

THE
KURDISH
Human
Rights

PROJECT

Legal Review



(2005) 7 KHRP LR
June 2005

The Kurdish Human Rights Project

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

AIMS

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

METHODS

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

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Abbreviations

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

Relevant Articles of the European Convention on Human Rights

Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, non-governmental organisations or groups of individuals (formerly Article 25)
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber

Protocol No. 1 to the Convention

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

Section 1: Legal Developments & News

Council of Europe adopts three new Conventions

On 3 May 2005, the Committee of Ministers of the Council of Europe adopted three major new Conventions. The first Convention concerns the prevention and fight against terrorism, establishing new criminal offences for terrorism and reinforcing international cooperation on its prevention. The second Convention relates to money laundering, and the search, seizure and confiscation of the proceeds from crime in connection with the financing of terrorism. Finally, the last Convention concerns action to prevent human trafficking. The treaties opened for signature at the Summit of Heads of States and Government on 16 and 17 May 2005.

Ratification of ECHR Protocol No. 14

At the beginning of 2005, the President of the EctHR, Mr Luzius Wildhaber, called on the state members to accelerate the ratification of Protocol No 14. The protocol aims to reform ECtHR procedure in order to reinforce its effectiveness and needs to be ratified by all state parties to enter into force. Turkey and Azerbaijan signed the Protocol No 14 on 6 October 2004 and 16 February 2005 respectively. Armenia ratified the Protocol No 14 on 1 January 2005, following its ratification of Protocol No 12 on 17 December 2004, which relates to the general prohibition of discrimination.

ECtHR: Election of new judges for Serbia & Montenegro and Latvia

In January 2005, the Parliamentary Assembly of the Council of Europe elected Mr Dragoljub Popovic as the first judge in respect of Serbia and Montenegro in the ECtHR. Ms Ineta Ziemele was elected on 27 April 2005 in respect of Latvia.

UN approves new watchdog on minorities

The UN Commission on Human Rights decided to establish a new UN special mechanism on minorities during its 61st session in April 2005. A UN Expert on Minority Issues will be in charge of promoting and protecting minority rights in association with governments

and minorities worldwide. This represents a significant contribution to the resources required for tackling the extensive violations of minority rights. The mandate conveys new hopes for minority rights, which have often been overlooked by the UN system. A major strong point of the new mechanism is the capacity to initiate consultations with Governments and minorities on issues of conflict. It also provides a new method for minorities to address their concerns at an international level through the UN system. The new post of Expert on Minority Issues is part of a general reform of the UN aimed at giving more priority to human rights issues. The development should enhance respect for minority rights and the prevention of ethnic and religious conflict, and should assist in the progress of the Millennium Development Goals.

China, Russia and USA undermine the establishment of a UN Special Rapporteur on protecting human rights in counterterrorism efforts

A small coalition of states, led by China, Russia and the United States, are attempting to undermine the establishment of a UN Special Rapporteur on protecting human rights within counterterrorism measures. The Special Rapporteur would be in charge of monitoring the compliance of counterterrorism laws and practices with international human rights standards. The coalition has submitted a number of unacceptable amendments on the new Rapporteur's mandate in an attempt to decrease its effectiveness. The pressing need for monitoring under a single mandate that has a comprehensive overview of the relationship between human rights and counterterrorism measures has been emphasised by UN Secretary General Kofi Annan, the UN High Commissioner for Human Rights, member states, international human rights institutions and NGOs.

Azerbaijan: Presidential Decree pardons 114 people imprisoned for criminal offences

On 20 March 2005, a Presidential Decree was passed discharging 114 people imprisoned for criminal offences in connection with public disturbances in the aftermath of the 2003 Presidential Election. These people included 50 political prisoners and 7 leaders of the opposition. This decree came just after the death in custody of twenty-year-old Algait Magarov, who died in February 2005. He had been convicted and imprisoned for a criminal offence in connection with his participation in the October 2003 protests regarding the Presidential elections. Nevertheless, the right to freedom of expression is still of crucial concern in Azerbaijan. On 5 March 2005, Elmar Huseynov, a leading independent journalist from weekly news magazine 'Monitor', was murdered in his

apartment. Huseynov's articles were highly critical of Azeri authorities and President Aliyev. According to the OSCE, Monitor has been under constant pressure from the Government for the critical nature of some of the articles and had already been forced to close on two occasions. The OSCE has called for a full investigation into the murder, whilst tension and suspicion over the investigation are rising in Azerbaijan.

Municipal elections in Azerbaijan fall short of international standards

The second municipal elections since independence took place in Azerbaijan on 17 December 2004. The OSCE and the International Foundation for Elections Systems coordinated the election observations. There was a low turnout of about 50 per cent overall. According to the OSCE office in Baku, the elections fell short of a number of the international standards, including components of the Copenhagen Document 1990 and established principles regarding election procedure such as presence of observers, pluralism, and organisation of a free election at reasonable intervals. The observers notified various irregularities during voting and counting of the election results that could have changed the outcome in some municipalities. The OSCE also noted the complexity of the process for new voters.

In April 2005, the Council of Europe declared its concerns regarding the political climate in Azerbaijan. It stressed particularly that the primary condition for the next legislative elections do not comply with current international standards, notably concerning freedom of expression and freedom of assembly. It also added that political opposition is undermined by the fact that, although most of the opposition leaders have been released from prison by a Presidential pardon, they are still not allowed to stand for election.

Registration of NGOs in Azerbaijan remains problematic

On 5 May 2005, the OSCE released a report highlighting the difficulties regarding the registration procedure of NGOs in Azerbaijan. The report raises concerns over the rejection of registration on irrelevant grounds, the prolongation of the processing time without proper grounds and the hampering of the process as a result of its centralisation. This situation is of particular concern because it undermines the right to freedom of assembly and, according to the OSCE, the lack of registration status significantly hinders NGOs from functioning properly.

OSCE Trial Monitoring Report: trials in Azerbaijan do not comply with international human rights standards

An OSCE Trial Monitoring Report of 2003/2004 has raised important issues regarding the conduct of trials in Azerbaijan. The report revealed that, in many cases, Azerbaijani trials do not comply with the relevant international standards, including the right to legal counsel, the right to an impartial and independent tribunal, the right to a fair hearing and the right to a reasoned judgment. In addition, the report found that law enforcement officials have sometimes used excessive force in making arrests and the rights of persons in detention have not been adequately protected. Of particular concern are the extensive and credible allegations of torture and ill-treatment of detainees, and that courts have accepted evidence said to have been derived through torture and coercion. The lack of independence of the judiciary continues to be an additional concern. These issues are of particular relevance to the trials of opposition leaders arrested in the turmoil after the 2003 Presidential elections. The OSCE and the Government of Azerbaijan have agreed to increase their cooperation on judicial and legal reform, to remedy the deficiencies and to enforce the existing laws within the judicial process.

Azerbaijan signs new programme regarding discrimination against women

On 16 February 2005, the Azerbaijan State Committee for Women's Issues signed an agreement with the United Nations Development Program and the Embassy of Norway entitled "2005 National Human Development Report on Gender Attitudes". This document aims to address the issue of gender inequality through undertaking a survey on gender attitudes and public debates. The National Human Development Report on Gender Attitudes has been promoting gender equality in Azerbaijan since 1995, and its work is considered crucial for the progress of woman rights.

Protests continue against the Baku-Tbilisi-Ceyhan oil pipeline

Protests and demonstrations against the Baku-Tbilisi-Ceyhan (BTC) oil pipeline continue to take place. On 29 April 2005, more than 50 human rights and environmental groups from 13 countries expressed their deep concerns regarding the failure of the World Bank to rectify continuing problems with the pipeline. The pipeline is being built by the oil company BP and will carry oil from the Caspian Sea through Azerbaijan, Georgia and Turkey to the Mediterranean. Most of its nearly £2 billion cost comes from public sources, including the World Bank and the European Bank for Reconstruction

and Development (EBRD). A Memorandum has been sent to the World Bank and the EBRD listing serious concerns with the pipeline, including safety failures and accidents, pending cases against BP in the ECtHR and European Court of Justice, environmental issues and the alleged torture of a local activist.

Minsk Group report on Nagorno-Karabakh conflict

From 31 January to 6 February 2005, an OSCE Minsk Group Fact-Finding Mission visited Azerbaijan to assess the issue of Armenian illegal settlements in the territory. The Minsk Group Report was presented and discussed in Vienna on 23 March 2005. The conclusions revealed that the estimated number of Armenian citizens settled in the region was around 15,000 and are “quite limited” and voluntary. The report states that, “the mission has not established that the population is a result of Armenian policy” and “the mission has not noticed any evidence of direct involvement of Armenian authorities”. Discussions for the resolution of this ten-year conflict are still tense and the OSCE Minsk Group remains concerned by the growing tension in the region regarding recent violations of the ceasefire.

Armenia: amendments to laws concerning freedom of assembly

The OSCE, the Venice Commission of the Council of Europe and the Armenian Government are currently in discussions regarding the amendment of Armenia’s current laws regarding freedom of assembly. The two organisations have proposed amendments which provide for spontaneous demonstrations and the freedom to counter-demonstrate. Both the OSCE and the Council of Europe have previously evaluated the current laws as non-compliant with the relevant international standards. They are considered excessively restrictive: for example, they prohibit public gatherings “for the purposes of election or referendum campaigning” if the demonstration interferes with traffic regulations. The Council of Europe has also requested the implementation of promised reforms of the Constitution, judicial system and electoral legislation, which still have not been implemented after four years of membership.

Turkey: EU agrees accession negotiations despite continuing lack of respect for human rights

Following the Commission’s 2004 report and recommendations on Turkey, the Brussels Summit of the Council of Europe held on 16 and 17 December 2004 decided to open EU

accession negotiations with Turkey. The Council considered that Turkey has “sufficiently fulfilled the Copenhagen political criteria” and welcomed the recent progress in its reform process. However, the Council emphasised the need for Turkey to continue its reform efforts and to implement six specific items of legislation identified by the Commission. The process will continue to be monitored closely by the Commission and report to the Council regarding all points of concern identified by the 2004 report, including the implementation of the zero-tolerance policy regarding torture and ill-treatment.

This decision has opened new hopes and opportunity for the Kurdish people who expect that a European membership may uphold the respect for their rights in Turkey. This decision is also of major importance for Turkey, which has been denied access to the European Union, mainly as a result of the lack of respect for human rights and minority rights throughout the country, and the use of torture by state security officers. Nevertheless, the respect for fundamental human rights in Turkey is still rife with controversy. Turkey refuses to acknowledge the Armenian genocide of 1915 and torture continues to be an issue. Police officers charged with torture still benefit from impunity, despite the recent reforms. Turkish courts continue to give minimal sentences to the perpetrators of torture and investigations into alleged torture cases are not always carried out properly.

CEDAW releases recommendations regarding discrimination against women in Turkey

On 17 February 2005, CEDAW released its recommendations on Turkey, following its report and the Shadow Report submitted by women’s organisations. The Committee commended the amendment of article 10 of the Constitution on May 2004, making the state responsible for both ensuring non-discrimination between women and men and also for taking the necessary measures to provide equal rights and opportunities in practice for women in every field. It also noted the increase in compulsory basic education from five to eight years.

Nevertheless, significant further steps are needed. In particular, the Committee demanded a better definition of ‘discrimination against women’ in the Turkish Penal Code and emphasised that the state should initiate campaigns to raise public awareness on discrimination against women, and take steps to educate prosecutors and judges. Further, women are currently underrepresented in the labour force, in Parliament (4.4 % of seats) and in public institutions. The state should therefore introduce special temporary measures to decrease this under-representation and to diminish the high rate of female illiteracy, guaranteeing women access to all levels of education and the

expansion of professional choices for women. New regulations should be introduced to address the regional disparities of girls, especially in rural areas, and further policies should be implemented to resolve the problems of those whose mother tongue is not English. The Committee expects a response to these issues in the next report, and the provision of more information about particular discrimination situations, such as against Kurdish women

Recent nationalist activity in Turkey: human rights lawyers receive death threats

Turkey has seen a new wave of ultra-nationalist activity in the past few months, after a group of children attempted to burn a Turkish flag in the city of Mersin on 21 March. Nationwide demonstrations took place in response, to show support for the Turkish flag. On 6 April, five activists distributing leaflets which protested against conditions in Turkish prisons were nearly lynched by a mob. On 19 April, three lawyers working at the Istanbul branch of the Human Rights Association (IHD) received death threats in letters sent by an ultra-nationalist group named the Turkish Revenge Brigade (Türk Intikam Tugayı) on 19 April 2005. Similar incidents have occurred throughout Turkey since then.

Iraqi Presidential and legislative elections

On 30 January 2005, Iraq held its first legislative and Presidential elections since the coalition removed Saddam Hussein. Opinions were divided about the feasibility of whether the elections would reach the appropriate democratic standards, given that Iraq is still an occupied and insecure country. The task of preparing and conducting the elections was conferred to the Independent Electoral Commission of Iraq (IECI). The IECI was established in May 2004 and is an independent body composed of nine Commissioners, seven of whom are Iraqi. The UN was also involved in the electoral process, providing support and assistance to IECI in the form of advice on electoral regulations and procedures and regarding information campaigns directed at voters.

An estimated 8 million people voted in the elections of the Transitional National Assembly. The UN reported that the turnout was good, despite attempts to create violent disturbance. According to the Iraqi Election Information Network, election observers noticed a number of technical irregularities and deficiencies. However, the Iraqi Election Information Network, the International Mission for Iraqi Elections and Human Rights Watch agreed that these elections generally met the relevant international standards.

The Shia United Iraqi Alliance won the majority of Assembly seats, followed by the Kurdish parties. On 6 April 2005, the Parliament finally appointed the Kurdish Jalal Talabani as the new President of Iraq and Ibrahim Jaafari from the Shia Alliance as the new Prime Minister. The Iraqi Kurds also elected their own Parliament on 30 January 2005. However, only the Kurds living in the KDP and PUK administrations were allowed to vote. Fifty per cent of Iraqi Kurds and a million Kurds within the Kurdish diaspora were not therefore permitted to vote.

The emergence of a new Government in Iraq presents a new opportunity to change the relationship between Iraqi Kurds and Turkey. This idea is prevalent among the Iraqi Kurdish leaders, who hope to re-establish the relationship with Turkey on a new basis, focusing particularly on economic interests.

Trials of former Iraqi leaders

The Iraqi Special Tribunal, established to prosecute former members of Saddam Hussein's regime, is now ready to start conducting its first trials. The tribunal is composed of 35 Iraqi judges whose identities are generally kept secret. On 1 March 2005, one of these judges, Barwez Merwani was killed in Baghdad. At the beginning of March, the first charges against five detainees were referred to the trial judges. Former President Saddam Hussein, Deputy Prime Minister Tariq Aziz, Vice President Taha Yasin Ramadan and Al Hassan al-Majid ('Chemical Ali') all face trial, among other ex-Baath party leaders. However, there are concerns about the ability of the Iraqi tribunal to fulfil its duty, since the court rules on procedure and evidence fail to reach the international requirements for a fair trial.

Violent repression against women's demonstrations in Iran

On 8 March 2005, approximately 1000 women demonstrated in Tehran, in celebration of International Women's Day. The women were protesting against the clerical establishment and were asking for regime change. The state security forces, armed with Kalashnikovs and truncheons, reacted by arresting a number of the women. A few weeks later, other demonstrations took place in several cities during the occasion of a football match. Women actively joined the people protesting against the Government and calling for the overthrow of the mullahs. The demonstrations turned sour when the security forces started arresting people, using violence against the demonstrators. A few people were killed and several women were seen beaten to death. The authorities had previously declared that every female demonstrator arrested would be beaten for un-

Islamic behaviour, before being released.

For the past 26 years, the situation faced by women under the Iranian mullah regime has been characterised by institutionalised violence and misogynistic abuse in the name of religion. Women are systemic targets of the regime. In January 2005, the authorities denied women the right to run for the Presidential elections in June. In April, Tehran police launched a new campaign to ensure that women are properly covered up in public.

Amnesty granted to Syrian Kurds arrested in 2004

In March 2004, clashes between Kurds and Arabs at a football match led to huge demonstrations and riots across the country, sparking off a new era of human rights violations against Syrian Kurds. Repression from the Syrian authorities was particularly severe against Kurdish people, with 30 Kurds being killed during the riots. The authorities arrested more than 2000 people, including children. Investigations into the March 2004 events have not yet been started.

On 30 March 2005, a Presidential Amnesty granted pardon to 312 Kurdish citizens detained following the March 2004 arrests. However, the Syrian Human Rights Commission does not consider the Presidential pardon satisfactory, since it does not allow for the release of all the political detainees arrested in March 2004. In addition, on 19 April 2005, the Syrian Human Rights Commission expressed doubts about the sincerity of the amnesty, given that only 150 prisoners have been released so far.

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The trials of Ferhat Kaya

In September 2004, the present author took part in an international fact-finding mission to observe the trials of Ferhat Kaya in Ardahan, north-eastern Turkey. The mission included representatives from Corner House, Environmental Defense (USA), Friends of the Earth (England, Wales and Northern Ireland) and the Kurdish Human Rights Project. Mr. Kaya, a shopkeeper and the Chairman of the pro-Kurdish Democratic People's Party (DEHAP) in the Central District of Ardahan in North-East Turkey is at the forefront of a local campaign to highlight the social and environmental impacts of BP's Baku-Tbilisi-Ceyhan (BTC) oil pipeline, which passes through Ardahan Province. He was arrested in May 2004 and alleges that he was tortured while in police custody. He believes that his arrest and ill-treatment were directly connected to his human rights work and in particular his work regarding the BTC oil pipeline. An indictment was lodged by the public prosecutor against the 11 police officers who Mr. Kaya alleged were responsible for his ill-treatment. The police officers were acquitted following a request by the prosecution. We observed the final hearing in that trial. An indictment was also lodged against Mr. Kaya regarding his behaviour on arrest. That indictment alleges that he resisted and insulted police officers and failed to comply with their request to provide identification details. That trial continues and if found guilty Mr. Kaya faces a custodial sentence

The mission was left with grave concerns that authorities in north-east Turkey are falling far behind the national programme to eliminate torture and ill-treatment. There certainly appears to be a continuing gap between the legal reforms recently adopted by Turkey and their implementation in practice, and the mission was disappointed to learn that on 25 December 2004 Mr. Kaya was once more detained by the police. He has made further allegations of ill-treatment and is the subject of a further investigation for resisting the officers against whom he has made these allegations.

The mission observed the judge sitting on a raised platform at the same level as the prosecutor. There was no cross-examination and little questioning of the witnesses who appeared. In the trial of the 11 police officers charged with the ill-treatment of Mr. Kaya, the hearing ended with the prosecutor requesting the acquittal of the defendants and the judge duly acceding to the request. Having acquitted the 11 police officers the same

Judge and prosecutor proceeded to conduct the trial in which Mr. Kaya was a defendant. The mission had the following concerns:

- (i) That trials in relation to essentially the same incident were heard by the same judge and prosecuted by the same prosecutor at the same sitting. It is of particular concern that in the judgment handed down on the acquittal of the police officers, the judge referred to the fact that she considered the injuries sustained by Mr. Kaya may have been the result of his resisting police officers – this is the subject matter of a trial which has not yet concluded;
- (ii) The structure of the court-room where the prosecutor and the trial judge were sitting at the same level and retired through the same door during recess;
- (iii) The accuracy of the court transcript where the stenographer noted exactly what the prosecutor said in court but where the judge summarised for the stenographer what should be noted of what all other parties said;
- (iv) That the Public Prosecutor had felt there was sufficient evidence to lodge an indictment alleging ill-treatment – including medical evidence of injuries –and then, without explanation, requested that the trial judge find the defendants not guilty;
- (v) That defence counsel for the police officers, Mecit Kaya, is a lawyer employed by the Legal Advisor’s Office in the Directorate-General of Security, the Ministry of Internal Affairs. This gives the appearance that special treatment is being afforded to these police officers by the Ministry of Internal Affairs;
- (vi) That the trial of the 11 police officers on such serious charges was concluded in three short hearings with no apparent detailed questioning of the police officers by either the prosecution or the trial judge. The defendants simply appear to have been permitted to adopt the statements which they had drafted for each other;
- (vii) That the case was adjourned from 30 June to 22 September due to a judicial recess. According to the seventh Harmonisation Package adapted on 30 July 2003, proceedings under Article 245 of the Turkish Penal Code should not be adjourned for more than 30 days and should take place even during

judicial recesses¹;

- (ix) That the statements of the police officers, which formed their evidence as they were not questioned in any detail during the hearings, were drafted by colleagues who were also defendants;
- (x) The assertion that one officer went home before Mr. Kaya was taken to the hospital for the first time on 5 May 2004 is highly questionable as he typed the statements of his fellow police officers later that evening and there does not appear to have been any investigation into this discrepancy;
- (xi) That the grounds of Mr. Kaya's detention are very unclear. The file simply contains two writs requesting the identification and address details of Mr. Kaya;
- (xii) The apparent lack of independence of the tribunal where the trial judge did not exercise her powers to further investigate the allegations once the Public Prosecutor had expressed his opinion regarding the guilt of the police officers;
- (xiii) That Mr. Altun, a complainant (and witness) complained of psychological pressure exerted by police officers when making a statement at the police station;
- (xiv) That Mr. Altun felt compelled to withdraw his complaint as a result of intimidation;
- (xv) The contradiction between defence counsel's assertion in one case that Mr. Kaya's injuries were sustained as a result of legitimate use of force and the assertion of the complainant in the other case who claims that Mr. Kaya's injuries were sustained as a result of his own actions. The Mission sought independent medical advice in Ankara on the medical report prepared at the hospital at 19.30 hours on 5 May 2004. It was the view of the doctor whom the Mission consulted that the injuries recorded were consistent with kicking and that these injuries could not have been sustained by Mr.

¹ Article 5- The following article has been added to the Code of Criminal Procedures No.1412 dated 4.4.1929: "Additional article 7- The investigation and prosecution concerning those who commit the criminal offences specified in article 243 and 245 of the Turkish Penal Code No. 765 dated 1.3.1926 shall be considered urgent cases and will be treated without delay as priority cases. Hearings of cases relating to these offences can not be adjourned for more than 30 days, unless there are compelling reasons, and these hearings will also be held during judicial recess."

Kaya “throwing” himself around the room in which he was being detained. It is of particular note that police statements refer to Mr. Kaya’s left hand whereas the injuries recorded are mostly on his right hand;

- (xvi) The presence of police officers throughout the medical examinations of Mr. Kaya despite the fact that recent legal reforms in Turkey include a further amendment to the Regulation on Apprehension, Detention and Statement Taking in January 2004, which strengthened the rights of detainees. That law provides that medical examinations of detained persons are now to be carried out without the presence of the security forces, except when the doctor requires otherwise.”²;
- (xvii) The contradiction between the injuries recorded in the medical reports prepared on 5 and 6 May 2004. It seems impossible that the kind of injuries which were recorded on 5 May 2004 would have not been visible or apparent to the doctor examining Mr. Kaya on 6 May 2004;
- (xviii) The fact that Mr. Kaya received injuries in police custody and received no medical treatment for these injuries; and
- (xix) That Mr. Kaya was held in handcuffs and subjected to loud noises and bright lights during the first night of his detention.

Concerns over implementation of reforms in the north-east Turkey are reinforced by evidence from more intensely monitored areas of Turkey, which reveals continuing abuse of state powers. Despite the recognised efforts being made by the Turkish authorities it is reported that Governmental as well as nongovernmental organisations interested in this issue continue to receive substantial numbers of torture allegations. In a recent report Human Rights Watch observed: “In the first four months of 2004 the Human Rights Directorate of the Office of the Prime Minister recorded that it had received fifty complaints of torture and ill-treatment in police custody. İnsan Hakları Derneği (IHD, Human Rights Association of Turkey) reported 692 incidents of torture (emphasis added) and ill-treatment by police in the first six months of 2004. During the first eight months of 2004 597 people applied to the Human Rights Foundation of Turkey for medical attention for torture and ill-treatment as well as illness arising from prison conditions.”³ According to the Foundation, 918 torture victims received medical treatment from its

2 2004 Regular Report on Turkey’s Progress towards Accession” Commission of the European Communities, Brussels 6 October 2004, SEC 2004 (1201)

3 “Eradicating Torture in Turkey’s Police Stations: Analysis and Recommendations”, Human Rights Watch, September 2004: <http://www.hrw.org/backgrounder/eca/turkey/2004/torture/>

centres throughout Turkey in 2004, of whom 337 affirmed that they had been tortured. Furthermore, the Foundation recorded five deaths in custody. On the basis of these figures, Yavuz Önen, the head of the Foundation, stated on 4 January 2005 that torture is still systematic state practice in Turkey.⁴ The European Commission's 2004 *Regular Report on Turkey's Progress towards Accession Commission of the European Communities* concludes that "Turkey still needs to pursue vigorously its efforts to combat torture and other forms of ill-treatment by law enforcement officials." This conclusion is strongly supported by the findings of the September 2004 trial observation mission.

The full trial observation report, Report on the Trial of Ferhat Kaya, is available on request from KHRP.

4 Özgür Politika, 04.01.05

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Relatives of human rights defenders at risk: the extra-judicial killing of Siyar Perinçek

On 21 December 2004, an international Fact Finding Mission observed a part of the trial of three security officers at Adana Heavy Criminal Court. The security officers are allegedly responsible for the extra-judicial execution of Siyar Perinçek on 28 May 2004. It is also alleged that they tortured Nurettin Basçi, who was with Siyar Perinçek at the time of his killing. The mission included representatives from the Kurdish Human Rights Project, the Bar Human Rights Committee and an independent Swedish organisation, 'Lawyers without Borders'. The mission's visit coincided with the European Council's decision of 3 October 2005 to open negotiations on Turkey's accession to the European Union. Thus, another objective of the mission was to assess whether in practice, the legal reforms introduced were protecting the human rights of those most vulnerable.

