was taken to the Bornova Central Police Station.

Later that day, at around 8pm, the Applicant was examined by another doctor at the Bornova First Aid and Traumatology Hospital, who reported grazes above the Applicant's left eyebrow, erythematic lesions on the left temporal area, and bruises and grazes on the Applicant's right knee. The doctor also noted that the Applicant complained of pains in the back of his knees and his head.

At around 4pm on 27 December 2005, the police officers drew up a report of the incident at the Faculty of Literature building at Ege University, explaining that six individuals (not including the Applicant) had provoked violence and thrown stones at police officers.

On 28 December 2005, the Applicant was again examined by a doctor at the Bornova First Aid and Traumatology Hospital. The doctor observed that there were no new signs of physical violence on

the Applicant's body, and stated that the Applicant had not complained of ill-treatment during his detention in police custody.

Later that day, the Applicant issued statements to two public prosecutors, where he stated that he had not taken part in the demonstration and had been beaten by police officers during his arrest. On a later date, the İzmir public prosecutor initiated an investigation into the Applicant's allegations of ill-treatment. During this investigation, the Applicant gave a detailed account of the events and reiterated his statements.

On 18 October 2006, the İzmir public prosecutor decided not to prosecute any police officers in relation to the Applicant's allegations of ill-treatment. The public prosecutor explained that there was no concrete evidence of the ill-treatment except for the Applicant's allegations of an 'abstract nature'. He stated that the police officers had acted in accordance with their duties during demonstrations that had turned violent, meaning that the force they used had not been excessive.

The Applicant's appeal against the public prosecutor's decision was dismissed by the Karşıyaka Assize Court on 23 February 2007.

### Complaints

The Applicant complains that the force used against him during his arrest was excessive and disproportionate, in contravention of Article 3 of the Convention.

The Applicant complains that his arrest was in itself unlawful since there were no reason suspicions to justify it. In this regard, the Applicant complains of a violation of Article 5 of the Convention. Under the same Article, the Applicant also complains that he was not informed of the charges levelled against him. Finally, the Applicant complains that there was no effective investigation into his allegations of ill-treatment, in contravention of Article 13 of the Convention.

### Held

The case was communicated on 10 October 2009 to the government for observations on the issues raised by the Applicant's claims. The Court requested observations on whether the Applicant has been subjected during his arrest to a treatment that amounted to torture or inhuman and degrading treatment in breach of Article 3 of the Convention.

Secondly, the Court requested observations on whether the investigations carried out by the domestic authorities in the present discharged them of their positive obligation under Article 3 of the Convention in regard of the procedural protection from ill-treatment. Furthermore, the Court requested observations on whether the Applicant's right to effective domestic remedies under Article 13 of the Convention regarding his complaints under Article 3 has been respected by the domestic authorities.

The Court requested several documents such as the complete file of the investigation, the video recording the demonstration, and the İzmir public prosecutor's decision of 18 October 2006.

***Dbouba v. Turkey***

(15916/09)

**European Court of Human Rights:** Communicated on 24 June 2009

*Prohibition against torture, inhuman and degrading treatment or punishment; right to liberty and security – Articles 3 and 5 of the Convention*

Facts

The Applicant is a Tunisian national. In 1986, the Applicant became a member of the Islamic Tendency Movement (now known as Ennahda), an illegal organisation in Tunisia. The Applicant was arrested and questioned by police forces on numerous occasions by Tunisian police forces, and subsequently decided to leave Tunisia for Syria in 1990.

In 1996, the Applicant went to renew his passport at the Tunisian consulate in Damascus, Syria. In the process of renewing his passport, he was detained and questioned by Tunisian officials in the consulate. He subsequently decided to leave Syria for Turkey. He arrived in Turkey in 1996, and remained living there without a residence permit until 2007.

On 19 June 2007, the Anti-Terrorist Branch of the Şanlıurfa Police Headquarters arrested and detained the Applicant on the grounds that he was a suspected member of al-Qaeda. His pre-trial detention was ordered on 22 June 2007 by the Bursa Magistrates' Court. On 9 August 2007, he was charged with being a member of al-Qaeda – an illegal terrorist organisation.

The Applicant's trial commenced on 24 January 2008, before the İstanbul Assize Court. In the first hearing, the Applicant was released pending trial but was prohibited from leaving Turkey. Consequently, the Applicant was placed in a foreigners' detention centre (Izmit) in Kocaeli. Here, he was kept in a cell of 9 sq. metres, containing two 0.9 metre benches. He had to ask guards to go to a toilet, was never able to leave his cell and was refused access to his family or lawyer. He went on a hunger strike, which enabled him to see his lawyer three times.

In March 2008, the Applicant was transferred to the Kırklareli Foreigners' Admission and Accommodation Centre. Here, he was kept in a 16 sq. metre cell with three other detainees, the food he was given was of a very poor quality, he was provided with no products to clean himself with, and there was no drinking water, so he was obliged to buy mineral water.

On 11 June 2008, a result of the poor detention conditions at Kırklareli Foreigners' Admission and Accommodation Centre, the inmates started a riot, in which one asylum seeker died and two police officers were wounded. The Deputy Director of the Kocaeli police headquarters believed the Applicant to have provoked others at the Centre and had started a protest after refusing to accept the meals he was given. Consequently, on 17 October 2008, the Deputy Director applied to the İstanbul Assize Court asking it to annul its decision to prohibit the Applicant from leaving the country.

On 3 December 2008, under the UNHCR mandate, the Applicant was recognised as a refugee. Consequently, he applied to the Turkish authorities for asylum, but received no response from the authorities. On 22 January 2009, the İstanbul Assize Court annulled its decision to prevent the Applicant from leaving the country.

On 24 March 2009, the Applicant was asked to provide his digital fingerprints by the Kırklareli Foreigners' Admission and Accommodation Centre. The Applicant refused on the belief that it might result in his deportation to Tunisia. The Applicant is still being held at the same Centre.

### Complaints

The Applicant complains that he risks being subjected to ill-treatment if he is deported to Tunisia, by virtue of his affiliation with Ennahda, in contravention of Article 3 of the Convention. He also complains that he has not been informed of any decisions taken in his case, and that he has not been told on what basis he has been detained – in contravention of Article 5(2) of the Convention.

Moreover, he complains that he has been unable to challenge the lawfulness of his detention, in contravention of Article 5(4) of the Convention.

Finally, he complains of the poor detention conditions at the Izmit and Kırklareli detention centres, and claims €40,000 (Euros) under Article 5(5) of the Convention.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

### ***Eski v. Turkey***

(8354/04)

**European Court of Human Rights:** Communicated on 10 October 2009

*Prohibition of Torture, Inhuman and Degrading Treatment; Right to a fair trial; Right to an effective remedy – Articles 3, 6 and 13 of the Convention*

### Facts

The Applicant, Mr Gökhan Eski, is a Turkish national who was born in 1975 and lives in İzmir.

On 30 December 2002, the Applicant had a fight with his friend in a taxi. The Applicant was drunk at the time. The taxi driver subsequently stopped at Ş. Coşkun Erçin police officer, where the Applicant's friend entered to make a complaint against the Applicant. The Applicant followed him.

At the police station, the Applicant swore, threw himself left and right and hitting some police officers in the process. In order to stop him from continuing his actions, police officers blindfolded and gagged the Applicant. He was then taken for a medical examination, after which he returned and continued to swear. As a result, police officer 'M.G.I.' hit the Applicant with a truncheon and instructed others to do so too. Three more police officers therefore began to hit him in a similar fashion.

On 30 December 2002, the İzmir Forensic Medical Institute issued a medical report in relation to the Applicant. The report explained that the Applicant had widespread bruises on his back, swelling and bruising on the right side of his forehead, bruises on the back of his legs, bruises

on his upper left arm, and bruising and swelling on one of his fingers on his right hand. It also explained that the Applicant's right arm had been fractured, and that his injuries rendered him unable to work for 15 days.

On 31 December 2002, the Applicant's mother complained about the Applicant's ill-treatment to the İzmir Governor's Office. On 2 January 2003, the Applicant's lawyer visited the Applicant in prison, where he observed the injuries sustained by the Applicant and took a detailed account of the ill-treatment. On 24 January 2003, the Applicant lodged a complaint to the İzmir Public Prosecutor's Office, asking for the prosecutions of the police officers who ill-treated him. He also asked for the prosecution of the police chief and those police officers who failed to inform the relevant authorities of his ill-treatment even though they knew about it.

On 4 February 2003, the Applicant was convicted of defamation, as well as using physical violence against the police officers in the course of their duties. The Applicant was sentenced to a total of 20 months imprisonment as a result. On 5 February 2003, the Applicant was examined by the İzmir Forensic Medical Institute, who reported that his injuries were still visible and that he was unable to work for 15 days.

On 12 March 2003, the İzmir public prosecutor decided not to prosecute the police chief due to a lack of evidence. The Applicant applied for rectification of this decision, but his request was dismissed by the Karşıyaka Assize Court on 18 July 2003.

On 29 June 2004, the İzmir Criminal Court of First Instance found four police officers guilty of ill-treating the Applicant. The six other police officers on duty that day were acquitted of their charges. On 7 March 2007, the Court of Cassation quashed the İzmir Criminal Court of First Instance's convictions of the four police officers, and upheld the acquittals of the other six police officers.

On 9 March 2009, the İzmir Criminal Court of First Instance again convicted the four police officers, sentencing them to 25 days imprisonment and 25 days expulsion from civil service. It also deferred the imposition of their sentenced, in accordance with 231 Code of Criminal Procedure. The Applicant appealed against the deferment, but his appeal was dismissed by the İzmir Assize Court on 2 March 2009.

### Complaints

The Applicant complains that he was ill-treated by the police officers, in contravention of Article 3 of the Convention. He also complains that the manner in which the investigation into his allegations, as well the subsequent criminal proceedings, was conducted constitutes a violation of Articles 3, 6 and 13 of the Convention.

### Held

The case was communicated to the government for observations on several points raised by the Applicant in its claims.

The Court requested observations from the government on whether the Applicant has been subjected to torture or inhuman and degrading treatment in breach of Article 3 of the Convention.

Secondly, the Court requested the government to respond to the question whether the deferment of sentencing in the ensuing of criminal proceedings against the police officers by the domestic authorities is in breach of Article 3 having regard to the positive obligation of the government to protect the physical and moral integrity of the Applicant through the law.

Finally, the Court requested observations on whether the way the investigation and the issuance of criminal proceedings against the police officers were conducted by the authorities were in breach of Article 3 of the Convention.

***Güler & Öngel v. Turkey***  
(29612/05), and (30668/05)

**European Court of Human Rights:** Communicated on 15 September 2009

Prohibition of torture, inhuman and degrading treatment; Right to liberty and security of person; Freedom of expression; Freedom of assembly and association – Articles 3, 5, 10, and 11 of the Convention

#### Facts

The Applicants, Mr Serdar Güler and Mr Savaş Kurtuluş Öngel, are Turkish nationals who were born in 1977 and 1979 respectively. The first Applicant lives in İstanbul and the second Applicant lives in Mersin.

On 29 June 2004, a large group of demonstrators assembled on İstiklal Street in İstanbul, where a statement in protest of the NATO summit held in İstanbul from 28-29 June 2004 was being read to the press. The Applicants were part of the group of demonstrators. As soon as the statement had been read, with no prior warning being given, the police began to disperse the demonstrators with tear gas and truncheons. The Applicants were arrested as part of the police operation.

The Applicants complained that they had been beaten and insulted by the police officers both prior to and during their arrest. As a result, they were taken to Bayrampaşa Health Clinic, where they were medically examined by a doctor in the presence of police officers. On 30 June 2004, the Applicants were taken to Beyoğlu Forensic Medicine Institute, where a medical examination reported several bruises and wounds on both Applicants' bodies. The doctor also stated that the Applicants were both unfit to work for 7 days. Later that day, the Applicants were released from custody, by order of the Beyoğlu public prosecutor.

On 18 July 2004, the Applicants complained to the Beyoğlu public prosecutor against their arresting police officers. The Applicants complained that their arrest had been unlawful, and that the police officers had used excessive both during and after their arrest.

On 2 August 2004, the Beyoğlu public prosecutor decided not to prosecute the arresting police officers, on the basis that the force used by the officers had been in accordance with Article 16 of Law No. 2559 on Duties and Powers of the Police, and had therefore not been excessive. He also concluded that the injuries sustained by the Applicants were caused by a use of force which was proportionate.

The Applicants applied for rectification of the public prosecutor's decision, but this was dismissed by the İstanbul Assize Court on 13 December 2005.

Meanwhile, on 30 June 2004, the Applicants were indicted before the Beyoğlu Criminal Court on the grounds that they had taken part in an illegal demonstration without prior authorisation and had not dispersed following the police officers' warning, in contravention of Article 32 of Law No. 2911. The Applicants were also accused of chanting slogans.

The Applicants' criminal proceedings were still pending when the application was lodged with the ECtHR.

### Complaints

The Applicants complain that the force used against them during their arrest had been excessive and disproportionate. They claim that this treatment constitutes ill-treatment within the meaning of Article 3 of the Convention.

The Applicants complain that their detention was unlawful, in contravention of Article 5(1)(c) of the Convention. They also complain that the police's interference with the reading of the statement constituted an unjustified interference with their rights under Article 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention.

### Held

The Court requested observations for the government on whether the Applicants have been subjected to a treatment that amount to torture under Article 3 of the Convention and the present case amounted to a disproportionate and unjustified interference with their right to freedom of assembly under Article 11. The parties are requested to submit information about the income of the proceedings pending domestic courts and to submit a copy of the medical report dated 29 June 2004.

### ***I.G. v. Moldova***

(53519/07)

**European Court of Human Rights:** Communicated on 13 July 2009

*Prohibition inhuman and degrading treatment - right to private and family life – Articles 3 and 8 of the Convention*

### Facts

The Applicant, Ms I.G., is a Moldovan national who was born in 1989 and lives in Bilicenii Vechi (Moldova).

On 21 August 2004, the Applicant, aged 14 years and 8 months at the time, was invited out for the evening by V.R., whom she had met several times over many years. V.R. took the Applicant to a disco bar and forced her to drink at least 100ml of vodka. Upon leaving the bar, V.R. drove V.D. back to his house. Upon arrival, V.D. stated he'd be back in 30 minutes. V.R. subsequently asked the Applicant to move to the back seat of the car with him, the Applicant did so. Once there, V.R. tried to kiss the Applicant, but the Applicant pulled away, stressing that she did not want to have sexual



intercourse. V.R. subsequently pressed his body against the Applicant and held her arms with one arm, therefore immobilising her. He proceeded to take off her clothes, after which he raped her. She had never experienced sexual intercourse before and she was covered in blood afterwards.

The Applicant informed her mother of the rape on 22 August 2004. After discussions with V.R., the Applicant's mother filed a complaint of rape on behalf of her daughter at the Singerei police station on 25 August 2004. On 26 August 2004, the Singerei Prosecutor's Office ordered the Applicant to undergo a forensic examination. The examination concluded that there had been 'a rupture of the hymen, which could have been caused by in the described circumstances by a straight, blunt object, possible a penis in erection'. Due to the lateness of the Applicant's examination, no traces of blood, sperm, bruises or injuries were found on her body. On 1 September 2004, V.R. was charged with committing rape knowingly on a minor.

On 10 February 2006, the Singerei District Court issued their judgment on the case. They believed that the Applicant was not forced into having sexual intercourse, because there were no bruises or injuries on her body. They also rejected her argument that she was too intoxicated to understand what was going on. Consequently, they believed the Applicant to have consented to the sexual intercourse, and V.R. was found not guilty of rape. Instead, they convicted V.R. of committing sexual intercourse on a person under the age of 16 whilst under the influence of alcohol, in contravention of Article 174 Moldovan Criminal Code. V.R. was given a suspended three-year prison sentence.

The Applicant appealed, but was told that Articles 276 and 401 Moldovan Criminal Code only allowed her to appeal when the complaint was lodged by the victim (herself), and in the present case, the Applicant's mother had initiated the proceedings. Subsequent appeals took place, and on 11 April 2007, the Balti Court of Appeal annulled the Singerei District Court's charges and acquitted V.R. of all charges.

The Applicant has since been diagnosed with post traumatic stress, resulting from the sexual assault, the states failure to effectively prosecute V.R. and the public humiliation she was subjected to as a result of the domestic proceedings.

### Complaints

The Applicant complains of the State's failure to effectively investigate and prosecute V.R. She states that by failing to do so, the State has failed to satisfy its positive obligation to effectively investigate and prosecute crimes of sexual violence, in contravention of Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to private and family life) of the Convention. The Applicant particularly stresses the State's failure to effectively evaluate the Applicant's consent as a minor.

The Applicant also claims that the State's failure to conduct the investigate and prosecute V.R. means that she hasn't been provided with an effective domestic remedy, in contravention of Article 13 of the Convention.

Finally, the Applicant claims that the corroborative evidence requirements in Moldovan law have violated her right to non-discrimination under Article 14 (taken in conjunction with Article 8) of the Convention. She suggests that the fact that evidence must corroborate is discriminatory

against women because it is based on an erroneous assumption about the reliability of women's reporting rape.

### Held

The Court has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit a full copy of the case file relating to the criminal investigation of the alleged rape of the Applicant, conducted by the Prosecutor's Office.

### ***Kaya v. Turkey***

(12673/05)

**European Court of Human Rights:** Communicated on 6 November 2009

*Prohibition of torture, inhuman and degrading treatment; Right to liberty and security of person; Freedom of expression; Freedom of assembly and association; Right to an effective remedy; Prohibition of discrimination – Articles 3, 5, 10, 11, 13 and 14 of the Convention*

This is a KHRP assisted case

### Facts

The Applicant, Mr Ferhat Kaya, is a Turkish national who was born in 1974 and lives in Ardahan.

On 5 May 2004, whilst passing the police station, the Applicant was asked by a police officer whether he was Ferhat Kaya. The Applicant asked why and was subsequently dragged into the police station without reason. In the station, the Applicant was told that a warrant had been issued for his appearance in court and he was asked to provide his identification documents. He was taken for a medical examination, after which he was charged with resisting police arrest. He was insulted, told he was a member of the PKK (Kurdistan Workers' Party) and was called a traitor. Later, five or six police officers beat the Applicant. The Applicant claimed to have lost consciousness as a result of the beatings, and was threatened with a rifle by one police officer. He was taken for another medical examination, during the course of which the police officers remained in the room.

In a report dated 5 May 2004, signed by thirteen police officers, the Applicant had been invited to the police station to establish his address in accordance with the instructions of the Erzurum Enforcement Criminal Court. The report stated that the Applicant had refused and started shouting at them. Consequently, the police called the public prosecutor, who ordered his arrest. The report stated that once in the station the Applicant was taken for a medical examination. Upon his return, the Applicant, when asked to put his personal belongings on the table, became aggressive and started to shout and threaten the officers and to throw his clothes about. He then punched the glass door, purposefully banged his head on the table and tried to cut himself with broken glass. According to the report, the police officers subsequently handcuffed him for his own safety, and later took him for a further medical examination.

As mentioned, the Applicant was medically examined by the Ardahan State Hospital on 5 May 2004. The first examination reported no signs of ill-treatment on the Applicant's body. The second examination reported a cut on the Applicant's right wrist as well as a cut on the outside of the wrist, a small graze on the third and fourth fingers of the Applicant's right hand, redness on his left

wrist, redness measuring 10cm x 2cm on the Applicant's back, redness on his right shoulder, and patches of redness on the right side of his back.

On 6 May 2004, the Applicant was brought before the Ardahan Magistrates' Court, where he was informed of the accusations against him. The Applicant denied the accusations, waived his right of access to a lawyer, and was subsequently placed in detention. He requested his release, but his requests were denied on 7 May and 11 May 2004. In the meantime, criminal proceedings were instigated against the Applicant for defamation, using physical violence against a police officer in the course of his duties and destroying State property. These proceedings are still pending before the Court of Cassation.

On 10 May 2004, the Applicant applied to the Ardahan public prosecutor, complaining of the ill-treatment he suffered and asking for the identification and prosecutor of those responsible. On 11 May 2004, the Applicant met with the public prosecutor and identified the six police officers from photographs. Between 12 and 15 May 2004 the public prosecutor heard from the police officers, who denied the accusations against them.

On 13 May 2004, the public prosecutor interviewed Mr B.A., who worked with the Applicant. He claimed to have seen the Applicant being beaten, and that he himself had been threatened and sworn at when he had gone to bring cigarettes to the Applicant at the police station. The statement made by B.A. contradicted his statement made on 5 May 2004.

On 17 May 2004, eleven police officers were indicted by the Ardahan Criminal Court of First Instance for ill-treatment of the Applicant and B.A. Throughout the subsequent trial, all parties appeared before the Court and reiterated their previous statements. However, B.A. refused to give a statement and withdrew his complaint against the police officers. The Applicant alleges that the reason for B.A.'s withdrawal of his statement was because the police officers had threatened him again.

On 22 September 2004, the Ardahan Criminal Court of First Instance acquitted each of the police officers of the charges against them. The Court cited a lack of evidence as the reason for their decision. The Court also noted that the injuries explained in the second medical report conducted on 5 May 2004 were attributable to the scuffle between the Applicant and the police officers at the police station. The judgment became final on 30 September 2004, with the Applicant unable to appeal because he had not intervened in the proceedings as a third party.

### Complaints

The Applicant complains that he was subjected to ill-treatment whilst he was at the police station on 5 May 2004 and was not provided with appropriate medical treatment, in violation of Article 3 of the Convention. The Applicant also complains of the manner in which the investigation into his allegations of ill-treatment was conducted, arguing that no effective investigation was carried out by the authorities – in violation of Article 3 (in conjunction with Article 13) of the Convention.

The Applicant complains that he was unlawfully and arbitrarily detained and that he was not informed of the reasons for his arrest and detention – in violation of Article 5(1) and 5(2) of the Convention.

The Applicant complains that the actions of the police officers also breached Article 10 and 11 of the Convention, arguing that his arrest and detention was motivated by his political affiliation and membership of the Ardahan District Branch of the Democratic People's Party (DEHAP).

With reference to his other complaints, the Applicant also complains that he was discriminated against on account of his race and political allegiances.

#### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

#### ***Kurkaev v. Turkey***

(10424/05)

European Court of Human Rights: Communicated on 29 September 2009

Prohibition of torture, inhuman and degrading treatment; Right to liberty and security of person - Articles 3, 5 and 13 of the Convention

#### Facts

In May 2000, the Applicant, a Russian national, was living in Grozny, Chechnya when he was wounded by a bomb which fell in the street near his house. He was subsequently arrested and taken into custody twice. Whilst in custody, the Applicant was questioned on how he received his wound and asked whether he had been involved in the armed conflict. The Applicant was 17-years-old at the time.

The Applicant feared for his life and decided to leave Chechnya for Azerbaijan in August 2000, after which he flew to İstanbul on 4 September 2000. Whilst in İstanbul, the Applicant applied for a temporary residence permit, which was granted to him at three month intervals. The Applicant's permit was renewed under 2 August 2001. The Applicant lost his passport, did not apply to the Russian authorities for a new one and did not apply to the Turkish authorities for renewal of his temporary residence permit after that date either.

On 23 June 2004, the Applicant was taken into custody by the Anti-Terrorism Branch of the İstanbul Security Headquarters as part of the security measure implemented for the NATO summit in İstanbul in 2004. During his questioning, the Applicant claimed asylum. On either 25 or 26 June 2004, the Applicant was taken to the Foreigners' Department with a view to his deportation. On 29 June 2004, the İstanbul State Security Court decided not to prosecute the Applicant, stating that there was insufficient evidence to instigate criminal proceedings against the Applicant.

On 1 July 2004, E.K., a lawyer at a non-governmental human rights organisation, informed the Foreigners' Department that the Applicant's life would be endangered if he were returned to Russia. E.K. also explained that even taking the Applicant to the Russian Consulate to renew the Applicant's passport posed a risk to the Applicant. He stressed that the Applicant should not be deported, stating that if deportation was unavoidable then he ought to be deported to a safe third country. On 19 July 2004, the Ministry of Interior informed E.K. that the Applicant could leave

for any country he wished with a valid passport or visa, or, if he did not have either document, the Applicant would be deported to the country from which they entered Turkey.

On 19 July 2004, the Applicant applied to the Ankara Administrative Court, requesting the suspension of his deportation proceedings and annulment of the deportation order which had been implied by the Minister of Interior's letter to E.K. On 12 August 2004, the Applicant asked the Foreigners' Department whether there was in fact a deportation order being served against him. Later in August, the Applicant was informed verbally that his claim for asylum had been refused.

On 7 September 2004, the Applicant was told that he was unable to reside in Turkey any longer because he possessed neither a valid passport nor a valid visa. Consequently, he was placed in the Foreigners' Department of the İstanbul Security Headquarters as an administrative measure as the Turkish authorities attempted to have a new passport or travel document issued by the relevant Consulate.

On 23 August 2004, the Ankara Administrative Court rejected the Applicant's request for the suspension of his deportation proceedings and the annulment of his deportation order on the grounds that the necessary procedures had not been satisfied. Upon the satisfaction of the procedural requirements, the Applicant reinstated the suspension and annulment request.

The Applicant was released on 25 September 2004, and the Ankara Administrative Court suspended his deportation proceedings on 4 October 2004. Nonetheless, on 3 September 2006, the Ankara Administrative Court rejected the Applicant's request for the annulment of his deportation order on the grounds that he was to be deported to Azerbaijan or any other safe third country, and not to Russia. As part of the Court's rationale for their judgment, it also stated that the Applicant had undergone medical treatment whilst he was in Azerbaijan, at which point there had been no attempt to return him to Russia and he had not applied for Asylum to the Azerbaijani authorities.

The Applicant appealed against the Ankara Administrative Court's decision of 3 September 2006. This appeal is still pending before the Council of State.

Whilst in detention at the Foreigners' Department of the İstanbul Security Headquarters the Applicant was kept in an overcrowded room, with no windows. Due to the overcrowding, the Applicant was often required to sleep on the floor without a sheet or blanket. The showering facilities and hygiene of the place in general was poor, and he was not allowed to get any exercise of fresh air throughout his time in detention. He was given the same insufficient meals each day. The Applicant's claims of the poor conditions at the Foreigners' Department of the İstanbul Security Headquarters are also corroborated by the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

### Complaints

Relying on Article 3 of the Convention, the Applicant complains that his deportation to Russia would expose him to a real risk of death or ill-treatment. He also complains that the detention conditions at the Foreigners' Department of the İstanbul Security Headquarters were poor, in violation of Article 3 of the Convention.