Siyar Perinçek was the son of Mihdi Perinçek, the IHD (Human Rights Association) representative for Anatolia East and South-eastern region. On 28 May 2004 at around 3pm, Siyar was shot dead by a security officer outside the office of the Adana branch of the IHD (Human Rights Association). Nurettin Basçi, whom he was with, was arrested by the police and is currently being held on remand in Adana Kurkcüler F type prison. He has accused the police of subjecting him to torture during his detention. It is believed that the killing of Siyar Perinçek amounted to an extrajudicial execution. The security officers charged have alleged that both Siyar Perinçek and Nurettin Basçi were members of the PKK and were preparing for armed activity in Adana. This is strongly refuted.

Court Hearings

Three hearings had already taken place when the mission observed the trial on 21 December 2004. A number of witnesses gave evidence at the trial, including Dr. Mehmet Kobaner, the surgeon who operated on Siyar Perinçek. After the hearing, the advocates who represented the victims were interviewed by the mission. A number of problems with the legal system and procedures generally were identified by the advocates:

- (i) In cases involving police officer defendants, the identity of witnesses is not revealed in advance for fear of harassment or worse by the police;
- (ii) Destruction of evidence by the police is still a common fear of many lawyers and human rights activists (*e.g.* in the case of Siyar Perinçek and Nurettin Basci, the crime scene report is missing and without explanation);
- (iii) The police and/or other state authorities fail to follow basic procedures (*e.g.* when collecting evidence);
- (iv) The police officers in the Perinçek /Basci case have not been suspended from work; neither have they faced any disciplinary hearings (their lack of attendance at court on 21 December came as no surprise);
- (v) There is a strong belief that state perpetrators escape punishment.

Interview with Representatives of IHD

Representatives of the IHD were also interviewed by the mission. A number of issues were discussed at the interview, particularly the conclusion of the European Commission that the Turkish government is “seriously pursuing” its policy of zero tolerance and that torture is no longer systematic. The claim was vigorously disputed by the IHD. It was confirmed that despite recent legislative changes, torture is still practised by the state, and this included both physical and psychological torture. Further, every human rights defender had suffered torture at some point. This is due to the fact that they are always seen as opponents of the state and because they attempt to highlight the failings of the system. In addition, it was felt that it was no coincidence that Siyar Perinçek was shot outside the Adana branch of the IHD. Rather, this was seen as an act to intimidate those involved with defending human rights.

The police security forces continue to be present during medical examinations of detainees (and were present when Nurettin Basci was examined in the instant case). This is in direct contravention of the current law, which states that medical examinations of detained persons are now to be carried out without the presence of the security forces, except when the doctor requires otherwise. Although this might be a situation where a further medical report would assist, the IHD stated that the prosecutor rarely takes such reports into consideration. Overall, it was also felt that the Commission report had not properly addressed the human rights abuses still experienced by the Kurdish people

Continuation of Human Rights Violations

The mission observed that despite the introduction of legal reforms, there exists

an alarming level of human rights violations. According to a report released by the Diyarbakir Human Rights Association, the total number of violations experienced in the southeastern and eastern regions in 2004 increased from 6,472 in 2003 to 7,208 in 2004. Further, a worrying trend of killings by the security forces is emerging, including that of Siyar Perinçek. The killings of Fevzi Can and Ahmet Kaymaz and his 12-year old son, Ugur, were the focus of another mission that visited Turkey between 16 and 20 December 2004. The findings of the mission are contained in a separate report published by the Kurdish Human Rights Project and the Bar Human Rights Committee.

Climate of impunity and other problems

It was noted that there has been a failure to either introduce measures which address the climate of impunity, or at least to apply the measures already in place. The trial observation and later interviews also revealed significant failings in the legal system. Such problems hinder the administration of justice and indicate a strong bias towards state perpetrators. The main areas of concern can be summarised as follows:

- (i) Evidence of impunity can be found in several legislative provisions, including:
 - the Turkish Code of Criminal Procedure, which has adopted trial in absentia as an exception, only in cases where light sentences are involved *i.e.* where the offence is punishable by a fine, imprisonment for up to two years and/or confiscation. However, police officers charged with torture are exempt from appearing personally before the court;
 - Article 154 of the Criminal Procedure Law provides that the office of the public prosecutor shall directly prosecute civil servants who have abused their power or been negligent. However, Article 154/5 states that police superiors, guilty of the same offences, shall be subject to the trial procedure applicable to judges in connection with their duties;
- (ii) There are no legislative provisions which deal with the suspension from duty of members of the security forces who are prosecuted for torture and maltreatment;
- (iii) The seating arrangement in the court room remains unsatisfactory. Firstly, the prosecutor sits next to the judges (and retires through the same door). This arrangement suggests a lack of impartiality and independence. Previous fact finding mission reports have also commented on this apparent inequality of arms;
- (iv) The indictment sets out the defence, which gives the impression that those

- allegations form part of the case to be 'disproved' by the victim(s);
- (v) Legislative provisions which safeguard the rights of detainees are not being respected in practice.

Conclusion

The areas of concern not only suggest that there is a lack of compliance with domestic legislation but also suggest that several international standards have been breached. With specific reference to the case of Siyar Perinçek and Nurettin Basci, those alleged breaches include *inter alia* the independence and impartiality of the judiciary (the composition of the court room and the seating arrangement of the prosecutor and the judges) and the right to equality of arms (the exemption of the police officers from attending their own trial; the failure to provide evidence in a timely fashion so as the case against the police officers can be fully prepared; the form of the indictment; witness' fear of reprisals from police officers). Recommendations for both the Turkish government and for non-governmental organisations were made at the conclusion of the trial observation report.

The full trial observation report, *Relatives of Human Rights Defenders at Risk: the Extra-Judicial Killing of Siyar Perinçek*, is available on request from KHRP.

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Freedom of expression at risk

On 2 March 2005 an international trial observation mission from Kurdish Human Rights Project observed two trials concerning freedom of expression in Ankara and Istanbul. The defendants in the trials, Ragip Zarakolu and Dr Fikret Baskaya, were to be prosecuted for sentiments they expressed in print. Concerns had been raised internationally over the propriety of the prosecutions. In the event Mr Zarakolu's trial was adjourned until 12th May 2005 to secure the attendance of a co-defendant and Mr Baskaya was acquitted after the Prosecutor withdrew the indictment against him.

Mr Zarakolu faces a prison sentence of between 6 months' and 2 years' imprisonment if his prosecution under Article 312 (instigating the hatred by one group of citizens of another) of the Penal Code is successful. The Indictment accuses him of "...expressing that Kurdish people have a right to determine their own fate, [and thereby] the crime of instigating hatred among people against others on the grounds of social class, race, religion, sect or region in a way dangerous for the public security is committed".

The proceedings against Mr Zarakolu descended into near farce when it became apparent that the judge responsible for the case would not be attending and that a replacement was required. When a suitable judge was found, the case was adjourned because Mr Zarakolu's co-defendant (and editor) was not present. Whether he ever will be present is a moot point; a common view is that he has sought asylum abroad because of persecution.

Dr Baskaya's prosecution under Article 159 of the Penal Code (insulting the Turkish state) was in relation to assertions he made that the Turkish state bore responsibility for the 1993 Sivas massacre, in which 37 Kurdish Alevi intellectuals died. That assertion, together with others that Turkey was a 'torturing state', originally appeared in an article published in the news daily *Gundem* in mid-1993, republished verbatim in 1997 in a compendium of Baskaya's works ("Writings against the Stream" or "Swimming against the Current"). The 2003 reprint of the 1997 work was the object of the prosecution.

The crowded courtroom barely reacted when the Prosecutor withdrew the indictment. Speeches were subsequently made by each defence advocate and each Defendant was

given an opportunity to talk. In Baskaya's case, he made a spirited speech far more inflammatory than his original article, saying that the 12th September 1980 military Junta turned Turkey "into a 780,000 km² torture chamber" and "in Turkey, torturers are protected by the state and rather than being punished are promoted".

These two prosecutions pose a serious threat to the credibility of Turkey's efforts to modernise its laws on freedom of expression and contribute significantly to the "chilling effect" impacting on the country's citizens. At the time of the observations, it was thought that changes to the Turkish Penal Code - purporting to bring the country into line with European Union norms - would be implemented in early April 2005. In fact, the implementation timetable has been pushed back in order to give the Justice Commission of the Turkish Parliament time to reconsider the changes, which should take place before 1 June 2005. More than twenty provisions concerning freedom of expression in the current Turkish Penal Code need to be amended. Worryingly, the changes which were due to be implemented in April 2005 reproduce the same provisions under which both Zarakolu and Baskaya were prosecuted: nothing less than a sea change in the attitude of the police, prosecuting authorities and judiciary will be necessary to render the country a resilient, strong, and vibrant democracy.

The full trial observation report, *Freedom of Expression at Risk: Writers on Trial in Turkey*, is available on request from KHRP.

Lucy Claridge, Legal Officer, KHRP

The EU, Turkey and the Kurds

On 22 and 23 November 2004, an international conference on ‘Turkey, the Kurds and the EU’ was held at the European Parliament in Brussels. The conference was sponsored and organised by the Bar Human Rights Committee, the Kurdish Human Rights Project, medico international and the Rafto Foundation. It brought together leading human rights institutions, political parties, academics, writers, legal experts and prominent Turkish and Kurdish intellectuals from Europe, the United States, Africa and the Middle East. The purpose of the conference was to exchange ideas and formulate a constructive and coherent response to Turkey’s impending accession negotiations on 17 December 2004.

As a result of the presentation of conference papers and the interventions made by the delegates, it was resolved to establish a standing ‘Civic Commission on Turkish EU Accession.’ This Civic Commission has now been set up, and consists of leading European, Turkish and Kurdish elected politicians, NGOs, academics, and human rights and environmental activists. Its purpose is to monitor and conduct regular audits of the European Commission’s performance in ensuring Turkey’s full compliance with the accession criteria, as defined by the accession agreements. Yearly conferences will be held at both the European Parliament and in the relevant regions to consider the Civic Commission’s annual audit reports.

In the future, and if advised by the Civic Commission, standing committees will also be established to address relevant thematic issues. These may include:

- a Kurdish Select Committee to deal with the Kurdish issue and promote a democratic platform for dialogue between the constituent parts of Turkey;
- a Council of Europe Select Committee to monitor Turkey’s compliance with judgments of the European Court of Human Rights;
- a Constitutional Select Committee to identify constitutional and legislative measures aimed at dismantling out-dated political provisions and practices within Turkey which hinder the drive for democratic reform; and
- a Legal Select Committee to use all existing international human rights instruments and available remedies to legally enforce any breach of either the

EU or Turkey's non-compliance with any accession agreement or other relevant international law.

The resolution of the Kurdish conflict is central to the establishment of a stable, democratic and peaceful Turkey capable of entering the EU. True democratic reform can only occur if Turkey undertakes new political reform to its state institutions and banishes adherence to ethnic nationalism, which is the root cause of Turkey's endemic instability. As asserted at the conference, the Kurdish people and their representatives therefore have a fundamental role to play in the accession process and should be given a full participatory role by the EU and Turkey in the debate over Turkey's democratic and constitutional future.

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The evolution of the right to life by the European Court of Human Rights⁵

Background and Introduction

The European Court of Human Rights is the one court in Europe with the purpose and mandate of protecting of human rights through the interpretation of the *European Convention for the Protection of Human Rights*.⁶ The Convention and any judgments rendered by the European Court of Human Rights are binding on the members of the Council of Europe that have ratified the Convention.

This essay focuses on the right to life pursuant to Article 2.⁷ It is noteworthy that the first reported reference to applications being made, (mostly) claiming in part a breach of Article 2, date back to 1964.⁸ Of the first 50 cases brought all but two were found to be either inadmissible or, the alternative, struck off of the list.⁹ Cases that particularly deal with breaches of Article 2 of the Convention are of much more recent vintage, the first case being reported in 1995. As will be seen when the cases are reviewed in a chronological fashion, the majority of the same deal with allegations against Turkey. Further as will be seen, the principles developed by the Court¹⁰ have not confined themselves to incidents involving the taking of life by the State, but have encompassed situations where the obligation of the State to protect life has assumed a role of substantial importance.

5 This article was originally published in the *Baltic Yearbook of International Law*, 2004 edition. It has been reproduced with the kind permission of Stuart Hendin QC and Brill Academic Publishers.

6 *European Convention for the Protection of Human Rights and Freedoms*, 4 November 1950, 213 U.N.T.S. 221 (hereinafter *European Convention on Human Rights*).

7 See *European Convention*, *supra* note 1.

8 The first reported/recorded case that makes any reference to Article 2 is *X v. Federal Republic of Germany*, 2300/64.

9 See <<http://hudoc.echr.coe.int/hudoc/default.asp?Cmd=page&Page>>.

10 *European Court of Human Rights* (hereinafter referred to as either 'the Court' or 'the Strasbourg Court').

The Early Cases

The first of the reported cases dealing directly with Article 2 was reported in late April of 1995, and was not terribly helpful in giving any indication as to how the Court would deal with allegations of violations of the Right to Life as guaranteed by the Convention.¹¹

In *Diaz Ruano*¹² the applicant's son had been arrested and interrogated by the police. During the course of the interrogation he was shot by one of the investigators and killed. The police officer that had fired the fatal shot was initially convicted of murder, but an appellate court overturned this conviction.

The father of the deceased applied to the Commission alleging, inter alia, that the boy had been the subject of torture and inhuman and degrading treatment (contrary to Article 3 of the European Convention) while he was in custody. The Commission held the application to be admissible for raising issues under Article 2 of the European Convention.

However, the Court did not determine the case because a settlement was reached by the parties before the actual hearing date, and as a result the case was struck off the court list.

The next case to be brought before the Court dealing with Article 2 was *McCann*.¹³ The importance of this case, as this paper develops, cannot be underestimated. *McCann*, involved British SAS troops sent to Gibraltar to assist in the apprehension of IRA terrorists. It was believed that the three terrorists were going to Gibraltar to detonate a bomb of some sort. As part of the preparations by the authorities, rules of engagement were established. In the course of the operation all three of the suspected terrorists were shot and killed.

Subsequently a coroner's inquest was held on Gibraltar. Later the civil actions commenced in the United Kingdom subsequent to the deaths were struck out.

An application was made to the Commission in August of 1991, and in March of 1994, the Commission took the position, by a split vote, that there had been no violation of Article 2 of the Convention.¹⁴

11 *Ibid.*

12 *Diaz Ruano* (1995) 19 EHRR 542.

13 *McCann and others v. the United Kingdom*, (1996) 21 EHRR 97.

14 *Ibid.*, para. 142.

Article 2 of the Convention reads:

‘1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force, which is no more than absolutely necessary;

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

As will be seen in virtually every case to be examined, the Court commenced consideration of the applicability of the law by expressing the fundamental importance of this Article. It is further to be seen in the following cases, that the Court treats the *obiter* in this case as part of the basic discussions that will follow. The Court expressed the contextual importance of Article 2 as follows:

‘It must be born in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions of the convention – indeed one which in peacetime, admits no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe...As such, its provisions must be strictly construed’.¹⁵

The Court held that the purpose of the Article is to assist in the determination of situations where the use of force, which may result in death of an individual, is permitted. But the Court was very clear, as will be seen in its later rulings, that force must only be used where it is ‘absolutely necessary’ in achieving one of the areas enumerated in the Article.¹⁶ Further, the Court remarked that the term ‘absolutely necessary’ implies a high standard that must be met, implying that a very real test will be cast back to the State in

¹⁵ *Ibid.*, para. 147.

¹⁶ *Ibid.*, para. 148.

question.¹⁷ The Court then commented that, not only will the actions of the individuals involved (particularly the agents of the State in question) be subject to scrutiny, but as well the planning and control of the operation in its entirety will be subject to judicial scrutiny.¹⁸

The Court then made clear that the general prohibition of the taking of life by the State would be without effect if there were no avenue to review the actions of the authorities in question. Avoiding the issue as to whether or not Article 2 (1) inferred a right of access to a court in order to commence civil suit by suggesting instead that Article 6 is the appropriate avenue for the same.¹⁹ However of far greater significance is the comment by the Court that the prohibitions contained in Article 2 would be ineffective if there was no mechanism or procedure in place to review the lawfulness of the (entire) conduct of the authorities. The Court held that the general provisions of Article 2 must be read in conjunction with the general duty of the State pursuant to Article 1 of the European Convention. Reading together the two Articles the Court found that, by implication, there is a duty upon the State to conduct *effective* official investigations when individuals have been killed with the use of force involving, either directly or indirectly, agents of the State.²⁰ As will be seen in a number of the cases that follow, while the Court has not been able to fix responsibility for either an actual or deemed death by agents of the State that constituted a violation of Article 2 of the Convention, nevertheless breaches of the same were found on the basis that no effective investigation was conducted. The expansion of this concept by the Court will be examined.

The *McCann* Court, at the end of the day, accepted that the soldiers involved in the incident had an honest belief that they were acting in a manner to prevent loss of life,²¹ and further that there may be cases where actions may be taken out of mistaken but honestly held beliefs, which would be acceptable. The Court found that to hold otherwise would be to place an 'unrealistic burden' on the legitimate duty of those charged with the responsibility of protection of life within the State.²² The Court, in absolving the actions of the individual members of the operations team involved in the shooting, was not so generous to those involved in the planning of the operation.

In finding a breach of Article 2 the Court identified a number of serious errors that taken together were sufficient to constitute a breach of rights of the deceased in this

17 *Ibid.*, para. 149.

18 *Ibid.*, para. 150.

19 *Ibid.*, para. 160.

20 *Ibid.*, para. 161.

21 *Ibid.*, para. 200.

22 *Ibid.*

case. The Court was critical of the planning of the operation, from the first decision to allow the suspects into Gibraltar, through the failure to build in any margin for error in intelligence assessments, and finally to the reflex action of the soldiers in question to use lethal force by opening fire. This (failure of the authorities in the planning) in particular was held to constitute a breach of Article 2 (2) (a) of the Convention,²³ suggesting that the State had not satisfied the Court that the amount of force used was no more than was 'absolutely necessary' in the circumstances.

As an interesting footnote to this case, it should be noted that the applicants received no non-pecuniary (general) damages in the judgment. It is to be recalled that the Court considers itself to be a court of equity, and it is an often-recited maxim that anyone who comes to such a court seeking equity must do so with 'clean hands'.

It is appropriate to consider the nature of the positive duty that the Court is prepared to impose upon the State in the application of Article 2 of the Convention. This is discussed in general in *Osman*,²⁴ which was decided in October 1998.

The facts in *Osman* involve the story of a teacher infatuated with one his young students. The actions of this individual resulted in death and injury. The case revolves around what information the authorities either knew, or ought to have known, and what actions they could or should have taken to prevent the harms suffered. It is not intended to deal with the particular facts of this case, but rather to focus on the principles enunciated by the Court.

The Court was asked to consider whether or not the police and other authorities had failed in their obligation to protect Osman from what was claimed to be the danger that the teacher posed. There was as well a claim that the domestic court decision to dismiss an action commenced against the authorities amounted to a breach of the right of access to a court pursuant to Article 13 of the Convention.

The Court, in its discussion of Article 2, reviewed briefly its earlier decision in the case of *L.C.B. v. United Kingdom*²⁵ and reminded that the State has a positive duty to take steps to protect the lives of persons within the jurisdiction of the State. This obligation compels the State to put in place criminal law provisions to deter the commission of (criminal) offences, and as well to establish the appropriate State machinery in support of the same.²⁶ While the parties arguing this particular case differed on the degree of the

23 *Ibid.*, para. 213.

24 *Osman v. the United Kingdom*, (1998) 5 EHRC 293.

25 *L.C.B. v. the United Kingdom*, Application No., 23413/94.

26 Note that in this judgment the Court does not deal with the issue of what would constitute a criminal offence.

State obligation, the decision suggests that no issue was taken with the direction of the Court that in certain circumstances there is a positive obligation on the State authorities to take positive measures to protect the lives of individuals who may be at risk from the criminal acts of others.²⁷ However, the Court did give consideration and credence to the realities of modern society by holding that the authorities cannot ‘undertake the impossible’, but rather are obliged to undertake their obligations bearing in mind such factors as priorities and available resources.²⁸

The Court then addressed the issue of onus of proof that would be required in cases brought under this principle. The Court, as will be seen in other cases, does not cast upon the State a reverse onus (of proof) nor does it address the issue of level of proof required. Rather, it held that once the allegation or (legal) claim is made it is ‘sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge’.²⁹

Relying on the principle that each case ought to be determined on its own merits the Court found (as a matter of fact) that the applicants had not directed the Court to any ‘decisive’ point on the unfortunate sequence of events where the Court could find that the authorities (police) either knew or ought to have known that lives were in both ‘real and immediate risk’ from the perpetrator. The Court could not find any *single* event in the sequence of events that was sufficient to trigger either actual or implied knowledge on the part of the police to trigger an obligation. Further, and of significance, is the comment in the judgment that the perpetrator was also deemed to have rights that were to be respected by the authorities in the discharge of their duties.³⁰ Notwithstanding the fact that the application failed to find a breach of Article 2 of the Convention, nevertheless this case is not to be underestimated in its importance in identifying and qualifying the positive obligation of the State to protect individuals within the jurisdiction.

The *Andronicou and Constantinou v. Cyprus*³¹ case presented the Court with another opportunity to examine the use of lethal force by police in the context of allegations of breaches of Article 2. This case adds further parameters to the applicability of the Article. The facts in *Andronicou* involve an incident that developed over the course of the day of 24 December 1993. The male and female deceased were to have been married. For reasons unknown, the male barricaded himself and his fiancée in their apartment

27 *Osman, supra* para. 115.

28 *Ibid.*, para. 116.

29 *Ibid.*

30 *Ibid.*, para. 121.

31 *Andronicou and Constantinou v. Cyprus* (1998) 25 EHHR 491.

and during the day said that he was armed and was going to kill her. Negotiations to effect a peaceful resolution of the matter failed, and the police became involved. As the situation deteriorated, and fearing that the male would kill the female, the police stormed the apartment. Unfortunately during the police operation the male was killed, and the female was critically wounded and later died. Subsequently a full inquiry was held into the incident.

For purposes of this discussion the Court considered whether the (lethal) force used was 'strictly proportional' bearing in mind the circumstances of the moment, and the principles enunciated in Article 2. Considering its earlier decision in *McCann*, the Court also indicated that it would not only deal with the actual shooting, but would also examine all of the circumstances attendant to the police storming of the premises, including (but not limited to) matters such as planning and control.

The thrust of the complaint was to the effect that the killing of the male, and the wounding (which resulted in the death of the female) constituted a breach of Article 2.³²

In its discussion of the issue, the Court, after recalling the importance of Article 2, undertook a consideration of the words 'absolutely necessary' as found in the Article. The Court expressed:

'In this respect the use of the term 'absolutely necessary' in Article 2(2) indicates a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention' In particular, the force must be strictly proportionate to the achievement of the aims set out in subparagraphs 2(a), (b) and (c) of Article 2.'

Furthermore, in keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administered the force but also all the surrounding circumstances, including such matters as planning and control of the actions under examination.³³

The Court reviewed the arguments of both the applicant and the respondent, and as well heard the position of the Commission (that was critical of the planning and control) dealing with the planning and control phases of the police operation. The Court did

³² *Ibid.*, para. 153.

³³ *Ibid.*, para. 171.

its own assessment of the facts before arriving at the conclusion that it had not been demonstrated, presumably by the applicants, that the police operation was ill planned and ill organized.³⁴ However this portion of the judgment is silent as to, firstly, which party bore the burden of proof, and secondly the level of proof required. In the absence of judicial comment it is suggested that the burden of proof rested with the applicant, but the decision is silent as to the standard of proof to be met.

The Court then examined the actions of the police members involved in the shooting, and in that regard the Court held that although the taking of life was regrettable, nevertheless the police in question acted in the honest belief that their actions were done with the intent to save the life of the female hostage, and secondly, that the actions were done in a sort of reflex action. It is of note that in exonerating the police involved in the actual shooting the Court stated:

‘It notes in this respect that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reason, to be valid at the time, but subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others.’³⁵

To demonstrate the evolutionary nature of the Convention, as interpreted by the Court, it is useful to reflect on the dissenting opinion of Judge Pikis. This opinion suggests that the duty to protect life had increased since the *McCann* decision when the Judge opined:

‘The recent decision of the Court on the case of *McCann and Others v the United Kingdom* (judgment of 27 September 1995, Series A no., 324) puts, to my understanding, the duty of the State to protect the life of the individual on a higher pedestal than hitherto.’³⁶

The Cases Involving Turkey and Article 2

As was suggested earlier, the majority of cases involving alleged breaches of the ‘Right to Life’ as guaranteed under Article 2 involve claims made against Turkey, and it is

34 *Ibid.*, para. 186.

35 *Ibid.*, para. 192.

36 *Ibid.*, dissenting judgment of Judge Pikis, para. (c).

interesting to follow the development of the law in this regard.

The first of these cases, *Kayak*,³⁷ dated back to an incident that took place on 25 March 1993. The applicant alleged that the deceased, Abdulmenaf Kaya, was killed while unarmed, by members of the Turkish military, and subsequently a weapon was placed on his body. The respondent alleged that the deceased was found with the weapon after an exchange between members of the military and terrorists.

Of note, (not only to this case, but as well to a number of those following) is the fact that, subsequent to the shooting a government physician examined the body and concluded that the cause of death was cardiac insufficiency caused by bullet wounds. No full autopsy was carried out. It further appeared as though no full independent inquiry of the incident was carried out.

It is also to be noted that in this case, as well as most of the other cases involving claimed breaches of Article 2 by Turkey, the Commission conducted its own inquiry in Turkey in an attempt to ascertain the facts of the matter. The comments regarding cooperation, or the lack thereof, will be relevant as well.

In *Kayak*, the Commission found that there had been a violation of Article 2, not based on the circumstances of the killing, but rather on the inadequacy of the inquiry conducted after the fact,³⁸ and further, notwithstanding that neither the applicants nor the Commission delegate pursued the same before the Court, the Commission asked for a ruling on whether or not there had been a breach of rights afforded under Article 3 of the Convention.

The focus of this case is the attention that the Court gives to the investigation that took place after the fact. The Court focused on the comments of the Commission that because the facts of the killing were unclear, that there was a requirement on the part of the (State) authorities to carry out a *thorough* investigation,³⁹ and in this case the commission held that the investigation conducted was so inadequate that it amounted to a failure to protect life contrary to Article 2.⁴⁰

The Court accepted the observations in this regard, and went further in saying:

‘The Court recalls at the outset that the general prohibition on arbitrary

37 *Kaya v. Turkey*, Application No., 22729/93; see also, *Velikova v. Bulgaria*, p. 24; *Jordan et al v. the United Kingdom*, p. 35.

38 *Ibid.*, para. 52.

39 *Ibid.*, para. 84.

40 *Ibid.*, para. 85.

killing by agents of the State contained in Article 2 of the Convention would be ineffective, in practice, if no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under Article 2, read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention' requires by implication that there be some form effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.

The Court observes that the procedural of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.⁴¹

The judgment reflects a real sense of dismay at what was done, or perhaps better put, not done by the (domestic) public prosecutor in the conduct of his inquiry.⁴² The court gave note to the fact that incidents involving loss of life were commonplace in south-east Turkey,⁴³ but the Court was very clear in holding that there can be no displacement of the obligation of the State, under Article 2, to conduct an *independent and effective* investigation into the circumstances of the death.⁴⁴ Relying on the failure to have such an inquiry done, the Court found a breach of Article 2, and awarded damages accordingly. In *Kurt*⁴⁵ the facts dated back to events that took place in November of 1993. There had been a clash between members of the Kurdish Workers' Party and members of the security forces in or near the village where the applicant lived. During, or immediately after the clash, the applicant's son had been seen with members of the military, and was not seen thereafter. The applicant made a number of inquiries of officials concerning her son's whereabouts and was told firstly that he had probably been taken by the members of the Workers' Party, and then was subsequently told that the authorities had no record of his being taken into detention or custody.

This case is significant because the Court seems to avoid a course of analysis that seems to develop in cases to be considered later. Of importance in *Kurt* is the fact that the Commission had accepted the evidence as offered by the applicant as credible, and

41 *Ibid.*, paras. 86, 87.

42 *Ibid.*, para. 90.

43 *Ibid.*, para. 91.

44 *Ibid.*

45 *Kurt v. Turkey*, (1998) 5 BHRC 1, Application No., 24276/94.

accepted her belief that the last time she saw her son he was ‘surrounded’ by members of the security forces.⁴⁶ However, what is difficult to reconcile is the fact that the Commission chose not to address the case as a violation of Article 2, but rather that, as far as the son was concerned, there had been a breach of rights afforded under Article 5, and a breach of Article 3 as it pertained to the applicant who was the mother of the ‘disappeared’.⁴⁷

At the Court the applicant continued to press for a finding of a breach of Article 2, as far as the son was concerned, while she sought relief for herself claiming a breach of Article 3. Of significance is the fact that the Court accepted, and held as a matter of fact, that the last time that the applicant had seen her son he was surrounded by members of the military, and that he (the son) had not been seen since.

The applicant urged the Court to follow the rationale used by the Inter-American Court of Human Rights in *Velasquez Rodriguez*⁴⁸ and to hold that the State owed her son an obligation (which she claimed had been breached) under Article 2, and that such a finding could be made even though there was no specific evidence that the boy had been killed by agents or authorities of the State.⁴⁹

The Court, it is suggested with respect, sidestepped the matter before it as it pertained to Article 2 of the Convention. In finding that there had been no concrete evidence of a shooting, the Court ruled that it was not obliged to find a positive obligation on the part of the State to demonstrate a failure to protect life pursuant to Article 2.⁵⁰ It also must be remembered that the Court did accept the fact that the last time the deceased was seen he was surrounded by members of the military, and had not been seen since. The Court dismissed the claim as it related to a breach of Article 2.

However, in what appears to be a turnaround of sorts the Court held that:

‘the unacknowledged detention of an individual was a complete negation of the guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt investigation into an arguable claim that a person has been taken into custody and has not been seen since.’

46 *Ibid.*, para. 53.

47 *Ibid.*, para. 73.

48 *Velasquez Rodriguez v. Honduras*, (1998) 4 Inter-Am. Ct.H.R. (ser. C).

49 *Kurt*, *supra*, para. 101.

50 *Ibid.*, para. 107.

The avoidance of a finding of a breach of a positive obligation on the part of the State in *Kurt* is all the more unreasonable when one considers the finding:

‘Having regard to these considerations, the Court concludes that the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant’s son after he was detained in the village and that no meaningful investigation was conducted into the applicant’s insistence that he was in detention and that she was concerned for his life. They have failed to discharge their responsibility to account for him and it must be accepted that he has been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5.’⁵¹

It is submitted that this wording is very similar to that used by the Court in finding breaches of Article 2 when read in conjunction with Article 1 in later cases to be considered.

The *Gulec*⁵² case involves events that took place in early March of 1991. During a series of demonstrations the applicant’s son, a high school student, was killed. It was the position of the government that a shot from one of the armed demonstrators killed the boy, while the applicant argued that the security forces had killed his son.

Within six weeks of the incident, the applicant filed a criminal complaint against, *inter alia*, the officer commanding the security personnel involved, but the criminal proceedings effectively went nowhere. The matter was lodged with the Commission in mid-March of 1993. The Commission undertook its own inquiry in Turkey, and in mid-April of 1997 issued a report finding (by an almost unanimous vote) a breach of rights afforded under Article 2.

At the Court, the applicant alleged that the boy had been killed by members of the security service, and further that after the shooting there had been no meaningful investigation into the incident. The government took the position that the boy had been killed by a shot fired by one of the demonstrators, and further that the investigation had been a proper one. It is of note that the Commission in its submission posed that there had been, firstly an excessive use of force by the authorities, and secondly that there had been no ‘real’ investigation into the incident.⁵³

The Court, in its reasoning accepted the finding of fact of the Commission that there

51 *Ibid.*, para. 128.

52 *Gulec v. Turkey*, (1998) Application No., 21593/93.

53 *Ibid.*, paras. 63, 64, and 65.

had been, at the relevant time, a riot going on, however the Commission took serious issue with the use of an armored vehicle equipped with automatic weaponry to deal with the situation. The Court further noted that while the use of force is permitted under Article 2 (2) (c) to deal with riots, that nevertheless there ‘must be a balance struck between the aim pursued, and the means employed to achieve it.’⁵⁴ The Court was further critical of the lack of (riot control) equipment that the security personnel had at hand, notwithstanding the admission that the government regarded this area to be unstable. If this line of thought is carried to a logical conclusion, one is left with what developed in *McCann*⁵⁵ being used.

Further, in a judicial attempt to cast doubt on the credibility of the government’s position, the Court noted that from the evidence available, there was nothing available by way of tangible material (spent cartridges) to support the position that the fatal shot had been fired by a rioter.⁵⁶

The Court was precise in the choice of its wording when it termed the actions of the authorities and more particularly the force used, as not being ‘absolutely necessary’ as enunciated in Article 2.⁵⁷

However, the Court reserved its harshest criticism in this matter for the manner in which the post incident investigation was conducted. The Court reviewed both *McCann* and *Kaya*, and was very clear in reminding:

‘The general legal prohibition of arbitrary killing by agents of the State laid down in Article 2 would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State Authorities. The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State.’⁵⁸

‘The procedural protection for the right to life inherent in Article 2 of the Convention means that agents of the State must be accountable for

54 *Ibid.*, para. 71.

55 *See supra*, *McCann v. the United Kingdom*.

56 *Gulec*, *supra* para. 72.

57 *Ibid.*, para. 73.

58 *Ibid.*, para. 77.

their use of lethal force, their actions must be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in the circumstanced.⁵⁹

In holding the that the entire ‘investigation, was so flawed so as to amount to a breach of Article 2’, the Court added a new factor, namely that where a complaint has been made (presumably by a relative of the deceased) that the author of the complaint is to have notice of any investigation, and be able to participate in the same.

The choice of words by the Court is not to be overlooked. It is clear that the when there is a taking of life by an authority or agent of the State there is no option as to whether an inquiry will be held, but rather it is mandatory. Further, in the cases that deal with the positive obligation to hold an inquiry, the Court has set standards as to what is meant by terms such as ‘effective, independent or public’.

The *Ergi*⁶⁰ case provides an example of the Court’s reasoning in applying some of the principles developed from both *McCann* and *Kaya*. The facts to this case find their basis in an incident that took place in late September of 1993, when the deceased who was innocent of any wrongdoing whatsoever, and who unfortunately happened to be in the wrong place at the wrong time, was hit by a 7.62 milli-metre rifle round and died from his wounds. The fatal round was a standard NATO forces issue round. The parties could not agree upon the incident, or on the circumstances surrounding the same. The applicants took the position that the security forces had engaged in an ill planned and indiscriminate attack in retaliation for the death of a government collaborator. The government responded with the argument that their security forces had been attacked by terrorists and that the deceased was hit by a stray round in crossfire, or that she had been hit by a bullet fired by the terrorists.

The investigation did not develop with any dispatch, and when the case was brought to the Commission the matter was still pending in the domestic system. A further complicating and significant factor for the case was that while the matter was pending before the Commission, the applicant was ‘questioned’ by members of an anti-terrorist authority as well as a public prosecutor regarding the need for financial assistance to bring this case to the Court.

It is of note that the Commission had undertaken its own inquiry into the matter in Turkey and the innuendo in the Commission report to the effect that the government had not

59 *Ibid.*, para. 78.

60 *Ergi v. Turkey*, (1998) Application No. 23818/94.

been helpful in providing necessary witnesses did not assist the respondent.⁶¹ However, the Commission by inference found that the security forces had commenced the use of firearms in the area where the fatal shot had come from. Further, the Commission held that while it could not find, as a matter of fact, that members of the security forces had fired the fatal shot, nevertheless there was 'significant evidence' indicating that security forces had fired the fatal shot.⁶² The Commission held that Article 2 had been breached in that firstly there was a failure in both the planning as well as the conduct of the operation in question, and secondly that there had been a failure to conduct an effective examination into the death of the girl.⁶³ Of interest as well, although not germane to the findings of the breach of Article 2, was the finding of a breach of the right of access to the Court pursuant to Article 25.

At the Court itself, the applicant invited the Court to impose a reverse onus upon the respondent to comply with a standard (of proof) of beyond a reasonable doubt that there had been terrorists involved in this incident⁶⁴ The Court did not dismiss this line of argument, but rather avoided dealing with it, by agreeing with the Commission that there were some doubts as to the origin of the bullet, and therefore it could not hold beyond a reasonable doubt that the girl was intentionally killed. The judgment is apparently silent as to whether or not a reverse onus, as against the Government, would have been applied if the Court were satisfied as to the origin of the fatal shot.

*McCann*⁶⁵ dealt with failures in operational planning, and *Ergi* follows that line of reasoning as well. However, as will be seen in other cases, the Court was now expanding its reasoning to include Article 1 as well. The Court judgment notes:

'In this regard, it is to be recalled that the text of the provision...read as a whole, demonstrates that paragraph 2 does not primarily define instances when it is permitted to intentionally kill an individual, but describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life. The use of the term 'absolutely necessary' suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Article 2 to 11 of the Convention. In particular the force used must be strictly proportionate to the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. In

61 *Ibid.*, paras. 29 and 41.

62 *Ibid.*, para. 41.

63 *Ibid.*, para. 55.

64 *Ibid.*, para. 71.

65 *McCann*, *supra*.

keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject the deprivations of life to the most careful scrutiny, particularly where deliberate force is used, taking into consideration not only the actions of the agents of the State who actually administer the force, but also all of the surrounding circumstances, including such matters as the planning and control of the actions under examination...

Furthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to 'secure' an effective enjoyment of the right to life.⁶⁶

In *Ergi*, the Court was satisfied, after accepting certain inferences that the fatal shot had come from an area where the security forces had been and further

'...that there had been a real risk to the lives of the civilian population through being exposed to cross-fire between the security forces and the PPK. In light of the failure of the authorities of the respondent State to adduce direct evidence on the planning and conduct of the ambush operation, the Court, in agreement with the Commission, finds it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population.'⁶⁷

However, the Court was particularly critical of the post-incident conduct of the respondent in this case. The Court took Article 2 further by holding:

'In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death.'⁶⁸

As a footnote to the case there was also a finding of a breach of rights afforded under Article 25. The Court noted that it is fundamental to the operation of the system (of the Convention) that individuals must have access to the Commission without any form of pressure from the authorities, to modify or withdraw complaints as against these authorities.⁶⁹ The judgment makes no mention of damages awarded under this heading, but in light of the fact that the applicant was denied aggravated damages, it is submitted that the finding of the breach of this article was 'justification' in and of itself.

66 *Ibid.*, para. 79.

67 *Ibid.*, para. 81.

68 *Ibid.*, para. 82.

69 *Ibid.*, para. 105.

It is suggested that the Strasbourg Court continued to expand the applicability of Article 2 to include situations where there was evidence of the presence of State authorities or agents at the time that the incident took place. The *Yasa*⁷⁰ case is reflective of such a judicial expansion. The facts in the first of the two incidents that make up this matter date back to mid-January of 1993. The first of the applicants was going to his place of work at a newspaper stand when he was shot by a person, or persons unknown. He received a number of gunshot wounds and spent some days in hospital, and while he was in hospital he made a complaint to the appropriate police authorities.

The second incident that is part of this matter involves the first applicant's uncle. This individual was shot and killed while looking after the first applicant's newsstand. The police were notified and purported to have conducted an investigation.

As will also be seen, more than five years had transpired between the time the first complaint had been made to the police and the time the case came before the Strasbourg Court. No suspects had been identified and all that could be said by the authorities was that the dossier was still open and the investigation was ongoing.

The matter was brought to the Court based on the allegation that the shootings took place because the news stand in question (operated by the first applicant) sold a newspaper of some sort that was supportive of certain Kurdish movements within Turkey. The allegation, for purposes of this discussion focused on a breach of rights protected by Article 2, although there were allegations of breaches of other Articles including, but not limited to, Article 3.

The Commission found, as a matter of fact, that it could not be demonstrated, beyond a reasonable doubt, that either police or others on authority were involved in either shootings,⁷¹ however, and at the same time the Commission held that:

‘...the Government had or ought to have been aware that those involved on its publication and distribution feared that they were falling victim to a concerted campaign tolerated, if not approved by State agents.’⁷²

It is to be noted as well that at the Court hearing the Commission took the position that the respondent had been unhelpful in assisting the Commission, and for that reason it found that the deficiencies in the government's investigation were significant enough to

70 *Yasa v. Turkey*, (1998) ECHR 22495/93.

71 *Ibid.*, para. 34.

72 *Ibid.*

amount to a breach of the obligations under Article 2.⁷³

It is of note that at the actual Court hearing the applicant filed as new evidence a government report that referred to certain events that had taken place in Turkey,⁷⁴ and while this could be received in evidence, nevertheless the same was of no probative value in assisting the applicant's claim of government involvement in the actual shootings. The Court held that as far as the actual shootings were concerned, no violation of the obligations under Article 2 could be found.⁷⁵ However the same did not hold for the second thrust of the applicant's argument dealing with the post-incident investigation.

The Court commenced this area of discussion by immediately reminding of both *McCann* as well as *Kaya*, and the Court held that the obligation of the government was to commence an investigation immediately upon learning of the killing of the uncle. Further, and to reflect the ongoing development of the law in this area, the Court held that the wounded applicant also could rely on an allegation triggering Article 2, because of the fact that the firing of eight rounds at the applicant and his wounding amounted to 'attempted murder'.⁷⁶ The question may be asked as to whether or not the Court would have taken the same position if for example only one or two shots were fired at the applicant, and he was not wounded?

The court was less than impressed by the fact that it was presumed by the appropriate authorities that no agents of the State were involved in either of the shootings in question.⁷⁷ The Court did not mince any words when it found that the investigations started immediately after the shootings, some five years earlier, had yielded no tangible result⁷⁸ with the conclusion that the failure of the investigation (notwithstanding the political climate in the area), would only lead to an exacerbation of a 'climate of impunity and insecurity'.⁷⁹

It may be that the Court raised the benchmark standard higher in finding:

'In the instant case, it was therefore incumbent on the authorities to have regard, in their investigation, to the fact that State agents may have been implicated in the attacks. In that connection, whether or not the applicant had formally identified the security forces as being

73 *Ibid.*, para. 90.

74 *The Susurluk Report*, *ibid.* para. 46.

75 *Ibid.*, para. 97.

76 *Ibid.*, para. 100.

77 *Ibid.*, para. 105.

78 *Ibid.*, para. 103.

79 *Ibid.*, para. 104.

the assailants was of little relevance.

In short, because the investigations carried out in the instant case did not allow the possibility that given the circumstances of the case the security forces might have been implicated in the attacks and because up till now, more than five years after the events, no concrete and credible progress has been made, the investigations cannot be considered to have been effective as required by Article 2.⁸⁰

What has evolved from *Yasa* is the notion that the Court will be prepared to consider a shooting without causing death as a breach of Article 2, and further that time delays in the production of 'results' of an investigation may also be cause for a finding of an Article 2 breach.

The *Cakici*⁸¹ case demonstrates how earlier decisions of the Strasbourg Court are modified or refined with the passage of time. The facts in *Cakici* date back to an incident that took place in early November 1993 in a Turkish village. It was alleged by the applicant that his brother was taken into custody (of some sort) by security forces and later transferred to two places of detention; that he had been tortured and had not been seen since. The respondent took the position that the individual in question had never been taken into custody, as there were no records indicating the same.

As if to add some confusion, it was alleged by the authorities that Ahmet Cakici's identification card had been found (approximately one and a half years later) on or near the body of an individual killed by the police during a terrorist clash. Further, some two and a half years after the initial incident took place the local 'prosecutor'⁸² ruled that his office was without jurisdiction to deal with the matter, finding that in all likelihood the card found near a dead terrorist was sufficient indication that Ahmet Cakici was dead.

The respondent did not at all impress the Commission with the argument as put forward. Further, the Commission noted four distinct areas of failure to meet (former) Article 28 (1) (a) obligations,⁸³ implying that the difficulties it faced in determining the facts were in large part a result of not having significant evidence available to it.⁸⁴ At the end of the day, the Commission was of the view that there was a 'very strong probability' that

80 *Ibid.*, paras. 106 and 107.

81 *Cakici v. Turkey* (1999) ECHR 23657/94.

82 Under Turkish domestic law, this was the official charged with the responsibility of conducting the investigation.

83 See former Article 28, now Article 38:1. If the Court declare the application admissible, it shall a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities.

84 *Cakici, supra*, para. 44.

Ahmet Cakici was dead, and that in all likelihood the same came about consequential to firstly, detention, and then ill treatment during the same.⁸⁵ The Commission expressed the view that both Articles 2 and 3 had been violated as it pertained to Ahmet Cakici.

The Court accepted without any comment, as it does in almost every case, the findings of fact of the Commission. But it is here that the Court goes further, in its findings of fact, than did the Commission. The Court accepted that Ahmet Cakici had been detained and had been the subject of serious ill treatment.⁸⁶ However, the Court then went on to hold that, as a matter of fact, there was sufficient circumstantial evidence⁸⁷ upon which it was to be concluded beyond a reasonable doubt, that Ahmet Cakici had died as a result of his detention and subsequent treatment.⁸⁸ Having determined, or made this finding of fact (that the young man must be presumed dead), in the circumstances of this case the responsibility for the same rested with the State. The Court then went on to hold that as result of the State offering no 'explanation' or 'justification', the death in question was as a result of the actions of State authorities, and there was a violation of Article 2 of the Convention.⁸⁹ In addition to this finding against the State, the Court also found a violation of the same Article as a result of the 'inadequate' investigation.

Cakici, in addition, goes one step further than just a finding of a breach of Article 2, in that it recalls some of the witness evidence in this matter, and finds as well a breach of Article 3 as it pertains to the treatment of the deceased before his (assumed) death.⁹⁰ It is of note that in so finding, the Court said that it did so to the standard of proof beyond a reasonable doubt. It must be further noted that pursuant to Article 15 (1) of the Convention there can be no derogation from either Articles 2 or 3.⁹¹

Brief reference will be made to the *Ertak*⁹² matter. The facts of this case are not complicated. In the latter part of August 1992, on his way home from work, the applicant's son was stopped and apparently taken into police custody. Others, as the Commission found and held as a matter of fact, saw him in the custody of the security forces. The young man

85 *Ibid.*, para. 84.

86 *Ibid.*, para. 85.

87 Black's Law Dictionary, Sixth Edition, defines circumstantial evidence as "The proof of various facts or circumstances which usually attend the main fact in dispute, and therefore tend to prove its existence, or to sustain, by their consistency, the hypothesis claimed. Or as otherwise defined, it consists in reasoning from facts which are known or proved to establish such as are conjectured to exist."

88 *Cakici, supra*, para. 85.

89 *Ibid.*, para. 87.

90 *Ibid.*, para. 92.

91 See Article 15 (1): No derogation from Article 2, except in respect of deaths form lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

92 *Ertak v. Turkey* (2000) Application No. 20764/92.

was not seen again. The applicant firstly made an application to the police, and then to the appropriate prosecutors' office as to the whereabouts of the young man. These came to naught. The Commission held that agents of the State had killed the young man, and further that the investigation into the incident had been both ineffective as well as inadequate.⁹³ It is of note that the Commission was of the opinion that the fact of the death at the hands of authorities had been proven 'beyond a reasonable doubt.'⁹⁴

If one looks at the following comments of the Court:

'Stressing that the authorities are under an obligation to account of individuals under their control, the Court observes that no explanation has been offered into what occurred after Mehmet Ertak's arrest. Accordingly, it considers that in the circumstances of the case the Government bore responsibility for Mehmet Ertak's death, which was caused by agents of the State after his arrest . . .'⁹⁵

It is now seen that the Court is applying a reverse onus on the State to offer a detailed explanation, however the decision appears to be silent as to the level of proof that the explanation must attain. It could be argued (by common law attorneys) that if the Court has made a finding 'beyond a reasonable doubt' that the State need only then raise (by argument or defense) a 'reasonable doubt' as it would pertain to the findings of fact made regarding the death. It is submitted however that the State would have a far more difficult task in trying to overcome a finding of fact dealing with the inadequacy of the post incident investigation.

As it has done in almost every one of its decisions, the Court reiterated the fundamental importance of Article 2, however a careful reading of the following is rather important in appreciating the evolutionary nature of the Court in dealing with Article 2. The Court stated:

'The obligation is not exclusively concerned with the intentional killing from the use of force by agents of the State but also extends, in the first sentence of Article 2 § 1, to a positive obligation on States to protect by law the right to life. This requires by implication that there should be some form of adequate and effective official investigation when individuals have been killed a result of the use of force.'⁹⁶

Following this logic, the Court is saying rather clearly that in the case of any death involving the use of force, inquiries to a certain standard must be undertaken, and

93 *Ibid.*, para.108.

94 *Ibid.*, para. 129.

95 *Ibid.*, paras. 132 and 133.

96 *Ibid.*, para. 134.

applying considerations from other cases, this may also include keeping the appropriate relatives of deceased persons apprised of the outcomes of these investigations. It is suggested that this case may be an attempt by the Court to influence police conduct as well.

The *Velikova*⁹⁷ matter is helpful in this review as it adds further definition to the obligations of the State in dealing with allegations of breaches of Article 2. In *Velikova*, the police arrested Tsonchev in late September of 1994. After about twelve hours in police custody medical officials were called to the police station where the individual was pronounced dead. The facts suggest that immediately after the police reported the matter through a chain of command and examinations or investigations were undertaken. From the time of the death until the time of the actual hearing before the Strasbourg Court the investigation had yielded no results.

The Court in reaching its conclusions cited the earlier decisions of *McCann v United Kingdom, Ireland v. United Kingdom*,⁹⁸ and *Cakici*.⁹⁹ However, and in addition, the Court in this matter commented:

‘The Court considers that where an individual is taken into police custody in good health but is later found dead, it is incumbent on the State to provide a plausible explanation of the events leading up his death, failing which the authorities must be held responsible under Article 2 of the Convention. In assessing evidence, the general principal applied in cases has been to apply the standard of “proof beyond a reasonable doubt” . . . However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control or custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.’¹⁰⁰

As the cases develop the Court seems to become more definitive. In the above, for example, the use of the word ‘must’ is not by accident, nor is the term ‘convincing’. However, the question may be asked as to how the court is to be ‘convinced’ as to any

97 *Velikova v. Bulgaria* (2000) Application No. 41488/98.

98 *Ireland v. the United Kingdom*, (1978) 2 EHRR 25.

99 *Cakici v. Turkey*, *supra*.

100 *Velikova*, *supra*, para. 70.

particular set of facts or presumptions, when it relies of the findings of fact made by the Commission in most, if not almost all cases.

In addition, *Velikova* not only adds definition to the onus or obligation on the State to explain the circumstance or cause of death beyond a reasonable doubt, but as well suggests standards to be met in measuring the conduct of the post incident investigations to be undertaken when a death involving use of force has taken place. The decision recites:

‘The investigation must be, *inter alia*, thorough, impartial and careful
...

The Court further considers that the nature and degree of scrutiny which satisfies the minimum threshold of the investigation’s effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all the relevant facts and with regard to the practical realities of the investigation work. It is not possible to reduce the variety of situations which might occur to a bare check list of acts of investigation or other simplified criteria.