Finally, the Applicant complains that he was arbitrarily detained and that he has been unable to challenge the lawfulness of his detention before the domestic authorities. With regard to these complaints, the Applicant complains of violations of Article 5(1) and 5(4) of the Convention.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

## **Right to a fair trial**

### ***Kaba and Others v. Turkey***

(1236/05)

**European Court of Human Rights:** Communicated on 15 September 2009

*Fair hearing – Free legal assistance – Article 6(1) and 6(3)c of the Convention*

### Facts

The Applicants, Ms Havva Kaba, Miss Edanur Kaba and Miss Elif Kaba are Turkish nationals who were born in 1978, 2001 and 1997 respectively and live in İstanbul.

The Applicants are the wife and children of Mr Yusuf Kaba, who was a sergeant in the Turkish Navy and who died of cancer in 2003. The Applicants alleged that Yusuf's cancer was caused by his exposure to asbestos at the Hasköy Dock. They further allege that the treatment he received at the GATA military hospital was insufficient.

On 22 August 2003, the Applicants instigated compensation proceedings before the Military Supreme Administrative Court against the Ministry of Defence. At this time, the Applicants also applied for legal aid to assist them in the payment of the court fees, producing documents indicating that they were in a poor financial position. On 21 November 2003, the Applicants were informed by the Military Supreme Administrative Court that they did not qualify for legal aid, and were ordered to pay 8,758,870,000 TRL (approximately €5,000) in court fees. They Applicants were given one month to pay the fee, or else their proceedings would be discontinued.

On 21 January 2004, the Applicants again applied for legal aid to pay the court fees. On 26 January 2004, the Military Supreme Administrative Court again dismissed their request. Once again, the Applicants were ordered to pay the court fees or else have their proceedings discontinued.

On 22 April 2004, the Applicants requested rectification of the Military Supreme Administrative Court's most recent decision. On 26 April 2004, the Applicants' lawyer requested clarification of the Military Supreme Administrative Court's decision dated 26 January 2004.

On 12 May 2004, the Military Supreme Administrative Court examined both the request of the Applicants and the Applicants' lawyer. It decided that its decision dated 26 January 2004 was not the final decision on the merits of the Applicants' case, meaning that neither the rectification or clarification of the judgment were possible under domestic law. What's more, the Military

Supreme Administrative Court discontinued the Applicants' case on the grounds they had not paid the necessary court fees.

### Complaints

The Applicants complain that the Military Supreme Administrative Court's refusal to grant them legal aid in order to pay the court fees means that they have been denied access to a court, in contravention of Article 6(1) of the Convention.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

### ***Karakaya v. Turkey***

(30100/06)

**European Court of Human Rights:** Communicated on 14 October 2009.

*Determination of civil rights and obligations - Right to a fair trial – Article 6 of the Convention*

### Facts

The Applicant, Ms Şenay Karakaya, is a Turkish national who was born in 1956 and lives in İstanbul.

On 3 August 2001, the Applicant's employment contract was terminated on the grounds that she had the right to retire. The Applicant was informed that the termination of her employment contract would occur after 20 August 2001. She was given an 8-week notice period, during which time she applied to the Social Security Institution for her retirement pension.

On 25 April 2003, the Applicant sued her employer for failing to make a notice payment. On 30 September 2004, the İstanbul Labour Court ordered the employer to pay the Applicant the necessary notice payment. The Court came to this conclusion on the basis of Turkish legislation which excludes retirement entitlement as a reason for terminating a contract.

On 26 May 2005, the Court of Cassation quashed the İstanbul Labour Court's decision, stating that the Applicant was not entitled to receive the notice payment because she had undoubtedly accepted the termination of her contract by applying to the Social Security Institution for her retirement pension during the 8-week notice period. The İstanbul Labour Court accepted the Court of Cassation's judgment and dismissed the Applicant's case on 21 December 2005.

On 15 February 2006, the Court of Cassation upheld the second judgment of the İstanbul Labour Court. The final decision was served on the Applicant on 30 March 2006.

### Complaints

The Applicant complains that she was not given a fair trial, particularly because the domestic courts adopted a contradictory approach to that of an identical case brought by a different employee. The Applicant therefore complains of a violation of Article 6(1) of the Convention.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.

### ***Sancakli v. Turkey***

(1385/07)

**European Court of Human Rights:** Communicated on 14 October 2009

*Determination of a criminal charge - Right to a fair trial – Article 6 of the Convention*

### Facts

The Applicant, Mr Rifat Sancaklı, is a Turkish national who was born in 1955 and lives in İstanbul.

On 2 October 2004, the Applicant's hotel was raided by the gendarmerie on the grounds that it was suspected of being used for prostitution purposes. On 4 October 2004, the Applicant issued a statement before the gendarmerie officers, where he denied the charges levelled against him. On 30 May 2005, the Büyükçekmece Public Prosecutor issued a bill of indictment against the Applicant, charging him with 'not obeying the authorities' order' under Article 526(1) Turkish Criminal Code.

On 10 June 2005, the Büyükçekmece Magistrates' Court issued a penal order in accordance with Article 385 Code of Criminal Procedure, thereby issuing the Applicant with a fine of 100 TRL (Turkish Lira) underneath Article 32 of Law No. 5326 in respect of minor offences. The Büyükçekmece Magistrates' Court came to this decision without holding a hearing. On 3 February 2006, the Büyükçekmece Magistrates' Court upheld its previous decision, without holding a hearing into the matter.

### Complaints

The Applicant complains that his rights under Article 6(1) of the Convention have been violation. In this connection, the Applicant complains that he was unable to defend himself or have the assistance of a lawyer, since there had been no public hearing into the case. The Applicant further complained that his proceedings had not been fair because there had been insufficient evidence for his conviction.

### Held

The ECtHR has put questions to the parties concerning the issues raised by the Applicant and has asked the respondent State to submit various documents so as to support their counter-claims.



## B. Substantive ECHR Cases

### Right to life

*Andreou v. Turkey*  
(45653/99)

**European Court of Human Rights:** Judgment dated 27 October 2009

*Right to life - prohibition against torture and inhuman and degrading treatment – Article 2 and 3 of the Convention*

#### Facts

In 1996 the Cyprus Motorcycle Federation (CMF) organised a demonstration protesting against the Turkish occupation of Northern Cyprus. On 2 August 1996 100 hundred Cypriot and other European cyclists rode through Europe from Berlin to Cyprus. On 11 August 1996 the motorcyclists and other civilians proceeded along various points of the UN buffer zone. The demonstrators' presence there instigated violent clashes between counter-demonstrators, the authorities of the Turkish Republic of Cyprus and the demonstrators themselves. Mr Anastasios Isaak, a Greek-Cypriot protestor, was beaten to death by Turkish forces in the Dherynia.

On 14 August 1996 the Applicant attended Mr Isaak's funeral in Paralimni. After the funeral a number of attendees including the Applicant's son, daughter and son-in-law went to the place of Anastasios' death to pay their respects. The Applicant stayed outside the UN buffer zone and observed the events. Tensions arose between the Turkish forces in the area and the demonstrators. As a result Solomos Solomou was shot and killed when he climbed a flagpole outside the Turkish-Cypriot ceasefire zone. Soldiers began firing into the area under the control of Turkish forces and a number of people were wounded as a result, including the Applicant. The Applicant was shot in the abdomen and in consequence she lost a kidney. The Applicant still suffers from her injuries including great psychological stress, and has been unable to obtain employment as a result.

The United Nations Forces in Cyprus (UNFICYP) subsequently issued a report on the events of 14 August 1996. The report stated that Turkish forces fired '20 to 50 rounds indiscriminately into the crowd inside the buffer zone' following the shooting of Solomos Solomou. The report corroborated the Applicant's account of the events and her injuries. Various medical reports demonstrated the injuries that the Applicant had sustained, and the treatment that had been administered to her. These reports explained that she had been shot in the back by a bullet from a semiautomatic weapon, and that urgent surgery was required to remove her right kidney. The medical reports also explained the subsequent suffering the Applicant experienced, particularly depression, panic attacks and paranoia.

#### Complaints

The Applicant complained that her shooting was in violation of Article 2 of the Convention, even though the shooting had not proved to be fatal, and that the excessive use of force imposed upon her by the shooting had constituted inhuman treatment, in contravention of Article 3 of the Convention. The Applicant also alleged that the permanent effects of the injuries and the incident itself had led to her employment prospects and her enjoyment of life being greatly reduced. In

this regard, she complained that her rights to a private life under Article 8 of the Convention had been violated.

### Held

With regard to admissibility the Court found that the responsibility of the State under the Convention was engaged. It observed that even though Turkey exercised no control over the territory in which Applicant had sustained her injuries, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the Applicant should be regarded as ‘within [the] jurisdiction’ of Turkey within the meaning of Article 1 of the Convention.

### *Article 2*

The Court referred to its decision in the case of *Solomou & Others v Turkey* (36832/97), in which the events surrounding the death of Solomos Solomou had been examined. In that case the Court had attributed the victim’s death to the state and in violation of Article 2, and had said that the killing could not be justified on the grounds of any of the exceptions contained within Article 2(2) of the Convention. In the Applicant’s case, the State has raised the defence that the use of force was necessary to quell a riot or insurrection, as justifiable under Article 2(2)(c). The Court rejected this argument, stating that even though some demonstrators had iron bars and sticks in their possession, the indiscriminate firing by Turkish forces could have caused serious injury to demonstrators, bystanders and UN members and the use of force was therefore disproportionate. What’s more, the Court rejected the State’s additional argument that the use of force against the Applicant was necessary ‘in defence of any person from unlawful violence’ in accordance with Article 2(2)(b). In this regard, the Court noted that the Applicant was not armed, had not behaved in a violent manner, and was not posing a threat to public order to the extent that a threat to her life would have been justifiable.

Having regard to each of the abovementioned observations, the Court held that the State’s use of excessive force had not been ‘absolutely necessary’ within the meaning of Article 2(1) of the Convention, and had not been justified by any of the specific exceptions contained within Article 2(2). Consequently the State had violated the Applicant’s right to life under Article 2 of the Convention.

### *Article 3 & 8*

Following their finding of a violation of Article 2 of the Convention, the Court considered it unnecessary to examine whether there had been further violations of the Convention in respect of the Applicants’ complaints under Article 3 and 8 of the Convention.

### *Article 41*

The Court awarded the Applicant 585.68 EUR in pecuniary damages, 40,000 EUR in non-pecuniary damages and 10,000 EUR in costs and expenses.

***Gasyak and Others v. Turkey***

(27872/03)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Right to life – Article 2 of the Convention*

Facts

The Applicants are the relatives of four persons killed in March 1994. On 6 March 1994, the four men were stopped by gendarmes. The men were seen arguing with the gendarmes and were eventually placed in vehicles along with two former members of the PKK who had been working for the gendarmes since their arrest (known locally as the ‘confessors’). The vehicles began travelling towards Çizre.

A witness subsequently saw something being thrown out of one of the vehicles, on investigation this was found to be the driving license of one of the four men. The vehicles then turned off the main road, towards Holan village. Witnesses in Holan village saw one of the four men shot by either the gendarme officers or the confessors when trying to escape. The remaining three men were taken to the gendarme station in Bozalan village. Later that day, they were taken to a place outside the village where they were shot and killed. The incident was witnessed by people in a nearby field.

On 7 March 1994 some of the witnesses told the Applicants about the fate of their relatives and what they had seen. The Applicants contacted the police, the gendarmerie and the governor’s office. On 8 March 1994 gendarmes found the bodies of the four men covered with soil and stones. Each man had been shot and had their head smashed with stones. An on-site report attributed the deaths to PKK members, suggesting that the Applicants were killed because they had been village guards. The Applicants were not questioned, nor were any persons present in the vicinity at the time of the investigation. No further steps were taken by the Çizre prosecutor, who sent the case file to the public prosecutor at the Diyarbakır State Security Court on 5 April 1994. The investigation by the public prosecutor of Diyarbakır State Security Court merely consisted of sending occasional letters to the gendarmerie, asking them to search for the perpetrators. The gendarmerie, on numerous occasions between 1 September 1995 and 22 March 2002, informed the Court that they had been unable to find the perpetrators.

The authorities search for the confessors was claimed to be unfruitful, yet the vehicle used to transport the four men was in continuous use by confessors. The Applicants had also found out the address of one of the confessors but the gendarmerie failed to take any steps to question him.

On 11 July 2002 a lawyer representing the Applicants asked the Diyarbakır prosecutor to investigate into the killings. In his request he highlighted that neither the Applicants, nor the witnesses, nor anyone living in the area where the bodies were found had been questioned. Consequently, on 15 July 2002, the Diyarbakır prosecutor eventually questioned the Applicants and the witnesses. Following their questioning, the Diyarbakır prosecutor determined that the case did not fall under his jurisdiction, and so forwarded the case onto the Çizre prosecutor.

The Çizre prosecutor questioned the Applicants and witnesses on various dates in December 2002, January 2003 and May 2003. One of the witnesses offered to identify the confessors on an identity

parade. The confessors were questioned on 17 March 2003 and 15 July 2003. They were charged with multiple homicides by the Şırnak Assize Court on 5 August 2003. Following various delays, on 29 March 2005, the confessors were acquitted of their charges on the grounds that there was not enough evidence against them. The court's decision was largely based on the fact that one of the witnesses was unable to positively identify one of the confessors. The witness blamed his inability to identify the confessor on the fact that he hadn't seen him for over 10 years.

The Applicants appealed against the decision, arguing that there had been no effective investigation into their relatives' killings, in contravention of Article 2 and 13 of the Convention. On 14 November 2006, the Court of Cassation dismissed the Applicants' appeals and upheld the confessors' acquittals.

### Complaints

The Applicants complained that their relatives had been killed by state agents, and that the state had not conducted an effective investigation into their deaths in contravention of Article 2 of the Convention.

### Held

#### *Article 2*

The Court was of the view that it could not examine the Applicants' complaint that their relatives had been killed by state agents because the Applicants had failed to comply with the six-month rule under Article 35 of the Convention. The Court did however examine their complaints in relation to the effectiveness of the investigation into their relative's deaths; the Court observed that no attempt was made to identify or question the gendarme officers allegedly involved in the killings. The Court was particularly critical of the state's belief that it was illogical to consider that the killings may have been conducted by state agents. The Court stated that the fact that confessors had never appeared before the trial court was in itself incompatible with the requirements of an effective investigation. The use of photographs in the proceedings was insufficient and their lack of attendance meant that they could not be identified by the witnesses. The Court also found it 'wholly unsatisfactory' that even misleading information given by one of the defendants in relation to his whereabouts at the time of the killings did not spur the trial court into questioning him.

Having regard to all these deficiencies, the Court held that the state had failed to hold an effective investigation into the deaths of the Applicants' relatives and there had therefore been a procedural violation of Article 2 of the Convention.

#### *Article 41*

The Applicants were each awarded 10,000 EUR in non-pecuniary damages. The Applicants were also jointly awarded 4,000 EUR in costs and expenses.

***Kallis and Androulla Panayi v. Turkey***  
(45388/99)

**European Court of Human Rights:** Judgment 27 October 2009

*Right to life – Article 2 of the Convention*

Facts

On 3 June 1996, the Applicants' son, Stelios Kalli Panayi, who was serving in the Cypriot National Guard, went to the United Nations buffer zone in Nicosia so as to exchange his hat and another belong to a soldier in the Turkish-Cypriot armed forces. The Applicants' son was off duty at the time and was unarmed. During his attendance within the UN buffer zone, the Applicant was shot by Turkish soldiers. Members of the UN forces in Cyprus (UNFICYP) tried to reach the Stelios so as to administer him with the necessary medical treatment in order to save his life. However, the Turkish soldiers continually shot at the UNFICYP members when they attempted to get close to Stelios, meaning that he was not provided with any medical treatment and he died as a result.

The Turkish government disputed the facts, claiming that the Applicants' son was fully armed and had entered the Turkish buffer zone. They claimed that the Stelios provoked the Turkish soldiers and refused to stop when crossing a bridge that only UNFICYP were allowed to use. They claimed that an ambulance arrived and took the Applicants' son to hospital, where he subsequently died. However, the facts submitted by the Turkish government were proved to be false, following a UN report into the incident.

On 7 June 1996, the UN Secretary-General issued a report on the incident, where it was explained that the Applicants' son shot and killed inside the UN buffer zone in central Nicosia. The report stated that the fatal shot was fired by a Turkish-Cypriot soldier whom members of the UNFICYP had seen entering the buffer zone with a rifle affixed upon his back. The report also stated that the members of the UNFICYP were prevented from attending to the Applicants' son because Turkish-Cypriot soldiers fired bullets towards them whenever they moved in the direction of the Applicants' son.

Complaints

The Applicants complain that their son had been killed by Turkish forces in contravention of Article 2 of the Convention. They also complained that there had been no effective investigation into the killing, in contravention of the procedural element of Article 2 of the Convention.

Held

*Article 2*

The Court held that the Turkish government were responsible for the death of the Applicants' son. They accepted the submission of the facts by the Applicants, which were corroborated by the report of the UN Secretary General. On account of particularly strong evidence, the Turkish government also accepted that it had been a Turkish soldier who had fired the fatal shot at the Applicant. The Court rejected the Turkish Government's argument that the fact that Stelios had been wearing his uniform gave them sufficient grounds for assuming he was armed. In that regard, the Court observed that Stelios' behaviour did not pose a threat to the Turkish forces, which were in overwhelming control of the area where the incident took place.

Moreover, the Court was particularly critical of the fact that Turkish soldiers had prevented the members of the UNFICYP from attending to the Applicants' son. Having regard to this fact and the abovementioned findings, the Court held that the Applicants' son's death could be attributed to the Turkish Government – the Turkish government had used excessive force and were responsible for the death of the Applicants' son. Accordingly, the State had violated Article 2 of the Convention in the substantive sense.

With regard to the effectiveness of the investigation, the Court observed that the Turkish Government had submitted few pieces of evidence containing a brief account of the events by the soldiers involved in the incident. Drawing inference from this, as well as the fact that the investigation had been carried out by same body to which the accused belonged, the Court believed that the investigation could not have been conducted independently. What's more, the State had failed to take any criminal proceedings against the Turkish soldier responsible for the death of the Applicants' son. Taking all these failing into account, the Court stated that the State had failed to conduct an effective investigation into the death of Stelios – in contravention of the procedural element enshrined within Article 2 of the Convention.

*Article 41*

The Applicants were awarded EUR 35,000 each in respect of non-pecuniary damage, and EUR 9,888.30 for costs and expenses.

***Seyfettin Acar & Others v. Turkey***

(30742/03)

**European Court of Human Rights:** Judgment 6 October 2009

*Right to life – Article 2 of the Convention*

Facts

On 20 April 1992, a number of villagers from Çalpinar village were travelling in two vehicles. Soon after leaving their village, the villagers were stopped by village guards who decided to open fire on the vehicles. Six of the villagers were killed in the attack, including the first Applicant's brother and the sixth Applicant's husband, Mr Süleyman Acar (not the fourth Applicant). A number of other villagers were injured, including the second Applicant's brother and fifth Applicant's husband, Mr Sabri Acar, who died in hospital on the following day.

The third Applicant (Yusuf Acar) was shot in the leg during the attack, and his injuries required a month to heal. The fourth Applicant, Süleyman Acar (to be distinguished from the first and sixth Applicants' relative), had broken bones and a split bullet in his body. The doctors who examined the fourth Applicant deemed it unnecessary to remove the split bullet pieces because they were not considered a threat to the life of the Applicant.

On 20 April 1992, the scene of the attack was visited by the Midyat public prosecutor, who concluded that those to have died were shot at close range. The public prosecutor came to this conclusion without the guidance of a forensic doctor. On the same day, the public prosecutor asked the gendarmes who were in the area to collect the used bullet cases, but the gendarmes refused. Consequently, the public prosecutor collected the cases himself - 66 in total. The cases had

been come from rifles given to the village guards by the gendarmes. The public prosecutor later concluded that the village guards had set an ambush in order to kill the villagers.

A gendarmerie report disputed the facts of the incident as observed by the public prosecutor. The report suggested that the village guards had not opened fire on the villagers, instead attributing the attack to PKK (Kurdistan Workers' Party) members wearing military uniforms.

On 8 July 1992, twenty-seven village guards were charged with multiple homicides relating to the incident. The guards were indicted before the Midyat Assize Court. For security reasons, the case was moved to the Denizli Assize Court. It wasn't for over another 8 years until the Denizli Assize Court finally came to a judgment in the case. On 20 November 2000, the Denizli Assize Court acquitted all the village guards. On 7 February 2002, the Court of Cassation upheld the Denizli Assize Court's judgment in relation to seventeen of the accused, but quashed the judgments in relation to the remaining ten.

A retrial before the Denizli Assize Court began with reference to the ten village guards whose acquittals had been quashed. On 20 May 2003, the Denizli Assize Court found the ten village guards guilty of the murders of the eight villagers killed during the attack, as well as guilty of the attempted murders of the villagers that were injured during the attack. The ten village guards were thereby sentenced to life imprisonment.

On 9 December 2004, the Court of Cassation upheld the Denizli Assize Court's judgment with reference to eight of the accused, and quashed the convictions of the other two. The retrials of the two village guards were still pending when the Court came to its judgment in this case.

### Complaints

Four of the Applicant's complained that their relatives had been killed by state forces in contravention of Article 2 of the Convention. The third and fourth Applicants, who were injured during the attack, complained that their right to life under Article of the Convention had also been violated. The Applicants also complained that the investigation conducted by the state had not been effective – in contravention to the procedural limb of Article 2 of the Convention.

### Held

#### *Article 2*

The Court observed that they had examined the circumstances surrounding the shootings and the subsequent investigation in a previous case (*Acar and Others v Turkey* (36088/97 and 38417/97)). In that case, the Court found the state to have violated Article 2 of the Convention in respect of the deaths and injuries. They also found the investigation to have been ineffective, in violation of the procedural limb of Article 2 of the Convention.

Having regard to previous findings in relation to the shootings, the Court considered there to be no arguments or evidence provided by the State which would lead it to a different conclusion in the Applicants' case. In this regard, the Court was particularly critical of the use of village guards, who had received no formal training and who acted outside the normal structure of discipline applicable to the gendarmerie and police forces. The Court observed that the village guards were employed and armed by the state, meaning that the deaths and injuries to the Applicants and their relatives could be attributed to the State. The State were unable to provide any justification for the

killings and attempted killings of the Applicants and their relatives, meaning that they had violated the Applicants' rights under Article 2 of the Convention in the substantive sense.

With regard to the effectiveness of the investigation, the Court explained that the State had again been unable to provide any arguments or evidence to draw it to a different conclusion from that of *Acar and Others v Turkey* (36088/97 and 38417/97). Consequently, the Court believed the State to have failed to provide the Applicants with an effective investigation into the killings and attempted killings, meaning that they had also violated Article 2 of the Convention in the procedural sense.

#### *Article 41*

The Court awarded the following damages as a result as of their finding of a violation of Article 2: The first Applicant (Seyfettin Acar) was awarded €5,000 EUR in non-pecuniary damages. The second Applicant (Talat Acar) was awarded €5,000 EUR in non-pecuniary damages. The third Applicant (Yusuf Acar) was awarded €10,000 EUR in pecuniary damages, and €20,000 EUR in non-pecuniary damages. The fourth Applicant (Süleyman Acar) was awarded €10,000 EUR in pecuniary damages, and €20,000 EUR in non-pecuniary damages. The fifth Applicant (Narinci Acar) was awarded €25,000 EUR in pecuniary damages, and €30,000 EUR in non-pecuniary damages. The sixth Applicant (Hasbiye Acar) was awarded €24,000 EUR in pecuniary damages, and €30,000 EUR in non-pecuniary damages. The Applicants were also jointly awarded €4,150 EUR in respect of costs and expenses.

#### ***Varnava & Others v. Turkey***

(16064/90), (16065/90), (16066/90), (16068/90), (16069/90), (16070/90), (16071/90), (16072/90), and, (16073/90)

**European Court of Human Rights (Grand Chamber):** Judgment 18 September 2009

*Right to life; Prohibition of torture, inhuman and degrading treatment; Right to liberty and security of person – Article 2, Article 3 and Article 5 of the Convention*

#### Facts

The alleged violations of the Convention under these applications stem from the Turkish military operations in northern Cyprus in July and August 1974. The Applicants and the State differ in their accounts of the facts in each application. Each application contained two Applicants (the victim and a relative).

Between July and August 1974, eight of the nine individuals to have disappeared were serving in the Cypriot military attempting to oppose the advancing Turkish military offensive. Each of these individuals were placed on the front line. Seven of these eight men were captured by Turkish forces and transported to Adana Prison. Several witness accounts corroborated these facts. Of the other Cypriot soldier to have disappeared, he last seen during an ambush by Turkish forces when Cypriot forces were attempting to retreat to Kyrenia. Each of the eight men's whereabouts is still uncertain.

The ninth individual to have disappeared, Savvas Hadjipanteli, was a bank employee in Yialousa. On 18 August 1974, he was taken by Turkish soldiers for questioning. On 27 August 1974, some Turkish Cypriots forced 4 bank employees to open two safes. They were unable to open the third



because the Applicant had the keys. After another 10-12, the same Turkish Cypriots returned with the Applicant's keys. The Applicant's body was later found, in 2007, within a mass grave in which prisoners killed extra-judicially in 1974 were located.

The Turkish government on the other hand suggested that each of the nine men had not been taken into the custody of the Turkish Army. Instead, they argued that the eight military personnel had died in action, and that the ninth individual was not on the list of prisoners at the prison where it was alleged he had been detained – which had in fact been inspected by the International Red Cross (ICRC).

### Complaints

The Applicants complained that their relatives had disappeared at the hands of Turkish forces in 1974 and that the State had failed to account for them since – in contravention of Article 2 of the Convention. Some Applicants also complained the distress and anguish they had suffered as a result of not knowing the whereabouts or state of their relatives amounted to inhuman treatment, in contravention of Article 3 of the Convention. The Applicants also complained that their relative's alleged detention contravened their right to liberty and security under Article 5 of the Convention.

Some Applicants also complain of various other Articles of the Convention, such as Article 4 (prohibition of slave labour), Article 6 (right to a fair trial), Article 8 (right to private and family life), Article 10 (freedom of expression), Article 12 (right to marry), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

### Held

#### *Article 2*

Article 2 of the Convention has both substantive and procedural limbs. Under the procedural limb, Turkey is required to investigate into alleged violations of the right to life. As such, Turkey is required to effectively investigate into disappearances at the hands of State forces, particularly in relation prisoners of war or civilians caught up in armed conflict.