The Court considers that unexplained failure to undertake indispensable and obvious steps is to be treated with particular vigilance. In such a case, failing a plausible explanation by the Government as to the reasons why indispensable acts of investigation have not been performed, the State’s responsibility is engaged for a particularly serious violation of its obligation under Article 2 of the Convention.’¹⁰¹

While it has not been the focus of this discussion, nevertheless it would be an error to overlook the comment that the Court made regarding the applicability of Article 13.¹⁰² In two comments by the Court the interlocking of the two Articles became forged:

‘The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The scope of the obligation under Article 13 also varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably

101 *Ibid.*, paras. 80, 81, and 82.

102 See Article 13: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

hindered by the acts or omissions of the respondent State.

A violation of Article 2 cannot be remedied exclusively through an award of damages.

Given the fundamental importance of the right to protect life, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation likely to lead to those responsible being identified and punished and in which the complainant has effective access to the investigation proceedings.¹⁰³

The *Ilhan*¹⁰⁴ case provides some clear direction as to the fact that the Court is able to expand its capacity to find breaches of Article 2 even where there has been no death, either actual or deemed. In *Ilhan*, the applicant's brother had been detained in one fashion or another and had been severely beaten causing severe injuries with debilitating *sequelae*. Approximately two months after the incident took place the local prosecutor made a decision not to prosecute any of the members of the police or other security forces involved.

This application was brought by the victim's brother who alleged that, inter alia, the beating was of such a nature that it threatened life, and as such it violated not only Article 3, but Article 2 as well. The Commission had taken the view that there had been a violation of rights protected under Article 2, although, the individual had not been killed.

The Court did not find a breach of the rights afforded under Article 2, but notwithstanding the *obiter* of the Court is of significance. The Court found that even though the force used did not cause death, nevertheless the Court still had the inherent ability to examine cases dealing with 'use of force, under Article 2.'¹⁰⁵ The Court specifically commented:

'Nevertheless, the degree and type of force used and the unequivocal aim or intention behind the use of force may, amongst other factors, be relevant on assessing where in a particular case, the State agents' actions in inflicting injury short of death may be regarded as incompatible with the object and purpose of Article 2 of the Convention.'¹⁰⁶

It may be hypothesised at this juncture that the intent referred to may be developed by

103 *Velikova, supra* para. 89.

104 *Ilhan v. Turkey*, (2000), Application No. 22277/93.

105 *Ibid.*, para. 75.

106 *Ibid.*, para. 76.

the application of circumstantial evidence then leading to the further application of a reverse onus. However, in fairness to the Court the decision also reflects the judicial observation that very few cases involving injury, while not causing death, will be brought under the umbrella of Article 2, at least as far as the actions of the perpetrators *vis-à-vis* the victim are concerned.¹⁰⁷ The Court rather held that the provisions of Article 3 are in this area appropriately read in conjunction with Article 1.¹⁰⁸

The Court, in *Ilhan* found a breach of the protections afforded under Article 3 of the Convention, both in the actual acts involved, including the delay in obtaining medical treatment of the victim as well as the failure to carry out an effective investigation into the circumstances of the incident.

The issue of proportionality in the use of force was, *inter alia*, discussed in the *Gul*¹⁰⁹ case, and in that regard attention should be given to the earlier reviewed case of *Andronicou and Constantinou v. Cyprus*.¹¹⁰ The facts in *Gul* date back to the early morning hours of 8 March 1993. The police were in the process of a search operation when they knocked on the door of the apartment occupied by the deceased and his family and while he was in the process of unlocking and opening the door three members of the police, with automatic weapons opened fire through the door, wounding the deceased who subsequently died from the wounds.

This decision, after focusing on the fundamental importance of Article 2, then considered whether the actions of the police officers themselves were warranted under the circumstances. The Court was very clear in noting that its role is not to become a criminal court in the allocation of degree of individual fault.¹¹¹ Rather in noting that it is competent to consider the notion of proportionality in the use of force, and in so doing found that:

‘The reaction however of opening fire with automatic weapons on an unseen target in a residential block inhabited by innocent civilians, women and children was as the Commission found, grossly disproportionate.’¹¹²

The decision in *Mahmut Kaya*¹¹³ dealt with the case of a disappearance that occurred

107 *Ibid.*, para. 76.

108 *Ibid.*, para. 77.

109 *Gul v. Turkey* (2000) Application No. 22676/93.

110 *Andronicou and Constantinou v. Cyprus* (1998) 25 EHHR 491.

111 *Gul*, *supra* para. 80.

112 *Ibid.*, para. 81.

113 *Mahmut Kaya v. Turkey* (2000) Application No. 22535/93.

on 21 February 1993, with the body of the deceased being found shot in the back of the head with other marks on his body some six days later. Of note was the fact a report was made with the local police that the deceased had disappeared on 22 February 1993. The deceased was a physician who had been suspected of providing medical aid to members of a political movement opposed to the government.

The Court ruled that it had not been demonstrated beyond a reasonable doubt that any State authority or anyone acting on behalf of the State was involved in the killing, but the Court looked in another direction in reaching its decision of a breach of Article 2. The Court rather, focused on the issue as to whether the State failed in a duty to protect the individual from a known risk. The Court was satisfied, on the basis of material that it had before it, that the deceased was at some risk, and further that the authorities either were aware, or in the alternative, ought to have been aware that this risk could come from either individuals or groups acting with the knowledge (known or implied) of authorities. In this case the Commission had conducted its hearings in both Strasbourg as well as Ankara.¹¹⁴ The reasoning of the Court bears a striking resemblance to the issues that were raised in *Osman*.¹¹⁵ However, the result was not the same. It is a given, that each case before the Court is to be decided on its own merits and facts, but some of the comments made in the judgment bear consideration. After reciting the principle of the positive duty to protect life, the court reminded, from *Osman*, that the State has the obligation aforementioned when they ‘knew or ought to have known’ of a real risk to the life of a particular individual.¹¹⁶

The Court accepted that in this case the authorities either were aware, or ought to have been aware of risks to individuals¹¹⁷ and then the issue became whether the authorities did all they could to avoid risk to the deceased.¹¹⁸ Here, the Court directed attention to the number of incidents involving violence, and recited a number of its own decisions chronicling similar issues¹¹⁹ and lack of independent investigation. However, with the greatest respect to the Court, it may be argued that in this particular case a double standard has been applied as between the United Kingdom and Turkey. It can be strongly argued that in *Osman*, the facts identify areas where the authorities either knew, or ought to have known of the risks but through negligence did not act ‘to protect life.’

There is little issue whether the Court reached the appropriate decision in finding a

114 *Ibid.*, para. 61.

115 *Osman v. the United Kingdom*.

116 *Mahmut Kaya v. Turkey supra*, para. 81.

117 *Ibid.*, para. 91.

118 *Ibid.*, para. 92.

119 *Ibid.*, para. 96.

breach of Article 2. It is suggested, however, with the greatest of respect to the Court, that this case reflects a double standard adopted by the Court when looks dispassionately at both *Mahmut Kaya* and *Osman*.

The *Timurtas*¹²⁰ case reported in mid-June of 2000 is helpful in that it adds definition to, inter alia, when the presumption of death will arise in considering breaches of Article 2. In this case, the applicant's son was taken into police custody in mid-August of 1993 and had not been seen since. The applicant made inquiries and as well went through the official complaint procedure regarding his son but with no result. The applicant was told in early June of 1996 that nothing further was to be done by the authorities regarding this matter.

There is one factor that sets this case apart from a number of the others, and which caused the Court to comment in rather blunt terms about the conduct of the authorities. The case was brought to the Commission in early February of 1994. The applicant filed, as evidence, a document that he said had been prepared by the police, and which purported to make specific reference to the custody of the missing person.

The various cases in which Turkey was the respondent reflect an increasing degree of frustration on the part of the Court with the failure of the respondent to co-operate with the Commission (as required by the Convention) in the conduct of its inquiries. In this regard attention should be given to the Commission's evaluation of the evidence available to it, and the reasons for the same.¹²¹ The Court carried further in stating:

'More importantly, the Court would emphasize that Convention proceedings do not in all cases lend themselves for rigorous application the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court had previously held that it is of the utmost importance for the operation of the system of individual petition instituted under the former Article 25 of the convention (now replaced by Article 34) that States furnish all necessary facilities to make possible a proper and effective examination of applications... It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory

120 *Timurtas v. Turkey* (2000) Application No. 23531/94.

121 *Ibid.*, paras. 39 and 41.

explanation may not only reflect negatively on the level of compliance of the respondent State with its obligations...but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained.¹²²

‘...It is insufficient for the Government to rely on the allegedly secret nature of the document, which in Court’s opinion, would not have precluded it from having made available to the Commission’s delegates...Consequently, the Court finds it appropriate to draw an inference from the Government’s failure to produce a document without a satisfactory explanation.’¹²³

In this case, before the Court, the Commission in expressing its frustration with the respondent reminded the Court that it should consider positions taken by other judicial organs in circumstances not dissimilar. While the Commission held that it could not find a violation of Article 2 on the death question, it nevertheless argued:

‘The Inter-American Court has on several occasions pronounced that forced disappearances frequently involve the violation of the right to life. In the Inter-American system, a violation of the right to life as a consequence of forced disappearance can be proved in two different ways. First, it may be established the facts of the case at hand are consistent with an existing pattern of disappearances in which the victim is killed. Second, the facts of an isolated incident of fatal forced disappearance may be proved on their own, independent of a context of an official pattern of disappearances. Both methods are used to establish the state control over the victim’s fate, which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.’¹²⁴

The Court had little difficulty in arriving at the conclusion that the individual must be presumed dead, thus triggering the finding of a breach of Article 2, but some of the comments made in the judgment bear some closer scrutiny. Attention has already been given to the earlier decisions of the Court in the *Cakici*, *Ertak* and *Kaya* cases. However, in this case, the Court seems to go further by suggesting that in cases where the State has not given what the Court has described as a ‘plausible’ explanation as to the fate of the individual in question, and where the Court has accepted ‘sufficient’ circumstantial evidence, the court will make a finding of fact that the individual died whole in State

122 *Ibid.*, para. 66.

123 *Ibid.*, para. 67.

124 *Ibid.*, para. 80.

custody.¹²⁵ The Court then added:

‘It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died.’¹²⁶

The Court, it appears, was anxious to conclude a breach of Article 2 in the disappearance and presumed death in this matter, however, it was obliged to take into account its earlier decision in *Kurt*. The Court in *Timurtas* suggested that in this case it was satisfied the individual was actually taken into custody, while in *Kurt* the individual was only last seen surrounded by soldiers. The Court then suggested that there was a substantial difference between the time frame of four and a half years in *Kurt*, and the six and a half years in the *Timurtas* case.¹²⁷

With the greatest of respect to the Court, it is suggested that this last comment by the Court is, at best, a legal fiction. Rather it can be argued that the Court was, in *Timurtas*, expressing its strongest criticism at the State in question, not only for its failure to protect life, but also the manner in which it engaged in deliberate refusal of its Convention obligation to assist in the investigations undertaken by the Commission.

As if to reinforce the last suggestion, the Court was rather blunt in expressing its views of the investigation done, or perhaps better stated, not done by the respondent when the Court described:

‘The lassitude displayed by the investigating authorities poignantly bears out the importance attached to the prompt judicial intervention required by Article 5 §§ 3 and 4 of the Convention which as the Court emphasized in the case of *Kurt*, may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2.’¹²⁸

The Court in *Tanli*¹²⁹ seemed disposed to be giving direction to the specifics of the adequacy, or lack thereof in the post incident investigation carried out by the authorities, and in particular the medical professional involved in the post mortem examinations. Further, this case is instructive in that it demonstrated that the Court would have regard for the investigations and opinions of other bodies when considering a particular case.

125 *Ibid.*, para. 82.

126 *Ibid.*, para. 83.

127 *Ibid.*, para. 85.

128 *Ibid.*, para. 89.

129 *Tanli v. Turkey* (2000) Application No. 26129/95.

In *Tanli*, the son of the applicant was taken into police custody on 27 June 1994, and the following day the family was notified that the young man had died of a heart attack while in custody. The public prosecutor opened an investigation dossier, and in due course indictments were filed against three of the police officers involved. Further a court order was issued, in early May 1995, indicating that the body should be exhumed and sent for a post mortem examination. The report of that examination was of little assistance, but it was critical of the first examination done after the death of the young man.

In the early portion of the case report the Court refers to two reports of the European Committee for the Prevention of Torture,¹³⁰ and the Court makes specific note of the fact that in Turkey, the Committee found:

‘...that torture and other forms of severe ill treatment were important characteristics of police custody.’¹³¹

‘...the practice of torture and other forms of sever ill treatment of persons in police custody remains widespread in Turkey.’¹³²

‘In its second public statement issued on 6 December 1996, the CPT noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that Torture and other forms of ill-treatment were still important characteristics of police custody.’¹³³

Further the Court referred to the Manual on the Effective prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the United Nations in 1991.¹³⁴ The Court by implication was most critical of what the Turkish authorities had not done by way of post-incident medical examinations.

The Court reminded that individuals in police or other custody are to be protected by the authorities¹³⁵ and again reminded that not only is proof required to be given by the State to rebut a presumption of ‘beyond a reasonable doubt,’ but the Court went on to say again:

‘Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise

130 *Ibid.*, paras. 103–106.

131 *Ibid.*, para. 105.

132 *Ibid.*

133 *Ibid.*, para. 106.

134 *Ibid.*, para. 107.

135 *Ibid.*, para. 141.

in respect of injuries and death occurring that detention. Indeed the burden of proof may be regarded as resting on the authorities to provide a satisfactory explanation.¹³⁶

The decision is noteworthy in its choice of wording. The Court said rather clearly that the State had not accounted for the death in question¹³⁷ rather than that the State had given an insufficient accounting. There is, it is suggested, a fundamental difference between 'no account' and an 'insufficient account.' Further, the Court directed attention to the fact that (in its opinion) the post mortem examination was ineffective and further observed that no autopsy had been carried out. The Court gave specific attention to the deficiencies that it considered fundamental in this case.¹³⁸ In so doing the Court was further developing its case law by enunciating again standards that it deemed requisite for investigations required under Article 2. The Court then made it very clear that the primary responsibility for the implementation of such investigation rested with the appropriate State.

The final case to be considered deals not with the issue of death, and the causation or responsibility for the same, under Article 2, but rather is a roadmap for States in their review of incidents involving the use of force causing death in such a way that future breaches of the Article may be, by example avoided. The *Jordan*¹³⁹ case addressed the issue of violations of Article 2 dealing with the alleged failure of the State to undertake proper investigations in all four of the cases that comprise this judgment. All four cases find their basis in the Northern Ireland, and involve either (the then) Royal Ulster Constabulary, the military, and suspected members of the Irish Republican Army. Three of the cases, (*Jordan, Kelly, and Mckerr*) involve deaths caused by the security forces, while the last (*Shanaghan*) deals with the investigation subsequent to a death caused by a person, or persons unknown.

The court judgment in all four cases is for all intents and purposes the same. The Court reminded at the commencement of the discussion of the law, the fundamental importance of Article 2 to the operation of the European Convention. It is clear from the judgment that by virtue of Article 15, there can be no derogation from Article 2 in peacetime.¹⁴⁰ The Court then, as if to recapitulate some of its earlier decisions, again reminded:

'Where the events in issue lie wholly or in large part, within the

136 *Ibid.*, para. 142.

137 *Ibid.*, para. 147.

138 *Ibid.*, paras. 120 and 150.

139 *Hugh Jordan v. the United Kingdom* (2001) Application No. 24746/94. (This case report also incorporates the judgments in *Mckerr v. the United Kingdom* (2001) Application No. 28883/95; *Kelly & Others v. the United Kingdom*, (2001) Application No. 30054/96; *Shanaghan v. the United Kingdom*, (2001) Application No. 37715/97.

140 *Jordan v. the United Kingdom*, *supra*, para. 102.

exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries or death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory explanation.¹⁴¹

‘The text of article 2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. [...] Consequently the force used must be strictly proportionate to the achievement of the permitted aims.’¹⁴²

‘The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.[. . .] The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life, and in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave the initiative to the next kin either to lodge a formal complaint or take any responsibility for the conduct of any investigative procedures.’¹⁴³

‘For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.[. . .] This means not only a lack of hierarchical or institutional connection but also a practical independence.’¹⁴⁴

‘The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was

141 *Ibid.*, para. 103.

142 *Ibid.*, para. 104.

143 *Ibid.*, para. 105.

144 *Ibid.*, para. 106.

or was not justified in the circumstances [...] and to the identification and punishment of those responsible.[...] Any deficiency in the investigation which undermines its ability to establish the cause of death of the person or persons responsible will risk falling afoul of this standard.¹⁴⁵

In addition the Court was clear that these processes must be done in an expeditious manner in order to maintain public confidence.¹⁴⁶ Lastly, while the practice may vary from case to case, nevertheless the investigation process must be subject to some form of public scrutiny,¹⁴⁷ implying transparency in the process, and as well, in order that legitimate interests be seen to be protected, there must, in all cases, provision for some form of 'next of kin' involvement.

It is of some note that judgment reflects that it is not for the Court to delineate in any detail which procedures should be adopted in the conduct of such investigations,¹⁴⁸ however, and with the greatest of respect to the Court, that is precisely what was done in the earlier cases involving Turkey as the respondent. The Court, by specifically identifying specific defects, is by implication telling States what it feels must be done.

Conclusion

The cases that the Court has dealt with that have been brought before it alleging breaches of Article 2 have been diverse in fact. From the early cases dealt with, the Court has shown flexibility in its ability to expand the parameters as to how it will deal with cases involving alleged breaches.

The Court has expanded its line of reasoning to be both positive in the creation of obligation on the part of States, as well as reinforcing the negative aspects of what a first reading of the Article would suggest.

The Court has taken the obligations as enunciated in Article 2, and combined the same with the obligations as required by Article 1. Where the Court could not, because of the evidence, or lack thereof available to identify violators of Article 2, the Court expanded the duties to impose the obligation on States to conduct post-incident inquiries, and then to set standards for the same.

145 *Ibid.*, para. 107.

146 *Ibid.*, para. 108.

147 *Ibid.*, para. 109.

148 *Ibid.*, para. 123.

The Court expanded its mandate to call into scrutiny, not only the acts in question, but as well all facets of the circumstances that may have led to the incident including, but certainly not limited to, planning and command and control.

The obligations upon the State were specified to include death caused by agents of the State, or others in authority, but to cases where the perpetrators were unknown. The Court in its judgments offered refinements to the standards of proof that would be required, the acceptability of circumstantial evidence, the applicability of different types of onus of proof, and when and under what circumstances inferences (of fact) may be drawn.

It might appear that at times the Court was drawing, with some degree of artificiality, time lines that were inconsistent. Nevertheless the Court has throughout conducted itself as a 'court of equity' requiring those who come before it seeking relief to arrive with 'clean hands'. It will be interesting to revisit the line of cases that develop over the next 15 years to see if the Court remains as innovative as it was during the first time frame studied. One would hope however, that as States accept their obligations as High Contracting Parties to the Convention, that the number of refereed cases will decline. In the affairs of man, that outcome is highly unlikely.

Nusrat Chagtai, Public Interest Lawyers¹⁴⁹

Iraq and the legal space of the European Convention on Human Rights

Introduction

On 14 December 2004, the Divisional Court delivered judgment in *Al-Skeini v Secretary of State for the Defence*¹⁵⁰, a judicial review action brought by six Iraqi families. Five cases involved shootings of Iraqi civilians in Basra by British troops during patrols or home raids. The sixth involved the death of Baha Mousa in British custody.

The case turned on whether the deaths came within UK jurisdiction under the European Convention on Human Rights (the “Convention”) in respect of the substantive and procedural obligations under Articles 2 and 3. Therefore, the meaning of “jurisdiction” under Article 1 of the Convention was central to the case and more specifically, when jurisdiction extends beyond a state party’s territory.

This article will firstly set out why Convention protection is essential where troops are operating abroad and secondly, show that the Divisional Court’s judgment did not go far enough. This explains why the case is to be heard before the Court of Appeal in October this year.

The need for Convention protection in Iraq

On 20 March 2003, the US and UK launched major military operations against Iraq. These combat operations completed on 1 May 2003. The UK accepted that between this time and 28 June 2004, it was an occupying power in areas of southern Iraq where British troops exercised sufficient authority. Therefore, it was bound by its obligations under the Regulations annexed to the 1907 Hague Convention (the Regulations) and the 1949 Fourth Geneva Convention (Geneva IV), which impose obligations in times of war

149 Public Interest Lawyers are currently acting for families of Iraqi civilians killed or tortured by British troops

150 [2004] EWHC 2911 (Admin)

and occupation, such as the duty to respect the lives of protected persons and to treat them humanely¹⁵¹, and to provide effective penal sanctions in domestic law for persons committing grave breaches of the Geneva Convention.¹⁵² “Grave breaches” are defined in Article 147 to include “wilful killing, torture or inhuman treatment...”

Furthermore, the UN Human Rights Committee has commented in respect of the International Covenant on Civil and Political Rights (ICCPR) that:

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.”¹⁵³

Therefore, human rights can and must apply concurrently with international humanitarian law. The UK has ratified the ICCPR, as well as the UN Convention against Torture 1984 (CAT). Under Article 4 of the latter, each contracting state is required to “ensure that all acts of torture are offences under its criminal law.” The prohibition of torture is also a norm of customary international law and applies wherever state agents operate.¹⁵⁴ Additional protection is provided by the Rome Statute of the International Criminal Court (ICC Statute) to prosecute “serious crimes of concern to the international community as a whole”, including grave breaches of the Geneva Conventions.¹⁵⁵

Undoubtedly, there is an array of legal protection for civilians in armed conflict situations under international law. In the UK, we have legislation giving effect to international law obligations through the Geneva Conventions Act 1957, Criminal Justice Act 1988, Army Act 1955, and the International Criminal Court Act 2001. However, enforcement under these provisions is problematic. Prosecution for crimes such as torture require the Attorney General’s authority and in respect of the ICCPR, the UK has not ratified the Optional Protocol, which provides the right of individual petition to the Human Rights Committee.

However, even before action can be taken for a breach of obligations under the above provisions, there is no effective system of independent investigation as required by articles 2 and 3 of the Convention. The obligation to *initiate* an investigation where, for example, a civilian is killed by a member of the armed forces, falls on the military. The defect with the current system was demonstrated by the cases before the Divisional Court in *Al-Skeini*. The ultimate decision to initiate an investigation vests with the

151 Hague Regulations, Article 46 and Geneva Convention IV, Article 27

152 Geneva Convention IV, Article 146

153 UNHRC’s General Comment No.31 (29.3.04) (CCPR/C/21/Rev.1/Add.13)

154 1975 UN Declaration on Torture

155 Articles 4 and 8 of the Rome Statute of the International Criminal Court

Commanding Officer (“CO”) who would assess whether an incident fell within the Rules of Engagement (“RoE”) - which have never been disclosed. If the CO was satisfied that a soldier had acted lawfully and within the RoE, there was no need for an investigation by the Royal Military Police (Special Investigations Branch) (RMP(SIB)). Where the CO found the conduct fell outside the RoE, or where there was insufficient information, the matter was referred to the RMP for investigation who then report back to the chain of command. The lack of independence is just one of the problems inherent in the system of military investigations, which was highlighted in *Al-Skeini*. In some of the cases, following the start of the judicial review action, a review of the CO’s conclusion that the incidents had fallen within the RoE was found to be unsound and the cases were reopened for investigation by the RMP. In the case of Baha Mousa, the Divisional Court found that the investigation had not been prompt, open or effective and failed to sufficiently involve the family.¹⁵⁶

The procedural obligation under articles 2 and 3 of the Convention, which requires an independent, timely, open, and effective investigation, is therefore fundamental to ensuring compliance with not just substantive obligations under the Convention but also under international humanitarian law. The Convention further provides a mechanism of achieving accountability through domestic courts for victims of human rights abuses in circumstances where they would otherwise have no other means of redress.

Jurisdiction under article 1

Article 1 of the Convention provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”

In *Al-Skeini*, the Divisional Court concluded that jurisdiction under Article 1 is “essentially territorial.”¹⁵⁷ This was common ground between the parties – that jurisdiction is primarily territorial but that there are exceptions. However, the Divisional Court’s reasoning was based on a questionable interpretation of the well-known case of *Bankovic v Belgium*¹⁵⁸, which involved an action against NATO member states for the aerial bombing of a television station in Belgrade.

Firstly, *Bankovic*, was considered to be the “watershed” on the extra-territorial applicability

¹⁵⁶ paras 326 – 335, *Al-Skeini*, note 1

¹⁵⁷ note 1, para 245

¹⁵⁸ *Bankovic v Belgium* and 16 other Contracting States, Admissibility Decision, 12 December 2001

of the Convention on the basis that it was the first time that public international law was used to assist in interpreting Article 1. The court in *Bankovic* found that “from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial” and therefore, other bases of jurisdiction are “exceptional” and require “special justification.”¹⁵⁹ Secondly, the court found confirmation of this essentially territorial notion in the Convention’s travaux préparatoires¹⁶⁰ to demonstrate the exceptional character of extra-territorial jurisdiction by a contracting state as arising where there is:

- (i) *a case involving activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state as recognised under customary international law.*¹⁶¹ The Divisional Court found this to be the narrow exception of “personal jurisdiction,” that is, where a state agent exercises authority and control over persons or property abroad.
- (ii) *effective control of territory as a consequence of military occupation or through consent, invitation or acquiescence where the contracting state exercises all or some of the public powers normally to be exercised by that government.*¹⁶² The Divisional Court placed a regional restriction on this exception which can be described as the “effective control” exception.

These two exceptions will be dealt with in turn.

Personal Jurisdiction

There is a long line of cases on “personal jurisdiction” which is articulated by the Commission in *Cyprus v Turkey*¹⁶³:

“...authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.”¹⁶⁴

159 note 9, para 59

160 note 9, para 63

161 note 9, para 73

162 note 9, para 71

163 *Cyprus v Turkey* (unreported, App No 6780/74 and No 6950/75, 26.5.75)

164 note 14, para 8

This exception was relevant to the case of Baha Mousa who died in a British prison. The Divisional Court held that the Convention extended to the prison where Baha Mousa was detained but its reasoning greatly restricted the exception. It stated that:

“article 1 jurisdiction does not extend to a broad, world-wide extra-territorial personal jurisdiction arising from the exercise of authority by party states’ agents anywhere in the world, but only to an extra-territorial jurisdiction which is exceptional and limited and to be found in specific cases recognised in international law”¹⁶⁵

The court went on to consider such cases, which largely involved diplomatic or consular premises, vessels or aircrafts.¹⁶⁶ It concluded that:

“It is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v United Kingdom*, a prison.”

Although this was a welcome conclusion, the restrictive approach to personal jurisdiction leads to an undesirable result and is inconsistent with for example the approach taken by the Commission in *Cyprus v Turkey* (1975) where Turkish soldiers who had murdered, raped, detained, displaced and dispossessed individuals in Northern Cyprus were found to fall within Turkish jurisdiction. It is further inconsistent with the decision in *Ocalan v Turkey*¹⁶⁷ which involved the arrest of Mr Ocalan by Turkish security forces in Kenya on a Turkish aircraft. The Court in *Ocalan* did *not* refer to where the aircraft was registered, nor did it place emphasis upon Mr Ocalan being a Turkish citizen. Its decision was based on the *fact* that Mr Ocalan, once handed over to the Turkish officials, came under “effective Turkish authority”¹⁶⁸ Therefore, a narrow approach, as taken by the Divisional Court, limited to embassies and consulates, ships and aircrafts is not essential to the personal jurisdiction exception. Furthermore, Scheinn points out that such a narrow approach makes sense in the framework of public international law regarding the *permissibility* of a state exercising jurisdiction beyond its territory. It should not be relevant to “the legal consequences of the exercise of authority abroad, be it permissible or not.”¹⁶⁹ In respect of jurisdiction under the Convention, the focus should simply be on whether authority

165 note 1, para 269

166 e.g. *X v UK* 15.12.77, *W M v Denmark* 14.10.92, see paras 269 – 274 of Divisional Court’s judgment

167 *Ocalan v Turkey* (2003) 37 EHRR 10

168 note 18, para 93

169 Scheinn, “Extra-territorial Effect of the ICCPR” in Coomans and Kamminga

and control is exercised by a state agent over an individual.¹⁷⁰

Applying the above to our cases in Iraq, it is clear that if Turkish security forces exercising authority and control over an individual in Kenya fall within Turkish jurisdiction, British troops arresting and detaining an Iraqi civilian exercise authority and control over that individual and bring him within UK jurisdiction. However, arguably, why should this be different to British troops who do not arrest an Iraqi civilian but raid his home and shoot him or where troops are conducting a patrol and carrying out functions akin to policing? In such situations, if the Divisional Court's judgment is correct, as long as the British soldier did not arrest the Iraqi civilian, but simply shot him, UK jurisdiction would not extend. Such an outcome would be unacceptable.¹⁷¹

Effective control

This was particularly relevant in the first five cases. It was argued that British troops, through their military occupation of southern Iraq, exercised effective control over that territory. In addition, the UK, with the US, was responsible for administering and making law in Iraq through the Coalition Provisional Authority' (CPA) which was set up by the coalition partners in order to "exercise powers of government."¹⁷² The CPA acted as the administrative body for administrative decision-making and for issuing legislation.¹⁷³

However, the Divisional Court in *Al-Skeini*, through its interpretation of *Bankovic*, restricted the effective control exception to applying only within the territory of a state party, and the *espace juridique* (legal space) of the Convention. It relied on para 80 of *Bankovic*, which stated that the Convention is a "multi-lateral treaty operating, subject to art 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states...." It further went on to say that:

"the FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."

170 *Ocalan, Cyprus v Turkey* (1975)

171 This creates an incentive to shoot the individuals concerned, McGoldrick "Extra-territorial application of the International Covenant on Civil and Political Rights" in Coomans and Kamminga

172 8 May 2003 letter addressed to the president of the Security Council from US and UK permanent representatives to the UN.

173 *Al-Skeini*, note 1, paras 18 to 26

Following this, the Divisional Court took a narrow approach to *Bankovic* so as to limit the scope of Convention to only its “regional context,” that is, limited to the territory of a state party even where effective control exists. It observed that the ECHR had only been applied *so far* within the regional sphere of the party states to the Convention itself, subject to the *obiter* remarks in *Issa*¹⁷⁴ (considered below). The Divisional Court considered that this conclusion was further supported by the reference to the “regrettable vacuum” point, which arose in *Cyprus v Turkey*¹⁷⁵ and was referred to in *Bankovic*.¹⁷⁶ The Divisional Court stated that the reference to a “regrettable vacuum” in *Cyprus v Turkey* “was not directed to universalist ambitions for the Convention but to the entirely different situation where otherwise the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention which they had previously enjoyed.”¹⁷⁷ Furthermore, the Divisional Court considered that the express provision in article 56 for extension of jurisdiction to dependent territories by agreement, was further support for the argument that the Convention was not meant to apply throughout the world.¹⁷⁸

The Divisional Court’s reasoning is problematic. Firstly, as Wilde points out, the reference to “regional context” is not necessarily a reference to a territorial concept but could just as well refer to a regional grouping of states, irrespective of where they act.¹⁷⁹ This is further supported by Lawson who writes that saying the Convention was not *designed* to be applied throughout the world, does not mean that its application outside Europe is *excluded*.¹⁸⁰ The court has never said that jurisdiction under the Convention is *exclusively* territorial and the fact that it has only been applied *so far* within its regional sphere does not necessarily lead to the conclusion that it cannot extend beyond the territory of a state party. Such a conclusion would be incompatible with the notion that the Convention is a “living instrument”¹⁸¹ and means that breaches of human rights outside Europe remain unremedied – an extremely undesirable result at a time when military operations outside Europe are increasingly common.

Secondly, the Divisional Court was wrong in its approach to *Issa v Turkey*¹⁸² which was delivered a month before *Al-Skeini*. In *Issa* the applicants were the relatives of

174 para 249 of the judgment

175 (2002) 35 EHRR 30

176 *Bankovic*, note 9, para 80

177 note 1, para 190

178 note 1, para 190

179 “The ‘legal space’ or *espace juridique*’ of the European Convention on Human Rights and its relevance to extra-territorial state action” 2 *European Human Rights Law Review* (2005)

180 Lawson “Life After *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights” in Coomans and Kamminga

181 e.g. *Selmouni v France* (2000) 29 EHRR 403

182 Application no 31831/96, 16 November 2004

Iraqi shepherds who had been detained by Turkish armed forces conducting a military operation in northern Iraq. The bodies of the shepherds were found badly mutilated. The ECtHR found that the applicants had failed to establish the required standard of proof that the Turkish forces had conducted operations in the relevant area (para 81). However, before deciding this, it stated:

“The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, s 80).” (para 74)

Issa clearly does not seek to limit the effective control exception to only territory of contracting states and is the most recent Strasbourg judgment on the issue. The court considered that the relevant territory in northern Iraq would have been brought within the *espace juridique* of the Convention had the standard of proof for establishing sufficient control been satisfied. Arguably, therefore, *Issa* is not inconsistent with *Bankovic* if *espace juridique* is taken to mean territory to which jurisdiction under article 1 extends. Wilde further points out that the Divisional Court was wrong to dismiss paragraph 74 of *Issa* as *obiter*. The ECtHR needed to affirm the relevance of the legal test before applying it. Therefore, simply because the facts in *Issa* did not meet the legal test, the court’s statement on the meaning of that test does not become *obiter*. It was clearly relevant to the case before the Divisional Court.

Thirdly, the restriction of the effective control exception to the territory of a state party is inconsistent with the possible applicability of the personal jurisdiction exception to anywhere in the world. For example, *X v UK*¹⁸³ concerned actions of the British consulate in Jordan, and of course in *Ocalan v Turkey*, Turkish officials exercised authority and control in Kenya.

Fourthly, the “regrettable vacuum” point does not in fact assist the Divisional Court’s conclusion that the Convention does not extend beyond a state party’s territory. In *Loizidou v Turkey (Preliminary Objections)*¹⁸⁴ it was stated that:

“Bearing in mind the object and purpose of the Convention, the responsibility of a

183 (unreported, App No 7547/76, 15 December 1977)

184 (1995) 20 EHRR 99

Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.” (para 62)

Notably, the obligation to secure the rights and freedoms under the Convention derives from the *fact* of “control” and there is no mention of a regional restriction to only territory of a state party. This was confirmed by *Cyprus v Turkey (2001)* (para 77) where the court proceeded to say that if Turkey was not found responsible where it exercised effective overall control over northern Cyprus, a “regrettable vacuum” would result in the system of human rights protection for individuals who had previously enjoyed such protection (para 78). However, as Wilde points out, here the court is saying why a finding it has already made (based upon the fact of overall control) serves an important policy purpose. This is not the same as saying that the existence of a vacuum in a system of human rights protection is a prerequisite to establishing jurisdiction through effective control. The Divisional Court in *Al-Skeini* therefore incorrectly uses the “regrettable vacuum” point in support of its conclusion that the Convention has a regional restriction. Its interpretation of *Bankovic* is misleading. In *Bankovic*, the applicants were the ones who raised the vacuum point and the court responded by explaining that *Cyprus v Turkey (2001)* was concerned with a *specific type* of vacuum where the population resided in a state party. This was entirely different to the vacuum suggested by the applicants in *Bankovic* because the FRY was not a state party.¹⁸⁵

Finally, in light of the above, article 56 cannot be a determinative factor for concluding that there is a regional restriction to the Convention. If it were, it would undermine the “essentially” and not *exclusively* territorial nature of article 1 jurisdiction.

Conclusion

As has been suggested by Lawson¹⁸⁶, *Bankovic* was a political judgment, as arguably *Al-Skeini* may have been. However, where there is overall effective control which may arise through military occupation, there is no valid basis for restricting the applicability of the Convention outside the region. Admittedly, in such circumstances, there may be a fear of how a state party would secure all the Convention rights but arguably, if a state is found to have overall effective control of a territory, there is no reason why it should not have an obligation to secure all Convention rights. It is then up to the state to decide

185 note 28

186 note 27

whether it is necessary to derogate from derogable rights and whether it is proportionate to restrict any qualified rights. It may even be a solution to say that where international humanitarian and human rights law apply concurrently, human rights norms can be interpreted consistently with international humanitarian law.¹⁸⁷ However, *Al-Skeini* was about the absolute rights to life and freedom from torture. An argument that a state may not be able to secure all the rights under the Convention and possibly not be able to comply with all the procedural obligations under articles 2 and 3 is no valid reason for saying that jurisdiction cannot extend outside the region of Europe where effective control is found to exist. This would run contrary to the notion that human rights treaties are not just about rights but also duties and contracting states should not be able to avoid these when acting outside Europe.

187 the *lex specialis*, see Gillard, "International Humanitarian Law and Extra-territorial State Conduct" in Commans and Kamminga

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Charting the gradual emergence of a more robust level of minority protection: minority specific instruments and the European Union¹⁸⁸

Abstract

Following a brief discussion concerning the concept 'minority', this article analyses certain trends that can be gleaned from the supervision of minority specific instruments (or provisions) as well as the gradual development of a minority protection paradigm within the EU.¹⁸⁹ The supervisory system of the Framework Convention for the Protection of National Minorities (FCNM) will receive most attention, because it has developed the most extensive and most detailed body of relevant opinions concerning minority rights. Furthermore, it reveals remarkable developments regarding minority protection, through rather extensive and demanding interpretations of the ensuing State obligations which significantly reduce the at first sight almost boundless State discretion. At the same time, it seems important to discuss the latest views of the Human Rights Committee (HRC) concerning minority protection issues, some of which have elicited divergent interpretations among academics. While it would be far fetched to qualify developments regarding minority protection in the EU under the heading of 'minority specific instruments', they surely deserve attention. Arguably, the minority protection rhetoric is gradually expanding to the internal policy domain, which is reflected in the explicit recognition in the recently adopted Constitution of respect for minority rights as a foundational value of the EC. The final part of this article analyses the repercussions of the accession dynamic, with its attention for minority protection in the candidate countries, for both direct and more indirect channels of 'minority protection' within the EU.

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189 The relevant developments until 31 August 2004 are included in the analysis undertaken here

1. Introduction

It can hardly be denied that minority issues, minority protection and the accommodation of population diversity have been at the forefront of the international agenda during the last decade. The atrocious examples of the former Yugoslavia and Rwanda demonstrated only too well the importance of an adequate system of minority protection in order to prevent (and/or manage) ethnic conflict. Renewed initiatives pertaining to standards setting both at the intergovernmental and expert level¹⁹⁰ have been complimented by certain developments in the jurisprudence or quasi-jurisprudence of supervisory organs of both human rights and minority rights conventions.

Following a brief discussion concerning the concept 'minority', this article analyses certain trends that can be gleaned from the supervision of minority specific instruments (or provisions) as well as the gradual development of a minority protection paradigm within the EU.

It is generally accepted that non-discrimination in combination with individual human rights constitute essential elements of an adequate minority protection.¹⁹¹ The need for minority specific rights or so-called special measures attuned to the specific needs of minorities can be argued for on the basis of considerations concerning substantive equality and the right to identity of minorities. However, these 'special' rights remain rather contentious for governments. At the international level, this tends to result in minority specific provisions that are often not legally binding and always weakly formulated, leaving a considerable margin of appreciation to States.¹⁹² This margin of appreciation is positive in that it allows for the specific circumstances to be fully taken into account. However, it can also be abused by States that try to avoid any (meaningful) obligation. In this respect, it is to be welcomed that supervisory organs of minority rights provisions scrutinise the positions of the contracting States critically in order to safeguard adequate levels of minority protection.

In this contribution the supervisory system of the Framework Convention for the

190 In the Council of Europe the Framework Convention for the Protection of National Minorities was adopted in 1995, while at the invitation of the OSCE High Commissioner on National Minorities a group of experts has elaborated the 1996 Hague Recommendations regarding the Education Rights of National Minorities, the 1998 Oslo Recommendations regarding the Linguistic Rights of National Minorities, the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life and the 2003 Guidelines on the Use of Minority Languages in the Broadcast Media.

191 *Inter alia* Benoit-Rohmer, F., *The Minority Question in Europe: Towards a Coherent System of Protection of National Minorities*, Council of Europe, Strasbourg, 1996, p. 16.

192 For a more extensive discussion in this respect, see, *inter alia*, Henrard, K., *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, KLI, The Hague, 2000, pp. 8-11 and 218-233.

Protection of National Minorities (FCNM) will receive most attention, because it has developed the most extensive and most detailed body of relevant opinions concerning minority rights.

At the same time, it seems important to discuss the latest views of the Human Rights Committee (HRC) concerning minority protection issues, some of which have elicited divergent interpretations among academics. While it would be far fetched to qualify developments regarding minority protection in the EU under the heading of ‘minority specific instruments’, they surely deserve attention. Arguably, the minority protection rhetoric is gradually expanding to the internal policy domain.¹⁹³ The final part of this article analyses the repercussions of the accession dynamic, with its attention for minority protection in the candidate countries, for both direct and more indirect channels of ‘minority protection’ within the EU.

2. Definition of the concept ‘minority’

Discussing and evaluating levels of minority protection presupposes that the meaning of the concept ‘minority’ is clear. However, until the present day there is no generally accepted legal definition of the term in question.¹⁹⁴ Nevertheless, when scrutinising the various proposals of definition by academics and from within international organisations, a certain core of objective and subjective elements for such definition emerges.¹⁹⁵ While there is broad agreement about the requirement of stable ethnic, religious or linguistic characteristics which are different from those of the rest of the population, a numerical minority position, non-dominance and the wish to preserve their own cultural identity,¹⁹⁶ this is not the case concerning the nationality requirement.

The traditional understanding of minorities clearly included this nationality requirement (and/or the related requirement of ‘long-standing ties with the country of residence’). Several (if not most) States (and some academics) hold on to that, thus excluding (in

193 It seems important to clarify from the beginning that when talking about minority protection within the EU, this refers to the protection of minorities (and the related diversity) within the individual member States (see also Von Toggenburg, G. ‘Unity in Diversity: Some Thoughts on the New Motto of the Enlarged Union’, at www.cjiemn.org, p. 4). In other words, this article is concerned with the extent to which the Union is involved in the question how multicultural a State should be. This obviates the need to go into the far from straightforward discussion of the identification of a minority at EU level.

194 With the exception of the 1994 Convention of the Central European Initiative for the protection of minority rights (Article 1), not a single international legally binding document contains a definition of this concept, which is wrought with sensitivities. See also Meijknecht, A., *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia, Antwerp, 2002, p. 69.

195 See also Pentassuglia, G., *Minorities in International Law*, Council of Europe, Strasbourg, 2003, pp. 57-58.

196 It should be underscored that these discussions played in regard to both ‘national minority’ (Europe) and ‘ethnic (...) minority’ (UN). For a more in depth discussion, which cannot be fully repeated here, see Henrard, *op.cit.* (note 3), pp. 30-48.

principle) so called ‘new’ or immigrant minorities.¹⁹⁷ However, a number of critical remarks can be made about this nationality requirement: not only can nationality legislation too easily be manipulated by States, the requirement is particularly problematic as regards the Roma population and in case of State succession.¹⁹⁸ Furthermore, even pure textual and contextual interpretations of minority rights instruments do not justify such a requirement.¹⁹⁹ The Human Rights Committee in its General Comment on Article 27 ICCPR, the most basic minority rights provision in international law, has resolutely rejected the nationality requirement.²⁰⁰ In view of the dynamic nature of the field,²⁰¹ it seems wise also to include developments regarding non-nationals in this analysis of the latest developments regarding minority protection.

Secondly, even though there is considerable disagreement in this regard, cogent reasons can be put forward why minorities should not only be defined at State level. As the European Commission for Democracy through Law (Venice Commission) of the Council of Europe has acknowledged,²⁰² it is essential to also consider those levels of sub-State government that have competencies of relevance to minorities.

Finally, as was fully argued elsewhere, the adjectives ‘national’ and ‘ethnic, religious or linguistic’ can be understood as covering more or less the same load.²⁰³ Hence, they are used interchangeably here. Admittedly, since the concept ‘national minority’ dominates European parlour on minority protection, that concept features more often.

While there does not seem to be an agreement in reach, *inter alia* concerning the vexed question whether or not the nationality requirement is constitutive for a ‘minority’, various international organisations seem to opt for a more pragmatic, flexible approach.²⁰⁴

197 See also *infra* when discussing the scope *ratione materiae* of the Framework Convention for the Protection of National Minorities. It should be highlighted that these discussions played in regard to both ‘national minority’ (Europe) and ‘ethnic (...) minority’ (UN).

198 Henrard, *op.cit.* (note 3), pp. 39-40.

199 Pentassuglia, *op.cit.* (note 6), pp. 59-62.

200 Human Rights Committee, General Comment on Article 27 ICCPR, UN Doc. HRI/GEN/1/Rev. 1, at 38, para. 5.2.

201 See also the various contributions in: Bakker, Edwin and Bomers, Jeroen (eds), *New Minorities: Inclusion and Equality (proceedings of a roundtable conference on October 20, 2003)*, Nederlands Helsinki Committee, The Hague, 2003.

202 Venice Commission, *Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium*, March 2002, CDL-AD (2002) 1. See also Thornberry, P. and Martin Estebanez, M.A., *Minority Rights in Europe*, Council of Europe, Strasbourg, 2004, pp. 93 and 95.

203 Henrard, *op.cit.* (note 3), pp. 53-55. Certain arguments were put forward that ‘national minority’ would have an extra dimension as compared to ‘ethnic minority’. Nevertheless, analogous discussions materialised about and similar definitions were put forward of these concepts in the framework of international organisations. See also Pentassuglia, *op.cit.* (note 6), p. 63; Thornberry and Martin Estebanez, *op.cit.* (note 13), pp. 93-94.

204 *Inter alia*, Henrard, *op.cit.* (note 3), pp. 24, 27-30; Thornberry and Martin Estebanez, *op.cit.* (note 13), p. 93.

This makes it possible to continue the development and refinement of ‘minority rights’ notwithstanding the absence of a formally binding definition. Furthermore, several working definitions are being used as point of departure in legal literature concerning minorities.²⁰⁵

3. Developments as regards minority specific Instruments

3.1. The Framework Convention for the Protection of National Minorities

Without denying the importance of the ongoing work by the UN Working Group on Minorities and the manifold working papers adopted by this group, the developments concerning the implementation of the Council of Europe’s Framework Convention for the Protection of National Minorities are undoubtedly more important as it concerns the first international treaty, with a multilateral, general protection regime for minorities.²⁰⁶

3.1.1. Procedural Issues: the Monitoring Mechanism and Review of the Annual Activity Reports of the AC

In order to properly evaluate the contribution of the Framework Convention (FCNM) to minority protection (in general and in specific States), it is essential to assess its monitoring mechanism and the way in which the rather vague terms of the Convention are interpreted.²⁰⁷ Indeed, without wanting to deny the importance of the adoption of a legally binding instrument on minority protection,²⁰⁸ it should be noted that the FCNM mainly consists of programmatic provisions, which leave considerable discretion to the State parties.²⁰⁹ Furthermore, the Convention omits a definition of the concept ‘national minority’, seemingly leaving the determination of its scope *ratione personae* to the contracting parties.²¹⁰

205 *Inter alia*, Élias Dimitras, P., ‘Recognition of Minorities in Europe: Protecting Rights and Dignity’, MRG Briefing, at www.mrg.org, p. 1.

206 Benoit-Rohmer, F., ‘Le Conseil de l’Europe et les Minorités Nationales’, in: Malfliet, K. and Laenen, R. (eds), *Minority Policy in Central and Eastern Europe: The Link Between Domestic Policy, Foreign Policy and European Integration*, KULeuven, Leuven, 1998, p. 145. For an in-depth discussion of the Framework Convention, see Klebes, H., ‘The Council of Europe’s Framework Convention for the Protection of National Minorities – Introduction’, *Human Rights Law Journal*, Vol. 16, 1995, pp. 92-98.

207 See also Steketee, E., ‘The Framework Convention: A Piece of Art or a Tool of Action’, *International Journal of Minority and Group Rights*, Vol. 8, No. 1, 2001, p. 11.

208 See also *ibidem*, p. 3.

209 Alfredsson, G., ‘A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Process’, *International Journal of Minority and Group Rights*, Vol. 7, No. 4, 2000, p. 293; Phillips, A., *The Framework Convention for the Protection of National Minorities: A Policy Analysis*, MRG working paper, London, p. 3.

210 Paragraph 4 of the Explanatory Memorandum to the Framework Convention explains that no consensus could

The Framework Convention itself determines the broad lines of the monitoring mechanism in Articles 24 to 26. These provisions merely establish that the Committee of Ministers of the Council of Europe is ultimately responsible for the monitoring exercise, which is limited to a periodical review of State reports, excluding any judicial or quasi-judicial complaint procedure. The periodic State reports have to contain full information on the legislative and other measures adopted by State parties, in order to give effect to the Convention. The fact that it is a political body that has the final say concerning the review of these State reports, seems to limit the effectiveness of the procedure.

The provisions further stipulate that an Advisory Committee, consisting of experts in the field of minority protection will assist the Committee of Ministers in this activity. As the determination of the further details pertaining to this reporting mechanism are also left to the Committee of Ministers, this body established in its 1997 Resolution (97) 10, *inter alia*, the rules pertaining to the composition of the Advisory Committee. Importantly, these Rules specify that members of the Advisory Committee 'shall serve in their individual capacity, shall be independent and impartial...'²¹¹ This requirement significantly contributes to the legitimacy of the Advisory Committee and its monitoring work, carrying the potential to strengthen the credibility of the supervision.²¹²

After consideration of the periodic State reports, the Advisory Committee transmits its opinions to the Committee of Ministers.²¹³ Subsequently, the Committee of Ministers adopts conclusions concerning the adequacy of the measures taken by the State party concerned to give effect to the Framework Convention. In addition, the Committee of Ministers has the possibility to formulate recommendations in respect of the State party concerned and even to set a time limit for the submission of information on the implementation of these recommendations.²¹⁴ However, no real sanctions can be imposed on contracting States for non-compliance with their obligations under the Convention.²¹⁵

Several issues pertaining to the actual practice of the monitoring mechanism deserve special attention. Firstly, the degree to which the Committee of Ministers relies on and follows the opinion of the Advisory Committee, will be important, as the latter consist of independent experts, supposedly not restricted by political sensitivities. Related to

be reached on the interpretation of the term national minorities.

211 Resolution (97) 10, rule 6.

212 Pentassuglia, G., 'Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – with special reference to the role of the Advisory Committee', *International Journal of Minority and Group Rights*, Vol. 6, No. 4, 1999, p. 431.

213 Resolution (97) 10, rule 23.

214 *Ibidem*, rule 24.

215 Alfredsson, *loc.cit.* (note 20), pp. 295-297.

this is the question how the Advisory Committee interprets the Convention, the more concrete scope of the State obligations and how it gives shape to its own responsibilities in this respect. Finally, the way in which the Committee of Ministers will make use of its possibility to adopt recommendations and monitor their follow-up, will also have a considerable impact on the efficiency and impact of the overall supervisory mechanism of the FCNM. These issues are evaluated on the basis of a study of the various annual activity reports of the AC and the country opinions that have been adopted and made public by August 2004.