The Court observed that the State had not produced any evidence to prove their assertion that the Applicants had been found dead or had been killed in the conflict zone under their control. Indeed, they were unable to provide any evidence to counter the claims made by the Applicants. They also observed that the disappearances had occurred in life-threatening circumstances where military operations had been accompanied by widespread arrests and killings.

The Court rejected the State's argument that the investigation conducted by the UN Committee on Missing Persons (CMP) was enough to satisfy their procedural obligation to investigate into disappearances under Article 2 of the Convention. The CMP investigation had not determined the facts surrounding the deaths, nor was it collecting evidence in an effort to hold accountable those responsible for the killings. The State had failed to take any measures to investigate into the disappearances of the Applicants themselves, and therefore had failed to satisfy their procedural obligation enshrined within Article 2 of the Convention. There was a 'continuing violation of Article 2'.

### *Article 3*

Drawing upon the inter-state case between Cyprus and Turkey on the 1974 conflict, the Court observed that where military operations had resulted in the considerable loss to life and large scale detentions, relatives of those to have disappeared had suffered agony of not knowing whether their relatives were still alive. With regard to the evident suffering being inflicted upon the Applicants, Turkey had been reluctant to investigate or provide information on the whereabouts of those to have disappeared. The Court held Turkey's inactions had therefore resulted in inhuman treatment being inflicted upon the Applicants. This was further supported by the duration over which the Applicants were forced to suffer this most acute anxiety. Turkey had therefore violated the Article 3 rights of each Applicant who was a relative of the disappeared Applicants.

### *Article 5*

The Court held there was insufficient evidence to suggest that seven of the nine men to have disappeared under Turkish control. As a result, there had been no violation of Article 5 of the Convention in regard to their complaints.

However, the Court held there to be a violation of Article 5 in regard to the complaints of Eleftherios Thoma and Savvas Hadjipanteli. These two Applicants were included on the ICRC list of detainees and had last been seen under the control of Turkish forces. Turkey had neither logged the Applicants' presence in detention, nor provided any evidence to show the movements of the Applicants during detention. This, coupled with the Court's finding in relation to the procedural limb of Article 2, led the Court to conclude that there was 'no doubt' that Turkey had failed to conduct the necessary investigation required under Article 5 of the Convention.

### *Other Articles of the Convention*

Following the Grand Chamber's finding of violations in relation to Articles 2, 3 and 5, they considered that the main legal questions had been dealt with, meaning that it was unnecessary to give separate rulings on the other complaints made by the Applicants.

### *Article 41*

The Court awarded €12,000 EUR in non-pecuniary damages, and €8,000 in costs and expenses, to each Applicant.

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

### *Abdolkhani & Karimnia v. Turkey*

(30471/08)

**European Court of Human Rights:** Judgment dated 22 September 2009

*Right to life - prohibition of torture, inhuman and degrading treatment - right to liberty and security - right to an effective remedy - Article 2, 3, 5(1), 5(2), 5(4) and 13 of the Convention*

### Facts

The Applicants are Iranian nationals and are currently being held at the Gaziosmanpaşa Foreigners' Admission and Accommodation Centre in Kırklareli, Turkey. They were all members of the People's Mojahedin Organisation (PMOI). They had moved to a PMOI camp in Iraq but having

been dissatisfied with the motives of the organisation, they subsequently moved to a refugee camp managed by the United States military in Iraq. In 2006 and 2007 the Applicants were recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR) on the basis of their links to PMOI, which put them at risk of persecution in Iran.

In April 2008 the refugee camp was closed down and the Applicants travelled to Turkey where they were arrested and deported back to Iraq on 17 June 2008. The Applicants immediately returned to Turkey and on 21 June 2008 they were arrested and detained on the grounds of illegal entry. The Applicants informed the Turkish authorities of their past political affiliation and their status as refugees. They were refused the right to legal assistance whilst under arrest. On 23 June 2008 the Muş Magistrates' Court convicted the Applicants and ordered their deportation to Iran. On 28 June 2008 Turkey attempted to deport the Applicants but they were refused entry by Iran. On 30 June 2008 the Muş Magistrates' Court ordered the Applicants' stay from deportation initially until 4 August 2008 and it was then extended indefinitely. The Applicants remain in Gaziosmanpaşa Foreigners' Admission and Accommodation Centre.

### Complaints

The Applicants complained that they were at real risk of death or ill-treatment if they were deported to Iran, in contravention of Articles 2 and 3 of the Convention. They also alleged that their detention was unlawful and in violation of Article 5(1) on the grounds that their detention was not authorised under domestic law. Further, the Applicants complained that they had not been informed of the reasons for their detention and that they were unable to challenge the lawfulness of their detention (in contravention of Article 5(2) and 5(4)). Finally, they alleged that they had been prevented from applying for asylum and from challenging their deportation in contravention of Article 13 of the Convention.

### Held

#### *Article 3*

The Court observed reports from the UNHCR Resettlement Service, Amnesty International and Human Rights Watch, all illustrating that PMOI members were being executed or were found to have died in suspicious circumstances in detention in Iran. They also noted that Turkey had not interviewed the Applicants in relation to their asylum claims, whereas the UNHCR had interviewed them in this regard. As a result, drawing upon the asylum status the Applicants were granted by the UNHCR, the Court was obliged to accept the Applicants' claims of threats to their life as credible. The Court accepted Turkey's argument that allowing the Applicants to stay in Turkey might generate a risk to national security, yet rebutted this argument on the grounds that Article 3 is an absolute right in any case, and so could not be justifiably derogated from so as to protect the interests of national security. Drawing upon the credible nature of the Applicants' claims and the State's inability to provide adequately-grounded counter-claims, the Court held that there was a real risk that the Applicants would be subjected to treatment in contravention of Article 3 of the Convention if they were forcedly returned to Iran. The Court also held that their deportation to Iraq would also constitute a violation of Article 3 of the Convention, since PMOI members deported to Iraq had gone missing.

*Article 2*

Following the Court's finding of a violation of Article 3, they felt it unnecessary to consider the legality of the Applicants' proposed deportation with reference to Article 2.

*Article 5*

The Court observed that there were no legal provisions that established the basis or procedure for ordering and extending the Applicants' detention with a view to deportation. Similarly, there were no legal provisions indicating the time-limits for such detention. Consequently, the Court found the Turkish legal system failed to protect the Applicants from arbitrary detention and therefore their detention could not be deemed 'lawful' under Article 5(1) of the Convention.

The Court observed that the Applicants were arrested and placed in police custody on 21 June 2008 and were convicted of illegal entry into Turkey on 23 June 2008. They also observed that their sentence had been deferred with their conviction too. They noted that the State was unable to provide any evidence to show that the Applicants had been informed of the grounds for their detention between these times. Nor had they been informed of the grounds for their detention after their conviction. As a result, the Court were obliged to assume that the State had failed to communicate the grounds for the Applicants' detention to them at any stage in contravention of Article 5(2) of the Convention.

Owing to the fact that the Applicants had been denied legal assistance and were never informed of the grounds for their detention, they had been unable to appeal against their detention. The Court therefore a violation of Article 5(4) as the Turkish legal system had failed to provide the Applicants with a remedy whereby they could challenge the legality of their detention.

*Article 13*

The Court was particularly critical of the fact that neither the administrative nor the judicial authorities had failed to take account of the Applicants' claims that their deportation placed them at real risk of ill-treatment. What's more, the State had failed to notify the Applicants of the reasons for the refusal of their asylum claim and the reasons for their deportation, and had not served the deportation orders on the Applicants. The Court therefore concluded that as the Applicants' allegations that their deportation would result in ill treatment had never actually be examined by the State, the Applicants couldn't have been provided with an effective remedy in relation to their complaints under Article 3. Therefore, the Applicants' rights under Article 13 of the Convention had been violated in this regard.

*Article 41*

The Applicants were awarded 20,000 EUR each in non-pecuniary damages and 3,500 EUR jointly in costs and expenses.

***Ballıktaş v. Turkey***

(7070/03)

**European Court of Human Rights:** Judgment dated 20 October 2009

*Prohibition of torture and inhuman and degrading treatment - right to a fair trial – Article 3 and 6 of the Convention*

Facts

On 6 March 2000 the Applicant was arrested by gendarmerie at the border in Edirne, on her return from Bulgaria. She was subsequently taken to a gendarmerie station within the area, where she was informed that she had the right to be represented by a lawyer and to inform her family of her arrest. However, the arrest report also stated that she could not consult a lawyer until her detention had been extended by a judge, since she had been arrested in relation to an offence over which the State Security Courts had jurisdiction. Between 7 and 9 March 2000 the Applicant was interrogated by gendarmerie in the absence of a lawyer. During this time she signed a statement admitting her involvement with the activities of the PKK (Kurdistan Workers' Party). On 9 March 2000 the Applicant was examined by a doctor at the Edirne branch of the Forensic Medicine Directorate who reported no injuries or signs of ill-treatment on her body. She was then questioned by the public prosecutor and judge at the Edirne Magistrates' Court, where she admitted to being a member of the PKK. The judge ordered her continued detention pending trial.

On 3 April 2000 the Applicant was indicted by the İstanbul State Security Court on the grounds that she was a member of an illegal organisation. The Applicant was represented by a lawyer throughout the subsequent trial. On 22 June 2000, in the first hearing in the Applicant's case, she informed the Court that she was not a member of the PKK and had only accepted the accusations before the prosecutor and judge because she was informed by the gendarmerie that she would be tortured at the gendarmerie station again. She also stated that the medical report showing no signs of ill-treatment on her body had been drafted before she had been beaten and threatened with rape. The Applicant also alleged that she had been stripped naked by the gendarmerie during her detention. At the second hearing, on 29 August 2000, the Applicant repeated her allegations of ill-treatment, explaining that she had also been drenched in water and gendarmerie officers had touched very intimate parts of her body.

On 9 October 2001 the İstanbul State Security Court convicted the Applicant and sentenced her to 12 years 6 months imprisonment. The Applicant's statements made as a result of torture were used as a basis for her conviction. The Applicant had asked for a cassette tape of her questioning to be provided by the Government as this would prove that she had been ill-treated. The Government failed to supply any such cassette. On 8 July 2002 the Court of Cassation upheld the Applicant's conviction.

Complaints

The Applicant complained that she had been subjected to ill-treatment in contravention of Article 3 during her detention at the gendarmerie station. She also complained that she had been denied a fair trial because the İstanbul State Security Court had used the statements allegedly obtained through torture as the basis for her conviction and as she had been refused legal assistance during

her detention at the gendarmerie station. In this regard, the Applicant complained of violations of Article 6(1) and 6(3) of the Convention.

### Held

#### *Article 3*

The Court rejected the medical report dated 9 June 2000 as sufficient evidence for proving or disproving that the Applicant had been subjected to ill-treatment. It stated that the report lacked detail and fell far short of the standards set by the European Commission for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), which are regularly taken into account by the Court when determining the sufficiency of medical reports. With reference to the cassette tape which the Applicant stated would prove her allegations of torture, the Court noted that they had asked the state to provide such a tape but the state had failed to do so. However, it decided to not draw inference from the state's failure to provide such evidence, stating that it would examine the issue in light of the effectiveness of the investigation instead. As such, on the evidence provided, the Court did not consider the Applicant to have been subjected to ill-treatment and there had therefore been no substantive violation of Article 3.

However the Court stressed that any investigation into allegations of ill-treatment in contravention of Article 3 must be capable of leading to the identification and punishment of the perpetrators. In the Applicant's case, the Court noted that the state had made no attempt to question the Applicant about her persistent allegations of torture, nor had they questioned the gendarmerie officers who had interrogated the Applicant. What's more, the Court noted that the state remained silent on the existence of the cassette tape which could have clarified the accuracy of the Applicant's claims. Having regard to each of these observations, the Court held that the State had failed to take even the most rudimentary of steps of investigation into the Applicant's allegations, in violation of the procedural obligations under Article 3.

#### *Article 6*

The Court noted that refusal of legal assistance during gendarmerie detention was systemic, since all individuals detained under offences which the State Security Courts had jurisdiction over were refused legal assistance at the time. Therefore, even if the Applicant had asked for legal assistance, it would have been futile. The Court also noted that the issue had been dealt with in numerous cases, including *Salduz v Turkey* (36391/02). They held that the Applicant had been undoubtedly affected by the lack of legal assistance, since she continually rejected the statements she had made at that time throughout her subsequent hearing. In the Court's eyes, neither the legal assistance later provided to the Applicant nor the adversarial nature of the proceedings could cure the defects which had occurred. The lack of legal assistance given to the Applicant during her gendarmerie detention had irretrievably affected her defence rights, in contravention of Article 6(1) and 6(3)(c) of the Convention. The Court considered it unnecessary to decide upon whether there had been a violation of Article 6(1) in light of the State's lack of investigation into the Applicant's allegations of ill-treatment, as this issue had already been dealt with in the finding of a violation of the procedural element of Article 3.

#### *Article 41*

The Applicant was awarded 7,000 EUR in non-pecuniary damages and 2,000 EUR in costs and expenses.

***Gök and Güler v. Turkey***

(74307/01)

**European Court of Human Rights:** Judgment dated 28 July 2009

*Prohibition of torture, inhuman and degrading treatment or punishment - right to a fair trial – Articles 3, 6(1) and 6(3)(c) of the Convention*

Facts

The first Applicant was arrested and detained on the grounds that he was a suspected member of an illegal organisation (the PKK) on 23 November 1995. The second Applicant had been taken into custody on the same grounds on 18 November 1995.

On 26 November 1995, in the absence of a lawyer, the Applicants were interrogated by police officers. They both gave details of their participation in the killings of Mr M.S.T and the kidnapping of G.T, on behalf of the PKK. On 27 November 1995, again in the absence of a lawyer, the Applicants gave details of their codes name and acts undertaken by them. On 28 November 1995 they were examined by a doctor who found a bruise of 1x1cm on the first Applicant's lip, and two 2cm scratches on the second Applicant's knee and his complaints of pains in his lower back.

The first Applicant complained of being blindfolded, beaten with sticks and having his head stood on during their interrogation. The second Applicant alleged to have been subjected to a mock execution. Both Applicants complained that they had suffered electric shocks, falaka (beating of the soles of the feet) and Palestinian hanging.

On 28 November 1995 the Applicants were brought before a judge at the İstanbul State Security Court where they refused to give statements and refuted the contents of their written statements. Both Applicants stated that they had been forced to sign their statements as a result of torture, with the second Applicant alleging that some of his statements were written by police officers.

On 5 December 1995, the Applicants were indicted under Article 125 of the Criminal Code for allegedly being involved in the killing of Mr M.S.T and kidnapping of G.T. A number of hearings were held in the Applicants' cases and the military judges were changed to civilian judges on 18 June 1999. On 17 November 1999 the Applicants were convicted of being part of an armed organisation and sentenced to 12 years and 6 months imprisonment. The Court of Cassation upheld their convictions and sentences on 1 February 2001. On 9 November 2004 the Applicants were released from prison.

On 20 June 2000 the first Applicant wrote to the Human Rights Commission of the Turkish Grand National Assembly complaining of his ill-treatment. On 12 June 2001 the Fatih Public Prosecutor's Office decided not to commit any police officers to trial because the statutory time-limit had passed by this point. The Applicant filed a second petition on 22 October 2004 but on 11 March 2005, the Fatih Public Prosecutor's Office decided not to commit any persons for trial for the same reasons.

Complaints

The Applicants complained of being subjected to ill-treatment whilst being held in police custody, in contravention of Article 3 of the Convention. They also complained that they were denied a fair trial as they were convicted on statements made under duress by a tribunal on which a military

judge had sat (in contravention of Article 6(1)). Further they has been unable to receive legal assistance whilst in police custody in contravention of Article 6(3)(c).

### Held

#### *Article 3*

The Applicants submissions to the domestic courts of the treatment suffered during their detention were inconsistent with those submitted to the ECtHR. Furthermore, the Applicants failed to provide any conclusive or convincing evidence to prove that such ill-treatment took place. Therefore, there had been no violation of Article 3 of the Convention in its substantive element. However, the Court did hold that the Fatih's Public Prosecutor's Office had failed to conduct an effective investigation into the allegations of torture, in violation of the procedural element of Article 3.

#### *Article 6*

The Court held, citing previous case law, that the displacement of the military judge with a civilian judge does not necessarily negate any allegations of bias. They observed that in the Applicants' case, the military judge was not replaced until the end of the proceedings, meaning that most of the trial was conducted under his supervision. Consequently, the replacement did not allay the Applicants' concern as to the independence and impartiality of the court. Therefore, there had been a violation of Article 6(1) of the Convention.

The Court also noted that the lack of access to a lawyer whilst in custody was systemic, and applied to all individuals suspected of an offence which falls under the jurisdiction of the State Security Courts. They held that irrespective of the fact that the Applicant was able to access legal assistance during the trials, their inability to access a lawyer during their initial custody had affected their defence rights. Consequently, there had been a further violation of Article 6(1), in conjunction with Article 6(3)(c) of the Convention.

#### *Article 41*

The Applicants were each awarded 6,500 EUR in non-pecuniary damages.

### ***Karapetyan v. Turkey***

(22387/05)

**European Court of Human Rights:** Judgments dated 27 October 2009

*Administrative detention – prohibition of torture and inhuman and degrading treatment – right to liberty and security - right to a fair trial and right to adequate time and facilities for preparation of defence – right of appeal in criminal matters - Articles 3, 5§2, 6 § 1 taken together with 6 § 3 (b) of the Convention, 13 and 14 of the Convention*

This is a KHRP-assisted case.

### Facts

Zaven Karapetyan is an Armenian national, born in 1945, who lives in Karakert (Armenia).



In February and March 2003 a presidential election took place in Armenia. Following the first and second rounds of the election, a series of protests alleging irregularities were organised in Yerevan by the opposition parties.

A demonstration took place on 21 March 2003 in Yerevan. The Applicant, who was in the city when the demonstration took place, claimed that he had not attended the demonstration. However two police officers came to his home on 22 March 2003 and required him to accompany them at the police station. The Applicant showed resistance but was nevertheless taken to the police station and then charged with an administrative offence for having maliciously used foul language and maliciously disobeyed the lawful orders of the police officers for about five to seven minutes.

The Applicant was brought before a court two hours later and convicted to ten days' detention under Article 182 of the Code of Administrative Offences for disobeying the police and using obscene language.

#### Complaints

The Applicant complained that the conditions of his detention amounted to inhuman treatment in breach of Article 3 due to notably overcrowding cells, poor ventilation, no sleeping facilities, toilets in unsanitary conditions, lack of natural light and inadequate food.

The Applicant complained that the conditions of his arrest were in breach of Article 5(2) because he has not been informed of the legal and factual grounds for his arrest.

He also relied on complaints about the administrative proceedings against him under Article 6 §§ 1 and 3 (a)-(d) of the Convention notably that his case was examined in an expedited procedure, therefore not giving them adequate time and facilities for the preparation of their defence.

The Applicant complained under Article 13 of the Convention that he had no appeal procedure at his disposal to contest the decision of 22 March 2003.

The Applicant then complained under Article 14 of the Convention that the administrative penalty he has been subjected to is due to his political opinion.

#### Held

##### *Article 3*

The Court held unanimously that although his detention had been relatively short, the conditions of detention of the Applicant violated Article 3. According to the Court, overcrowded cells with lack of natural light, no sleeping facilities and an unsanitary toilet caused him great suffering, diminished his human dignity and aroused in him feelings of humiliation and inferiority which amounts to inhuman and degrading treatment prohibited under Article 3 of the Convention.

##### *Article 5*

The Court held that there was no violation of Article 5 and that the complaint was manifestly ill-founded. The Court noted that the reasons for the Applicant's arrest were indicated in several records signed by the Applicant and that therefore the Applicant was aware of the reasons of his arrest.

*Article 6*

The Court noted previous findings of a violation of Article 6 in a number of other similar cases against Armenia.

The administrative case against the Applicant has been examined similarly in an expedited procedure as the Applicant has been kept in detention in a police station without any contact with the outside world, brought before a court and convicted in a matter of hours. Therefore, the Court held that no adequate time and facilities for the preparation of his defence has been granted to the Applicant, this in violation of the right to a fair hearing embodied in Article 6 § 3 (b) taken together with Article 6 § 1.

*Article 2 of Protocol No.7*

Then, the Court held unanimously, after making reference to similar previous cases against Armenia, that there is no clear and accessible right to appeal in practice which constitutes a clear violation of Article 2 of Protocol No. 7.

*Article 14*

The Court first observed that similar allegations arose in numerous previous cases against Armenia. However, the Court held that was insufficient evidence to find that Applicant was subjected to administrative penalty because of his political opinion.

***Müdet Kömürcü v. Turkey (No. 2)***

(40160/05)

**European Court of Human Rights:** Judgment 21 July 2009

*Prohibition against torture, inhuman and degrading treatment or punishment, right to an effective remedy – Article 3 and 13 of the Convention*

Facts

On 27 November 1997, the Applicant was taken into police custody on suspicion that he had been involved with a terrorist organisation. He remained in detention until 2 December 1997. During this time, he alleges that he had been subjected to ill-treatment. On 2 December 1997, he was examined by a doctor, who noted that he had a 1cm-long crusted scar on his left leg, and a 2cm-wide lesion surrounding his left eyelid. The Applicant issued statements to the State Security Court (on 1 December 1997) and the Fatih Public Prosecutor (on 10 March 1998), that he had been beaten and had his testicles squeezed during his detention. On 17 April 1998 the İstanbul Public Prosecutor charged four police officers with ill-treating the Applicant. On 20 June 2003, the İstanbul Assize Court held that the Applicant had been subjected to ill-treatment, and that the police officers had inflicted this ill-treatment so as to obtain the Applicant's confession.

On 29 March 2005, the Court of Cassation quashed the convictions because the Applicants medical records and statements were absent from the case file, meaning the investigation was insufficient. The İstanbul Assize Court later discontinued the proceedings because the case had become time-barred.

## Complaints

The Applicant complained that he had been tortured during his detention, in contravention of Article 3 of the Convention. He complained that his right to a fair trial (Article 6) had been violated, as the authorities had failed to hold an effective investigation into his alleged torture, and had failed to identify and punish those responsible. The Applicant also complained that he was unable to obtain compensation for his ill-treatment because the proceedings had become time-barred, in contravention of Article 13 of the Convention.

## Held

The Court held that the complaints should all be dealt with under Article 3.

### *Article 3*

The Court stated, citing previous case law, that where the facts are known wholly or in large part to the State, strong presumptions of fact shall arise from the injuries sustained during detention. They observed that the Applicants' submissions were backed up by medical evidence, and that the State could not provide credible arguments as to where the injuries to the Applicant came from. The Court therefore found that the police officers had in fact subjected to the Applicant to ill-treatment during his detention, in contravention of the substantive element of Article 3.

The Court also found there to be a violation of the procedural element of Article 3. They observed, from previous case law, that where criminal proceedings concern treatment in alleged contravention of Article 3, the proceedings must not be time-barred. Evidently, the proceedings did become time-barred in this case, and therefore there had been a violation of Article 3 of the Convention in the procedural element.

### *Article 13*

The Court found, referring to the notion that proceedings concerning allegations of torture should never become time-barred, that the Applicant was unable to receive any compensation because of the time-barring of the civil proceedings. Consequently, the State had not provided the Applicant with an effective remedy, and had therefore violated Article 13 of the Convention.

### *Article 41*

The Applicant was awarded €10,000 EUR in non-pecuniary damages, as well as €2,000 in costs and expenses.

## ***Terzi and Erkmen v. Turkey***

(31300/05)

**European Court of Human Rights:** Judgment 28 July 2009

*Prohibition of torture, inhuman and degrading treatment or punishment – Article 3 of the Convention.*

## Facts

On 21 May 1997, the Applicants were arrested and taken into custody at the Mersin Security Headquarters on allegations of car theft. During their subsequent detention, they claimed to have

been subjected to ill-treatment by two police officers (S.D. and I.A.). The Applicants alleged that they were stripped naked, beaten and subjected to electric shocks. On 23 May 1997, the Applicants were taken to a forensic doctor (S.T.), who examined them and reported that there were no traces on the Applicants' bodies to suggest any ill-treatment. The Applicants were also released on 23 May 1997, and complained to the public prosecutor in reference to the ill-treatment they had suffered. On the same day, the public prosecutor brought them before another forensic doctor, who reported that the first Applicant had a series of red marks in various sizes on his scapula (shoulder blade) and thorax (chest, rib cage and sternum area), a 2cm-wide bruise on his lip and a 0.5cm-wide ecchymosis (a spot caused by a bruise) on his right eye. The same doctor reported that the second Applicant had a red 1x1cm skin wound on his groin. On 13 December 1999, S.D. and I.A. were convicted of ill-treatment under Article 245 Criminal Code by the Mersin Assize Court. They held that they could not be convicted of torture because Article 245 Criminal Court stipulated that the victims must have been charged with an offence for the treatment to be classed as torture – the Applicants having only been taken into custody, and not charged with any offences. S.D. and I.A. were sentenced to imprisonment, but their sentences were reduced to a fine.

On 31 January 2001, the Court of Cassation quashed the convictions on the grounds that the provisions applicable to police officers were Articles 245 (torture) and 230 (negligence) Criminal Code only. However, on 30 January 2002, the Mersin Assize Court persisted with its earlier judgment. On 15 November 2002, the Joint Criminal Chambers of the Plenary Court of Cassation (*Yargıtay Ceza Genel Kurulu*) quashed the Mersin Assize Court's judgment on the grounds that S.D. and I.A. had in fact committed acts of torture against the Applicant, by intentionally inflicting ill-treatment in order to obtain confessions. S.D. and I.A. had therefore committed acts in contravention of Article 243 Criminal Code. They also held S.T. to have committed an offence under Article 230 Criminal Code, for drawing up the Applicants' medical reports in the presence of police officers and without examination of their bodies.

On 16 January 2004, the Mersin Assize Court held the prosecution of S.T. as time-barred, but convicted both S.D. and I.A. and sentenced them to two years imprisonment each. S.D. and I.A. both appealed. On 24 June and 15 October 2004, the Applicants' asked the Court of Cassation to expedite the case because it was in danger of being time-barred. On 15 December 2004, the Court of Cassation did in fact hold the cases of S.D. and I.A. as time-barred and dismissed the proceedings.

The Applicants subsequently wrote to the Ministry of Justice, asking them to identify the judges in each Court and to hold them accountable for allowing the proceedings to become time-barred. On 13 March 2006, the Ministry of Justice informed the Applicants of the judges who sat in their case but also notified them that no proceedings would be taken against the judges because their complaint related to the use of judicial powers.

### Complaints

The Applicants complained that they were tortured in police custody on 27 May 1997 and the Turkish authorities have failed to establish, or hold accountable, the perpetrators of the alleged torture. As a result, the Applicant's claimed breaches of Article 3 (prohibition of torture, inhuman and degrading treatment), Article 5 (right to liberty and security), Article 6(1) (right to a fair trial), and, Article 13 (right to an effective remedy) of the Convention.

## Held

### *Article 3*

The Court held that the issues raised by the Applicants under Articles 3, 6 and 13 of the Convention should all be dealt with solely under Article 3. They observed that the *Yargıtay Ceza Genel Kurulu* had found S.D. and I.A. to have inflicted torture upon the Applicants.

They believed that this finding, coupled with the conjunctive medical records, indicated that ill-treatment had clearly taken place. Drawing inference from previous judgments, the Court explained that 'torture' under Article 3 means 'deliberate inhuman treatment causing very serious and cruel suffering'. They found the actions of S.D. and I.A. to be clearly intentional, and regarded the treatment they issued as 'particularly serious and cruel, capable of causing severe pain and suffering'. The treatment issued by S.D. and I.A. therefore constituted torture, in contravention of the substantive element of Article 3 of the Convention.

The Court also found there to have been a violation of the procedural element of Article 3 of the Convention. Citing previous judgments, they explained that criminal proceedings or sentencing must not be time-barred, nor should the alleged torturer continue his duties. The Court observed that the domestic courts had allowed the case to become time-barred, and S.D. and I.A. had been allowed to continue their duties. Therefore, there had been a violation of the procedural element of Article 3 of the Convention.

### *Article 5*

The Court declared the Applicants complaints under Article 5 inadmissible. They highlighted that the Applicants were detained on 21 May 1997 and released on 23 May 1997, although the complaints were not introduced to the Court until 23 August 2005. Their Application had therefore not been submitted within six months of the date of the alleged Article 5 violation (as required under Article 35(1) of the Convention), rendering it inadmissible.

### *Article 41*

The Applicants were each awarded €15,000 EUR in non-pecuniary damages.

## Commentary

This case reaffirms the Court's interpretational stance on torture. Citing *Selmouni v France* (25803/94) and *Ireland v United Kingdom* (5310/71), the Court has confirmed that perpetrators shall commit torture when their actions represent 'deliberate inhuman treatment causing very serious and cruel suffering'. Whether the treatment issued by the perpetrators is branded as torture or inhuman or degrading treatment or punishment, makes no difference in terms of a violation of the Convention; all such treatment breaches Article 3. However, as observed by the Court, torture carries a particular 'special stigma', rendering it more serious than inhuman or degrading treatment or punishment. The definition and prohibition on torture is clear, yet member states to the Convention still violate this provision in abundance.

This judgment also possesses particular significance in terms of the procedural element of Article 3. The procedural element, first developed in *A v United Kingdom* (25599/94), requires States to have legislation in place so as to prevent torture and to punish those responsible. However, *Terzi and Erkmen v Turkey* represents an expansion of this aspect, overlapping it with the obligations expressed within Article 6 in relation to a right to a fair trial. Whilst the Applicants had submitted

alleged violations under Article 6 within their application (in reference to the length of the proceedings), the Court expressly decided to take this into account in relation to the procedural element of Article 3, rather than consider a violation of Article 6. Directly criticising the Turkish criminal law system, the Court held that time-barring proceedings provides 'no dissuasive effect' to potential torturers. Consequently, the Turkish criminal law procedure did not satisfy the positive obligation imposed upon states to protect individuals from treatment contravened under Article 3. The willingness of the Court to deal with what could be potential breaches of Article 6 under the procedural elements of other Articles is an increasing trend. Undoubtedly, the expansion of the procedural element has its benefits; providing for violations of Article 3 where the investigation into whether the alleged treatment took place was inadequate; and, carrying with it the detrimental stigma that Article 3 violations possess. However, this judgment could, potentially, pave the way for the procedural element of Article 3 to acquire further components enshrined within Article 6.

### **Ümit Gül v. Turkey**

(7880/02)

**European Court of Human Rights:** Judgment 29 September 2009

*Prohibition on Torture, Inhuman and Degrading Treatment; Right to a fair trial – Article 3 and Article 6 of the Convention*

#### **Facts**

On 14 January 2001, the Applicant was arrested by the anti-terrorist branch of the Tunceli police headquarters on suspicion of having written slogans in support of the Communist Party of Turkey – an illegal organisation in Turkey. He was subsequently placed in police custody.

During his detention, the Applicant was subjected to ill-treatment. He was hosed with pressurised cold water, was suspended by the arms, whilst also suffering electric shocks and beatings. Four medical reports issued on 14, 16, 17 and 19 January 2001 by the Tunceli State Hospital (at the request of the police headquarters) indicated that there were no signs or marks of ill-treatment on the Applicant's body. Each report explained that the Applicant had not made any complaints and that there were 'no injuries on his body'.

On 17 January 2001, the Applicant was questioned by police officers. In his statement included a confession by the Applicant explaining that he carried out several duties for the aforementioned illegal organisation, including distributing copies of a left-wing newspaper, writing slogans on walls and attending meetings with other members of the organisation. His statement also explained that he did not want the assistance of a lawyer.

On 19 January 2001, the Applicant was brought before the Tunceli Magistrates' Court, where he affirmed the statements he had made two days previously and where his detention pending trial was ordered. The Applicant was subsequently detained in Malatya Prison.

On 22 January 2001, the Applicant applied to the Malatya State Security Court asking for his release. He claimed that he had been subjected to physical and psychological torture during his detention in police custody, whilst also explaining that he had been prevented from sleeping for

three days preceding his appearance before the Court, meaning that he was not fully conscious at the time. The Malatya State Security Court rejected his application on 23 January 2001.

On 8 February 2001, the Applicant asked to be referred to a hospital so that his allegations of torture could be corroborated. On 14 February 2001, the Malatya public prosecutor informed the Applicant that the alleged torture had not taken place within his jurisdiction and so forwarded the request to the Tunceli public prosecutor. The Applicant was eventually examined by the director of the Malatya branch of the Forensic Medicine Directorate on 28 February 2001. The director's report indicated that the Applicant had four scars on the front and back of his shoulders. The report indicated that the Applicant complained of pains and restriction of movement in his arms.

The Applicant made two statements to a prosecutor (dated 22 March 2001 and 10 April 2001) indicating what treatment he had been subjected to. Within the statements, the Applicant explained that he had been stripped naked, wrapped in a damp blanket before being beaten with truncheons and suspended by his arms. He also claimed that police officers had threatened to harm his relatives and dismiss his father from his job. He asked the prosecutor to prosecute the police officers responsible.

On 13 April 2001, the Applicant was again examined at the Malatya State Hospital. The doctor observed a number of scars on the Applicant's shoulders, compatible with the report dated 28 February 2001. It was suggested, again, that the Applicant be referred to a specialist hospital.

On 14 April 2001, Tunceli public prosecutor requested authorisation from the Tunceli governor to prosecute the alleged perpetrators of the Applicant's ill-treatment. On 7 and 11 May 2001, two of the police officers allegedly responsible for the Applicant's ill-treatment were questioned by investigators. Both police officers denied the allegations and argued that members of terrorist organisations made such allegations in an attempt to lower the morale of the police. The Applicant had been released on bail during this time (on 24 April 2001).

The Applicant was scheduled to undergo a further medical examination to establish whether the injuries he had sustained had any permanent effects, yet on 15 May 2001 the prosecutor in charge of the case against the police officers recommended to the Tunceli governor that permission for their prosecutor ought not to be granted. Consequently, the Tunceli governor refused the request for prosecution of the police officers on 21 May 2001.

The Applicant applied for the Tunceli governor's refusal to be annulled, and was successful on 13 June 2001. The Malatya Regional Administrative Court annulled the refusal on the grounds that the investigation was incomplete, that the decision was based on the account of a prosecutor who had not interviewed the Applicant and the decision was based on statements made by those alleged to have tortured the Applicant alone. The investigation therefore continued.

Once the prosecutor had finished his investigation, he again concluded that permission for the prosecution of the police officers ought not to be granted. Consequently, the Tunceli governor again refused the request for prosecution of the police officers, on 27 July 2001. The decision of the Tunceli governor was not communicated to the Applicant, who had fled to Germany following harassment by Turkish police officers. Consequently, the Applicant did not lodge an objection against the governor's decision.

On 16 October 2001, the Tunceli prosecutor rendered a decision not to prosecute the police officers allegedly responsible for the Applicant's ill-treatment. The Applicant's legal representative lodged an objection, highlighting in particular the failure to remedy the defects identified by the Malatya Regional Administrative Court on 13 June 2001. On 8 November 2001, the Applicant's objection was rejected by the Erzincan Assize Court, on the basis of the Tunceli governor's decision of 27 July 2001.

### Complaints

The Applicant complained that, whilst in police custody, he suffered ill-treatment amounting to torture – in contravention of Article 3 of the Convention. The Applicant also complained that he had been unable to consult a lawyer during his detention in police custody, in contravention of Article 6 of the Convention.

### Held

#### *Article 3*

The Court found there to have been a violation of Article 3 of the Convention in both the substantive and procedural sense. The Court believed that the medical reports of 14, 16, 17 and 19 January lacked detail and fell far short of the standards recommended by the CPT (which are regularly taken into account by the Court in its examination of allegations of ill-treatment). Consequently, the reports were dismissed as evidence indicating or disproving the Applicant's claim of ill-treatment.

The Court observed that the next examination of the Applicant's injuries (on 28 February and 13 April 2001) was delayed due to lengthy communications between prosecutors concerning jurisdiction. Nonetheless, they observed that these reports corroborated with the Applicant's allegations of ill-treatment. Consequently, the Court held that the Applicant had been subjected to the kind of ill-treatment prohibited under Article 3 of the Convention. The Applicant had been under the detention and supervision of state agents when he had suffered such ill-treatment, meaning that the State must be responsible for the ill-treatment he had suffered. The State was unable to provide any evidence or arguments to contradict this determination by the Court, meaning that the State had violated the Applicant's rights under Article 3 of the Convention in the substantive sense.

The Court observed that the investigation into the Applicant's allegations of ill-treatment was conducted by a police chief in superior of those accused. Moreover, the decision to grant authorisation for the accused's prosecution was given by the Governor, who is the hierarchical superior to the police chief. The Court held, drawing upon numerous cases where investigations had been conducted in the same way, the investigation to have been conducted by entities which were not independent of those accused of performing the ill-treatment – in contravention of the independence and impartiality requirement of an effective investigation. Consequently, the State had violated Article 3 of the Convention in the procedural sense.

#### *Article 6*

The Court noted that irrespective of the Applicant's statement explaining that he did not want the assistance of a lawyer, Turkish law placed systemic restrictions on access to lawyers during police custody. Drawing upon the fact that the Applicant had been subjected to treatment in



contravention of Article 3 of the Convention during detention in police custody, the Court the use of the statement the Applicant made during this time by the Malatya State Security Court undoubtedly infringes the fairness of his proceedings. Consequently, the Court held that the 'absence of a lawyer at the initial stages of the investigation irretrievably affected the Applicant's defence rights.' Concordantly, the State had violated Article 6(3)(c) (read in conjunction with Article 6(1)) of the Convention by failing to allow the Applicant with access to a lawyer during his police custody.

#### *Article 41*

The Applicant was awarded €11,000 EUR in non-pecuniary damages, as well as €2,000 EUR in costs and expenses.

## **Right to liberty and security of person**

*Attı & Tedik v. Turkey*  
(32705/02)

**European Court of Human Rights:** Judgment dated 20 October 2009

*Right to liberty and security of person - right to a fair trial – Article 5 and 6 of the Convention*

#### Facts

On 31 May 1999, both of the Applicants were arrested at different locations in Diyarbakır. According to the arrest report, the first Applicant was arrested on the basis of the police officer's 'suspicion of his appearance/condition'. He was subsequently placed in police custody for the 'necessary investigation to be carried out'. The second Applicant was arrested in his house 'in relation to an investigation' and was subsequently taken into police custody. The arresting police officer proceeded to search the second Applicant's house, where he found a variety of books and magazines in both Kurdish and Turkish. On 2 June and 4 June 1999 the Diyarbakır Police Headquarters wrote to the Diyarbakır State Security Court and requested permission to detain the two Applicants for longer. The public prosecutor at Diyarbakır State Security Court granted the request on 4 June 1999, allowing their detention up until 10 June 1999.

On 4 June 1999 the Applicants were taken to a series of locations where they confessed to carrying out activities on behalf of the PKK. On the same day the Applicants signed two statements confirming their involvement in the aforementioned activities. On 8 June 1999 the Applicants were questioned by police officers and they admitted to being members of the PKK and the Patriotic Youth Union (Yurtsever Gençlik Berliği). On 9 June 1999 the Applicants were released from police custody and brought before the public prosecutor of the Diyarbakır State Security Court. Here, the Applicants claimed that they were not members of the PKK and had been forced to sign the statements admitting their membership. The Applicants were subsequently placed in pre-trial detention. The Applicants were refused legal assistance at each questioning session.

On 14 June 1999 the Diyarbakır State Security Court indicted the Applicants on the grounds that they were members of an illegal organisation. The Applicants were represented by a lawyer throughout the subsequent trial and repeatedly denied membership of the PKK and the accuracy

of their confessions. On 13 March 2001, relying on the confessions made before the police officers, the Diyarbakir State Security Court convicted the Applicants and they were sentenced to 12 years 6 months imprisonment. The Court of Cassation upheld the Applicants' convictions on 11 October 2001. The written observations of the public prosecutor at the Court of Cassation had not been forwarded to the Applicant at any stage.

### Complaints

The Applicants complained that they had not been properly informed of the reasons for their arrests, in contravention of Article 5(2) of the Convention. They also complained that the duration of their detention in police custody had been excessive and in violation of Article 5(3). Moreover, the Applicants complained that they had been unable to challenge the lawfulness of their detention in police custody in contravention of Article 5(4). The Applicants complained that the written observations of the public prosecutor at the Court of Cassation had not been forwarded to them and that they had been refused access to a lawyer during their detention in police custody, in contravention of Article 6(1). Finally, the Applicants complained that their relatives had not been informed of their arrests and this constituted a violation of Article 8.

### Held

#### *Article 5*

In relation to the alleged violation of Article 5(2), the Court noted that they had asked the State to submit documental evidence proving that the Applicants had been informed of the reasons for their arrest however the State had merely produced the arrest reports, which, in the opinion of the Court, did not contain any reasons for their arrests. The Court stated that the arrest reports did not relay the 'essential legal and factual grounds' for the Applicants' arrests and consequently, whilst the Court accepted that the Applicants would have known the reasons for their arrests four days later when they were taken to a number of locations, the State were held to have not promptly informed the Applicants of this in violation of Article 5(2).

With regard to the complaint under Article 5(3), the Court observed that the Applicants had been held in police custody between 31 May 1999 and 9 June 1999 before being brought before a judicial authority. The Court noted that it previously decided that a duration of 4 days 6 hours in police custody before being brought before a judicial authority had constituted a violation of Article 5(3). As such, the Court did not consider it necessary to detain the Applicants for 9 days prior to them being brought before a judge and the state had therefore violated Article 5(3) in this regard. The court also found a violation of Article 5(4) of the Convention as there was no effective way for the Applicants to challenge the lawfulness of their detention in police custody.

#### *Article 6*

The Court noted that the restrictions imposed on the right to access to a lawyer were systemic and applied to anyone held in police custody on offences under which the State Security Courts had jurisdiction. Moreover, the Applicants continually denied the accuracy of their statements made during their police custody, indicating that they were undoubtedly affected by the lack of legal assistance during that time. As a result, neither the assistance subsequently provided by a lawyer nor the adversarial nature of the proceedings could cure the defects that had occurred earlier. Therefore the Court considered the lack of legal assistance provided to the Applicants during their

detention in police custody to ‘irretrievably affect their defence rights’ in violation of Article 6(1) of the Convention.

With regard to the Applicants’ complaint that they had not been informed of the written observations of the public prosecutor at the Court of Cassation, the Court observed that they had decided the same issue in the case of *Göç v Turkey* (36590/07) in which a violation of Article 6 was found. The Court considered there to be no reason why they ought to depart from this finding.

#### *Article 8*

The Applicant’s complaints under Article 8 were deemed manifestly ill-founded since the documentary evidence produced by the State proved that their relatives had in fact been informed of their arrests.

#### *Article 41*

The Applicants were each awarded 5,000 EUR in non-pecuniary damages. In addition, the Applicants were jointly awarded 2,000 EUR in costs and expenses.

### ***Engin v. Turkey***

(6194/04)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Right to liberty and security of person – Article 5 of the Convention*

#### Facts

On 7 May 1997 the Applicant was arrested and taken into custody on suspicion of being a member of and taking part in the activities of an illegal organisation – the DHKP-C (Revolutionary People’s Liberation Party). On 10 May 1997 the Applicant was brought before the İstanbul State Security Court where the judge ordered his pre-trial detention.

On 20 May 1997 the Applicant was indicted on the grounds that he had attempted to undermine the constitutional order contrary to Article 146(1) of the Criminal Code. On 27 September 2001 the Applicant was convicted by İstanbul State Security Court and sentenced to death. The Applicant appealed and the Court of Cassation quashed the İstanbul State Security Court’s decision on 14 May 2002. The case was remitted back to the İstanbul State Security Court, which, on 25 December 2003, convicted the Applicant for a second time on the same charge and sentenced him to death.

On 5 July 2004, the Court of Cassation again quashed the decision of İstanbul State Security Court. By virtue of Law No. 5190, which came into force on 16 June 2004, the State Security Courts were abolished. Consequently, the Applicant’s criminal proceedings were remitted back to the İstanbul Assize Court. At the date of this judgment the Applicant’s case before the İstanbul Assize Court was still pending, and the Applicant continued to be held at the Kocaeli F-Type Prison where he had been since 10 May 1997.

#### Complaints

The Applicant complained that the length of time for which he has been detained pending trial has been excessive and therefore in violation of Article 5(3) of the Convention.

Held

*Article 5*

The Court observed that the Applicant had been detained for three different periods; the first period commenced on 7 May 1997 and ended upon his conviction on 27 September 2001, after which he was detained following ‘conviction by a competent court’ in accordance with Article 5(1) of the Convention. The first period of detention therefore lasted 4 years 5 months. The second period of detention began on 14 May 2002 when the Court of Cassation quashed the İstanbul State Security Court’s first judgment and ended on 25 December 2003 when the Applicant was convicted for a second time. This period of detention lasted 1 year 7 months. The third period of detention began on 5 July 2004 when the Applicant’s second conviction was quashed by the Court of Cassation, and continued until the date of the Court’s judgment. This period had therefore lasted 5 years 2 months at the time of the Court’s judgment. The Court calculated the total duration of the Applicant’s pre-trial detention to a figure of 11 years 2 months and was in clear violation of Article 5(3) of the Convention.

*Article 41*

The Applicant was awarded 9,200 EUR in non-pecuniary damages and 1,000 EUR in costs and expenses.

***Erkuş v. Turkey***

(30326/03)

**European Court of Human Rights:** Judgment dated 29 September 2009

*Right to liberty and security of person – Article 5 of the Convention*

Facts

The Applicant was on compulsory military service in Kırklareli. On 19 November 2002 the Applicant went on ten days leave to visit his family in Izmir but subsequently failed to return to his army barracks. On 22 February 2003 the Applicant was arrested on suspicion of being a deserter. He was taken to the Üçkuyular Military Station Command where it was confirmed that he had not returned to his army barracks after his leave.

On 23 February 2003 the Applicant was taken to Izmir Military Recruitment Office where he was detained in a ‘security room’ until 6 March 2003. On 7 March 2003 the Applicant was transferred to army command in Kırklareli, where he remained in detention until he was taken to the Çorlu Military Court. On 11 March 2003 the Applicant was brought before the Çorlu Military Court where the military judge ordered his remand in custody. On 12 March 2003 the Applicant was indicted on the grounds that he had exceeded his leave in contravention of Article 66(1) Military Criminal Code. On 14 March 2003 the Applicant was convicted and sentenced to ten months imprisonment.

On 22 April 2003 the decision of the Çorlu Military Court became final since neither the Applicant nor the public prosecutor appealed against the judgment. The length of time for which the Applicant was detained before trial was deducted from his prison sentence.

## Complaints

The Applicant complained that his detention was unlawful and excessively long, and that the state had failed to initiate an effective investigation into the matter in contravention of Article 5(1)(b), 5(1)(c) and 5(3) of the Convention.

## Held

### *Article 5*

The Court observed that the Applicant had been deprived of his liberty between 22 February 2003 and 7 March 2003, during which the Applicant had been detained in a security room for the majority of the time. They also observed that the state were unable to submit any evidence to suggest that the Applicant had been operating within the ordinary framework of army life, meaning that the Applicant's assertions that he had been detained during that time were presumed true by the Court.

The Court also observed that the Applicant had been deprived of his liberty when he was held at the Kırklareli army base between 7 March 2003 and 11 March 2003. The state was unable to provide any justification for holding the Applicant in detention for 12 days prior to his transfer to his army base in Kırklareli. The Court also thought it unnecessary to detain the Applicant for 17 days before he was brought before a judge and there had therefore been a violation of Article 5(1) of the Convention.

Following the finding that the Applicant's rights under Article 5(1) of the Convention had been violated, the Court considered it unnecessary to determine whether the Applicant's rights under Article 5(3) of the Convention had also been violated.

### *Article 41*

The Applicant was awarded 6,500 EUR in non-pecuniary damages and 1,503 EUR in costs and expenses.

## ***Geçgel and Çelik v. Turkey***

(8747/02) and (34509/03)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Right to liberty and security of person; right to a fair trial – Articles 5 and 6 of the Convention*

## Facts

The Applicants were both arrested and placed in police custody on suspicion of being members of an illegal organisation. During their detention they were not provided with any legal assistance and the statements made by them during this time were subsequently used by the court in convicting them. The Applicants are both currently serving prison sentences as a result.

The first Applicant (Mr Geçgel), was arrested and placed in police custody on 26 October 1996. He was not interrogated by the police until 12 November 1996, after which the public prosecutor and investigating judge also questioned him (on 15 November 1996). The first Applicant was convicted of being a member of an illegal organisation on 24 November 2002 and the Court of Cassation

upheld this decision on 11 March 2003. Throughout this time, the first Applicant remained in detention.

The second Applicant (Mr Çelik), was arrested and placed in police custody on 29 October 1996. He was interrogated by police officers on 13 November 1996 and by the public prosecutor and investigating judge on 15 November 1996. Like the first Applicant, the second Applicant was convicted as charged on 24 November 2002, with the Court of Cassation upholding his conviction on 11 March 2003.

### Complaints

The first Applicant complained that the duration of his pre-trial detention was excessive and exceeded the 'reasonable time' requirement of Article 5(3) of the Convention. Moreover, both Applicants complained that the length of time of the criminal proceedings against them had been excessive and in contravention of Article 6(1) of the Convention.

Both Applicants also complained that they had been unable to receive legal assistance during their pre-trial detention, and that the incriminating statements they made during this time were used as the basis of their conviction. In addition, the second Applicant complained that the main prosecution witness had not been heard by his trial court in contravention of Article 6(3)(d) of the Convention.

### Held

#### *Article 5*

The Court observed that the first Applicant's pre-trial detention began on 26 October 1996 and concluded on 24 October 2002, totalling 5 years 11 months. They also observed that the domestic courts constantly extended the Applicant's detention during this time, using the same unfounded reasoning that the nature of the offence for which the Applicant was accused and the state of the evidence against him warranted his continued detention.

The Court noted that they had previously found violations of Article 5(3) of the Convention in numerous cases possessing similar issues to the first Applicant's complaint. The Court stated that the State were unable to provide any arguments or evidence which would lead them to a different conclusion in the present case. Therefore, the length of the Applicant's pre-trial detention was deemed to be excessive and in violation of Article 5(3) of the Convention.

#### *Article 6*

The Court observed that the Applicants' criminal proceedings began on 26 October 1996 and 29 October 1996 respectively, and concluded on 11 March 2003, lasting 6 years and 4 months. Again, the Court noted that they had found violations of Article 6(1) of the Convention in numerous cases concerning similar issues to those in the Applicants' case and this case presented no evidence to depart from those findings.

With regard to the lack of legal assistance during the Applicants' police custody, the Court observed that they had already decided upon this issue in a previous case (*Salduz v Turkey* (36391/02)). They further observed that there were no circumstances in the Applicants' case which meant that they ought to depart from the decision in *Salduz*. Consequently, the Court held that the lack of

legal assistance provided to the Applicants during their police custody had violated Article 6(3)(c) of the Convention.

Finally, with reference to the complaint made by the second Applicant in relation to fact that the main prosecution witness had not been heard by the trial court, the Court considered it unnecessary to decide upon whether there had been a further violation of Article 6 since it had already found violations of Article 6 in two other regards.

#### *Article 41*

The first Applicant was awarded 7,000 EUR and the second Applicant was awarded 4,500 EUR, both in respect of non-pecuniary damages.

### ***Uyank and Kabadayı v. Turkey***

(7945/05)

**European Court of Human Rights:** Judgment 22 September 2009

*Right to liberty and security - Article 5(5) of the Convention*

#### Facts

On 16 May 1996, the Applicants were arrested and taken into custody in relation to their alleged membership to an illegal organisation. On 30 May 1996, they were brought before the Judge at the İstanbul State Security Court, who remanded them in custody. On 27 June 1996, the Applicants were issued with a bill of indictment by the Public Prosecutor at the İstanbul State Security Court, on the grounds that they were members of an illegal organisation and had participated in activities on behalf of that organisation.

The İstanbul State Security Court convicted the Applicants as charged and sentenced them to life imprisonment on 4 June 2003. However, on 20 January 2004, the judgment of the İstanbul State Security Court was quashed by the Court of Cassation. On 7 May 2004, the State Security Courts were abolished, meaning that the Applicants' cases were taken up by the İstanbul Assize Court. Following amendments in the domestic law, the Applicants requested to be released pending trial on 27 December 2004. On 29 December 2004, the İstanbul Assize Court refused the Applicant's requests, on the basis of the accusations against the Applicants, the length of their detention and the evidence in the case file. The Applicants appealed the refusal, but the İstanbul Assize Court dismissed their appeal without reasoning. Eventually, on 1 February 2006, the Applicants were released pending trial. However, on 30 April 2008, the Applicants were convicted the Applicants as charged and sentenced them to life imprisonment. The Applicants have since appealed, with their case currently pending before the Court of Cassation.