By August 2004, the Advisory Committee had released *four activity reports* covering respectively the period 1 June 1998 to 31 May 1999, the period between 1 June 1999 to 31 October 2000, the period between 1 November 2000 and May 2002, and finally the period between 1 June 2002 and 31 May 2004. Here, those statements in the reports will be focused upon which throw light on any of the above-mentioned issues.

The first Activity Report mainly contains a lot of information about the monitoring procedure. Of specific concern to this article is that the Committee already shows its determination to contribute to the effectiveness of the procedure. It reveals indeed its intention to use all the various avenues to obtain relevant information for its monitoring task that are open to it, as it notified the Council of Ministers to invite information from NGOs, representatives of civil society, national human rights institutions, and the like.²¹⁶

The second Activity Report sheds further light on the way in which the AC gives shape to its own responsibilities in the monitoring procedure. It is to be welcomed that the AC does not limit its supervision to legislative measures that have been adopted or amended. It specifically urges States to provide also information on the implementation of the relevant norms in practice. The Activity Report also reveals that the practice to include country visits in the process of evaluating a country report, which has considerable potential to contribute to the effectiveness of the supervisory mechanism, took root from the very beginning.²¹⁷

The third Activity Report contains particularly important information about the first issue, in that it highlights that the conclusions and recommendations of the Committee of Ministers have consistently reflected the main message of the corresponding

216 AC, *First Activity Report covering the period from 1 June 1998 to 31 May 1999*, www.humanrights.coe.int/minorities, para. 18.

217 AC, *Second Activity Report covering the period from 1 June 1999 to 31 October 2000*, www.humanrights.coe.int/minorities, para. 9. See also Phillips, *op.cit.* (note 20), pp. 6-7.

Opinions of the Advisory Committee.²¹⁸ In view of the political sensitivities inherent in minority protection issues, this reliance on the opinion of an independent expert body is remarkable and undoubtedly enhances the value and impact of the monitoring mechanism and its contribution to minority protection.²¹⁹

Importantly, the *Fourth Activity Report* confirms that the Resolutions of the Committee of Ministers continue to take up the main message of the corresponding Opinions of the AC. This is obviously to be welcomed, as it consolidates the legitimacy of the monitoring mechanism.²²⁰ Furthermore, the Committee of Ministers has taken various procedural decisions that help the AC to operate more effectively. The most important ones are the decision authorising the AC to commence its monitoring without a State report in case of persistent delays in submission, the decision confirming the suggested revised outline for the State reports of the second cycle and the mandate enabling the AC to increase its contacts with civil society by organising meetings with NGOs and other independent sources, also outside country visits.²²¹ By contributing to the reduction of delays in the monitoring procedure and the accumulation of ‘independent’ information by the AC, these decisions clearly enhance the quality, strength and smoothness of the monitoring process,²²² which is bound to have positive repercussions for the resulting level of minority protection.

Secondly, regarding its activities concerning the monitoring of the regular State reports, the AC seems dedicated to make the overall monitoring procedure ever more efficient and effective. In order, *inter alia*, to address the sometimes significant reporting delays which hampered the monitoring process during the nearly completed first cycle, the AC has revised and streamlined the procedure established for the second cycle.²²³ It should also be highlighted that the AC has taken various initiatives to improve the reporting procedure for the second cycle (in the form of suggestions to the AC in its new composition²²⁴), some of which are meant to speed up the process, others have also more substantive intentions. When it announces that State visits will focus more

218 See also AC, *Third Activity Report covering the period from 1 November 2000 to 31 May 2002*, www.humanrights.coe.int/minorities, paras 25-26. Cf. Phillips, *op.cit.* (note 20), pp. 7-8.

219 See also professor Thornberry in his conclusions of the Conference ‘Filling the Frame’ (marking the 5th anniversary of the entry into force of the Framework Convention), reprinted in paragraph 14 of AC, *Fourth Activity Report covering the period from 1 June 2002 to 31 May 2004*, www.coe.int/T/E/human_rights/minorities.

220 AC, *Fourth Activity Report*, *supra* note 30, para. 15.

221 *Ibidem*, para. 17.

222 See also Pentassuglia, G., ‘On the Models of Minority Rights Supervision in Europe and How they Affect a Changing Concept of Sovereignty’, *European Yearbook of Minority Issues*, Vol. 1, Martinus Nijhoff Publishers, Leiden/Boston, 2001/2002, p. 53.

223 AC, *Fourth Activity Report*, *supra* note 30, paras 7 and 21-24.

224 See also *ibidem*, para. 23.

on specific issues rather than repeating the general approach of the first cycle,²²⁵ it is expected and welcomed that these specific issues are those identified as problematic in the resolutions of the first cycle. This would obviously further enhance the follow-up and hopefully the actual levels of implementation of the resolutions at State level. The AC has in any event already improved the impact of these visits by extending their coverage also to the regions where national minorities reside in substantial numbers. Obviously, this enhances not only the amount of information that can be obtained from these minorities themselves, but also the contacts with regional authorities that are often in a key position to implement the Framework Convention!²²⁶

Another very important development pertains to the follow-up activities related to the country specific resolutions.²²⁷ The Committee of Ministers has explicitly given the AC further competencies and even suggested it to follow-up its Resolutions through a regular dialogue with the State concerned. While the AC has organised various follow-up seminars *in situ*, which proved to be useful tools for dialogue between the reporting cycles not only with the States, but also with civil society at large, it underscores the need for developing also other and new ways of ensuring follow-up and continuous dialogue with the State parties.

A final positive and noteworthy development concerns the attempt of the Advisory Committee to strengthen the coherence and synergies,²²⁸ not only with other Council of Europe bodies, but also with other international organisations, since this is bound to strengthen the levels of minority protection both within the Council of Europe and more generally. It can in any event be noted that the AC increasingly often included in its Opinions references to the reports by the European Center on Racism and Intolerance, and to the findings of the Committee of Experts of the Charter for Regional or Minority Languages, the other minority protection instrument of the Council of Europe.²²⁹ The AC had furthermore constructive contacts with representatives of the OSCE and the EU during country visits or follow-up seminars, which offers the opportunity of exchange of relevant information if not of more in depth discussions.²³⁰ The AC notes with satisfaction that its findings were a major reference in many activities organised

225 *Ibidem*, para. 23.

226 *Ibidem*, para. 11.

227 *Ibidem*, paras 18-20.

228 For a more in-depth study of these emerging synergies, see Henrard, K., 'An Ever Increasing Synergy towards a stronger level of minority protection between minority specific and non-specific instruments', to be published in the *European Yearbook on Minority Issues*, Vol. 3, Martinus Nijhoff Publisher, Leiden/Boston, 2003/2004.

229 AC, *Fourth Activity Report*, *supra* note 30, para. 29. The AC also acknowledges the important role of the Parliamentary Assembly of the Council of Europe as catalyst for further ratifications of the Framework Convention. (*inter alia*, Recommendation 1623 (2003), para. 32).

230 The *Fourth Activity Report*, however, does not specify what these 'contacts' have implied (*supra* note 30, para. 34).

on national minorities in other international organisations, and highlights in this respect the synergy with the UN Working Group on Minorities and particularly the attention devoted to the FCNM by the European Commission in its regular reports on the candidate countries. The AC arguably envisages deeper levels of synergy, as it remarks that the 'Framework Convention's monitoring process and its results could be followed and used more consistently by the European Commission and other relevant EU structures.'²³¹

As the AC has itself acknowledged, the opinions became increasingly substantial and detailed. This seems to indicate that the momentum reached so far will be maintained (and enhanced) as these opinions reflect an ever critical and in depth scrutiny of the reports.²³² Nevertheless, it remains to be seen how State practice will develop in response to the Conclusions and Recommendations of the Committee of Ministers. The second cycle of monitoring which starts in September 2004, should bring more clarity in this respect.

3.1.2. More Substantive Issues: Review of the Country Specific Opinions of the AC

As the ensuing analysis of the opinions will confirm, the FCNM system knows several constraints, notwithstanding the *de facto* predominance of the AC in the monitoring procedure. Monitoring can in any event not lead to binding decisions for the State parties, which have undeniably a certain margin of appreciation, so the AC cannot impose specific techniques or measures.²³³ However, once States have made a certain choice, the AC is rather critical as to its actual functioning and effects.²³⁴ In this respect, it identifies possible improvements, each time underlining the importance of involving the minorities concerned (consultations, *etc.*). It can furthermore be noted that while the AC is not oblivious to possible financial constraints of States, it continues to strive for the best possible level of minority protection.

231 *Ibidem*, para. 35.

232 AC, *Fourth Activity Report*, *supra* note 30, para. 9. At the same time, the Committee acknowledges that for reasons of accessibility and digestibility care should be taken not to make these opinions too bulky (*idem*).

233 The success of certain techniques obviously also depends on the specific (demographic) situation in the State. The AC has, for example, welcomed the adapted constituency boundaries and reserved seats in Ukraine (*Opinion on Ukraine*, 1 March 2002, at www.humanrights.coe.int/ minorities, paras 69-70), while approving the choice of a lower threshold and consultative committee for Danes in Germany to offset the lack of direct parliamentary representation (*Opinion on Germany*, 1 March 2002, www.humanrights.coe.int/minorities, para. 63). See also Alfredsson, *loc.cit.* (note 20), p. 301; Pentassuglia, *loc.cit.* (note 23), p. 422.

234 Verstichel, A., 'Elaborating a Catalogue of Best Practices of Effective Participation of National Minorities', to be published in the *European Yearbook on Minority Issues*, Vol. 3, Martinus Nijhoff Publishers, Leiden/Boston, 2003/2004, pp. 20-24.

Scope Ratione Personae of the FCNM

It should first of all be underlined that the Advisory Committee explicitly reserves for itself the right to screen critically the position taken by the contracting States regarding the determination of the scope *ratione personae* of the Framework Convention, concomitantly reducing their wide margin of appreciation. Typically, the AC:

‘underlines that in the absence of a definition in the Framework Convention itself, the Parties must examine the personal scope of application to be given to the Framework Convention within their country. (...) Whereas the Advisory Committee notes on the one hand that Parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, it notes on the other hand that this must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions...’²³⁵

The latter point is exemplified by the Opinion on Ukraine, where the Committee approves of the generous recognition of the 130 ‘nationalities’, but questions the limited recognition of the separate identity of the so-called sub-ethnic groups of the Ukrainian people.²³⁶ Similarly, in its Opinion on Moldova, the AC noted the privileged status of the Russian minority and urges the State to ‘ensure that appropriate attention is paid to the needs of all persons belonging to national minorities living in Moldova.’²³⁷ The AC in any event calls on States to eliminate legal uncertainties as to what is understood by ‘national minority’.²³⁸

The Committee also addresses the tricky *question of indigenous peoples and their status* in terms of minority rights. In line with the position of the Human Rights Committee (HRC) in terms of Article 27 ICCPR (see *infra*), it adopts an inclusive approach, while calming the fears of indigenous groups (like the Sami in Norway) that they might forego some of their rights as indigenous people. According to the AC:

‘the recognition of a group of persons as constituting an indigenous people does not exclude persons belonging to that group from benefiting from the

235 See, *inter alia*, AC, *Opinion on Norway*, 12 September 2002, ACFC/INF/OP/I(2003)003, paras 16-18; AC, *Opinion on Moldova*, 1 March 2002, ACFC/INF/OP/I(2003)002, paras 17-19.

236 AC, *Opinion on Ukraine*, *supra* note 44, para. 16.

237 *Ibidem*, para. 25.

238 See, *inter alia*, AC, *Opinion on Albania*, 18 May 2002, ACFC/INF/OP/I(2003)001, para. 19.

protection afforded by the Framework Convention. (...) the Framework Convention remains available to the Sami should persons belonging to this indigenous people wish to rely on the protection provided therein.²³⁹

The AC goes on to emphasise that the FCNM and the treaties designed for indigenous people should not be construed as mutually exclusive regimes.

In reaction to State parties (*inter alia* Malta) that indicate not to have any national minority at all, the Advisory Committee is sceptical. Although it acknowledges that there are probably not many minorities in the respective territories, it does point to the presence of various religious groups and immigrants.²⁴⁰ The reference to immigrants warrants a more in depth analysis of the AC's position regarding the nationality requirement for members belonging to minorities.

While initially the AC did not have an outspoken position on the 'traditional' nationality requirement,²⁴¹ which is also reflected in certain of the declarations of State parties to the Framework Convention,²⁴² it increasingly urges States not to limit their minority protection systems to nationals. Arguably, the AC developed its opinion in this respect especially in regard to the tricky question of State succession.²⁴³ The Committee indeed noted that for Estonia a nationality requirement does not seem suited, as it is a relatively new State and the problem of State succession should be taken into account.²⁴⁴ In its opinion on Lithuania the link between the regime to acquire the Lithuanian nationality on the one hand and a definition of national minority which would include a nationality requirement on the other hand, clearly came to the fore.²⁴⁵ While the Committee did not consider the nationality requirement for minorities problematic, because of the very flexible approach in the nationality legislation, the fact that the new law on citizenship is more restrictive, leads it to call on the authorities to ensure that the new law on national minorities would take this into account so as not to affect adversely the personal cope of

239 AC, *Opinion on Norway*, *supra* note 46, para. 19.

240 AC, *Opinion on Malta*, *Opinion on Liechtenstein* and *Opinion on San Marino*, all three adopted 30 November 2000, www.humanrights.coe.int/minorities, respectively paras 13-14, para. 13 and paras 13-14.

241 The definition of the concept minority by Capotorti, in his study on Article 27 ICCPR (Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1/1991), is still used as point of departure in most discussions in this regard and clearly includes the nationality requirement.

242 The nationality requirement features explicitly in the declarations of Austria, Estonia, Germany, Luxembourg, Poland and Switzerland, see www.humanrights.coe.int/minorities.

243 Various academics criticise the nationality requirement especially in situations of State succession, see, *inter alia*, Henrard, *op.cit.* (note 3), pp. 40-41.

244 AC, *Opinion on Estonia*, 14 September 2001, www.humanrights.coe.int/minorities, paras 16-17. See also the opinion on Ukraine, *supra* note 47, para. 17.

245 See also the various contributions in: Bakker and Bomers (eds), *op.cit.* (note 12).

application of the FCNM.²⁴⁶

Nevertheless, the AC does not limit its calls for a more flexible approach to a nationality requirement for minorities to newly emerged States. Indeed, in its opinion on Switzerland, the Committee opines in regard to the Swiss nationality requirement that ‘it would be possible to consider the inclusion of persons belonging to other groups, including non citizens where appropriate, in the application of the Framework Convention on an article-by-article basis.’²⁴⁷ It should be noted that the words ‘where appropriate’ seem to revert to the typical careful language to be found in minority protection instruments, providing a certain margin of appreciation for States.

Finally, in its opinions on Finland and Switzerland, the Advisory Committee appears to accept that *minorities should also be identified at the regional level* and not only at the State level, depending on the respective competencies of these sub-State levels of government.²⁴⁸ This progressive attitude, as compared to the approach of the Human Rights Committee in its *Ballantyne et al. vs Canada* view,²⁴⁹ is to be welcomed because it substantially increases the protection of those population groups that are minorities in a certain region but constitute the majority nation-wide. Furthermore, this approach finally opens possibilities for an adequate protection of so-called double minorities, which are population groups that constitute a minority within a region where the majority is a minority at the national level.²⁵⁰

Full, Real Equality and Special Measures for Minorities

When studying the country specific opinions of the Advisory Committee, it cannot be denied that a recurring feature of the opinions of the AC is the emphasis on full, real equality, which would require the adoption and implementation of special measures for persons belonging to national minorities.²⁵¹ In addition to the overarching theme of

246 AC, *Opinion on Lithuania*, 21 February 2003, ACFC/IINF/OP/I (2003) 008, paras 20-24.

247 AC, *Opinion on Switzerland*, 20 February 2003, ACFC/INF/OP/I(2003) 007, para. 24.

248 AC, *Advisory Opinion on Finland*, 22 September 2000, www.humanrights.coe.int/minorities, para. 17; AC, *Opinion on Switzerland*, *supra* note 61, para. 21.

249 HRC, *Ballantyne et al. vs Canada*, Communications 359/1989 and 385/1989, 31 March 1993.

250 See also the 2003 opinion of the Council of Europe’s Venice Commission concerning the Identification of Minorities in Belgium.

251 *Inter alia*, AC, *Opinion on Switzerland*, *supra* note 58, para. 87; AC, *Opinion on Azerbaijan*, 22 May 2003, ACFC/IINF/OP/I(2004)001, para. 28. In its opinion on Austria, 16 May 2002, at www.humanrights.coe.int/minorities, the Committee underlined that even for very small groups a considerable amount of determined measures on the part of the competent authorities is required to help them to preserve their identity (para. 82). The latter opinions reveal a trend to demand further, more far-reaching positive State action and State support, also of a financial nature. See, *inter alia*, AC, *Opinion on Norway*, *supra* note 46, para. 77; AC, *Opinion on Armenia*, 16 May 2002, ACFC/INF/OP/I (2003)001, para. 93.

substantive equality, other issues that are of similar importance and feature regularly in the AC's opinions, especially the last ones, are the demands for clear, sufficiently detailed legislative frameworks concerning the issues addressed by the Convention, while sufficient attention should be given to bringing actual practice in line with the legal rules.²⁵² The AC underscores indeed the importance of having legislative frameworks with sufficiently detailed and clear rules so as to avoid too much discretion for authorities.²⁵³ Obviously, while the AC necessarily concedes a certain margin of appreciation to States by not being overly directive, it guards simultaneously that this margin is not too extensive.

Concerning specific provisions of the Framework Convention, the Advisory Committee shows itself to be rather demanding, clearly going beyond a minimalist reading of the FCNM's open-ended formulations. When reading the opinions of the AC, several recurrent issues emerge, more specifically concerning language rights, education rights, rights pertaining to media and participatory rights. Interestingly, these themes were also identified as such by the OSCE's High Commissioner on National Minorities, who commissioned expert recommendations in the related fields.²⁵⁴ Consequently, it seems acceptable to focus the following analysis on the above-mentioned issues, while including an occasional reference to other particularly noteworthy findings of the AC.

Language Rights

As regards language rights, regulations pertaining language use *vis-à-vis* public authorities are carefully reviewed, as the Advisory Committee does not shy away from criticism regarding numerical thresholds used.²⁵⁵ It even promotes the possibility of giving minority languages an official status at sub-State level in case of strong territorial concentrations in this respect.²⁵⁶ It is furthermore commendable that the AC emphasises that the actual implementation of the rules requires accompanying measures in recruiting staff and providing language training.²⁵⁷ The latter are indeed essential to improve the actual implementation and realisation of the language rights concerned.

Underlining the increasing prominence of positive State obligations, the Committee

252 *Inter alia*, AC, *Opinion on Serbia and Montenegro*, 27 November 2003, ACFC/INF/OP/I (2004)002, para. 33; AC, *Opinion on Lithuania*, *supra* note 57, para. 73.

253 *Inter alia*, AC, *Opinion on Armenia*, *supra* note 62, para. 58; AC, *Opinion on Azerbaijan*, *supra* note 62, para. 24; AC, *Opinion on Norway*, *supra* note 46, para. 72; AC, *Opinion on Serbia and Montenegro*, *supra* note 63, paras 69-70.

254 **For an enumeration of these recommendations, see *supra* note 1.** While these recommendations are not legally binding, they do carry some *de facto* authority, as they have been made by independent experts on the basis of the existing human and minority rights (admittedly interpreted in a progressive way).

255 *Inter alia*, AC, *Opinion on Estonia*, *supra* note 55, para. 40.

256 AC, *Opinion on Croatia*, 6 April 2001, www.humanrights.coe.int/minorities, para. 44.

257 AC, *Opinion on Romania*, 6 April 2001, www.humanrights.coe.int/minorities, para. 50.

goes as far as urging States to check proactively the needs (on the part of minorities) concerning language use *vis-à-vis* public authorities.²⁵⁸

Mother Tongue Education

The importance of mother tongue education for members of national minorities is extensively acknowledged and promoted, with special attention to bilingual teaching in this respect.²⁵⁹ While the AC notes with satisfaction the achievements in this regard of Albania for its Greek and Macedonian population, it criticises the lack of education in Roma and Vlach and calls on the authorities to examine and cater for the needs of the latter communities as well.²⁶⁰ A similar critical attitude can be noticed in the opinion on Norway concerning minorities other than the Kven and Sami. Interestingly, the AC clarifies here that ‘the guarantees of Article 14 are not conditioned upon lack of knowledge of the state language, the authorities should examine to what extent there is demand amongst the national minorities (...) to receive instruction in or of their language, and depending on the results improve the current legal and practical situation if necessary.’²⁶¹ The Committee seems to consider the needs and wishes expressed by the minorities as quasi determinant of the State obligation, but the closing ‘if necessary’ re-acknowledges the inevitable State discretion in this regard. Nevertheless, its opinion on the UK arguably demonstrates that the AC thinks it appropriate or even desirable for the contracting States to promote mother tongue education and the teaching of minority languages, even if it is not a rallying point for the minorities themselves.²⁶² Furthermore, and in order to fully realise the right to mother tongue education, the AC highlights the need for supporting measures such as minority language textbooks and suitably qualified teachers.²⁶³

The Media and Minorities

As regards the media the Advisory Committee scrutinises several dimensions, including the coverage of minority languages in the public media, sufficient programs on minorities and their cultures, languages *etc.*, and their presence in private media. Also in this regard the Committee interprets the demands flowing from the Framework Convention for the Protection of National Minorities quite extensively, and even encourages the States

258 AC, *Opinion on Norway*, *supra* note 46, para. 89; AC, *Opinion on Albania*, 2003, ACFC/INF/OP I (2003)004, paras 52-53.

259 See, *inter alia*, AC, *Opinion on Switzerland*, *supra* note 58, para. 69.

260 AC, *Opinion Albania*, *supra* note 49, paras 65-66.

261 AC, *Opinion on Norway*, *supra* note 46, para. 59.

262 AC, *Opinion on the UK*, 30 November 2001, www.humanrights.coe.int/minorities, para. 91.

263 *Inter alia* AC, *Opinion on Romania*, *supra* note 68, paras 46-48.

to support minorities in their requests for broadcasting licenses, when they do not use an opportunity out of their own motion.²⁶⁴ Similarly, Switzerland is encouraged to examine possibilities for securing sufficient funding for the ailing only Romanche daily newspaper, notwithstanding the fact that substantial public subsidies are already granted to the Romanche press agency.²⁶⁵ In its assessment whether the different minority languages get each a fair share of the broadcasting time, the AC takes into account whether the timeslots are advantageous or not.²⁶⁶ The special attention of the AC for the actual practice and realisation of minority rights is highlighted by its demand that the Swedish authorities ‘monitor carefully that the (...) obligation of public service broadcasting companies to increase their efforts in this sphere is implemented and to take appropriate measures if this obligation is not honored.’²⁶⁷

The Right to Effective Participation of Persons Belonging to National Minorities

Article 15’s right to effective participation of persons belonging to national minorities, closely related to the internal dimension of the right to self-determination,²⁶⁸ can be interpreted to cover a broad variety of issues, including questions of (territorial or personal) autonomy and local self government, consultation mechanisms of various kinds and several forms of representation of minorities in the public sphere. While effective participation is not necessarily limited to public affairs, and can also pertain to cultural, social, and economic life, most studies and also most opinions of the AC are focused on the former.²⁶⁹ Without denying the importance of the other areas of the public domain, the analysis here will be limited to participation in public affairs.

The AC seems to consider the *participation of minorities in decision-making processes* as a precondition for a sound minority protection, as is exemplified by the experiences in Romania.²⁷⁰ The AC clearly voices its disapproval of a *de facto* under-representation or even absence of members of minorities in parliament or a government body. In these circumstances it seems to expect from States the adoption of measures facilitating access by such persons to the various branches of power.²⁷¹ It suggests in this respect to Serbia and Montenegro to exempt national minorities from the threshold requirement in its

264 AC, *Opinion on Moldova*, *supra* note 46, para. 51.

265 AC, *Opinion on Switzerland*, *supra* note 58, para. 49.

266 AC, *Opinion on Estonia*, *supra* note 55, para. 37; AC, *Opinion on Finland*, *supra* note 59, para. 31; AC, *Opinion on Croatia*, *supra* note 67, para. 41; AC, *Opinion on Moldova*, *supra* note 46, para. 52.

267 AC, *Opinion on Sweden*, 25 August 2002, ACFC/INF/OP/I(2003)006, para. 43.

268 Henrard, *op.cit.* (note 3), pp. 306-308.

269 See also Verstichel, *loc.cit.* (note 45), pp. 16-17.

270 AC, *Opinion on Romania*, *supra* note 68, para. 65.

271 AC, *Opinion on Armenia*, *supra* note 62, para. 77.

electoral legislation, because the participation of minorities could otherwise be negatively affected.²⁷² It is furthermore interesting to note that in line with the decisions of both the European Court of Human Rights (ECHR)²⁷³ and the Human Rights Committee (HRC)²⁷⁴ pertaining to Latvia, the Advisory Committee expresses grave concern in its opinion on Estonia because of the language requirements²⁷⁵ for candidates of (local) elections.²⁷⁶

A related point is exemplified by its opinion on the United Kingdom, which reveals that the AC considers a 'fair' (mirror?) *representation of minorities in the civil service and public administration* highly desirable in terms of Article 15. The AC criticises not only the low proportion of ethnic minorities in the House of Parliament, the devolved Assemblies and local councils, but also their under-representation in a wide range of public sector services. In the latter respect, it singles out the need for progress in the recruitment of ethnic minorities in the police service, expecting the States to adopt the necessary measures to realise this.²⁷⁷ Other opinions express similar concerns for the prison service, the army and the judiciary.²⁷⁸

In addition to these more direct forms of participation,²⁷⁹ the AC underlines throughout its work (also concerning other articles of the FCNM) the *need to consult the minority groups concerns in order to ensure an effective dialogue*. While consultation does not equal the possibility to determine the ultimate decision, the AC underscores that it should not be a hollow exercise.²⁸⁰ While the Committee tends to welcome the establishment of National Councils of National Minorities, it immediately emphasises that authorities should actually involve the representatives of the councils consistently and sufficiently.²⁸¹

272 AC, *Opinion on Serbia and Montenegro*, *supra* note 63, para. 102.

273 European Court of Human Rights, *Podkolzina vs Lettonie*, 9 April 2002, www.echr.coe.int, paras 33-38.

274 Human Rights Committee, *Ignatane vs Latvia*, Application No. 884/1999, 25 July 2001.

275 The AC underlines in its 2003 opinion on Azerbaijan (*supra* note 62) more generally that language proficiency requirements should not be overly extensive as that would cause undue problems related to the implementation of Article 15 (para. 79).