#### Complaints

The Applicants complained the length of their pre-trial detention, as well as the length of their criminal proceedings, was excessive – in contravention of Article 5(3) and 6(1) of the Convention respectively.

### Held

The second Applicant's case was struck out on the basis that he had not informed the Court of his change in address after leaving detention, meaning that he was regarded as no longer wanting to continue with his application (in accordance with Rule 47(6) of the Court Rules of Court).

#### *Article 5*

The Court observed that the first Applicant was placed in pre-trial detention on 16 May 1996 and continued to be detained there until his initial conviction 4 June 2003. Following the initial conviction being quashed and the subsequent remittance of the trial, the Applicant was again placed in pre-trial detention between 20 January 2004 and 1 February 2006. The Court therefore calculated the first Applicant's pre-trial detention to constitute 9 years and 1 month.

Drawing upon various cases raising similar issues to the first Applicant's complaints, the Court deemed the first Applicant's pre-trial detention to be excessive, and therefore in violation of Article 5(3) of the Convention.

#### *Article 6*

The Court observed that the first Applicant's criminal proceedings commenced on 16 May 1996 and are still pending. Therefore, they calculated the length of the Applicant's criminal proceedings to represent 13 years 2 months (up until the date of the Court's judgment).

Drawing upon various cases raising similar issues to the first Applicant's complaints, the Court stated that the length of the first Applicant's criminal proceedings were excessive, and therefore in contravention of Article 6(1) of the Convention.

#### *Article 41*

The Applicants failed to submit their just satisfaction claims in time and therefore were afforded no compensation under Article 41 of the Convention.

## **Right to a fair trial**

### *Alkin v. Turkey*

(75588/01)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Right to a fair trial – Article 6 of the Convention*

### Facts

On 13 May 1996 the Applicant, who was 11 years old at the time, stepped on a landmine when playing with fellow children in a meadow near Ortabağ village. According to a report drawn up by soldiers, minutes before the Applicant had stepped on the landmine she had been told to leave the area. The Applicant was subsequently airlifted to Şırnak Military Hospital and then to Diyarbakır. On 22 August 1996 the Applicant's leg was amputated from the knee and she was provided with a prosthetic leg.



On 19 May 1996 the Applicant's father issued a statement to the gendarmerie explaining that he believed the incident was an accident and that he didn't wish to press charges against anyone. On 4 June 1996 the Applicant made a statement to the same effect. The Uludere public prosecutor's office nonetheless initiated an investigation of its own motion. On 27 June 1996, the file was transferred to the Uludere District Administrative Council in order to obtain the necessary authorisation to continue the investigation. On 14 August 1997 the Uldere District Administrative Council declined the prosecutor's request for the continuation of the investigation on the grounds that the Applicant had been warned of the landmines but had continued to cross the minefield and therefore in the view of the Uludere District Administrative Court, the soldiers were not at fault for the Applicant's injuries. On 4 December 1997 Diyarbakır Regional Administrative Court examined the Uldere District Administrative Council's decision and upheld it. The Applicant wasn't informed of the decisions of the Uldere District Administrative Council and Diyarbakır Regional Administrative Court until 2004.

On 26 March 1997 the Applicant's parents applied to the Ministry of Justice requesting compensation (of both a pecuniary and non-pecuniary nature) for the injuries sustained by the Applicant. On 5 June 1997 the Ministry of Justice informed the Applicant's parents that no compensation would be paid to the Applicant in the absence of a judicial decision. Consequently, on 16 June 1997, the Applicant's parents filed a petition against the Ministry with the Diyarbakır Regional Administrative Court. They contended that the state was responsible for the injuries the Applicant sustained.

The Ministry and the Applicant's parents submitted their observations to the Diyarbakır Regional Administrative Court on 13 August and 15 September 1997 respectively, yet the Court failed to progress the case any further until 27 April 2000. On that date, the Court appointed an expert to calculate the amount of pecuniary damage sustained by the Applicant. On 17 October 2000 the expert calculated the pecuniary damage to the Applicant to amount to TRL 13,522,992,551. On 21 December 2000, the Applicant's parents were awarded that amount. The Court determined that the state was not responsible for the injuries the Applicant had sustained but had awarded them the sum on the basis of the 'social risk principle'.

On 2 May 2001, the Ministry appealed against this decision and they failed to pay the sum when the payment order was issued on 21 June 2001 or when called upon on to do so on 6 June 2002. On 25 February 2003 the Supreme Administrative Court dismissed the Ministry's appeal. On 1 July 2003, the Ministry of Justice paid the Applicant TRL 27,330,800,000. However, this figure fell short of the final calculation of compensation and the Ministry had to pay the Applicant an additional TRL 1,483,874,000 which was received by the Applicant on 2 November 2006.

### Complaints

The Applicant complained that the administrative proceedings concerning her claim for compensation had not been completed within a reasonable time. She claimed that the length of the proceedings was excessive and therefore in violation of Article 6(1) of the Convention.

Held

*Article 6*

The Court noted that the 'reasonable time' requirement of Article 6(1) of the Convention must be examined in light of the circumstances of the case, in particular the complexity of the case. The Court observed that the examination of the case before the domestic courts was restricted to determining whether the 'social risk principle' ought to be used; there was no examination of the alleged military negligence with reference to the explosion. As such, the Court did not believe the case to be particularly complex. The Court was critical of the Diyarbakır Regional Administrative Court's failure to take any meaningful steps with reference to the Applicant's case for the first three years. The Court was equally critical of the Supreme Administrative Court, which took two years to decide on the appeal lodged by the Ministry of Justice. Having regard to lack of complexity in the case, as well as the unjustifiable delays in the proceedings before the Diyarbakır Regional Administrative Court and Supreme Administrative Court, the Court stated that the Applicant's proceedings had not been conducted in a 'reasonable time' and there had been a violation of Article 6(1) of the Convention.

*Article 41*

The Applicant was awarded 4,000 EUR in non-pecuniary damages and 2,000 EUR in costs and expenses.

***Barker v. Turkey***

(34656/03)

**European Court of Human Rights:** Judgment dated 22 September 2009

*Right to a fair trial – Article 6 of the Convention*

Facts

On 15 August 1988 the Applicant took a case against the Treasury of the Republic of Turkey to the Erdek Civil Court, where he requested to be registered as the owner of a particular plot of land. On 17 April 1990 the Erdek Civil Court granted the Applicant's request. The Treasury appealed against this. The Applicant subsequently inquired about the outcome of the appeal on numerous occasions but was always informed that the proceedings were still pending.

In 1998 the Applicant was informed by the Court of Cassation that the court of first instance had in fact decided on the appeal on 28 October 1992. The Applicant complained to the Erdek Civil Court, who stated that the case file had never been sent back to them and that they were in the process of recreating the file. On 8 May 1998 the Treasury applied to the Court of Cassation requesting that the decision of 28 October 1992 be rectified. On 28 September 1998, the Court of Cassation refused to examine the Treasury's request on the grounds that the recreated file was insufficient. The case file was then sent back to the Erdek Civil Court where the case is still pending.

In 2001 the Land Registry Commission attached to the General Directorate of Land Registration conducted a land registry survey and consequently registered the title of the disputed land to 'K.T.' and the Treasury. On 30 May 2001 the Applicant challenged the land registry survey before the

Erdek Cadastral Court. An on-site inspection of the land was conducted on 18 May 2004 and on 20 October 2004 the Erdek Cadastral Court allowed the Applicant's request. The decision was upheld by the Court of Cassation on 10 November 2005, and it also dismissed the Treasury's rectification request on 26 February 2007.

### Complaints

The Applicant complained that the length of proceedings before the Erdek Civil Court and the Erdek Cadastral Court were excessive and in violation of Article 6(1) of the Convention.

### Held

#### *Article 6*

The Court observed that the Applicants' criminal proceedings before the Erdek Civil Court had commenced on 15 August 1988 and were still continuing. Consequently, they had lasted over twenty-one years at the time of the Court's judgment. Similarly, they observed that the proceedings initiated in the Erdek Cadastral Court had commenced on 30 May 2001 and ended on 26 February 2007, lasting five years and nine months. It also noted that the on-site inspection was conducted almost three years after the commencement of the proceedings. Drawing upon previous cases where facts similar to those in the Applicant's case had resulted in a violation of Article 6(1), the Court observed that there was no evidence submitted to it and no arguments presented by the Government that ought to lead it to a different conclusion in this case.

#### *Article 41*

The Applicant was awarded 21,000 EUR in non-pecuniary damages.

### ***Demirkaya v. Turkey***

(31721/02)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Right to a fair trial – Article 6 of the Convention*

### Facts

On 8 October 2001 the Applicant was placed in police custody in İzmir on suspicion of being a member of an illegal organisation, the Kurdistan Workers' Party (PKK). On 9 October 2001 the Applicant was questioned in the absence of a lawyer by the Anti-Terrorism branch of the İzmir Security Directorate. During his interrogation, the Applicant confessed to aiding and abetting the PKK and to acting as a courier for the organisation. On the same day, another individual accused of PKK membership ('N.S.') made a statement that he had stayed at the Applicant's house when he first came to İzmir, and that the Applicant had acted as a courier for the PKK.

On 12 October 2001 the Applicant was questioned by the İzmir public prosecutor, where he denied the allegations against him and informed the prosecutor that he had signed the confession without reading it. On the same day, the Applicant and sixteen others were brought before the investigating judge. The Applicant again denied the allegations against him. The Applicant was given access to a lawyer at this point and was subsequently placed in detention pending trial by order of the investigating judge. On 19 October 2001 the Applicant was indicted by the İzmir State Security

Court on the grounds that he had aided and abetted an illegal organisation in contravention of Article 169 of the Criminal Code and Article 5 of Law no. 3713 (Anti-Terror Law). Throughout the subsequent trial the Applicant continued to proclaim his innocence. N.S. also rejected his statement made before the police, arguing that it had been made under duress. On 20 June 2002 the İzmir State Security Court convicted the Applicant and sentenced him to 3 years 9 months imprisonment. On 10 October 2003, the Court of Cassation dismissed the Applicant's appeal.

### Complaints

The Applicant complained that he had been denied access to a lawyer whilst in police custody in contravention of Article 6(3)(c) of the Convention (in conjunction with Article 6(1) of the Convention).

### Held

#### *Article 6*

The Court observed that the Applicant's right of access to a legal representative during his pre-trial detention was restricted in accordance with Section 31 of Law No. 3842, which prevents those accused of offences falling under the jurisdiction of the State Security Courts from contacting lawyers during detention in police custody. As a result, the Court observed that the Applicant did not have access to a lawyer when he was interrogated by both the police and the public prosecutor. In the opinion of the Court, irrespective of the fact that the Applicant had received legal assistance during his trial and had later rejected his statement, the Applicant was 'undoubtedly affected' by the absence of a lawyer during his questioning as this statement had been used by the İzmir State Security Court as the main piece of evidence on which the Applicant's conviction was based. Neither the subsequent assistance given to the Applicant by a lawyer, nor the adversarial nature of the criminal proceedings could remedy the defects which occurred during the Applicant's questioning by the police and public prosecutor and the Applicant's defence rights had been irretrievably affected by the use of his statement in court proceedings. The Applicant's rights under Article 6(3)(c) of the Convention (in conjunction with Article 6(1) of the Convention) had therefore been violated.

#### *Article 41*

The Applicant was awarded 1,000 EUR in non-pecuniary damages.

### ***Halil Kaya v. Turkey***

(22922/03)

**European Court of Human Rights:** Judgment 22 September 2009

*Right to a fair trial – Article 6 of the Convention*

### Facts

On 31 December 2000, the Applicant was taken into police custody on suspicion of aiding and abetting an illegal organisation for chanting slogans in favour of the organisation and burning tyres in the street. The Applicant was 17 years old at the time, and interrogated by the police

and police prosecutor in the absence of a lawyer. The Applicant was subsequently charged under Article 169 of the Turkish Criminal Code with the aforementioned offence, on 10 January 2001.

Between 10 January 2001 and 13 August 2001, the Adana State Security Court held thirty-four hearings in relation to the case against the Applicant. The Applicant was not represented by a lawyer on any occasion. A lawyer was eventually assigned to the Applicant on 3 September 2001.

On 3 December 2001, the Adana State Security Court convicted the Applicant as charged and sentenced him to 2 years 6 months imprisonment. In convicting the Applicant, the Court had taken account of the statements he had made to the police and public prosecutor in absence of a lawyer. On 8 July 2002, the Court of Cassation dismissed the Applicant's appeal without holding a hearing on its merits. The decision of the Court of Cassation was deposited with the court of first instance on 21 August 2002, and the Applicant began his prison sentence on 11 September 2002.

On 30 July 2003, Turkish law abolished the State Security Courts. Consequently, on 29 August 2003, the Applicant requested the reopening of the case. The case was reopened by the Adana Criminal Court and the Applicant's release from prison was ordered. The Adana Criminal Court held that the Applicant should not be convicted under Article 169 of the Criminal Code, but under Article 312 instead. On 7 October 2004, the Applicant was convicted under Article 312 of the Criminal Code, and was sentenced to 3 months 10 days imprisonment. His sentence was then converted into a fine – on the basis of the Applicant's age at the time of the offence.

The Applicant appealed. On 19 December 2005, in light of further changes to the Criminal Code (on 12 October 2004) and Law no. 5326 (on 31 March 2005), the Court of Cassation decided that the case ought to be remitted to the Adana Criminal Court. The Adana Criminal Court finally found the Applicant guilty under Article 215 of Law no. 5326 and sentenced him to 25 days imprisonment. His sentence was subsequently converted into a fine.

On 20 June 2007, the Adana Assize Court upheld the Adana Criminal Court's judgment.

### Complaints

The Applicant complained he had been denied the assistance of a lawyer during his police custody – in contravention of Article 6(3)(c) of the Convention.

### Held

#### *Article 6*

The Court observed that it had already examined the same issue in the case of *Salduz v Turkey* (36391/02), where it had found a violation of Article 6(3). The Court noted from *Salduz* that the restriction imposed on access to a lawyer was systemic, applying to anyone held in police custody during that time in connection to an offence falling under the jurisdiction of the State Security Courts. The Court observed that there were no circumstances in the present case which would require it to depart from judgment in *Salduz*. Noting the Applicant's age, the Court stressed that providing legal assistance to minors is of 'fundamental importance', and, indeed, recognised by international law. Having regard to the above-mentioned findings, the Court found there to have been a violation of Article 6(3)(c) of the Convention, in conjunction with Article 6(1) of the Convention.

*Article 41*

The Applicant was awarded €1,500 EUR in non-pecuniary damages, as well as €200 EUR in costs and expenses.

***Micallef v. Malta***

(17056/06)

**European Court of Human Rights:** Judgment dated 15 October 2009

*Unfair domestic hearing – Articles 6*

Facts

The Applicant, Joseph Micallef, is a Maltese national who lives in Vittoriosa (Malta). In 1985 his sister, Mrs M., who has since died, was sued in the civil courts by her neighbour in connection with a dispute between them. The presiding judge of the court hearing the case granted the neighbour an injunction in the absence of Mrs M., who had not been informed of the date of the hearing. In 1992 the court found against Mrs M. on the merits.

In the meantime Mrs M. had brought proceedings in the Civil Court, sitting in its ordinary jurisdiction, alleging that the injunction had been granted in her absence and without giving her the opportunity to testify. In October 1990 the Civil Court found that the injunction had been issued in violation of the adversarial principle and declared it null and void.

In February 1993 the Court of Appeal upheld an appeal lodged by the neighbour and set aside the judgment of the Civil Court in favour of Mrs M. The Court of Appeal was presided over by the Chief Justice, sitting with two other judges. Mrs M. then lodged a constitutional appeal with the Civil Court, in its constitutional jurisdiction, alleging that the Chief Justice had not been impartial given his family ties with the lawyers representing the other party. She pointed out that he was the brother and uncle, respectively, of the lawyers who had represented her neighbour.

The constitutional appeal, which was taken over by the Applicant after his sister's death, was dismissed in January 2004. In October 2005 a further appeal lodged with the Constitutional Court was also dismissed.

Complaints

The Applicant complained that the Court of Appeal had lacked impartiality on account of the family ties between the presiding judge and the lawyer for the other party. He added that this had given rise to an infringement of the principle of equality of arms and that Mrs M. had been denied the opportunity to make submissions, in breach of her right to a fair hearing as provided for in Article 6.

Held

The Court found that the case was admissible on the ground that the Applicant did have victim status, firstly because he had been made to bear the costs of the case instituted by his sister and could thus be considered to have a patrimonial interest in the case and, secondly, because the case

raised issues concerning the fair administration of justice and thus an important question relating to the general interest.

#### *Article 6*

The Court reiterated that it assessed the impartiality of a court or judge according to a subjective test, which took account of a judge's conduct, and according to an objective test which, quite apart from the judge's conduct, sought to determine whether there were ascertainable facts, such as hierarchical or other links between the judge and other actors in the proceedings which might raise doubts as to his impartiality. The Court pointed out that even appearances might be of a certain importance in that regard.

The Court observed that under Maltese law, as it stood at the relevant time, there was no automatic obligation on a judge to withdraw in cases where impartiality could be an issue. Nor could a party to a trial challenge a judge on grounds of a sibling relationship – let alone an uncle-nephew relationship – between the judge and the lawyer representing the other party. Since then Maltese law had been amended and now included sibling relationships as a ground for withdrawal of a judge. In the dispute at issue here the Court took the view that the close family ties between the opposing party's lawyer and the Chief Justice sufficed to objectively justify fears that the panel of judges lacked impartiality. Accordingly, it concluded, by 11 votes to six, that there had been a violation of Article 6.1 of the Convention.

It also held that the finding of a violation constituted in itself sufficient just satisfaction under Article 41 for the non-pecuniary damage sustained by Mr Micallef and awarded him EUR 2,000 for costs and expenses.

#### ***Osmanağaoğlu v. Turkey***

(12769/02)

**European Court of Human Rights:** Judgment 21 July 2009

*Right to a fair trial - Article 6(1) and 6(3)(d) of the Convention*

#### Facts

The Applicant, Ünal Osmanağaoğlu, was suspected of being involved in the 'Bahçelievler massacre'. The said massacre took place on 9 October 1978. Seven young left-wing extremists were killed in a flat in Ankara by a secret nationalist organisation in response to the murder of the President of a local branch of a right-wing party and his son in İstanbul 6 days earlier. The Turkish military prosecutor's office identified fourteen persons, including the Applicant as those responsible for the 'Bahçelievler massacre' and subsequently took three sets of criminal proceedings against those allegedly responsible.

In the first case, in 1979, the Applicant absconded but was identified by another suspect in the case, D.D., as being in the vehicle from which the murderers left to enter the flat. However, D.D. explained in the trial that his statements had been obtained as a result of torture. His claim was backed up by medical evidence, and, consequently, the judges discredited his statements.

Then, in 1995, in the third set proceedings, the Assize Court found that the Applicant had taken part in the massacre. They based their findings on the incriminating statements made by D.D. and another suspect, M.Y., allegedly responsible for the massacre. M.Y. also alleged to have been interrogated under ill-treatment, which was also backed up by medical evidence. On 15 February, the Assize Court sentenced the Applicant to seven death sentences, one for each murder. The judgment was also upheld on appeal at the Court of Cassation in June 2001. The judgment was altered life imprisonment after the death penalty in peacetime was abolished in Turkey in 2002, and was further reduced to 40 years imprisonment in October 2007.

### Complaints

The Applicant complained that he was convicted on evidence from two of his co-accused which had been obtained by torture. He complained that he was also unable to contest the evidence on which he was convicted. Consequently, he complained of breach of Article 6(1).

### Held

#### *Article 6*

The Court held that it was crucial for the Applicant to be able to examine witnesses against him, because of the sentence that he faced and the reliability of their statements. They held that the judges had not assessed the admission of the incriminating statements to the fairness of the Applicant's trial. They failed to re-examine D.D. or M.Y., meaning that the credibility of their statements could not be examined, nor could the Applicant question their version of events.

As a result, the Court found Turkey to have violated the Applicant's right to a fair trial under Article 6(1), and under Article 6(3)(d) because the Applicant was unable to examine the witnesses testifying against him.

#### *Article 41*

The Applicant claimed no monetary compensation for the violations, instead asking that the proceedings against him be conducted in an equitable way. As a result, the Court held that, where there has been a violation of Article 6 of the Convention, the reopening of the procedure represents an appropriate means to adequately rectify the violation.

### ***Scoppola v. Italy (No. 2)***

(10249/03)

**European Court of Human Rights:** Judgment dated 17 September 2009

*Right to a fair trial, no punishment without law – Articles 6 and 7*

### Facts

Franco Scoppola is an Italian national who was born in 1940. He is currently in Parma Prison.

On 2 September 1999, after a fight with his children, the Applicant killed his wife and injured one of the children. He was arrested on 3 September. At the end of the preliminary investigation the Rome prosecution office asked for the Applicant to be committed to stand trial for murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm. At a hearing in February 2000 before the Rome preliminary hearings judge ('the GUP') the Applicant



asked to be tried under the summary procedure, a simplified process which entailed a reduction of sentence in the event of conviction. The judge agreed to his request.

In the version in force at that time, Article 442 of the Code of Criminal Procedure ('the CCP') provided that, if the judge considered that the penalty to be imposed was life imprisonment, such penalty should be converted into 30 years. On 24 November 2000 the GUP found the Applicant guilty and noted that he was liable to a sentence of life imprisonment; however, as the trial had been conducted under the summary procedure, the judge sentenced the Applicant to a term of 30 years.

However, Legislative Decree no. 341, which had entered into force that very day, had just amended Article 442 of the CCP. The latter now provided that in the event of trial under the summary procedure, life imprisonment was to be substituted for life imprisonment with daytime isolation if there were cumulative offences or a continuous offence.

The Public Prosecutor's Office at the Rome Court of Appeal considered that, in view of the entry into force of the new version, the Applicant's sentence should have been life imprisonment rather than 30 years. Accordingly, it appealed against the GUP's decision.

On 10 January 2002 the Rome Assize Court of Appeal sentenced Franco Scoppola to life imprisonment. Noting that Legislative Decree no. 341 of 2000 had entered into force on the very day of the GUP's decision, it considered that, since its provisions were classed as procedural rules, they were applicable to all pending proceedings. The Assize Court of Appeal further observed that under the terms of Legislative Decree no. 341 the Applicant could have withdrawn his request to be tried under the summary procedure and have stood trial under the ordinary procedure. As he had not done so, the first-instance decision ought to have taken account of the change in the rules introduced by the legislative decree.

After his appeal on points of law was dismissed, the Applicant lodged an extraordinary appeal with the Court of Cassation on the ground of a factual error. He argued that he had been convicted in breach of the fair-trial principles guaranteed by Article 6 of the European Convention on Human Rights and on the basis of retrospective application of the criminal law – in the form of Legislative Decree no. 341 – in breach of Article 7 of the Convention. That appeal too was dismissed.

The Application was lodged with the Court on 24 March 2003 and was declared partly admissible on 13 May 2008. On 2 September 2008 the Chamber to which the case had been assigned relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention. A hearing was held in Strasbourg on 7 January 2009.

### Complaints

The Applicant alleged in particular that his sentence to life imprisonment had breached Articles 6 and 7 of the Convention. The Applicant's complaints related not only to the alleged retrospective application of criminal law in violation of Article 7 but also to the compatibility with Article 6.1 of the provisions introduced by Legislative Decree no. 341.

Held

*Article 7*

The Court reiterated that the prohibition of the retrospective application of criminal law to the detriment of an accused, provided in Article 7 of the Convention, was an essential element of the rule of law and occupied a prominent place in the Convention system. Nevertheless, as the Court had consistently ruled since a 1978 decision of the European Commission of Human Rights, Article 7 did not guarantee the right of the accused to a more lenient penalty provided for in a law subsequent to the offence.

However, since the Convention was first and foremost a system for the protection of human rights, the Court had to consider the changing conditions in the responding State and in the Contracting States in general and respond to emerging consensus as to the standards to be achieved. It acknowledged that there had been important developments internationally. In particular, the principle of the applicability of the more lenient criminal law was enshrined in the American Convention on Human Rights, the European Union's (EU) Charter of Fundamental Rights and the statute of the International Criminal Court. Moreover, the Luxembourg-based Court of Justice of the European Communities, whose decision was also endorsed by the French Court of Cassation, held that this principle formed part of the constitutional traditions common to the member States of the EU.

The Court considered that since 1978 a consensus had gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, had become a fundamental principle of criminal law. In the light of such consensus the Court therefore decided to depart from its previous case-law and affirm that Article 7 § 1 guaranteed not only the principle of non-retroactivity of more stringent criminal laws but also, and implicitly, the principle of retroactivity of the more lenient law. That principle was embodied in the rule that where there were differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before adoption of a final judgment, the courts had to apply the law whose provisions were most favourable to the defendant.

In the Applicant's case, the Court considered that the relevant paragraph of Article 442 of the CPP was a provision of substantive criminal law given that it had set the length of the sentence to be imposed in the context of summary procedures. By virtue of the principle of retroactivity of the more lenient criminal law, of all the versions of such provisions which had been in force during the period between the commission of the offence and the adoption of the final judgment, the Italian courts should have applied the one more favourable to Mr Scoppola. The Court therefore concluded, by eleven votes to six, that by failing to do so, the Italian courts had acted in violation of Article 7.

*Article 6*

The Court observed that the Italian summary procedure entailed undoubted advantages for the defendant but also a diminution of some of the procedural safeguards inherent in the concept of a fair trial. By requesting the summary procedure, Mr Scoppola, in exchange for a 30-year sentence instead of a life sentence, unequivocally waived his right to a public hearing, to have witnesses called, to have new evidence produced and to examine prosecution witnesses.

The Court considered that, although Contracting States were not required to adopt simplified procedures, where such procedures did exist it was contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to waiving fair trial safeguards. It therefore concluded, unanimously, that there had been a violation of Article 6 in this respect.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the Applicant 10,000 euros (EUR) in respect of non-pecuniary damage, and EUR 10,000 for costs and expenses. Under Article 46 (binding force and execution of judgments) the Court decided that the sentence of life imprisonment imposed on the Applicant must be replaced by a penalty consistent with the principles set out in its judgment.