276 AC, *Opinion on Estonia*, *supra* note 55, para. 55.

277 AC, *Opinion on the UK*, *supra* note 73, paras 94, 96 and 97.

278 *Inter alia* AC, *Opinion on Serbia and Montenegro*, *supra* note 63, para. 103.

279 It should be underlined, however, that even regulations concerning actual representation in assemblies, executives, public service *etc.* do not guarantee actual influence on the decision taken. Still, the voice of the respective minorities is being heard. See also Verstichel, *loc.cit.* (note 45), p. 26.

280 In case the national legislation does not institute an obligation to consult, the AC still recommends that the minorities be consulted in a more consistent manner, while the authorities should give reasons when they in the end do not follow the advice (AC, *Opinion on Romania*, *supra* note 68, para. 66). See also AC, *Opinion on Azerbaijan*, *supra* note 62, para. 74.

281 AC, *Opinion on Serbia and Montenegro*, *supra* note 63, paras 106-107.

The AC's opinions reveal that it attaches great importance to a proper institutional framework ensuring regular (and effective) consultations, pressing States to consolidate contacts with minorities through the establishment of an official body of some kind.²⁸² The Committee additionally requires States to 'maintain direct dialogue ... also with organizations representing individual national minorities...'²⁸³ Obviously the AC is concerned that the opinions of all minorities are weighed adequately.

Forms of territorial and personal autonomy are important means of self-government for territorially concentrated groups that constitute a majority in a certain region, of course depending on their actual content and attributed competencies.²⁸⁴ In this regard, the AC explicitly promotes the development of local self-government and genuine decentralisation strategies as these are considered to be often an important factor in creating the necessary conditions for effective participation of persons belonging to national minorities.²⁸⁵

All in all, the supervisory mechanism of the Framework Convention seems rather promising and appears to add a certain bite to the, at first sight, rather weak provisions of the Convention itself. Equally clearly the AC aims at improving actual reality, the actual practice of minority protection, not only the legal standards. Of course, it will be as if not more important to design a workable follow-up procedure to ensure effective implementation of the Conclusions and Recommendations of the Committee of Ministers.²⁸⁶ As was confirmed in the latest opinions and the latest Activity Report of the AC, the Committee of Ministers basically leaves most of the actual follow-up monitoring to the AC. Arguably this will mean that also in this respect the Committee of Ministers will follow the lead of the Advisory Committee. Of course, only time will tell to what extent this will translate in significant adjustments by the State parties, both as regards the legal standards and their actual implementation. Nevertheless, it would be difficult to deny that the groundwork for an efficient supervision of the Framework Convention has been laid.²⁸⁷

282 *Inter alia*, AC, *Opinion on Albania*, *supra* note 49, para. 69; AC, *Opinion on Norway*, *supra* note 46, para. 61; AC, *Opinion on Estonia*, *supra* note 55, para. 58.

283 *Inter alia*, AC, *Opinion on Moldova*, *supra* note 46, para. 89; AC, *Opinion on Armenia*, *supra* note 62, para. 80.

284 Dinstein, Y., 'The Degree of Self Rule of Minorities in Unitary and Federal States', in: Brolmann, C. *et al.* (eds), *Peoples and Minorities in International Law*, Martinus Nijhoff, Dordrecht, 1993, p. 224.

285 AC, *Opinion on Azerbaijan*, *supra* note 62, paras 76-77; AC, *Opinion on Italy*, 14 September 2001, para. 61; AC, *Opinion on Serbia and Montenegro*, *supra* note 63, para. 111.

286 See also Pentassuglia, *loc.cit.* (note 23), p. 454.

287 As the Advisory Committee puts it in the conclusion of its Third Activity Report (at para. 59): 'the protection of national minorities, through the Framework Convention is a process. This process is still at an early stage and the forthcoming states will be a crucial test of the capacity of the Framework Convention to promote practical moves from analysis to action.'

3.2. The Emergence of Roma Specific Standards and Institutions

Prior to looking into the developments at the level of the UN, and more specifically at some of the views of the Human Rights Committee, it seems appropriate to mention that at the European level several organisations have been active in the formulation of Roma specific standards, acknowledging that this specific minority needs further, more detailed 'minority' measures, specifically elaborated in view of their specific needs and problems. Having developed this elsewhere,²⁸⁸ I only want to emphasise here that this gradual emergence of a sub-class of more specific minority standards for a certain type of minorities confirms that the field of minority rights is maturing and becoming more refined. In this respect it can also be highlighted that one of the themes in the opinions of the Advisory Committee is its concern for the Roma minority, not only in Eastern and Central European, but also in Western European countries (such as the United Kingdom),²⁸⁹ more specifically because of their special need of protection against discrimination. The Committee thus seems to follow the trend, which is emerging also more generally at the Council of Europe²⁹⁰ and at the level of the OSCE²⁹¹ and the EU,²⁹² of an awareness of and special attention for the predicament of the Roma. Indeed, even the European Court of Human Rights has explicitly acknowledged the State obligation to facilitate the gypsy way of life, requiring special measures to that effect, and more generally to take into account the specific vulnerable position of the Roma.²⁹³ A certain synergy towards a more robust level of minority protection is hard to deny.²⁹⁴

In addition to the Roma specific standards, also institutions are set in place by these international organisations to deal specifically with the Roma and their particular needs. This development seems perfectly in line with the opinions of the Advisory Committee

288 See Henrard, K., "The Building Blocks for an Emerging Regime for the Protection of a Controversial Case of Cultural Diversity: The Roma," *International Journal of Minority and Group Rights*, Vol. 10, No. 3, pp. 24-26.

289 *Inter alia*, AC, *Opinion on the UK*, *supra* note 73, paras 29-32; AC, *Opinion on Lithuania*, *supra* note 57, paras 32-33; AC, *Opinion on Moldova*, *supra* note 46, paras 34-36, 42 and 93; AC, *Opinion on Serbia and Montenegro*, *supra* note 63, para. 163.

290 See the establishment by the Committee of Ministers of a Specialist Group on Roma/Gypsies in September 1995 and its subsequent activities and recommendations. See also the Council of Europe Guidelines on the Education of Roma/Gypsy children in Europe of 4 February 2000.

291 See the various recommendations of the High Commissioner on National Minorities and his report of September 1999 to Session 3 (Roma/Sinti) of the Human Dimension Section of the OSCE Review Conference.

292 See the Guiding Principles for Improving the Situation of Roma, adopted by the COCEN group at the Tampere Summit in December 1999.

293 See, *inter alia*, the discussion in the case note with *Connors vs UK* by Henrard (*European Human Rights Cases*, Vol. 5, No. 7, 2004, pp. 613-615).

294 In this respect it should be highlighted that the UN Commission on Human Rights invites human rights treaty monitoring bodies in its Resolution 2004/51 entitled *Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, to continue to give attention to the situation and rights of minorities in the respective reporting procedures (para. 6).

of the Framework Convention for the Protection of National Minorities (analysed *supra*) underlining the need of supporting institutions to make the rights more effective, to improve levels of actual implementation.

3.3. The Human Rights Committee's Views in Terms of Article 27 ICCPR

While it should be acknowledged that the Human Rights Committee also deals with important minority issues in cases where only complaints are made in terms of general human rights enshrined in the ICCPR,²⁹⁵ the focus here will be on cases in which Article 27 is invoked (even when the Committee chose to focus on other provisions).

Traditionally most case law under Article 27 concerns indigenous people and this also holds true during the last few years. In this respect, the Human Rights Committee has largely followed its preceding jurisprudence which acknowledges a rather broad scope of application for Article 27, including traditional economic activities, but which at the same time allows the State interests (in specific instances) to outweigh the interests of the minority concerned rather easily.²⁹⁶ A few more specific remarks are in order concerning two cases, as there seems to be considerable discord about their interpretation and implications for minority protection.

Waldman vs Canada concerned a complaint by a Jewish father about the exclusive provision of public funding in the province of Ontario (Canada) for private Roman Catholic schools, while other religious minority schools are not funded at all. Regarding the alleged violation of Article 26 the Committee observes – in line with the steady jurisprudence of the ECHR in this respect – that ‘the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding

295 Reference should surely be made to *Ignatane vs Latvia* (Communication No. 884/1999, views of 25 July 2001), in which the Human Rights Committee found a violation of Article 25 ICCPR in relation to the administration of strict linguistic requirements for the exercise of passive voting rights in Latvia (to the detriment of members of the Russian speaking minority). Interestingly, the European Court of Human Rights has come to an analogous conclusion on the basis of Article 3 of the first Additional Protocol to the ECHR in the similar case of *Podkolzina vs Latvia*, judgement of 9 April 2002. For a more in-depth discussion of the former two cases, see Henrard, *loc. cit.* (note 39), p. 15.

296 For an overview of the previous case law, see Henrard, *op.cit.* (note 3), pp. 174-185. While the decision in *Ma-huika et al. vs New Zealand* of 20 October 2000 (‘the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System’) seems justified, criticism can be formulated regarding the views expressed in *Aerlea and Nakkalajarvi vs Finland* of 24 October 2001 and in *Jonassen et al. vs Norway* of 25 October 2002. While in the former the Committee could have given the benefit of the doubt to the minority instead of to the State (para. 7(6)), the inadmissibility decision in the latter was justly criticised in the Dissenting opinion by Henkin, Scheinin and Yrigoyen.

available without discrimination.²⁹⁷ According to the Committee, there are no reasonable and objective criteria to justify the differential treatment between the Roman Catholic faith and the author's religious denomination. Hence it concluded that Waldman's rights under Article 26 were violated.

While the author invoked several articles of the ICCPR, including Articles 2, 26 and 27, the Human Rights Committee starts by investigating the complaint in terms of the general non-discrimination provision of Article 26 and holds then that no additional issues arise in terms of Article 27.²⁹⁸ This reasoning could give the impression that Article 27 would not give rise to a right to financing of private minority schools, thus raising question marks about the degree of positive State obligations in favour of minorities that can be inferred from that article. However, there has never been recognition under international law that minority schools should be funded up to a certain extent by the States, while in terms of national law it was mostly circumscribed and depended on the specific circumstances. *In casu*, the practice in Ontario was already condemned as being in violation of Article 26 with the concomitant obligation of Canada to remedy that. Arguably, if a minority issue can be solved in terms of the general prohibition of non-discrimination, there does not seem to be a need to address the special measures aimed at protecting and promoting the separate identity of minorities, the minority right *sensu stricto*. Consequently, I disagree with the reading of this case as a setback regarding the interpretation of Article 27 ICCPR.

*Diergaardt et al. vs Namibia*²⁹⁹ can be understood in a similar fashion. The case deals with the Rehoboth Baster Community of Namibia, a minority with a distinctive culture and language (Afrikaans) which alleged a violation of several rights under the ICCPR, including Articles 1, 27 and 26, flowing from – respectively – the termination of their self government status, the confiscation of their lands after Namibia's independence from South Africa, and the prohibition for the administrative authorities to deal with them in Afrikaans.

The Human Rights Committee repeated its steady jurisprudence concerning Article 1 that it cannot be dealt with under the individual complaints procedure, while it can be taken into account in the interpretation of other rights protected by the Covenant, in particular Articles 26 and 27. Regarding the complaint about the expropriation of land which would infringe the rights of the members of the community under Article 27, the Committee did *not* state that the Rehoboth Basters were not a minority. It simply

297 HRC, Communication No. 694/1996, *Waldman vs Canada*, views of 3 November 1999, para. 10(6).

298 *Ibidem*, para. 10(7).

299 HRC, Communication No. 760/1997, *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. vs Namibia*, views of 25 July 2000.

argued that the relationship between the author's way of life and the lands covered by the claims was not such that a distinctive culture was at stake.³⁰⁰ Finally, the complaint about discrimination on the ground of language was decided on the basis of Article 26 and also here the Committee finds a violation of Article 26, because the State's instruction to civil servants not to reply to an author's written or oral communications with the authorities in Afrikaans, even when they are perfectly capable of doing so, is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities.³⁰¹ Insofar as one would voice criticism concerning the fact that this issue was not addressed in terms of Article 27, a similar point could be made as in the *Waldman* Case. Furthermore, the authors had not argued this point in terms of Article 27 and 'it is not for the Committee to construct a case on this ground under Article 27, in the absence of a complaint from the authors.'³⁰²

3.4. Interim Conclusion

While the importance of the development of an additional, more detailed category of protection standards for the Roma, a highly vulnerable and omni-present minority group in Europe, should not be underestimated; the most important developments with considerable potential to enhance minority protection on the basis of minority rights undoubtedly take place through the supervision of the Framework Convention for the Protection of National Minorities. It can only be hoped that these will in the long run induce similar developments at the UN level, strengthening the work of the UN Working Group of Minorities and influencing the views of the HRC in terms of Article 27 ICCPR, since they have not made similar strides and often raise more questions than they answer.³⁰³

300 *Ibidem*, para. 10(6). Contra A.H.E. Morawa, 'Minority Languages and Public Administration: A Comment on Issues Raised in *Diergaardt et al v Namibia*', *ECMI Working Paper 16*, 2002.

301 HRC, *Diergaardt et al. vs Namibia*, *supra* note 110, para. 10(10). In view of the previously advantaged position of Afrikaans speakers under the apartheid regime, this view can be criticised for actually upholding an outdated privilege, contrary to Article 26 ICCPR, as was pointed out in several of the dissenting opinions. Indeed, 'it is clear that the instruction puts the Afrikaans language exactly on the same footing as any other native languages spoken in Namibia, thus guaranteeing Afrikaans equal treatment without discrimination' (see dissenting opinion of Nisuke Ando) so that it can be said that 'the Committee has, in the belief that it was denouncing discrimination, given the impression that it has, rather, granted a privilege – that it in short undermined the principle of equality as expressed in article 26 of the Covenant' (Dissenting Opinion of Amor, see also Morawa, *loc.cit.* (note 111), p. 9).

302 *Diergaardt vs Namibia*, Individual Opinion of Bhagwati, Colville and Yalden.

303 Despite the focus of this article on minority specific instruments, I want to make a brief comment pertaining to the ECHR. Even though the Advisory Committee does not explicitly refer to similarities and emerging synergies between its own work and the case law of the ECHR in the chapter on co-operation with other bodies of its Fourth Activity Report, within the Council of Europe framework a certain influence of the mere existence of the Framework Convention for the jurisprudence of the ECHR is already visible. See ECHR, *Chapman vs UK*, judgement of 18 January 2001 and its discussion in Henard, *loc.cit.* (note 39), pp. 23-24

4. Developments concerning minority protection in the European Union

Minority protection has clearly felt not to 'belong' to areas for which EU/EC standards should be developed for internal purposes.³⁰⁴ It is important to highlight that the EU/EC only has the competencies explicitly assigned to it by the treaties.³⁰⁵ Even though these competencies steadily expand beyond the mere economic domain, member States have carefully guarded against assigning any explicit minority rights competence to the EU.³⁰⁶ However, this does not preclude the emergence of measures of relevance for minorities and minority protection. Some kind of mainstreaming in this respect would not be precluded³⁰⁷ and could follow the approach taken in respect of human rights.³⁰⁸

It is in any event striking that the EU never saw any problem in developing a clear and explicit external minority policy, which manifested itself towards third countries and later on also to candidate countries.³⁰⁹ Especially the entire accession dynamic saw the Commission involved in reviewing candidate countries in terms of compliance with minority rights standards.³¹⁰

4.1. Accession Monitoring

The criteria for aspirant members, formulated at the European Council meeting in Copenhagen in 1993, included among the political criteria 'respect for and protection of

304 Schweltnus, G., 'Much ado about Nothing? Minority Protection and the EU Charter of Fundamental Rights', ConWEB, No. 5, 2001, at les1.man.ac.uk/conweb/, pp. 1-3.

305 See also Alston, Ph. and Weiler, J.H.H., 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law*, Vol. 9, 1998, p. 661; Craig, P. and De Burca, G., *EU Law: Texts, Cases and Materials*, OUP, Oxford, 1998, pp. 110-111.

306 During the negotiations on the EU Charter of Fundamental Rights, more than a dozen proposals on a minority clause were submitted, but no agreement on such an explicit clause could be reached. A similar point can be made regarding the negotiations on the Constitution for the EU. While no explicit minority competence clause ensued, minority protection is now at least acknowledged as one of the EU's founding values (see *infra*).

307 See also De Witte, B., 'The Constitutional Resources for an EU Minority Protection Policy', in: Von Toggenburg, G. (ed.), *The Protection of Minorities and the Enlarged EU: The Way Forward*, forthcoming, LGI Book, Budapest, pp. 5-6. Von Toggenburg similarly notices that this mainstreaming approach is already underway (see also *infra*): Von Toggenburg, G., 'A Rough Orientation Through a Delicate Relationship: The EU's Endeavours for its Minorities', in: Trifunovska, S. (ed.), *Minority Rights in Europe: European Minorities and Languages*, TMC Asser Press, The Hague, 2000, pp. 211-213.

308 See also De Witte's analysis about the role of the ECJ in the Protection of Human Rights ('The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: Alston, Ph. (ed.), *The EU and Human Rights*, OUP, Oxford, 1999, pp. 859-897) which could be of similar relevance for minority protection in view of the absence of a clear competence basis in this regard.

309 *Inter alia*, De Witte, B., 'Politics versus Law in the EU's Approach to Ethnic Minorities', in: Zielonka, J. (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the EU*, Palgrave, 2002, pp. 469-473.

310 For a detailed analysis in regard to Eastern Europe, see Pentassuglia, G., 'The EU and the Protection of Minorities: The Case of Eastern Europe', *European Journal of International Law*, Vol. 21, No. 1, 2001, pp. 9-29.

minorities.³¹¹ The Commission, assigned with the task of assessing the extent to which candidate countries complied with these political criteria, devoted from the original assessment of the candidate countries in July 1997 considerable attention to minority issues (as compared to the other political criteria).³¹² It noted various causes of concern, particularly regarding the Hungarian minorities in Slovakia and Romania, the Russian speaking groups in the Baltic States and the Roma in most of the candidate countries.³¹³ However, the Commission concluded for all but one (Slovakia)³¹⁴ that the political criteria were fulfilled. The Accession partnerships in 1998³¹⁵ and the regular reports in the following years continued to reach this conclusion, notwithstanding the critical assessment especially concerning the treatment of Roma and in the Baltic States also of the Russian-speaking minorities.³¹⁶

On the one hand the continuing criticisms and calls for improvements appear to indicate that minority issues are important factors,³¹⁷ on the other hand, the monitoring procedure seems predominantly concerned with speeding up the adoption of the *acquis*.³¹⁸ The swift conclusion on compliance with the political criteria is arguably also determined by the outspoken political will to enlarge the Union towards Eastern Europe.

As the EU does not have its own standards, the benchmarks used by the Commission originate mainly from the Council of Europe and the OSCE. However, the Commission is criticised for not sufficiently clarifying its reliance on these outside benchmarks.³¹⁹ Interestingly, Commission members indicate in interviews the Framework Convention for the Protection of National Minorities as the most important tool to assess compliance with minority rights. The Commission in any event called on the candidate countries to ratify the Framework Convention for the Protection of National Minorities. A related point of criticism is that³²⁰ the Commission not only provides no in depth analysis in

311 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para. 7A(iii).

312 Pentassuglia, *loc.cit.* (note 121), p 12. The Commission has announced that it will continue to monitor respect for minority rights for acceding countries now and in the (indefinite) future: European Commission, *Strategy Paper 2003: Continuing Enlargement*, <http://europa.eu.int>, 6.

313 Pentassuglia, *loc.cit.* (note 121), p. 12.

314 Cf. De Witte, B. and Von Toggenburg, G., 'Human Rights and Membership of the European Union', in: Peers, S. and Ward, A. (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart, Portland, 2004, pp. 63-65. From the 1999 regular report onwards also Slovakia was said to comply with the political criteria.

315 Von Toggenburg, *loc.cit.* (note 118), p. 224, De Witte, *loc.cit.* (note 120), p. 473

316 Hughes, J. and Sasse, G., 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 1, No. 1, 2003, p. 14; Riedel, S., *Minderheitenpolitik in der EU-erweiterungsperspektive*, SWP Publishers, Berlin, 2001, pp. 8-9.

317 De Witte, *loc.cit.* (note 120), p. 473.

318 Hughes and Sasse, *loc.cit.* (note 127), pp. 14-17; Pentassuglia, *loc.cit.* (note 121), p 22.

319 Hughes and Sasse, *loc.cit.* (note 127), p. 15.

320 For more extensive criticisms, see *ibidem*, pp 12-20.

terms of specific provisions of the FCNM, but that its approach is also characterised by inconsistencies and internal contradictions.³²¹

The preceding analysis revealed that even though minority protection was not a major hurdle for the recently acceded States, the Commission never stopped pointing to areas for improvement. The important role played by the Council of Europe's Framework Convention further underscored the relevance of developments in that framework.

4.2. Minority Protection at the Internal Level?

The requirements concerning minority protection towards third countries and even candidate countries stand in sharp contrast with the lack of explicit demands towards the 'old' member States, and the ensuing lack of EU minority rights standards.³²² Nevertheless, minorities are not entirely ignored by the EU. De Witte identifies in addition to three modest but direct ways of EU involvement with internal minority questions, several more indirect, structural ways in which the EU has an impact on internal levels of minority protection.³²³ While this is not the place to develop all these lines extensively, it seems appropriate to focus on interesting developments pertaining to non-discrimination, as this is an essential pillar of minority protection (in combination with individual human rights),³²⁴ while briefly touching on the related question of the status of third country nationals (TCN).³²⁵ A few remarks on the possible implications of the EU's Charter of Fundamental Rights also seem appropriate.

321 *Ibidem*, pp. 16-19. It is for example remarkable that Latvia managed to get away with not ratifying the Framework Convention in view of its serious problems with its Russian speaking minority. In this respect it will be interesting to follow the way in which Turkey will continue to be monitored, not in the least because there is considerably less political consensus on its inclusion in the EU. This is expected to have repercussions for the review of the political criteria which is probably going to be rather firm. Irrespective of considerations of fairness, a strict minority scrutiny of Turkey concerning minority protection might further enhance the visibility of minority protection concerns in internal EU policies (see also *infra*).

322 *Inter alia*, De Witte, *loc.cit.* (note 120), p. 473; Von Toggenburg, *loc.cit.* (note 118), p. 221.

323 De Witte, *loc.cit.* (note 120), pp. 485-490. The direct impact concerns the support for minority languages, the EU's involvement in the Northern Ireland conflict, and the special protocols to the Act of Accession of Austria, Sweden and Finland. The indirect channels of EU influence identified by De Witte include Article 151, especially paragraph 4 TEC (Treaty on the European Community), the developing status for Third Country Nationals (TCN's) (and the developing non-discrimination law on the basis of Article 13 TEC. See also Von Toggenburg, *loc.cit.* (note 118), pp. 208-234 who also hints at the importance of a regional dimension.

324 Henrard, *op.cit.* (note 3), pp. 8-10. See also the Working Document of the Commission regarding the EU Anti-Discrimination Policy (LIBE 102 EN), which focuses in chapter 3 on 'mainstreaming equal opportunities for ethnic minorities'.

325 See also De Witte, *loc.cit.* (note 120), pp. 488-489, Von Toggenburg, G., 'The Race Directive: A New Dimension in the Fight Against Ethnic Discrimination in Europe', in: *European Yearbook on Minority Issues*, Vol. 1, Martinus Nijhoff Publishers, Leiden/Boston, 2001/2002, p. 242.

4.3. Non-Discrimination Law

Regarding non-discrimination law in terms of EC law, the adoption of Article 13 TEC (Treaty of the European Communities) with the Treaty of Amsterdam gave a significant new impetus by placing discrimination against new groups on the agenda, going beyond the traditional focus on gender (and nationality).³²⁶ The article provides the competence basis to adopt legislative measures aimed at combating discrimination on grounds of race or ethnic origin, religion or belief, age, disability and sexual orientation, the first two grounds of which having obvious repercussions for minority protection.

Two directives have so far been adopted on the basis of Article 13, namely *Directive 2000/43 EC implementing the principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin* (the Race Directive) and *Directive 2000/78 EC establishing a general framework for Equal Treatment in Employment and Occupation*.³²⁷ In view of its obvious relevance for the protection of racial or ethnic minorities,³²⁸ the Race Directive will be focused upon here.³²⁹

Several features of the Race Directive seem to entail that race is now the non-discrimination ground of greatest concern in the EU, replacing gender.³³⁰ Important aspects in this respect include the particularly far-reaching scope of application (applying to both public and private sectors, extending to access and supply of goods and services which are available to the public),³³¹ the reversal of the burden of proof,³³² the protection against victimisation³³³ and other measures aimed at the actual and efficient protection against discrimination.³³⁴ Furthermore, the explicit distinction between direct and indirect discrimination as well as the virtual exclusion of any exception to direct

326 For an extensive discussion of Article 13 EC and its possible impact, see Waddington, L., 'Testing the Limits of the EC Treaty on Non-Discrimination', *Industrial Law Journal*, Vol. 28, No. 2, 1999, pp. 133-151.