***Seyithan Demir v. Turkey***  
(25381/02)

**European Court of Human Rights:** Judgment 28 July 2009

*Right to a fair trial – Article 6(1), 6(3)(c) and 6(3)(d) of the Convention*

Facts

On 24 May 2000, the Applicant began his compulsory military service. On 10 July 2000, two of the Applicants' colleagues complained to their superiors on the grounds that the Applicant had made several improper comments. They alleged that he had shown them a map of Turkey and highlighted where Kurdistan would be, and where its flag would be placed. He told one of the colleagues that he had a commando physique and should join the Kurdish fight. The Applicant denied making any such remarks.

On 15 December 2000, the Applicant was indicted by the Izmir State Security Court on the grounds that he had disseminated separatist propaganda, in contravention of Article 8(1) Anti-Terror Law (TMK). On 2 February 2001, the Applicant appeared before the Erzurum State Security Court, where he was informed of the indictment against him, but he was not represented by a lawyer. Here, one of the colleagues' statements were read out, in which it was alleged that the Applicant had informed him that Turkish soldiers were traitors and that special forces were responsible for the death of Kurds but had attributed the deaths to the Kurds themselves.

All subsequent hearings were held at the Izmir State Security Court. The Applicant was absent from each hearing because he was conducting his military service in Erzurum at the time. During such hearings, statements of several witnesses were heard. On 4 September 2001, based on the witness statements, the Izmir State Security Court found the Applicant to have disseminated separatist propaganda and convicted him as charged. He was sentenced to 1 year's imprisonment as a result.

On 28 September 2001, the Applicant against his conviction, and, on 8 October 2001, he hired a lawyer to assist him. However, the Court of Cassation upheld the Izmir State Security Court's judgment on both 28 January 2002 and 17 April 2002. The Applicant began his prison sentence on 7 March 2003.

On 25 July 2003, the Izmir State Security Court annulled the Applicant's conviction and ordered his immediate release, on the grounds that Article 8 TMK had been repealed as a result of Law No. 4928.

### Complaints

The Applicant complained that he had been denied the rights of the defence, in contravention of Article 6(1), 6(3)(c) and 6(3)(d) of the Convention. In this regard, the Applicant complained that he had been unable to attend his hearings because of his military service, he had been unable to examine the prosecutor's witnesses or produce evidence of his own, and that the court of first-instance had convicted him without ever hearing him or the prosecutors witnesses.

### Held

#### *Article 6*

The Court observed that whilst Article 6(1) did not expressly provide a right to take part in the hearing, the rights explicated in Article 6(3) such as the right to 'defend himself in person' and 'to examine or have examined witnesses' generate a presumption that individuals must be present in their trials.

The Court stated that whilst the Applicant had requested to be exempt from attending the trial court, he was not read his rights nor assisted by a lawyer, and so must be regarded as a layman who could not be expected to appreciate that his request would result in his trial and conviction being conducted in his absence.

With regard to his conviction, the Court stated that where a conviction is based solely on the depositions made by a person who the accused has no opportunity to question or examine, the accused's rights to defence will have been restricted to such a degree so as to be incompatible with the guarantees provided under Article 6. Moreover, this will be further strengthened where the witnesses whose statements formulated the basis of the accused's conviction do not appear before the trial court. These principles applied directly to the Applicant's case, leading the Court to conclude that there had been a violation of Article 6(1) in conjunction with Article 6(3)(c) of the Convention.

After having found a violation of Article 6(1) in conjunction with Article 6(3)(c), the Court considered it unnecessary to examine whether Article 6(1) had also been violated in conjunction with Article 6(3)(d) – the Applicant's trial had already been judged to be unfair.

#### *Article 41*

The Applicant was awarded €2,000 EUR in non-pecuniary damages, and €1,000 EUR in costs and expenses.

***Stepanyan v. Armenia***

(45081/04)

**European Court of Human Rights:** Judgments dated 27 October 2009

*Administrative detention – right to a fair trial - Articles 6 § 1 taken together with 6 § 3 (b) of the Convention*

This is a KHRP-assisted case.

Facts

Stepan Stepanyan is an Armenian national, born in 1951, who lives in Artashat (Armenia).

In February and March 2003 a presidential election took place in Armenia. Following the first and second rounds of the election, a series of protests alleging irregularities were organised in Yerevan by the opposition parties.

A major demonstration took place on 10 April 2003 in Yerevan to which the Applicant, member of the National Democratic Union (NDU) political party and its representative in the Ararat Region of Armenia, participated.

From that date, the Applicant stayed away from his house until he came back on 20 May 2004. On that day the Applicant was brought to the local police station for disobeying the lawful orders of a police officer and for using foul language. He was then charged, brought to a court, and convicted under Article 182 of the Code of Administrative Offences for disobeying police orders and using foul language.

He was transferred to a detention facility and while serving his sentenced the Applicant went on hunger strike. On 26 May 2004, an appeal was lodged to the Regional Court by the administration of the detention facility seeking to change the type of penalty imposed on the Applicant. The Regional Court refused to change the type of penalty but only ordered to release the Applicant and the sentence be postponed for a month.

The Applicant lodged an extraordinary appeal to the Criminal and Military Court of Appeal on 8 June 2004. The Court mitigated the sentence to 6 days due to the Applicant's state of health but did not review the type of penalty imposed on him.

Complaints

The Applicant complained that the expedited proceedings of May 2004 violated his right to a fair trial embodied in Article 6 of the Convention, and that his conviction also violated his rights guaranteed by Article 8, 10, 11, 14 of the Convention and Article 3 of Protocol No. 1.

Concerning the decision of the Court of Appeal on June 2003, the Applicant claimed that the Court of Appeal did not provide a reasoned decision, the procedure for appeal was unclear, and that there has been no oral hearing. The Applicant complained that those proceedings before the Criminal and Military Court of Appeal have therefore violated his rights to a fair trial embodied in Article 6 of the Convention.

The Applicant also complained under Articles 3 and 8 of the Convention that from 2003 until his conviction he had been subjected to continual harassment by the authorities for his political activities.

### Held

#### *Article 6*

The Court found that the Applicant's complaints under Article 6 and other Articles of the Convention (Articles 8, 10, 11, 14 and Article 3 of Protocol No.1) regarding his conviction on 20 May 2004 were inadmissible as they had been lodged out of time.

Concerning the unfairness of the extraordinary appeal proceedings, the Court observed that even though Article 6 does not systematically require a public hearing, the public hearing requirement should apply before a court with jurisdiction as to both the facts and the law. The Court noted that in the present case the Applicant denied the facts upon which the charge against him was founded but that the first instance Court convicted him on the basis of the evidence given by the complainant. Therefore, the Applicant's guilt or innocence has to be determined with a direct assessment to the evidence given in person by him by the Court of Appeal. As the Criminal and Military Court of Appeal convicted him on the basis of the evidences given by the complainants in first instance without hearing him, the Court held that there has been a violation of Article 6.

#### *Article 3 and 8*

Having regard to the materials in the Court's possessions, the Court held that the Applicant's claims regarding the continuing harassment by the authorities he had been subjected to due to his political activities are manifestly ill-founded.

### ***Tevfik Okur v. Turkey***

(2843/05)

**European Court of Human Rights:** Judgment 29 September 2009

*Right to a fair trial – Article 6 of the Convention*

### Facts

On 10 September 2003, the Applicant was dismissed from service by the Supreme Disciplinary Council of the Ministry of Defence following his criminal conviction by a martial law court.

The Applicant subsequently requested the annulment of the Supreme Disciplinary Council's decision before the Supreme Military Administrative Court. In response to the Applicant's request, the Ministry of Defence explained that the Applicant had been dismissed in accordance with Law no. 657 on Civil Servants and the Regulation of Disciplinary Councils and Superiors Concerning Civil Servants Employed in the Turkish Armed Forces. The Ministry of Defence also submitted some documents which were classed as 'secret documents' under Article 52(4) of Law no. 1602 on the Supreme Military Administrative Court. The 'secret documents' were not disclosed to the Applicant.

On 24 June 2004, the Supreme Military Administrative Court dismissed the Applicant's request. The written opinion submitted by the principal public prosecutor to the Supreme Military Administrative Court during the proceedings was also not communicated to the Applicant.

On 16 September 2004, the Applicant's rectification request was also dismissed by the Supreme Military Administrative Court.

### Complaints

The Applicant complained that the principle of equality of arms had been infringed, on the basis that he had been unable to access the classified documents submitted to the Ministry of Defence to the Supreme Military Administrative Court, and that the written opinion of the principal public prosecutor had not been communicated to him – in contravention of Article 6(1) of the Convention.

### Held

#### *Article 6*

The Court observed that it had decided several cases on the same issue as in the Applicant's case. It believed that there were no particular circumstances in the Applicant's case which would require it to depart from this jurisprudence. Moreover, it believed that the State's suggestion that the secret documents were insignificant to the Applicant's case made their reluctance to disclose the documents all the more unjustifiable in terms of the fairness of the proceedings. Consequently, the Court held that the non-disclosure of the secret documents constituted a violation of the Applicant's rights under Article 6(1) of the Convention.

With regards to the non-communication to the Applicant of the public prosecutor's written opinion, the Court noted that such non-communication had constituted a violation of Article 6(1) of the Convention in numerous cases prior to the present case. The Court noted that the Government had failed to provide any evidence or arguments which would lead it to a different conclusion in the Applicant's case. Consequently, the non-communication of the public prosecutor's written opinion to the Applicant constituted a violation of Article 6(1) of the Convention.

#### *Article 41*

The Applicant was awarded €6,500 EUR in non-pecuniary damages.

On 29 September 2009, the Court found violations of Article 6(1) of the Convention in six other cases dealing with the same issue as the Applicant's case. These cases were *Cihangül v Turkey* (44292/04), *Dikel v Turkey* (8543/05), *İlter v Turkey* (43554/04), *Meridan v Turkey* (38011/05), *Okan Erdoğan v Turkey* (43696/04), and *Tamay and Others v. Turkey* (nos. 38287/04, 1416/05, 1688/05, 2596/05, 12342/05, 17250/05, 20241/05, 26665/05, 29859/05, 30476/05, 31959/05, 37140/05, 37196/05 and 23484/06).

***Tülin Soyhan v. Turkey***

(4341/04)

**European Court of Human Rights:** Judgment dated 6 October 2009

*Lack of legal assistance while in custody – administration of evidence – prohibition of torture and inhuman and degrading treatment – right to a fair trial – presumption of innocence– Articles 3, 13 and 6 of the Convention*

Facts

The Applicant, Tülin Soyhan, is a Turkish national who was born in 1976 and who lives in İstanbul. The Applicant was arrested and detained on 7 October 1998 on suspicion of belonging to an illegal organisation, the Revolutionary People's Liberation Party/Front.

The Applicant was detained in the İstanbul anti-terrorist branch headquarters from the 10 October to 13 October 1998, and was then transferred to the Izmir anti-terrorist branch headquarters. While in custody, the Applicant recognised her affiliation to the organisation, and also that she had taken part in operations including bombs attacks. She subsequently repealed her confession on several occasions either before the Public Prosecutor or the judge of the Izmir state security Court, stating that she had been subjected to psychological pressure and torture while in custody. A medical examination was carried out on the Applicant on 13 October 1998 in which the doctor reported signs of bruising all over the Applicant's body.

On 20 October 2008 the Applicant went before the Izmir and İstanbul Public Prosecutor to complain of inhuman and degrading treatment while in custody. The Izmir Public Prosecutor dismissed her claim, stating that she was under İstanbul anti-terrorist branch headquarters control when the alleged acts of torture would have occurred.

On 22 July 1999 the İstanbul Public Prosecutor charged two police officers with committing inhuman and degrading treatment towards the Applicant, but on 3 April 2000 the İstanbul Criminal Court acquitted both officers on the basis that the Applicant had not presented herself at court to identify them.

At the same time the Applicant was charged by the İstanbul Public Prosecutor for attempting to reverse the Turkish constitutional order and for the offence of belonging to an illegal organisation. The Applicant denied both allegations and stated once again that the confession had been made as a result of duress. On 25 October 2002 the court convicted and sentenced the Applicant to a life sentence. The Court of Cassation upheld this decision.

Complaints

The Applicant claimed a violation of Article 3 and 13 of the Convention due to being a victim of inhuman and degrading treatment by police officers while in custody, and due to the lack of an effective investigation and prosecution of the officers concerned. The Applicant also claimed violation of Articles 6 §§ 1, 2 and 3(c) on the basis of the absence of legal assistance while in custody and the courts decision to admit confessions resulting from ill-treatment.



## Held

### *Article 3 and 13*

The Court held that the Applicant's claims under Article 3 and 13 were manifestly unfounded and must be rejected in accordance with Articles 35(1) and (4) of the Convention as not being brought within the six month period required. The Applicant did not appeal the dismissal of the case by the Izmir Public Prosecutor, and did not present herself to the hearing before the İstanbul State Security Court, even though she had been duly informed.

### *Article 6*

In determining the violation of Article 6(3) in respect of the absence of legal assistance, the Court drew upon the case *Salduz v. Turkey* (36391/02) and held a manifest violation of Article 6(3).

Further, the Court held that even though the Court does not have to appreciate in *abstracto* the question of the organisation of evidence under criminal law, it regretted that the İstanbul State Security Court had not adjudicated on that question beforehand when examining the case.

## **Right to respect for private and family life**

### ***Enea v. Italy***

(74912/01)

**European Court of Human Rights:** Judgment dated 17 September 2009

*Prohibition of torture and inhuman and degrading treatment – right to a fair trial – right to respect for correspondence private and family life - Articles 3, 6 § 1, and 8 of the Convention*

## Facts

The Applicant, Salvatore Enea, is an Italian national who was born in 1938.

Detained since 23 December 1993, the Applicant was sentenced to 30 years' imprisonment for – among other offences – being a member of a Mafia-type organisation.

On 10 August 1994, the Applicant was subjected for a year to a special prison regime under section 41 bis of the Prison Administrative Act for reasons of public order and safety. This measure was ordered under a decree of the Ministry of Justice and this in view of the danger posed by the Applicant. The decree imposed restrictions on certain Applicant's rights such as visits of family members, and prohibitions to see non-family members, to use the telephone or monitoring of his correspondence. The monitoring of the Applicant's correspondence subjected to prior authorisation by the judicial authority. The application of this special regime was extended every year by means of decrees until late 2005.

The Applicant lodged several appeals to the Naples Court in charge of the execution of sentences in order to challenge the subsequent decrees he was continuously subjected to. The Court of Cassation only ordered the discontinuance of Decree No.19 and the application of the special regime in late February 2005. The Applicant was then placed in a high supervision prison unit. But as a result his health's situation, the Applicant served his sentence in a hospital wing of Naples prison between June 2000 and February 2005. The Applicant applied for a stay of execution of his

sentence on health grounds to the Naples court responsible for the execution of sentences. On 2 October 2008, the court ordered a stay of execution of his sentence on account of his state of health. The Naples court placed him under house arrest for a period of six months. Being under house arrest implies for the Applicant the prohibition of any contacts except his family members and medical personnel. The Applicant's current state of health has not been communicated to the Court.

### Complaints

The Applicant complained that his continued detention amounted to a violation of Article 3 of the Convention, especially due to this state of health.

The Applicant also complained that his right to a fair trial (Article 6) and to effective remedy (Article 13) have been violated through the continued restrictions to access to a court he has been subjected to as a result of the ministerial decrees and then the decision to place him in a high supervision prison unit.

The Applicant complained under Article 8 of the Convention that the special prison regime he was subjected to constituted a violation of his right to respect for family and private life, as well as his right to respect for correspondence due to the restrictions placed on contacts with his family and the monitoring of his correspondence.

Finally, the Applicant complained that his detention constituted a violation of Article 9 (freedom of religion) as he has not been able to practice his religion and particularly has been prevented from attending his brother and girlfriend's funerals.

### Held

#### *Article 3*

The Court held that there was no violation of Article 3 as the restrictions imposed on the Applicant were necessary and eased by the courts responsible of the execution of sentenced when required by his state of health.

#### *Article 6(1)*

The Court found a violation of Article 6(1) (right to a fair trial) as regards the Applicant's right to a court during the period of application of the special prison regime. The Court found that for Decree No.12 the court responsible for the execution of the sentenced had given its ruling well after the ten days deadline laid down in the legislation but dismissed the appeal on the ground that the delay expired. The Court held that Article 6 was violated as this decision has resulted in the deprivation of a decision on the merits of the application of the special regime.

The Court did not find any violation of Article 6(1) concerning his right to a court during his detention in a high-supervision unit. The Court considered that the Applicant was subjected to restrictions of his civil rights and that furthermore the Applicant could have access to the court if he would have been subjected to such restrictions.

#### *Article 8*

The Court found unanimously, and according to previous case-law, a violation of Article 8 (right to respect for correspondence private and family life) on the ground that the legal basis through

which the measure has been imposed did not clarify the duration of the measure, the reasons to justify it, its scope and the manner in which the relevant authorities had to exercise it.

## Freedom of thought, conscience and religion

*Bayatyan v. Armenia*

(23459/03)

**European Court of Human Rights:** Judgment dated 27 October 2009

*Freedom of thought, conscience and religion – Article 9*

### Facts

The Applicant was born in 1983 and lives in Yerevan, he is a Jehovah's Witness. He became eligible for military service during the 2001 spring draft (April-June). On the 1 April 2001 the Applicant sent identical letters to the General Prosecutor of Armenia, the Military Commissioner of Armenia and the Human Rights Commission of the National Assembly, stating that he consciously refused to perform military service and that he was ready to perform alternative civilian service in place of military service.

On 29 May 2001 the Parliamentary Commission for State and Legal Affairs sent a reply to the Applicant's letter of 1 April 2001, stating that every citizen was obliged to serve in the Armenian army and that since no law had yet been adopted on alternative service, that he must submit to the current law and serve in the Armenian army.

In early to mid-June 2001 the Applicant returned home, where he lived until his arrest in September 2002. On 12 June 2001 the Parliament declared a general amnesty which applied only to those who had committed crimes before 11 June 2001 and was subject to implementation until 13 September 2001.

### Complaints

The Applicant complained that his conviction for refusal to serve in the army had violated Article 9 of the Convention, interfering with his right to freedom of thought, conscience and religion.

### Held

Since Article 4.3 (b) clearly left the choice of recognising conscientious objectors to each Contracting Party, the fact that the majority of the Contracting Parties have recognised this right cannot be relied upon to hold a Contracting Party which has not done so to be in violation of its Convention obligations. In such circumstances, the Court concludes that Article 9, read in the light of Article 4.3 (b), does not guarantee a right to refuse military service on conscientious grounds. Therefore, States which do not recognise conscientious objectors cannot be prevented from punishing those who refused to do military service.

The Court noted that at the material time the right to conscientious objection was not recognised in Armenia. On the other hand, Armenia had officially committed itself to the outside world legally to recognise that right and, in the meantime, to pardon all convicted conscientious

objectors, allowing them instead, when the law on alternative service had come into force, to perform alternative civilian service.

The Court acknowledged that this must have given the Applicant a legitimate expectation to be allowed to perform alternative service after the entry into force of the new law instead of having to serve a prison sentence. Nevertheless the Court held that the authorities were not in breach of their Convention obligations for convicting the Applicant for his refusal to perform military service. The law on alternative service has been adopted in Armenia, thereby recognising the right to conscientious objection. The Court considered, however, that the substance of this law and the manner of its application in practice fell beyond the scope of the present application.

In conclusion, the Court held that there has been no violation of Article 9.

***Kimlya and Others v. Russia***

(76836/01 and 32782/03)

**European Court of Human Rights:** Judgment dated on 1 October 2009

*Freedom of religion – freedom of assembly – 9 and 11 of the Convention*

Facts

There are three Applicants. The first Applicant is Yevgeniy Kimlya, President of Surgut City Church of Scientology, who was born in 1977 and who lives in Surgut (Russia). The second Applicant is one of the co-founders of the Nizhnekamsk Church of Scientology, Aidar Sultanov, who was born in 1965 and lives in Nizhnekamsk (Russia). The third Applicant is the Nizhnekamsk Church of Scientology, which is a religious group without any legal status.

The Surgut Church of Scientology was initially registered in 1994 as a non-governmental organisation in 1994, but was dissolved on the ground that its activities were ‘religious in nature’. Deprived of a the status of a legal entity, their members applied to the Justice Department in August 2000 in order to be registered as a local religious organisation. However, the Justice Department refused the registration on 14 September 2000, on the basis that the organisation has failed to produce a document required under the Religions Act to prove that the religious group has existed in the given territory for more than 15 years. The first Applicant, appealed against this decision on the basis that this refusal constituted a breach of its constitutional right to freedom of conscience. However, all the domestic courts’ rejected its claims. They held that the claims based on constitutional rights were groundless and that the organisation failed to prove the requirements established under the above cited domestic law.

The others Applicants, the Nizhnekamsk Church of Scientology – initially set up as a religious group in 1998 - and one of its co-founders, had also applied for state registration in December 1999. Their registration as a religious organisation has been also subsequently refused on the basis of the Religions Act which requires that any new religious group has to be affiliated with a centralised religious organisation and that the group complies with the ‘fifteen-year rule’ cited above.

Therefore, and following complex and lengthy proceedings, the two churches of Scientology were refused registration as 'religious organisations' by reference to the legal requirement of the Religions Act. This decision prevented them to be recognised as a religious organisation and therefore let them being defined only as a religious group, which has no legal personality under the Religions Act. Indeed, any religious group under Russian domestic law cannot – among other restrictions - own or rent property, have a bank account, hire, acquire and distribute religious literature, or create educational institutions.

### Complaints

The Applicants complaint that the distinction between religious groups and religious organisations and the 'fifteen-year rule' requirement to gain legal personality under the Religions Act constituted a violation of Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 11 (freedom of assembly and association) of the Convention read alone or in conjunction with Article 14 of the Convention (prohibition of discrimination).

### Held

#### *Article 9 and 11*

To determine the application of Article 9 in the present case, the Court at first noted that the question of whether or not Scientology was a religion was a matter of controversy among the member states and therefore based its interpretation on the Russian domestic law's position which considers it as a religion.

As religious community traditionally exist in the form of organised structures, the Court found that Article 9 had to be examined in the light of the freedom of association embodied in Article 11 of the Convention.

First of all, the Court found that the lack of legal personality for religious groups under section 9 paragraph 1 of the Religions Act and the restrictions it involves for their members in the enjoyment of certain rights amount to an interference with the Applicants' rights under Article 9 and 11 of the Convention.

The Court then observed that this inference is disproportionate and amount to a breach of Article 9 and 11 as at no point in the proceedings it has be shown that the Applicants were engaged or intended to carry out unlawful activities. The Court found that the refusal to register the Applicants as a religious organisation is a consequence of an automatic application of a legal provision under the Religions Act i.e the 'fifteen-year rule' and that this rule targeted only newly emerging religious groups such as Scientology groups.

Therefore, the Court held that this interference with the Applicant's rights to freedom of religion and association is disproportionate and unnecessary in a democratic society and constituted a violation of Article 9 interpreted in the light of Article 11 of the Convention.

#### *Article 10 and 14*

The Court held unanimously that examining the complaints under Article 10 and 14 of the Convention were not necessary as those complaints were taken into account in the above findings.

## Freedom of expression

### *Kuliś and Różycki v. Poland*

(27209/03)

**European Court of Human Rights:** Judgment dated 6 October 2009

*Freedom of expression – Articles 10*

#### Facts

The Applicants were born in 1956 and 1946 respectively. The first Applicant lives in Łódź. The first Applicant owns a publishing house named ‘Westa Druk’ which publishes a weekly magazine, *Angora*, and its supplement for children, *Angorka*. The second Applicant was the editor in chief of the magazine.

On 16 May 1999 *Angorka* published an Article referring to an advertising campaign by a company, Star Foods, for its potato crisps. On the first page of the magazine there was a cartoon showing a boy holding a packet, with the name ‘Star Foods’ on it, saying to *Reksio* – a little dog, a popular cartoon character for children – ‘Don’t worry! I would be a murderer too if I ate this muck!’ Above the cartoon, there was a large heading reading ‘Polish children shocked by crisps advertisement, ‘Reksio is a murderer.’

The Article, printed on the second page of the magazine, read as follows:

‘Recently in Star Foods crisps [packets] stickers appeared which terrified parents and their children: ‘Reksio is a murderer.’

The above quoted Article on the second page was accompanied by a small cartoon featuring two cats holding a packet with the word ‘crisps’ on it and the dog *Reksio* in the background. One cat holds a piece of paper with the slogan ‘Reksio murderer’ apparently taken out from the packet and says to the second cat - ‘surely, he is sometimes unpleasant, but a murderer?!’

On 2 November 1999 Star Foods (‘the plaintiff’) lodged against both Applicants a civil claim for protection of personal rights. The company sought an order requiring the defendants to publish an apology in *Angora* and *Angorka* for publishing a cartoon discrediting, without any justification, Star Foods products. They further sought reimbursement of their legal costs and payment by the Applicants of 10,000 Polish zlotys (PLN) to a charity.

On 28 May 2001 the Łódź Regional Court (*Sąd Okręgowy*) found for the plaintiff, ordering the Applicants to publish apologies and to pay PLN 10,000 to a charity. The Applicants were also ordered to pay the plaintiffs PLN 11,500 to reimburse the costs of the proceedings. The court considered that the cartoon in question had breached the personal rights of the plaintiff and discredited the products of the company. The court dismissed the Applicants’ arguments that the cartoon had aimed to criticise the advertising campaign run by Star Foods and not their product.

On 21 March 2002 the Łódź Court of Appeal dismissed the Applicants’ appeal and ordered the Applicants to pay the plaintiffs PLN 2,500 to reimburse the costs of the appellate proceedings. On 12 December 2002 the Supreme Court refused to examine the cassation appeal lodged by the Applicants.

### Complaints

The Applicants alleged a breach of their right to freedom of expression guaranteed by Article 10 of the Convention.

### Held

The Court notes that it is undisputed that the civil proceedings against the Applicants amounted to an 'interference' with the exercise of their right to freedom of expression, which was prescribed by law, namely Articles 23 and 24 of the Civil Code, and was intended to pursue the legitimate aim of protecting 'the reputation or rights of others'.

The publication in question constituted a satirical denouncement of the company and its unacceptable advertising campaign, which used slogans referring to sexual and cultural behaviour, in a manner inappropriate for children. This clearly raised issues which are of interest and importance for the public. The Court observed that the cartoon in question was accompanied by a large heading referring to 'a shocking advertising campaign' and an Article on the second page reporting on the Star Foods campaign. Therefore the Applicants' aim was not primarily to denigrate in the minds of readers the quality of the crisps but to raise awareness of the type of slogans used by the plaintiff company and the unacceptability of such tactics to generate sales.

Regard being had to the interest of a democratic society in ensuring and maintaining the freedom of the press on subjects of public interest, the Court concluded that the authorities' reaction towards the Applicants' satirical cartoon was disproportionate to the legitimate aim pursued and, accordingly, was not 'necessary in a democratic society' 'for the protection of the rights of others.' Therefore there had been a violation of Article 10 of the Convention.

The Court awarded the first Applicant EUR 7,200 which he had been ordered to pay by the domestic courts, EUR 3,000 for non-pecuniary damages and EUR 6,100 covering costs.

### ***Manole and Others v. Moldova***

(13936/02)

**European Court of Human Rights:** Judgment dated 17 September 2009

*Freedom of expression – Articles 10*

### Facts

The Applicants, Larisa Manole, Corina Fusu, Mircea Surdu, Dinu Rusnac, Viorica Cucereanu-Bogatu, Angela Aramă-Leahu, Ludmila Vasilache, Leonid Melnic and Diana Donică are Moldovan nationals living in Chişinău. They are or were all employed by 'Teleradio-Moldova' (TRM), which was, at the time of the events in question, the only national television and radio station in Moldova. TRM was created by Presidential decree as a State-owned company on 11 March 1994, out of the previously existing State broadcasting body. TRM's statutes were changed in 1995, 1996 and again in 2002, when it was transformed into a public company and was registered as such on 26 July 2004.

According to the Applicants, throughout its existence, TRM was subjected to political control which they claimed worsened after February 2001 when the Communist Party won a large majority in Parliament. In particular, senior TRM management was replaced by those who were loyal to the Government. Only a trusted group of journalists were used for reports of a political nature which were edited to present the ruling party in a favourable light. Journalists were reprimanded for using expressions which reflected negatively on the Soviet period or suggested cultural and linguistic links with Romania. Interviews were cut and programmes were taken off the air for similar reasons. The opposition parties were allowed only very limited opportunity to express their views. In the first half of 2002, following a strike by TRM staff demanding end of censorship, two TRM journalists were subjected to disciplinary sanctions; they appealed in court which decided in their favour. A number of reports by international organisations and non-governmental groups affirmed that domestic law did not sufficiently guarantee the independence of editorial policy at TRM, and that the opposition was not adequately represented on the air.

In April 2002, the Moldovan Audiovisual Coordinating Council published its conclusions on the question of alleged TRM censorship. It found that certain words and topics were indeed prohibited in TRM's reports. However, it dismissed other allegations of censorship as excuses used by the journalists to cover their lack of professionalism.

The Government did not deny the specific incidents alleged by the Applicants and accepted the Audiovisual Council's conclusions. It did, however, submit that opposition politicians had access to national television for ten minutes a week and, during the 2005 electoral campaign, for an hour every day.

In July 2002 Parliament adopted a law on TRM transforming the company from state to public. As a result, all Applicants had to sit examinations to be confirmed in their posts. A large number of the journalists who were on strike earlier that year were not retained in post and 19 of them were banned from entering the TRM premises. The Applicants claimed they were dismissed for political reasons and appealed in court, however, unsuccessfully.

### Complaints

The Applicants alleged that they were victims of a practice of undue political influence over editorial policy by the State authorities through TRM's senior management, in breach of Article 10 of the Convention.

### Held

The Court first noted that the Government did not deny the specific examples cited by the Applicants of TV or radio programmes that had been banned from air because of the language used or their subject-matter. Further, having accepted that TRM maintained a list of prohibited words and phrases, the Government had not provided any justification for it. In addition, given that the authorities had not monitored TRM's compliance with their legal obligation to give balanced air-time to ruling and opposition parties alike, the Court found the relevant data provided by non-governmental organisations significant. The Court thus concluded that in the relevant period TRM's programming had substantially favoured the President and ruling Government and had provided scarce access to the air to the opposition.



The Court further found that during most of the period in question TRM had enjoyed a virtual monopoly over audiovisual broadcasting in Moldova. Consequently, it had been of vital importance for the functioning of democracy in the country for TRM to transmit accurate and balanced information reflecting the full range of political opinion and debate.

The State authorities were under a duty to ensure a pluralistic audiovisual service by adopting laws ensuring TRM's independence from political interference and control. However, during the period considered by the Court, from February 2001-September 2006, when one political party controlled the Parliament, Presidency and Government, domestic law did not provide a sufficient guarantee of political balance in the composition of TRM's senior management and supervisory body nor any safeguard against interference from the ruling political party in these bodies' decision-making and functioning. The Court therefore concluded that there had been a violation of Article 10 and that Moldova had to reform its legislation at the earliest opportunity and in line with relevant Council of Europe recommendations. The Court reserved the question of just satisfaction under Article 41 of the Convention for decision at a later date.

### ***Ürper and Others v. Turkey***

(14526/07), (14747/07), (15022/07), (15737/07), (36137/07), (47245/07), (50371/07), (50372/07) and (54637/07)

**European Court of Human Rights: Judgment 20 October 2009**

*Freedom of expression – Article 10 of the Convention*

#### Facts

The Applicants are the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers (*Ülkede Özgür Gündem*, *Gündem*, *Güncel* and *Gerçek Demokrasi*) published in Turkey.

On various dates between November 2006 and October 2007, each newspaper was suspended from publication and distribution by the İstanbul Assize Court. The newspapers were suspended on the grounds that they contained Articles considered to spread propaganda in support of the PKK (Kurdistan Workers' Party), whilst also approving crimes that were committed by the illegal organisation and its members. The İstanbul Assize Court also observed that the newspapers had disclosed the identity of officials involved in anti-terrorism operations, thereby endangering such individuals to terrorist attacks. Consequently, the newspapers were suspended for periods ranging from 15 days to 1 month, in accordance with Section 6(5) of Law No. 3713 ('Anti-Terror Law'). Neither the Applicants nor their lawyers were able to take part in the criminal proceedings before the İstanbul Assize Court.

A number of the Applicants were tried and convicted of the same charges levelled against the newspaper. Ali Gürbüz, the owner of *Ülkede Özgür Gündem*, was convicted of disseminating propaganda in favour of a terrorist organisation, approving crimes committed by that same organisation, and for identifying officials within Anti-Terrorism branches of the State. Ali Gürbüz was fined 380,000 Turkish Liras (TRY) as a result of his conviction.

Özlem Aktan, the executive director of *Ülkede Özgür Gündem* and *Gündem*, and Lütfi Ürper, the owner of *Gündem* and *Güncel*, were tried and convicted in the same vein as Ali Gürbüz. Lütfi Ürper was convicted on similar charges on three other occasions, with Hüseyin Bektaş, the owner and executive director of *Gerçek Demokrasi*, also being convicted on the same grounds.

Each of the Applicants individually prosecuted appealed against their convictions, with their appeals still pending before the court of first instance at the same of the Court's judgment.

### Complaints

The Applicants complained that the suspension of their respective newspapers from publication and distribution constituted an unjustified interference with their rights to freedom of expression underneath Article 10 of the Convention.

The Applicants also complained that their inability to take part in the criminal proceedings against their respective newspapers constituted a violation of Article 6 of the Convention, that there had been effective domestic remedy available to them (in contravention of Article 13 of the Convention), and that the suspension of the newspapers constituted an unjustifiable interference with their rights to property under Article 1 Protocol 1.

### Held

#### *Article 10*

Firstly, the Court stressed that news is a perishable commodity and that any delay to its publication may well deprive it of all its value and interest. As such, any restriction imposed on the distribution and publication of newspapers must be strictly justified. The Court observed that in the present cases, the suspensions of the Applicants' newspapers were to the affect that future publications of entire newspapers whose content had been unknown at the time of the İstanbul Assize Court's decision were also suspended. The Court was particularly critical of this imposition, stating that measures such as confiscation of particular issues of newspapers or restrictions on the publication of specific Articles would have been sufficient.

Moreover, the Court observed that the Applicants convicted of the same offences as the newspapers had their guilty assumed on the basis that they would commit the same kind of offences in the future. The convictions of the Applicants were therefore motivated by a sense of deterrence, whilst also hinder their professional activities. What's more, the Applicant's guilt had been assumed from proceedings from which the Applicants themselves which specifically excluded.

Having regard to the aforementioned observations, the Court held that the suspension of the entire publications had unjustifiably restricted the 'essential role of the press as a public watchdog', in violation of Article 10 of the Convention.

#### *Article 6 and 13 of the Convention, and Article 1 Protocol 1*

The Court considered it unnecessary to examine whether there had been further violations of the Convention. They stated that the 'main legal question' (the violation of Article 10 of the Convention) had been appropriately examined, meaning that it was not necessary to decide upon the alleged violations of Article 6 and 13 of the Convention and Article 1 Protocol 1.

#### *Article 41*

The Applicants were each awarded €1,800 EUR in non-pecuniary damages, as well as €5,000 EUR jointly in costs and expenses. In addition, Lütfi Ürper was awarded €40,000 EUR, Ali Gürbüz €5,000 EUR, and Hüseyin Bektaş €10,000 EUR in respect of pecuniary damages.

## **Freedom of assembly and association**

### ***Özbek and Others v. Turkey***

(35570/02)

**European Court of Human Rights:** Judgment 6 October 2009

*Right to a freedom of assembly and association – Article 11 of the Convention*

#### Facts

On 20 December 2000, the Applicants decided to set-up a public hearing foundation called Kurtuluş Kiliseleri Vakfı (the Foundation of Liberation Churches). On 21 December 2000, the Applicants applied to the Ankara Court of First Instance to register their foundation. The matter was referred to the Directorate General of Foundations, who opposed the registration of the Applicants' foundation on the grounds that the foundation's constitution explicated that its principal aim was to serve the interests of the Protestant community. This Directorate General's opinion was based on an Article of the Civil Code which prohibited supporting a specific community.

On 12 July 2001, the Ankara Court of First Instance refused to register the Applicants' foundation on the same grounds postulated by the Directorate General of Foundations. On 22 November 2001, the Court of Cassation upheld the Ankara Court of First Instance's judgment.

On 22 January 2002, the Applicants requested the Court of Cassation to review its decision. The Applicants claimed their foundation's constitution had been misinterpreted by the Court, since it was poorly worded and did not reflect the true intention of the founding members. The Applicants argued that the true intention of the foundation was to provide support to people in need and to victims of natural disasters, irrespective of their belief or religion. On 14 February 2002, the Court of Cassation rejected the Applicants' request.

In 2004, some of the Applicants formed a new association with aims similar to those of the Applicants' foundation in the present case. The new association made no reference to supporting any particular community.

#### Complaints

The Applicants complained that the refusal to register their foundation was in violation of their right to freedom of association under Article 11 of the Convention.

#### Held

#### *Article 6*

The Court observed that the Applicants had been willing to amend the foundation's constitution so as to reflect their true aims, and to comply with the legal requirements for their registration.

The Court of Cassation had not allowed the Applicants to alter their constitution, meaning that the Applicants were prevented from establishing a foundation that would have had legal status. The Court noted that this was not the first time the Court of Cassation had prevented individuals from altering their foundation's constitution so as to comply with the legal requirements for their registration – they had done so before on numerous occasions, as Court case law indicates.

The Court also held that the fact that some of the Applicants had subsequently registered another association did not prevent them from complaining about the State's refusal to establish their previous foundation.

Having regard to the above-mentioned observations, the Court found the State's refusal to register the foundation was not 'necessary in a democratic society', and had therefore violated Article 11 of the Convention.

*Article 41*

The Applicants were each awarded €2,000 EUR in pecuniary damages, as well as €500 EUR in non-pecuniary damages. The Applicants were also jointly awarded €5,200 EUR in costs and expenses.

***Saime Özcan v. Turkey***

(22943/04)

***Kaya & Seyhan v. Turkey***

(30946/04)

**European Court of Human Rights:** Judgment 15 September 2009

*Freedom of assembly and association, Right to an effective remedy – Article 11 and Article 13 of the Convention*

Facts

The Applicants were all teachers and were all members of their local branch of the trade union *Eğitem-Sen*, attached to trade union confederation *Kesk (Kamu Emekçileri Sendikaları Konfederasyonu)*

*Saime Özcan:*

On 1 December 2000, the Applicant took part in a one-day national strike organised by *Eğitem-Sen*. The demonstration called for the improvement of working conditions for civil servants. As she was taking part in the demonstration, the Applicant did not attend work that day.

As a result of the Applicant's absence from work, criminal proceedings were taken against her on the grounds that she had abandoned her work station – in contravention of Article 236 of the old Turkish Penal Code. On 31 January 2002, the Izmir State Security Court convicted the Applicant as charged and sentenced her to 3 months 10 days imprisonment. She was also issued with a fine and barred from public service for 3 months. Her prison sentence was later commuted to a fine.

On 2 December 2003, the Court of Cassation upheld the court of first instance's judgment, but reduced her debarment from public service to two and a half months. On 29 August 2007,

following the introduction of a new Penal Code, the Applicant's conviction and sentence were annulled.

*Kaya & Seyhan:*

On 11 December 2003, the Applicants took part in a one-day national strike organised by *Eğitem-Sen*. The demonstration was in protest against a bill under discussion at Parliament. As a result of their attendance at the demonstration, the Applicants had not attended their work station on that day.

On 5 January 2004, the Applicants were informed that disciplinary proceedings had been lodged against them regarding their absence from their work station. On 15 January 2004, the Applicants each received a disciplinary warning for their conduct. The Applicants disputed their penalty before the Ministry of State Education, on the grounds that the penalties imposed were in violation of both national and international trade union laws. On 30 January 2004, the Ministry for State Education rejected the Applicants' claims.

Complaints

All three Applicants complained that penalties and warnings they had received constituted an unjustified interference with their right to freedom of association under Article 11 of the Convention. Ms Kaya and Mr Seyhan also complained that there was no domestic remedy available to them to challenge the 'warning' given to them – in contravention of Article 13 of the Convention.

Held

*Article 11*

The Court found that the penalties imposed on the Applicants, albeit very light in the respect of those imposed upon Ms Kaya and Mr Seyhan, were such so as to dissuade trade union members from participating in legitimate strikes or other trade union action. As such, the penalties were not 'necessary in a democratic society', meaning that Article 11 of the Convention had been violated.

*Article 13*

The Court held that no safeguards were awarded to the Ms Kaya or Mr Seyhan to prevent possible or to even allow for a review of the lawfulness of the disciplinary measures imposed upon them. The Court noted in particular that neither the Constitution nor the statutory law had established any sort of mechanism for the judicial review of warnings or reprimands. As a result, the Applicants had not been afforded an effective domestic remedy, meaning that Article 13 of the Convention had been violated.

*Article 41*

Saime Özcan was awarded €500 EUR in non-pecuniary damages, and €1,840 in costs and expenses.

Ms Kaya and Mr Seyhan were awarded no damages since the Court considered there to be no causal link between the violation and the Applicants' claims of moral damage.

*Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*  
(37083/03)

**European Court of Human Rights:** Judgment dated 8 October 2009

*Freedom of association – Articles 11*

Facts

The association is a non-profit-making non-governmental organisation, now dissolved, which was active between 1995 and 2002. The application was lodged by its former Chairman, Mr Sabir Israfilov, who was born in 1948 and lives in Baku.

The Association was registered by the Ministry of Justice on 25 August 1995 and acquired the status of a legal entity.

On 10 September 2002 the Ministry issued a warning to the Association in accordance with Article 31.2 of the Law on Non-Governmental Organisations (Public Associations and Foundations), applicable at the material time ('the NGO Act'). The Ministry stated that the Association's activities did not comply with the requirements of its own Charter and the domestic law. It was noted that a general assembly of the Association's members had not been convened within the five-year period specified in its own Charter. Moreover, in any event, this provision of the charter was itself incompatible with the domestic law, as Article 25.2 of the NGO Act required that the supreme governing body of a public association – the general assembly of members – was to be convened at least once every year. The Ministry requested that, within ten days, the Association take measures to remedy the aforementioned breach and inform the Ministry of the measures taken.

In December 2002 the Ministry lodged an action with the Yasamal District Court, seeking an order for dissolution of the Association. The Association, represented by Mr Israfilov, lodged a counterclaim, contending that the Ministry's warnings had been unlawful and unsubstantiated. On 7 March 2003 the Yasamal District Court dismissed the Association's counterclaim and granted the Ministry's request, ordering the Association's dissolution.

Based on the above materials, the court found that, despite the early warning issued on 9 July 1997 (the content of which was not specified in the judgment), the Association had continued to commit breaches of domestic law on an even more systematic basis, which had led to the issuance by the Ministry of Justice of the three warning letters in 2002. The court noted that the Association's Charter did not comply with the domestic law on public associations, which required that a general assembly of members be held no less than once a year. In any event, even the five-year period for convening a general assembly, as required by the Association's Charter, had not been complied with. The court further found that the Ministry's findings concerning numerous irregularities during the general assembly meeting of 26 August 2002, as well as breaches of law in the general functioning of the Association, constituted a basis on which to dissolve the Association for systematic failure to comply with the domestic law. The court further noted that, in accordance with the NGO Act, the issuance of three warnings by the Ministry of Justice constituted a basis for an association's dissolution if the latter did not take any measures to remedy the shortcomings in its activities. The court therefore ordered that the Association be dissolved.

The Association appealed, claiming that the provisions of the NGO Act were vague and imprecise, giving the Ministry a wide discretion to interfere with public associations' activities and to issue warnings even for minor irregularities in their activities. The Association also argued that the Yasamal District Court's factual findings concerning its activities had been incorrect and unsupported by any evidence.

On 4 July 2003 the Court of Appeal dismissed the appeal and upheld the Yasamal District Court's judgment. By a final decision of 29 October 2003, the Supreme Court upheld the lower courts' judgments. The Association's state registration certificate was revoked and the Association was dissolved.

### Complaints

The Applicants alleged, in particular, that the dissolution of the Association had infringed their right to freedom of association, guaranteed under Article 11 of the Convention. The Applicants argued that the interference was not prescribed by law, because the NGO Act, being vague and imprecise, gave the Ministry of Justice an unlimited discretion to issue warnings to public associations without specifying clearly the scope of such discretion.

### Held

#### *Article 11*

In considering the interference was justified under Article 11 paragraph 2 (freedom of association), the Court noted that breach of Article 11 would be justified, if the interference was 'prescribed by law', pursued one or more legitimate aims under paragraph 2 and was 'necessary in a democratic society' for the achievement of those aims.

The Court therefore held that the provisions of the NGO Act would not meet the 'quality of law' requirement, which would be sufficient for a finding of a violation of Article 11 on the basis that the interference was not prescribed by law. Also, the Court noted, however, that these questions were in this case closely related to the broader issue of whether the interference was necessary in a democratic society. The Court considered that, in the circumstances of the present case, respect for human rights would require it to examine the latter issue as well.

Therefore, the Court followed that, in respect of this ground for the interference (breaches by the Association of the domestic legal requirements on internal management), the reasons would adduce by the national authorities to justify it were not relevant and sufficient. In such circumstances, the Court considered that the respondent State failed to demonstrate that the interference met a pressing social need.

Moreover, the Court held that the interference did not, in any event, comply with the 'proportionality' requirement. In this connection the Court considered that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference.

In the present case, forced dissolution was the only sanction available under the domestic law in respect of public associations found to have breached the requirements of the NGO Act and, accordingly, this sanction could be applied indiscriminately without regard to the gravity of the breach in question.

The Court argued that a mere failure to respect certain legal requirements on internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. Therefore, even if the Court were to assume that there were compelling reasons for the interference, it considered that the immediate and permanent dissolution of the Association constituted a drastic measure disproportionate to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits.

The Court concluded that the fact of the Association's alleged engagement 'in activities prohibited by law' was unproven. In such circumstances, the domestic courts' decision to dissolve the Association on this ground is, in the Court's view, nothing short of arbitrary.

The Government would have likewise failed to submit any explanation as to the specific details of the Association's allegedly unlawful activities or any evidence of such unlawful activities. In sum, the Court considered that no justification has been provided by the domestic authorities or the Government for the Association's dissolution on this ground. Having regard to the above analysis, the Court concluded that the interference was not 'necessary in a democratic society'. There has accordingly been a violation of Article 11 of the Convention.

### ***Uzunget and Others v. Turkey***

(21831/03)

**European Court of Human Rights:** Judgment dated 13 October 2009

*Unfair criminal proceedings – freedom of thought, conscience and religion - freedom of expression - right to freedom of assembly - Articles 6, 9, 10 and 11*

#### Facts

The Applicants were born in 1975, 1964, 1982, 1976, 1983, 1978, 1961, 1947, 1955, 1975, 1979, 1953, 1952 and 1976 respectively and live in Ankara. On 31 July 2000 the Applicants and several others, gathered in a public park in Ankara in protest against F-type prisons and the events which had occurred in Bergama Prison (on 27 July 2000) without the permission of the authorities. At the material time no authorisation was required for the holding of public demonstrations, however, notification was required seventy-two hours prior to the event. Police officers warned the crowd over a megaphone that the demonstration was illegal under Law no. 2911 on Meetings and Demonstration Marches. The group ignored the police warning. The police officers then arrested twenty-four persons, including the Applicants, and took them into custody. It appears from the newspaper Articles submitted by the Applicants that the police officers used force in order to disperse the protesters. As a result, some of the protestors were injured and a number of them were arrested by the police officers.

According to the arrest report, drawn up and signed by the police officers, the Applicants were demonstrating with protest banners in their hands. After having warned them to desist, the police arrested the protesters who continued demonstrating. It was also noted in the arrest report that three police officers, who had been injured during the clash with the demonstrators at the time of



the arrest, had had to be taken to hospital. The medical reports stated that the police officers were unfit for work for two days.

On 31 August 2000 the Ankara Public Prosecutor filed an indictment with the Ankara Criminal Court of First Instance against the Applicants and nine others, charging them with having taken part in a demonstration in a public place, without the permission of the authorities, contrary to Law no. 2911.

The Applicants alleged that the police officers had been armed during the hearings before the trial court and had verbally harassed the defence lawyers. Moreover, the police officers had obtained a copy of the reports and statements in the case file even though they were not a party to the proceedings. The Applicants' request to include these facts in the record of the hearings was dismissed.

On 5 July 2001 the Ankara Criminal Court of First Instance acquitted some of the accused but convicted the Applicants. The court found that the Applicants had ignored the police warning that their meeting was illegal and that they had to disperse. The police had had to use force in order to arrest the Applicants. Furthermore, having examined the Applicants' defence submissions, the court considered that the Applicants had indirectly confessed to the crime (*tevil yollu ikrar*) by admitting that they had gathered in the park in order to protest against F-type prisons and the events in Bergama Prison. It then sentenced Rıza Altuntov to a fine, taking into account the fact that he was a minor at the time of the incident (seventeen and a half years old), whereas it sentenced the other Applicants to one year and three months' imprisonment. It decided to suspend enforcement of the Applicants' sentence, under section 6 of Law no. 667, with the exception of Alaattin Uğraş, Sinan Cem Uzunget and İsmail Temizyürek.

On 7 March 2002 the Applicants appealed to the Court of Cassation against the judgment of the first-instance court. The written opinion of the Chief Public Prosecutor at the Court of Cassation was not transmitted to the Applicants.

On 19 December 2002 the Court of Cassation upheld the decision of the first-instance court.

### Complaints

The Applicants complained that the interference by the police with the meeting was in violation of their rights to freedom of thought, expression and assembly under Articles 9, 10 and 11 of the Convention.

The Applicants complained that they had been denied a fair hearing by the domestic courts, alleging a violation of Article 6. They had never been given an opportunity to reply to the written opinion of the Principal Public Prosecutor submitted to the Court of Cassation. Furthermore, the police officers had impaired the fairness of the proceedings by their intimidating and aggressive acts and the trial judge had ignored that behaviour. Additionally, the Applicant Rıza Altuntov claimed that, as he had been a minor at the time of the incident, he should have been tried by a juvenile court.

### Held

#### *Article 14*

Complaints under Article 14 were declared inadmissible.

*Articles 9, 10 and 11*

The Court considered that the Applicants' complaints should be examined from the standpoint of Article 11 alone and that the police intervention and the subsequent conviction of the Applicants for participating in the meeting constituted, in itself, an interference with the Applicants' rights under Article 11. This interference was prescribed by law in pursuance of the legitimate aim of preventing public disorder. However as the demonstrations were peaceful, the forceful intervention of the police officers was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention. Additionally, the sanction imposed on some of the Applicants, namely one year and three months' imprisonment, was not proportionate in the circumstances of the case, violating Article 11.

*Article 6*

The Government submitted that the Applicants or their representatives had had the right to consult the case file and examine the documents and that the written opinion of the Principal Public Prosecutor was not binding on the Court of Cassation. However the Court held that this amounted to an infringement of the Applicant's right to adversarial proceedings and therefore a violation of Article 6.

In relation to the alleged unfairness of the proceedings as a result of the police officers' intimidation, the Court found that the Applicants failed to submit any supporting evidence. Furthermore, the first-instance court seemed to have attached importance to the evidence given by witnesses and the Applicants' defence submissions, rather than the alleged acts or statements of the police officers who attended the hearings. This complaint was rejected.

In relation to the trial of Rıza Altuntov the Court held that the trial of a minor under the age of eighteen by a regular criminal court, rather than a juvenile court, does not as such violate the fair trial guarantee under Article 6. The Court therefore rejected the complaint.

The Court awarded each Applicant EUR 1,000 for non-pecuniary damage.

## **Prohibition of discrimination**

***Opuz v. Turkey***

(33401/02)

**European Court of Human Rights:** Judgment dated 9 June 2009

*Domestic violence – right to life – prohibition of torture and inhuman and degrading treatment – prohibition of discrimination - Articles 2, 3 and 14 of the Convention*

Facts

The Applicant, Mrs Nahide Opuz, is a Turkish national who was born in 1972 and lives in Diyarbakir, Turkey.

The Applicant started to live with H.O in 1990 and got married in November 1995. They had three children but are now divorced. Between April 1995 and March 2002, several violent and threatening incidents happened towards the Applicant and her mother.

On 10 April 1995, the Applicant and her mother alleged that H.O and his father asked them for money, had beaten them and threatened to kill them. They reported this incident and filed a complaint to the Diyarbakir Public Prosecutor. A doctor examined them and noted signs of violence all over both of their bodies including bruises, and swellings. The Public Prosecutor filed an indictment against H.O and A.O but on 15 June 1995 the Diyarbakir 1st Magistrate's Court discontinued the assault case, as the Applicant and her mother had withdrawn their complaints.

On 11 April 1996, H.O beat the Applicant very badly, insomuch that the medical report concluded that the injuries had endangered her life. On 12 April 1996 the Public Prosecutor charged H.O for aggravated bodily harm but the Court released the accused at the hearing on 14 May 1996, after a Public Prosecutor's request considering the nature of the offence and that the Applicant had fully recovered from her husband's assault. However, the Court discontinued the case after the Applicant's withdrawal of her complaint at the hearing of 13 June 1996.

On 5 February 1998, the Applicant, her mother and H.O had a fight where the latter pulled a knife at the Applicant. The Applicant and her mother were severely injured, as reported by a medical report. The Public Prosecutor decided however not to prosecute due to lack of evidences. As a result of this incident, the Applicant left the marital house and stayed at her mother's house.

On 4 March 1998, H.O ran a car into the Applicant and her mother, the latter's life being seriously endangered as a result. On 19 March 1998 the public prosecutor initiated criminal proceedings against H.O. in the Diyarbakir 3rd Criminal Court, and the Applicant brought divorce proceedings against him. A medical report was issued again to prove the mistreatments the Applicant were subjected to. On 2 April 1998, the Applicant and her mother even filed a petition asking for protective measures. However, H.O was granted release again by the Diyarbakir Criminal Court on 30 April 1998 and the Applicants withdrawn their complaints, discontinuing the proceedings against H.O.

On 29 October 2001, the Applicant was taken to the hospital after being assaulted by H.O. A medical report noted seven knife injuries on different parts of her body. Since this date the Applicant lived with her mother. H.O handed himself to the police, told them what happened and stated he regretted that he has done. The police confiscated the knife and released him after taking his statement. On 12 December 2001, charged H.O with knife assault and on 23 May 2003 a fine was imposed on him by the Diyarbakir 2nd Magistrate's Court.

On 14 November 2001, the Applicant lodged a criminal complaint alleging that H.O had threatened her again but the Public Prosecutor refused to prosecute H.O for lack of evidences.

On 19 November 2001, the Applicant's mother filed a complaint before the Public Prosecutor against and his relatives by alleging that they have constantly threatened her and her daughter. The Applicant again initiated divorce proceedings in the meantime. The police took both parties statements and H.O was charged on 10 January 2002 with making death threats.

On 11 March 2002, H.O followed the Applicant's mother from work to home and shot her. The Applicant's mother died instantly after the shot. On 26 March 2008, in a final judgment, the Diyarbakir Assize Court convicted H.O. of murder and illegal possession of a firearm but took into account that the accused committed the murder as a result of provocations made the deceased and diminished the sentence. The appeals before the Court of Cassation are still pending.

H.O has been released again in April 2008. The Applicant asked protective measures to the authorities as H.O again started issuing threats against her. Unsuccessful requests for protective measures have also been addressed to the Government until 29 May 2008, when the Government accepted to take particular measures.

### Complaints

The Applicant alleged that the Turkish authorities failed to protect her and her mother from domestic violence and that they were negligent in the face of repeated violence and death threats to which she was subjected.

She claimed that domestic violence were tolerated by the authorities and that their failure to protect her and her mother amounts to a violation of Article 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 6 (right to a fair trial within a reasonable time) and 13 (right to an effective remedy).

She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14 (prohibition of discrimination).

### Held

#### *Article 2*

The Court held that the Applicant's right to life embodied in Article 2 has been violated by the failure of the authorities to protect the Applicant and her mother from the evident foreseeable H.O's violent behaviour. The Court found that it was striking that the victims have always withdrawn their complaints when H.O was in liberty or were released. The Court reiterates that when such a situation is brought to the national authorities' attention, they cannot rely on the victim's attitude for their failure to prevent her from being mistreated. The Court also reiterates that such situation of domestic violence is not a family matter which prevents national authorities to continue criminal prosecutions against the Applicant's husband. The Court considers that the legislative framework should have enabled the prosecuting authorities to pursue criminal investigations against H.O despite the victim's withdrawal of their complaints. Above H.O's prosecution, the Court noted that the national authorities should have issued protective measures as in contrary of the Applicant's request for protective measures, the prosecuting authorities released H.O.

#### *Article 3*

The Court considered that the Applicant falls within the group of 'vulnerable individuals' and that the long-lasting violence and threats suffered by the Applicant as well as fear for her social background includes her in the 'vulnerable situation of women in south-east Turkey' (paragraph 160). Furthermore, the Court considered that the violence suffered by the Applicant amounts to ill-treatment within the meaning of Article 3 of the Convention. Although the Court noted that the prosecuting authorities have not been totally passive, the Court reiterates its opinion in respect of the complaint under Article 2 concerning the prosecution of H.O. The Court further noted 'with grave concern that the violence suffered by the Applicant had not come to an end and that the authorities had continued to display inaction' (Paragraph 173) until after the Court requested the Government to provide information about the protection measures it had taken. Therefore, the Court held that there has been a violation of Article 3 due to the failure of the authorities to take effective measures to protect the Applicant from ill-treatment.

#### *Article 14*

Based on international human rights law instruments, accepted by the vast majority of states, the Court stated that the state's failure to protect women against domestic violence amount to a breach of women's right to equal protection of the law. The Court also based its decision on NGO's reports. The Court therefore found that most of women victims of domestic violence lived in Diyarbakir, were of Kurdish origin, illiterate with a low level of education, and that 'when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint' (Paragraph 195).

Therefore, the Court held that 'bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the Applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women' (Paragraph 200).

#### *Other Articles*

The Court did not find necessary to examine the same facts under Articles 6 and 13 given the above findings.

#### Commentary

This decision is a landmark case which sets a precedent in relation to a state's positive obligations to protect women from domestic violence. In this case the Court recognised for the first time that domestic violence can amount to a breach of the right to life, the prohibition of gender discrimination and the prohibition of torture.

The Court's recognition of gender-based domestic violence as a systematic form of discrimination against women can be seen as providing a broader concept of discrimination as a whole. This decision is also warmly welcome as it aligned the concept of discrimination with international human rights law standards which has long recognised such violence as a form of discrimination.

Above the concept discrimination, and concerning the concept of torture, this decision is the first case in which any major international or regional court held a state responsible for torture due to its failures to adequately address domestic violence. Therefore, this decision enhances support that domestic cases involving severe domestic violence fall within the definition of torture embodied in the International Convention against Torture or other Cruel, Degrading or Inhuman Treatment or Punishment (CAT).

This decision also provides an overview of women's situation in south-east Turkey, this above the problematic and intolerable domestic violence in the region.

## Right to peaceful enjoyment of property

*Andreou Papi v. Turkey*

(16094/90)

*Christodoulidou v. Turkey*

(16085/90)

*Diogenous & Tseriotis v. Turkey*

(16259/90)

*Epiphaninou & Others v. Turkey*

(19900/92)

*Hadjiprocopiou & Others v. Turkey*

(37395/97)

*Hadjithomas & Others v. Turkey*

(39970/98)

*Hapeshis & Hapeshis-Michaelidou v. Turkey*

(35214/97)

*Hapeshis & Others v. Turkey*

(38179/97)

*Iordanis Iordanou v. Turkey*

(43685/98)

*Josephides v. Turkey*

(21887/93)

*Loizou & Others v. Turkey*

(16682/90)

*Ramon v. Turkey*

(29092/95)

*Roch Ruby Hotels Ltd v. Turkey*

(46159/99)

*Saveriades v. Turkey*

(16160/90)

*Strati v. Turkey*

(16082/90)

*Skyropiia Yialias Ltd v. Turkey*

(47884/99)

*Vrahimi v. Turkey*

(16078/90)

*Zavou & Others v. Turkey*

(16654/90)

**European Court of Human Rights:** Judgment dated 22 September 2009

*Prohibition of torture, inhuman and degrading treatment or punishment - right to private and family life - freedom of assembly and association - prohibition of discrimination - right to protection of property - Article 3, 8, 11 and 14 of the Convention and Article 1 Protocol 1*

## Facts

The Applicants in these 18 cases lived in Northern Cyprus during the 1974 conflict between Turkish and Cypriot forces. The Applicants fled from Northern Cyprus leaving behind their homes, plots of land and other immovable property due to the Turkish invasion. In each application, the Applicants' property was in an area under Turkish occupation and control in 1974. The Applicants had attempted to return to their property on several occasions, but their attempts were thwarted by Turkish forces who refused them entry. Some applications indicate that members of the Turkish military currently reside in the Applicants' homes and structures have been built over their land.

In *Andreou Papi v Turkey*, *Christodoulidou v Turkey*, *Strati v Turkey*, and *Vrahimi v Turkey* the Applicants attended anti-Turkey demonstrations on 19 July 1989. During these demonstrations, and throughout their subsequent detention, the Applicants suffered ill-treatment at the hands of several individuals working on behalf of the Turkish government. In *Andreou Papi v Turkey* the Applicant was struck on the head, back and other parts of the body by Turkish officials who were attempting to break up the demonstration. She was also struck with an electric baton at this time. During her transfer to a detention facility, she was beaten, assaulted, and subjected to sexual threats by Turkish officers. On 20 July 1989, the Applicant was brought before a judge, who ordered her detention for 48 hours. After this period, she was sent to a prison outside of Nicosia, where guards harassed the prisoners during the night, the toilets and showers were filthy and the cell didn't contain enough mattresses. Moreover, there were no doors on the bathroom, meaning that the guards could see the Applicant bathing. On 22 July 1989, the Applicant was convicted of having violated the borders of the 'TRNC' and was sentenced to three days' imprisonment. She was released on 24 July 1989. On 28 July 1989, she was examined by a Government doctor in Limassol who corroborated the Applicant's claims of ill-treatment.

In *Christodoulidou v Turkey* the Applicant was hit and pushed by Turkish policemen whilst attending the demonstration. One of the Turkish policemen purposefully struck the Applicant with a bayonet as a result of which her leg began to bleed profusely and she fell unconscious. The Applicant was subsequently taken to Nicosia General Hospital where she received internal and external stitching. For the following six months, the Applicant suffered considerable pain in her leg and was unable to walk or put weight on it. A medical report dated 27 March 2000 corroborated the Applicant's account of her injuries.

In *Strati v Turkey*, the Applicant had heard about the force used by Turkish soldiers and policemen during the demonstrations and decided to go there to help those injured as he was a nurse. The Applicant wore an armband marked with a red cross when he attended and was told which individuals to help by UN Officers. Whilst attending an injured woman on the ground, the Applicant was beaten by Turkish military personnel with clubs on both his the head and his body resulting in bleeding. He was then transferred to a detention centre, the 'Pavlidis Garage'. On 20 July 1989 the Applicant was taken to Seray Police Station and placed in a dark, dirty and damp cell. During his detention there he was beaten and threatened. On the same day, he was taken to court and charged with having violated the borders of the 'TRNC'. The judge was unsympathetic to the Applicant's claim that he was attending the demonstration as a nurse. On 22 July 1989 the Applicant was convicted and sentenced to 3 days imprisonment. From 24 - 28 July 1986 the Applicant went on hunger strike in protest and was placed in an isolation cell as punishment. The Applicant was released from prison on 28 July 1989. On 29 July 1989, the Applicant was

examined by a doctor at the Nicosia General Hospital, who corroborated the Applicant's claims of the treatment he was subjected to.

In *Vrahimi v Turkey* the Applicant was struck powerfully in the face by a Turkish army officer whilst attending a demonstration. She was subsequently pulled away by her hair in a violent fashion, thrown to the ground and beaten by a number of Turkish soldiers. She also received punches to the abdomen and kicks to the inner leg. She was then taken to the Pavlides Garage. The Applicant was not given any medical attention despite her serious injuries. In the early hours of 20 July 1989 morning, the Applicant was asked to sit on the floor in front of one of the guards and to stretch her legs over a small wall, the Applicant refused and was violently dragged into a car for transportation to Seray Police Station. During her transfer she was beaten and verbally abused and was placed in a small, filthy cell upon arrival at the station. She was subsequently harassed and beaten with electric batons by civilian-clothed Turkish police officers. As a result the Applicant suffered severe pains in her abdomen and was unable to eat. On 20 July 1989 the Applicant was brought before a judge and tried to complain about the treatment she had suffered, but the judge ignored her. Throughout her subsequent trial the Applicant was refused legal representation. On 22 July 1989, the Applicant was convicted and sentenced to 3 days imprisonment. After her release, the Applicant underwent a medical examination, which concluded that she had been subjected to the treatment she had complained of.

### Complaints

The Applicants in every case complain that Turkish occupation and control in their area required them to leave their property, and that they have been unable to return ever since. Consequently, each Applicant complained that their rights under Article 1 Protocol 1 have been violated by the Turkish government. Some Applicants also claimed violation of their rights to private and family life under Article 8 of the Convention. The Applicants in *Andreou Papi v Turkey*, *Christodoulidou v Turkey*, *Strati v Turkey*, and *Vrahimi v Turkey*, all contend that they were subjected to ill-treatment on various occasions at the hands of Turkish officers which amounted to a violation of Article 3 of the Convention.

### Held

#### *Article 3*

In *Andreou Papi v Turkey*, and *Vrahimi v Turkey* the Court believed there was little evidence to substantiate the Applicants' claims of ill-treatment contrary to Article 3 of the Convention. The Court held that whilst the Applicants' undoubtedly possessed the injuries they complained of, there was no compelling evidence to suggest that these injuries were caused by Turkish police officers. As such, in these cases, there had been no violation of Article 3 of the Convention. In *Christodoulidou v Turkey*, the Court stated that the medical records and witness accounts of the incident drew them to the conclusion that the injury suffered by the Applicant was caused by Turkish police. They explained that whilst there was a 'heightened tension' between Turkish forces and demonstrators at the time, the Applicant had not resisted arrest to the extent that it was necessary to inflict the injuries they did on the Applicant. Consequently, the State's use of force was excessive and unnecessary, and in contravention of Article 3 of the Convention. In *Strati v Turkey*, the Court accepted the evidence submitted by the Applicant, particularly the medical



records. They held that the State was unable to provide any evidence to the contrary and therefore attributed the treatment to the State and to be in violation of Article 3 of the Convention.

#### *Article 8*

The Court found there to be a violation of Article 8 in several cases (Diogenous & Tseriotis, Epiphaniou & Others, Hadjiprocopiou & Others, Hadjithomas, Hapeshis & Hapeshis-Michaelidou, Iordanis Iordanou, Loizou & Others, Saveriades, Strati, Zavou & Others) as the property complained of had represented a 'home', and consequently Turkey's refusal to allow the Applicant's access to their property constituted an unjustified interference with their rights under Article 8 of the Convention. However, the Court found there to be no violations of Article 8 of the Convention where the Applicants had not in fact owned or occupied the property at the time of the Turkish invasion (as held in the cases of Andreou Papi, Ramon and Vrahimi).

#### *Article 11*

The Court observed that whilst the Turkish forces had clearly interfered with the Applicants' rights to peaceful assembly, the violent nature of the demonstration meant that an interference with the Applicant's rights was justifiable. The actions of the Turkish forces had not therefore violated Article 11 of the Convention.

#### *Article 14*

In every application, the Court believed it unnecessary to conduct an assessment of the alleged violations of Article 14 of the Convention because of they had already found violations of the Articles to which the Article 14 allegations were conjoined.

#### *Article 1 Protocol 1*

The Court held that in each case, the Applicants' rights to peaceful enjoyment of their possessions were violated. The Court specifically drew upon the judgment in *Loizidou v Turkey* where they had previously held that an Applicant refused access to their property since 1974 (in the same circumstances) had therefore effectively lost all control it as well as any possibility that they may be able to use or enjoy it. In the same case, the Court had held that there was no justifiable rationalisation for the State's interference with the Applicants' rights under Article 1 Protocol 1, meaning that the Applicant's rights under the said Article had been breached. The Court found no reason to depart from this view and held that the Applicants' rights under Article 1 Protocol 1 had been violated.

#### *Article 41*

With reference to the violations of Article 1 Protocol 1, the Court decided to reserve judgment on awards to be made for a later date as the current value of the property is either unknown or disputed. The Applicant in *Strati v Turkey* was awarded 3,000 EUR, and the Applicant in *Christodoulidou v Turkey* was awarded 5,000 EUR in non-pecuniary damages as just satisfaction for violation of Article 3 of the Convention.

***Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey (No. 2)***

(37646/03, 37665/03, 37992/03, 37993/03, 37996/03, 37998/03, 37999/03 and 38000/03)

**European Court of Human Rights:** Judgment dated 6 October 2009

*Right to peaceful enjoyment of possessions – Article 1 Protocol 1 to the Convention*

Facts

The Applicant is a religious foundation established under Turkish law, with a constitution in accordance with the provisions of the Treaty of Lausanne concerning minority religious foundations. The foundation possessed various items of real property (a cemetery, plots of land, buildings, a chapel, and a monastery), which had been acquired by gifts and legacies. The items of real property had been in the foundation's possession for some time, but had not been registered in its name.

The Applicant had not submitted a declaration of property within a certain time (as required by Turkish law no. 2762), meaning that no title to the property had been entered onto the land registry in the foundations name. The Applicant foundation brought proceedings in relation to each property before the Bozcaada Cadastral Court on various dates, seeking the registration of the properties in its name. The Application was successful, but the Court of Cassation later quashed the Court of First Instance's decision on the grounds that the Applicants had failed to submit a declaration of property within the timeframe required by law and that the foundation could claim ownership of the property only on the basis of possession in the capacity of owner and not in adverse possession.

Complaints

The Applicant foundation complained that the state's refusal to enter its real property in the land registry had violated their right to peaceful enjoyment of possessions under Article 1 Protocol 1.

Held

*Article 1 Protocol 1*

The Court observed that the domestic court's refusal to enter the Applicant foundation's property on the land registry was based on the premise that acquisition of property by adverse possession must be based on possession in capacity of the owner. The Court noted that Section 14 of the Land Registry Act did not specify such a requirement, it merely stated that one must be in possession of the properties for a certain period of time.

In relation to the first two applications, the Court believed that the Applicant foundation could not have sufficiently foreseen the Court's refusal since it had been in possession of the properties on a continuous basis for over 20 years – enough to satisfy the requirements of Section 14 of the Land Registry Act – and therefore the interference by the authorities had been in violation of Article 1 Protocol 1. The Court also found the same violation in the case of the remaining properties even though these had not yet been decided on by the domestic courts.

*Article 41*

The Applicant foundation was awarded 5,000 EUR in costs and expenses. The Court also held that restitution of the Applicant foundation's property was the only means of redress. Consequently, it

called upon Turkey to register the foundation's real property on the land register, or else pay the Applicant 173,000 EUR to cover all heads of damage.

***Fokas v. Turkey***

(31206/02)

**European Court of Human Rights:** Judgment dated 29 September 2009

*Right to peaceful enjoyment of possessions – Article 1 Protocol 1*

Facts

The Applicants in this case are the heirs of Ms Polikseni Foka. Ms Foka was born in Greece in 1943 and was adopted by two Turkish nationals of Greek origin in 1954. Following the death of her adoptive parents (on 24 November 1981 and 6 March 1987) Ms Foka inherited their property following a judgment by the İstanbul 3rd Civil Court on 3 July 1987. The property consisted of three buildings in İstanbul, rent, deposits and valuable documents and deeds.

On 15 July 1991 Ms Foka was admitted to a psychiatric department of the Balıklı Rum hospital in İstanbul on the grounds that she was unable to take care of herself. On 31 July 1996 the Turkish authorities filed an application for the annulment of the İstanbul 3rd Civil Court judgment of 3 July 1987 on the grounds that changes in Turkish legislation prohibited Greek nationals from inheriting property in Turkey. On 27 November 1997 the İstanbul 7th Civil Court annulled the original decision even though Ms Foka had already paid the inheritance tax due to the state. The annulment was upheld by the Court of Cassation on 2 February 1998, who also dismissed the request for rectification of its decision on 12 October 1998. Consequently the immovable property was transferred to the Treasury and Ms Foka was deprived of all her income and accounts.

Ms Foka remained in a psychiatric ward without any resources and all subsequent appeals made by her were dismissed. Ms Foka died whilst in care at the psychiatric institution on 24 April 2000.

On 26 September 2000 the Applicants, the sole heirs to the property of Ms Foka, applied to the Beyoğlu Magistrates' Court for the issuance of a certificate of inheritance. On 19 April 2001 the Court dismissed the Applicants' claims in respect of the immovable property, but accepted their application in relation to the movable property. The Applicants appealed against the Beyoğlu Magistrates' Court dismissal of their application for the inheritance of the immovable property but were unsuccessful. The Court of Cassation upheld the decision of Beyoğlu Magistrates' Court and dismissed the Applicants' request for rectification of its decision on 20 November 2001.

Complaints

The Applicants complained of a violation of Article 1 of Protocol 1 on the basis that they had been deprived of their right to peaceful enjoyment of their possessions by the Turkish authority's refusal to recognise them as the legal heirs to Ms Foka's property.

## Held

### *Article 1 Protocol 1*

Drawing upon similarly decided cases, the Court found the Applicants' rights under Article 1 Protocol 1 to have been violated. The Court observed that in dismissing the Applicants' claims to the immovable property in question, the national courts erred in their consideration that reciprocity was a primary condition to be met. The Court also observed that the domestic court had wrongly relied on the legislative decree of 2 November 1964 which had been abolished on 3 February 1988, well before the annulment of Ms Fako's inheritance certificate in 1996. As a result, Ms Fako's inheritance certificate ought not to have been annulled.

The Court believed that the Applicants had a legitimate expectation of being recognised as the heirs to the immovable property inherited by their sister. Consequently, by refusing to recognise the Applicants' status as heirs the state had interfered with the Applicants' right to peaceful enjoyment of their possessions.

### *Article 41*

The Applicants' claims for damages were reserved for further deliberation on the basis that the exact value of the property which was as yet unknown.

## ***Yildirim v. Turkey***

(Application no. 21482/03)

**European Court of Human Rights:** Judgment dated 24 November 2009

*Enjoyment of property- Article 1 of Protocol No. 1*

## Facts

The Applicant was born in 1939 and lives in Ankara. On the basis of a construction permit obtained on 10 August 1976, Mr M.A. built a house in Boğazkurt, Ankara. The construction of the house was completed in 1978 and he regularly paid property tax. The property in question was subsequently purchased by the Applicant in 1996.

In the meantime, on 21 January 1981 the Ministry of Public Works and Settlement notified Mr M.A. that his construction permit had expired on 10 August 1980. He was also requested to provide a report proving that the utilisation of the property did not pose any threat to public health or to the environment, in order to obtain a property utilisation permit. On 11 February 1981 such a report was submitted to the Ministry. On 10 May 1981 Mr M.A. filed an application with the Ankara Provincial Construction Directorate for the renewal of the construction permit. In response, the administration notified him on 21 May 1982 that his application was currently being dealt with.

On 18 July 1996 the Applicant bought the property from Mr M.A. On 11 November 1998 the Directorate of Public Works and Settlement of the Ankara Governorship notified the Applicant that the construction on his land must be demolished as it had been completed in the absence of the required construction permit. On 20 November 1998 the same directorate notified the Applicant that an application for the renewal of the construction permit was not filed in time, nor

was the required property utilisation permit obtained and that the property was located in the absolute protection zone, contrary to the Law on Hygiene and the Regulation on the Prevention of Water Pollution, according to which construction within 300 metres of sources of drinking water and their basin is prohibited. Accordingly the Ankara Administrative Council issued a demolition order on 5 January 1999.

On 26 February 1999 the Applicant sought the annulment of the demolition order, stating that the construction had been completed within two years after the required permit had been obtained, so that the issue of a new construction permit was never required. He further maintained that the previous owner had also applied for a property utilisation permit on 11 February 1981, attaching the requested documents to his application, but that the administration had never responded.

In February 1999 the Applicant brought an action before the Kızılcahamam Civil Court to have the legal status of his property determined. On 22 September 1999 the Ankara Administrative Court decided that the demolition order issued by the administrative council had to be annulled. However this judgment was quashed on 29 March 2001 by the Supreme Administrative Court on the grounds that the Applicant's house had been constructed after the relevant permit had expired. On 6 March 2003 the Ankara Administrative Court followed the Supreme Administrative Court's decision and dismissed the Applicant's action for the annulment of the demolition order.

On 21 April 2003 the Directorate of Public Works and Settlement of the Ankara Governorship notified the Applicant that, pursuant to the Ankara Administrative Court's judgment of 6 March 2003, he must have his house demolished within thirty days of his receipt of the notification. On 26 May 2004 the Applicant's house was demolished by the administration.

### Complaints

The Applicant complained that he had been deprived of his property in circumstances which were incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention, which entitle him to the peaceful enjoyment of his possessions. The Applicant contended that the national authorities had unlawfully demolished his house without paying him any compensation.

### Held

#### *Article 1 of Protocol No. 1*

The Applicant purchased the house in question from its previous owner in 1996, relying on the records kept at the land registry office. The latter, which is the sole authority for the registration and transfer of immovable property, issued a title deed to him, attesting his ownership of the property. According to domestic law and practice, any limitation concerning such property must be entered in the land registry log book, which did not contain any annotation concerning the illegality of the construction. The rights of those who acquire property relying on the records kept by the land registry office are protected and any damage resulting from the keeping of those records engages the responsibility of the State.

The Applicant did not know or ought to have known that the house was an illegal construction under the domestic law. Having thus purchased the house in good faith and obtained a title deed, the Applicant paid the appropriate taxes and duties on it. As a holder of a title deed attesting his ownership of the house, the Applicant had a 'possession' within the meaning of Article 1 of Protocol No. 1, without any restriction, until he was deprived of it by the local authorities. The

authorities deprived him of his property in pursuance of a legitimate aim, namely to protect public health and the environment.

However the Applicant did not have any realistic prospect of success in obtaining compensation for the deprivation of his property, given that the administrative courts upheld the Ankara Administrative Council's demolition order. Furthermore, as the Government did not cite any exceptional circumstances to justify the total lack of compensation for that deprivation, the demolition of the Applicant's house constituted a disproportionate interference with his right to the peaceful enjoyment of his property, violating Article 1 of Protocol No. 1.

The question of the application of Article 41 was reserved and the Court invited the Government and the Applicant to submit their written observations on the matter and to notify the Court of any agreement that they may reach.



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