327 For an in-depth discussion of both directives, see Waddington, L. and Bell, M., 'More Equal than Others: Distinguishing European Union Equality Directives', *Common Market Law Review*, Vol. 38, No. 3, 2001, pp. 587-611.

328 De Witte, *loc.cit.* (note 118), pp. 12-13.

329 For a solid analysis of the Race Directive, with attention for its implications for minority protection, see Van den Berghe, F., 'Race in European Law – An Analysis of Council Directive 2000/43/EC, at www.eumap.org; Von Toggenburg, *loc.cit.* (note 136), pp. 231-244.

330 Bell, M., *Anti-Discrimination Law and the European Union*, Oxford University Press, Oxford, 2002, pp. 75-79. It should be noted that *Nachova vs Bulgaria* (26 February 2004) arguably reveals that also the ECHR scrutinises racial discrimination strictly (see 'Noot Henard', in *European Human Rights Cases*, Vol. 5, No. 4, pp. 300-301), which is furthermore in line with the special opprobrium attached to racial discrimination internationally (e.g. the CERD, the 2001 Racial Discrimination Conference Johannesburg 2001 and its manifold follow activities).

331 Race Directive, Article 3.

332 *Ibidem*, Article 8.

333 *Ibidem*, Article 9.

334 *Ibidem*, Articles 10-15.

discrimination³³⁵ enhances the resulting protection for racial and ethnic minorities. Furthermore, it should be noted that differentiations on the basis of language or religion could be covered as well, more specifically as instances of indirect discrimination on the basis of race or ethnic origin. Finally, the Race Directive explicitly allows the States to adopt certain affirmative action measures for previously disadvantaged groups in order to further the goal of substantive equality.³³⁶ While this does not oblige States to do so and while it is unsure how the European Court of Justice (ECJ)'s jurisprudence will develop in this regard,³³⁷ explicit openings towards special measures for ethnic or racial disadvantaged groups carry obvious potential for minority protection.

The Race Directive was supposed to be fully implemented by 19 July 2003. However, one year later, the Commission launched infringement proceedings against five member States for having failed to pass the necessary national measures to introduce, amend or up-date their equality legislation.³³⁸ The ensuing jurisprudence of the European Court of Justice will clarify various aspects of the Race Directive which are bound to have repercussions on the Directive's impact on minority protection in the Member States.

Here it should be recalled that immigrant groups are not excluded from the working definition of the minority concept used in this article. Extensive contingents of so-called third country nationals (TCN) are present in most member States, constituting a significant Muslim minority. While immigrants are meant to benefit from the Race Directive as well,³³⁹ it excludes differentiations based on nationality. The directive is criticised for seeming to overlook that differentiations based on nationality could (in some circumstances) be qualified as prohibited forms of indirect discrimination on the basis of race or ethnic origin.

Nevertheless, there has been a gradual tendency since the European Council meeting in Tampere in 1999 to enhance non-discrimination in economic, social and cultural life in the treatment of TCN, and granting especially the long term resident TCN rights and obligations comparable to those of EU citizens.³⁴⁰ This development, which led to the adoption of *Council Directive 2003/109/EC concerning the status of third country nationals who are long term-residents*,³⁴¹ can only be welcomed from the perspective of substantive equality and will undoubtedly improve the position of the corresponding

335 *Ibidem*, Articles 2, 4 and 5.

336 *Ibidem*, Article 5.

337 **Waddington and Bell**, *loc.cit.* (note 138), pp. 601-603.

338 **Commission Press Release – IP/04/947**.

339 **Schwellnus**, *loc.cit.* (note 115), p. 18.

340 **Presidency Conclusions, European Council Tampere, 1999**.

341 **Council Directive 2003/109/EC**, 25 November 2003, Official Journal L 016, 23/01/2004, p. 0044-0053.

minority groups.

4.4. EU Charter of Fundamental Rights

The solemn adoption of the EU Charter of Fundamental Rights in December 2000 can be seen as a significant step in the rise of the prominence of fundamental rights within the EU,³⁴² which was further confirmed by its inclusion in the Constitution (chapter II), adopted in June 2004. Without denying the vital importance of the interpretation and limitation clauses of the Charter,³⁴³ here only the more substantive provisions with some relevance for minority protection will be briefly analysed.

There was clear opposition to the inclusion of an explicit minority clause, but Article 21 of the Charter includes not only the ground 'language,' greatly welcomed by the European Bureau for Lesser Used Languages, but also 'belonging to a national minority.'³⁴⁴ The compromise provision which was meant to cater for minority concerns, is Article 22: 'The Union shall respect cultural, linguistic and religious diversity.'³⁴⁵ While the promotion of multiculturalism obviously can have positive repercussions for minority protection,³⁴⁶ this approach also has its limitations, as is exemplified by the ambivalent experiences so far with the mainstreaming clause on cultural diversity of Article 151, paragraph 4 TEC.³⁴⁷ In any event the Charter explicitly does not extend the field of application of Union law.³⁴⁸

4.5. The EU Constitution and Beyond

The attention for minority protection throughout the accession monitoring and negotiations, was expected to make it more acceptable to use minority rights rhetoric for internal purposes.³⁴⁹ If nothing else the accession process has promoted awareness and

342 Menendez, A.J., 'Chartering Europe: The Charter of Fundamental Rights of the European Union', Arena Working Paper 01/13, at www.arena.uio.no/publications/wpo1_13.htm, p. 1.

343 For a solid but critical analysis of the limitations system of the Charter, see Peers, S., 'Taking Rights Away? Limitations and Derogations', in: Peers, S. and Ward, A. (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart, Oxford, 2004, pp. 141-179.

344 Schweltnus, *loc.cit.* (note 115), p. 8.

345 *Ibidem*, p. 10.

346 *Ibidem*, pp. 20-21; Wallace, Ch., 'Education, Multiculturalism and the EU Charter of Rights', ConWEB No 5/2002, at les1.man.ac.uk/conweb/, p. 9.

347 Bruno de Witte highlights the danger in the broader Action Plan on Language Learning and Linguistic Diversity that the minority dimension will be diluted, while mainstreaming cultural diversity (on the basis of Article 151(4) TEC) implies that minority protection measures always have to fit within a measure whose central aim has nothing to do with minority protection: De Witte, *loc.cit.* (note 121), pp. 16-19.

348 Article II-51, 2 Treaty on the EU Constitution.

349 Sasse, G., 'Minority Rights in Europe: A New Policy Push from Central to Eastern Europe?', *EUI Review*, Winter 2003, p. 19. See in this respect also the Bolzano Declaration on the Protection of Minorities in the enlarged EU

best practices concerning minority protection inside the EU and has bolstered the profile of the Council of Europe's minority protection instruments.³⁵⁰ While the negotiations leading up to the adoption of the Constitution of the EU revealed the same reluctance of many States to include a minority specific clause, by way of compromise 'respect for the rights of persons belonging to minorities' now features among the founding values of the EU.³⁵¹ Still, it is not clear what the actual significance of this recognition as 'value' will be in view of the absence of the inclusion of a minority clause in the chapter on fundamental rights (the Charter), and the continuing lack of explicit legislative competence base on minority protection for the EU.³⁵² As in the case of human rights, this will probably strengthen a mainstreaming approach in respect of minority concerns.

Areas with considerable potential here include the developments in non-discrimination law³⁵³ and particularly the Race Directive, the changes in the status of long term resident TCN, and last but not least the mainstreaming of cultural diversity in terms of Article 151, paragraph 4 TEC.³⁵⁴ Initially at least,³⁵⁵ this mainstreaming approach should be guided by standards developed in the framework of the Council of Europe and the OSCE, with special attention for the Framework Convention, as is the case for the accession procedure.

It should also be highlighted that the Constitution extends the sanction mechanism in case of serious and persistent breach of human rights to minority rights.³⁵⁶ While the actual sanction procedure is very cumbersome, reducing its potential use, the preventive mechanism added by the Nice treaty has induced the Commission to establish a Network of Experts to elaborate an annual human rights report. The work of this Network, and especially its creative interpretation of the EU Charter of Rights, including its Article 22, is likely to extend the visibility of minority parlance within the EU.³⁵⁷

made by experts, January 2004.

350 See also Liebich, A., 'Ethnic Minorities and Long-Term Implications of EU Enlargement', *EUI Working Paper*, RSC No. 98/49, p. 9.

351 Article I- 2 Constitution of the EU. It should be noted that the exact numbering of the articles still changes.

352 See also De Witte, *loc.cit.* (note 121), p. 5.

353 See also the Commission's Green Paper, *Equality and non-discrimination in an enlarged European Union*, COM (2004) 379 final, 28 May 2004, which remarks in its foreword: 'Anti-discrimination policy is an important part of the EU's approach to immigration, inclusion, integration and employment. By clarifying rights and obligations and highlighting the positive benefits of diversity in a multicultural society, it can help to guide a process of change based on mutual respect between ethnic minorities, migrants and host societies'. (emphasis added)

354 *Ibidem*, pp. 11-20.

355 It might just be that over time also EU minority standards will be developed, as was the case for the EU Charter on Fundamental Rights.

356 Article I-58, replacing the old Article 7 TEU, refers back to the principles of Article I-2, which now includes respect for minority rights.

357 It can be highlighted that even before the adoption of the Constitution, the Network used Article 22 Charter to screen the activities of the member States concerning minority protection in terms of the FCNM, see *Report on*

Assuming that the EU Constitution will come into effect, it will be most interesting to study the implications of the recognition of minority protection as founding value of the EU (and the related inclusion in the sanction mechanism) for the already emerging more indirect avenues of minority protection mentioned above.

5. Conclusion

The preceding overview has revealed that the supervision of the FCNM has entailed remarkable developments regarding minority protection, through rather extensive, demanding interpretations of State obligations hence reducing the at first sight virtual boundless State discretion. While no similar strong developments can be discovered in the quasi jurisprudence of the HRC, the EU finally seems to creating some openings to a more explicit minority protection policy for internal purposes. The accession dynamic since 1993 and its monitoring of minority protection in the candidate countries has further bolstered the profile of the Framework Convention, as this was the central point of reference for the Commission. It is not inconceivable that this monitoring will become more consistent and more precise, taking into account the practice of the AC. Furthermore, this external exercise seems to have facilitated a gradual internalisation of minority issues, which eventually resulted in an explicit recognition of respect for minority rights as a foundational value of the EC. Even though the exact implications of this new value are still unclear, some kind of mainstreaming of minority rights concerns through the development of existing policies in minority friendly directions is anticipated. In so far as these developments would be guided by the FCNM, a mutually reinforcing dynamic would be created, which could lead to the emergence of a more coherent European system of minority protection. This in turn could tie in with broader synergetic trends at the level of general human rights, also at the UN level, contributing to the globalisation of minority rights.

Sajjad Nabi, Barrister, Veritas Chambers

Sanandaj showdown – a slippery slope?

As the world's focus remains fixed on Iraq and Al-Qaeda, Sajjad Nabi considers the predicament of the Kurds in Iran and the implications of a recent crackdown on Kurdish human rights activists in Sanandaj.

The well-known Kurdish filmmaker, Hineer Saleem, once said,

“Our past is sad. Our present is a catastrophe. Fortunately we don't have a future.”

This may at first blush sound unduly apocalyptic but Hineer Saleem would argue that recent events in Iran have done nothing to diminish its resonance.

The plight of the Kurds living in the Iranian province of Kordestan has rarely been as newsworthy as their counterparts in Iraq and Turkey. There are a number of reasons for this, including the West's pre-occupation with Iraq since the first Gulf War, the strategic significance of Turkey as a country which straddles East and West, the focus on Iran's nuclear programme and most of all, the chilling atrocities perpetrated against the Kurds during the Saddam era which had a desensitising effect on more “*minor*” human rights abuses and, to indulge in tabloid speak, grabbed all the headlines.

In recent months however, the situation in Kordestan has increasingly come under the spotlight, as alarming reports of harassment and persecution of Kurdish human rights activists in its capital, Sanandaj, have begun to surface. Before examining the reports in detail, it is first necessary to place them into context by looking at the socio-political dynamics of the relationship between the Kurds and the Islamic regime.

The Kurds and Khomeini's legacy

Superficially at least, Iran's social, cultural and linguistic diversities have not been denied as in other countries in the region. It is noteworthy that Kordestan province is officially recognised by the state and lends its name to the University in Sanandaj. Such official acknowledgement of Kurdish ethnicity would still be considered a political heresy in

Turkey and Syria (and of course in Saddam's Iraq) but unfortunately, the favourable comparisons largely end there.

For a start, although Kurds make up 16% of the population in Iran, Kordestan province amounts to only one eighth of the Kurdish inhabited area. In keeping with Iraq, Syria and Turkey, Kurdish claims to nationhood or even provincial autonomy have been ruthlessly suppressed. By way of example, shortly after the 1979 Islamic revolution, the new Islamic regime responded to such Kurdish overtures by dispatching 200,000 troops to Kordestan. In his infamous speech on 19 August 1979, the Ayatollah Khomeini declared a "Jihad" on the Kurdish peoples labeling them "*children of Satan*" and their political leaders as "*enemies of God*". The use of epithets normally reserved for the Israelis and the Americans made clear the contempt in which the new Islamic Republic held the Kurdish peoples and set the scene for what was to follow.

What underpinned the subsequent economic, political, and cultural discrimination against the Kurds was the imposition of Shi'a Islam as the ideological political system and the unfettered domination of the state apparatus by Shi'a Persians, leaving the Kurds, the majority of whom are Sunnis, as a minority in both national and religious terms.

The religious discrimination began almost immediately after Khomeini consolidated his position as the authorities began building large Shi'a mosques in predominantly Kurdish towns and launched a vociferous and often aggressive campaign aimed at converting young Kurds to Shi'a Islam.

In terms of nationality and ethnicity, the children in Kordestan province were forced to study in Persian as the country's official language on the spurious grounds that this would encourage national unity. In the event, it did nothing more than to put Kurdish children at a considerable learning disadvantage compared to native Persians. The discrimination continues at university level where a large percentage of the places in all Iranian universities (there are very few universities in Kurdish cities) are largely reserved for the children of martyrs and supporters of the regime, which by default excludes Kurdish students.

Centralised Shi'a power over Kordestan is reinforced by the endless appointment of non-Kurdish administrators often sourced from the state's security apparatus, at all levels of government in the province. This is calculated to remind the Kurds "who's boss" in almost all aspects of their life.

Khatami – a false dawn?

Following the appointment of Khatami in 1997, it was hoped that he and the reformists around him would implement changes to the political system which would benefit the Kurds. These hopes have, in all fairness, materialised to some degree, as many Kurds have engaged with the state in the albeit limited reform process and, as a result, been given some administrative responsibility and won a limited cultural, language and press freedoms for their fellow Kurds. Indeed, until the parliamentary elections in February 2004, a Kurdish bloc of legislators in the Iranian Majlis were permitted to speak out specifically on Kurdish issues.

However, there has been no sea change and the regime's response to protests and opposition has largely remained brutal. Indeed, even during the past few years when the relatively reformist President Khatami has tried to curb the culture of non-judicial imprisonment and summary executions elsewhere in Iran, in Kordestan, power remains firmly in the hands of the security establishment in what many perceive to be non-declared martial law.

In its 2004 report, Amnesty International stated that during 2003:

“At least 108 people were executed, often in public. The death penalty was carried out on long term political prisoners, apparently to intimidate political or ethnic groups such as Kurds and Arabs”³⁵⁸

Amnesty went on to highlight the case of a long term Kurdish prisoner executed in February of that year, Sasan Al-e Ken'an, a supporter of the banned Komala party, whose mother was, perversely, in Tehran seeking a meeting with members of the UN Working Group on Arbitrary Detention at the time of his execution.

Crackdown on Kurdish Human Rights Activists

Alarming, reports are now emerging of direct threats against and harassment of Kurdish Human Rights activists in Sanandaj, especially those working in connection with children's and women's rights.

The situation is so serious that Amnesty International have directly appealed to the Intelligence Section of the state security service operating in Kordestan - Hefazat-e-Ettela' at-e-Nirou-ye Entezami - to stop its actions.

It is said that members of the Association for the Defence of Children's Rights ("ADCR") and the Association of Kurdish Women Defending Peace and Human Rights ("AKW") have endured summons, interrogations, telephone threats and harassment from security personnel in connection with their human rights work.

It is telling that the Iranian authorities have had no hesitation in clamping down on the ADCR, even though it remains a legally recognised - and thus state endorsed - NGO. Its most senior officers have been pursued including Diba Alikhani, a board member who was summoned and interrogated specifically in connection with her work promoting women's and children rights, and Azad Zamani, who has made it clear that the group's activities have been carried out transparently and are aimed at benefiting all Iranians - not just Kurds. The ADCR have recently raised concerns about the administration of criminal cases against minors and the use of the death penalty against them. In many ways, it has called for nothing more than for Iran to comply with its obligations under the Convention on the Rights of the Child. ADCR is by no means a Kurdish protest group and neither does it have a subversive agenda, but there is now talk of the intelligence services applying to have its NGO licence revoked.

The AKW's position is even more tenuous. When its application for NGO status was inexplicably rejected by the Iranian authorities, who refused to offer any grounds for their decision, its founding member, Dr Roya Tolou'ie spoke out against the decision and was summarily summoned to appear before a Revolutionary Court in Sanandaj for interrogation on 5 April 2005.

Dr Tolou'ie is a leading Kurdish women's rights and human rights activist and an outspoken critic of the policies of the Iranian government. She has in the past been criticised for being photographed without a headscarf - a requirement for all women in Iran when appearing in public.

The Revolutionary Prosecutor in Sanandaj has bizarrely accused Dr Tolou'ie of jeopardising national security through her comments. The proceedings against her in the Revolutionary Court could result in her being detained or prosecuted in secret without the protection of internationally recognised fair trial standards.

Further, the arbitrary denial of the AKW's right to operate as a group contradicts the International Covenant on Civil and Political Rights, to which Iran is a signatory, and the UN Declaration on Human Rights Defenders, which provides at Article 5:

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others,

at the national and international levels:

- (a) to meet or assemble peacefully
- (b) to form, join and participate in non-governmental organisations, associations or groups

Worryingly, these cases of harassment are merely examples of a continuing and broadening clampdown on independent human rights activists. In Tehran on 1 March 2005, in what may or may not have been a state sponsored act, a fire bomber attacked the premises of Roshangaran Publishers, which publicises works on women's issues. The Director, Shahla Lahiji, is a former prisoner of conscience. She was detained, charged and imprisoned in connection with her participation at a conference on Iran, which took place in Berlin in April 2000.

In recent years, due to the considerable restrictions on activism and free expression imposed by the authorities, large numbers of young people, including women, have become involved in officially recognized NGOs focusing on private sphere issues like child custody, inheritance, domestic violence and divorce. However, it would appear the Iranian authorities have now had enough and it comes as no surprise that activists in Kordestan are first in line to be targeted.

Indeed, there are concerns that Kordestan may be being excluded from the nationwide struggle for human rights in Iran, either because the plight of the Kurds is seen as a low priority or because activists calculate that associating themselves from the perceived Kurdish agenda is likely to inflame the authorities and make any concessions less likely. By way of example, when the Iranian lawyer Shirin Ebadi received the 2003 Nobel Peace Prize in Oslo in 2003 for her "democracy building" efforts and her work to "improve human rights" in Iran, it was noted by some commentators that she had never even mentioned the plight of the Kurds in her many public statements. This may be harsh on Ms Ebadi but if true, it supports the "contamination" thesis cited above.

It seems that whilst the Kurds in Iran have fared better in some ways than those in Iraq, Syria and Turkey, the deep rooted suspicions and prejudices remain and a regime weary of its grip on power being diluted by reforms and rights is reasserting itself by picking on easy targets in Kordestan. They can operate safely in the knowledge that the media is far more interested in Iraq – it makes much better news – and the West is much more concerned with the "nuclear" question. For now, it is activists such as Dr Tolu'ie, Diba Alikhani and Azad Zamani who must shoulder the burden alone.

Dr Anke Stock, KHRP Representative

Kurdish Women's International Conference: "Women in South Kurdistan and Establishment of Civil Society", Stockholm/Sweden 9-10 April 2005

Shortly before the Iraqi Transitional National Assembly confirmed the new Iraqi Government, Kurdish women hosted a conference in Sweden to discuss the establishment of civil society in Iraqi Kurdistan. On 9 and 10 April 2005, KHRP partner, the Kurdish Women's Project (KWP), organised a conference on "Women in South Kurdistan and Establishment of Civil Society" in Stockholm. The Kurdistan Regional Government provided financial support for the conference.

The main aim of the conference was to open the discussion about the situation of Kurdish women in South Kurdistan and about the participation of Kurdish women in the establishment of civil society, *inter alia*, during the process of drafting a new constitution within a new Iraq. Another objective was to raise international awareness of the struggle of Kurdish women.

The conference brought together human rights activists from Iraqi Kurdistan and Europe, politicians from Iraqi Kurdistan and Sweden, academics, writers and legal experts. Speakers included Dr Rebwar Fattah, Ulla Hoffmann, Khanzad A. Abed, Mahabad Qaradaghi, Dr Nazand Bagikhani, Nebat, an Anfal victim, and Dr Anke Stock.

A short film on the lives of Kurdish women and an account by a woman called Nebat, a survivor of the Anfal campaign, gave the audience an insight into the struggle and existence of Kurdish women. Furthermore, the need for transformation of the Kurdish society was discussed, considering as examples education, mass media and the legal system. Another session was about the importance of women in politics and within NGOs.

The conference resulted in a resolution. The delegates of the conference acknowledged the achievements of the Kurdish people in Iraqi Kurdistan and congratulated Mr

Celal Talabani on his election as President of Iraq. Furthermore, they called for the consideration of several issues during the process of drafting the new constitution for Iraq. These included the separation of religion from state, the compliance with international standards, especially related to women's rights, the implementation of equality between men and women on the basis of the 'Equality Policy' of the Kurdistan Regional Government, awareness raising through training courses and education, and support and assistance for Anfal women. In addition, the conference called for the strengthening of relationships between Kurdish women in the Kurdish areas and the diaspora, and between Kurdish and international women's and human rights organisations.

Lucy Claridge, Legal Officer, KHRP

Enforcing the Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora

In June 2004, the Kurdish Human Rights Project and the Kurdish Women's Project launched the Kurdish Women's Charter ("the Charter"), a collective effort to urge the elimination of all forms of discrimination against Kurdish women and to promote participation of Kurdish women in the social, political, economic and educational spheres of life irrespective of their religious, political or other beliefs. The last issue of KHRP Legal Review³⁵⁹ contained a first interpretation of the Charter. In consultation with our partner organisations, KHRP have now published a manual to complement it. This contains a comprehensive interpretation of the Charter principles and the international mechanisms available for their enforcement.

The first part of the manual considers each article of the Charter in practice and offers comprehensive guidance on their application. This guidance is based upon the feedback we have received from fellow NGOs and Kurdish women regarding the Charter's importance and its application at grassroots level. We have aimed to put into words the experiences of Kurdish women in their attempts to implement the Charter in their daily life. The Charter principles are interpreted in the light of current practices that affect Kurdish women, for example, temporary marriages, violence against women and discrimination against women in the cultural, social and political aspects of life. The manual provides a comparison between each principle of the Charter and its corresponding international equivalent, in addition to up to date information on the ratification of relevant women's rights treaties and covenants by Armenia, Azerbaijan, Iran, Iraq, Syria and Turkey.

The second part of the manual provides an overview of the enforcement mechanisms available to women's organisations and individual women who wish to enforce the principles set out in the Charter. Even though the Charter is not legally binding, it will be possible for Kurdish women and/or Kurdish organisations to make complaints or bring actions where there has been a violation of the principles set out in the Charter, since

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they represent already existing international standards. The manual focuses on the UN and Council of Europe bodies that are most relevant to women and violations committed against them, as opposed to looking at the entire body of UN enforcement mechanisms. This part of the manual aims to give Kurdish women and women's organisations a better idea of their options in the event of violation of their rights.

The Charter is very much designed to be a living instrument in that the fundamental principles it enshrines always remain constant. However, its interpretation and ambit need to evolve with changing times and reflect the changing needs of women. The Charter was established to make a difference to the daily lives of Kurdish women, and the manual aims to make the experience of using the Charter a more accessible and constructive process.

Archana Sinha, Legal Intern, KHRP

The Hijab dispute : secularism v religion

In France, Germany, Turkey and the United Kingdom, varying degrees of tension exist in relation to the wearing of religious symbols such as, the Islamic headscarf (the “hijab”) in state schools. Some argue that education should be dispensed in a religiously neutral environment that is in keeping with secularism, a contemporary form of the principles of tolerance and equality. Others argue that banning the headscarf is a direct attack on the civil liberties of women in the Muslim community where the hijab is viewed as a measure of a woman’s piety.

The term “hijab” is a comprehensive term that includes a woman’s attire as well as the social rules and etiquette that govern her behaviour towards men. The basis for the dress code of women is found at 24:30, 31 of the Qur-aan, which states as follows:

“Tell the believing men to lower their gaze and guard their modesty. (...) and tell the believing women that they should (...) guard their modesty (...) not to display their adornments, except that which ordinarily appear thereof; and to draw their head-veils over their neck and bosoms (...)”

It is very important to put matters into context when considering the right to wear the hijab. Not all women who wear the hijab are oppressed. For the Western world, the hijab has come to mean terrorism, repressive attitudes towards women, lack of democracy, fear and fundamentalism. For many Muslim women today, especially those living in the West, the hijab is a means of expressing their religion and a culture where the woman is required to be modest. Is it so wrong to remove the emphasis on the physical persona of women from social interaction? If a woman chooses to wear the headscarf of her own free will, surely the answer must be no. One Muslim woman wrote:

“For women who freely choose to wear the Islamic headscarf, it can be difficult to take being told you are oppressed for wearing it from a culture where around 5% of all females spend their teens puking over a toilet bowl so that they can look like Kate Moss.”³⁶⁰

360 www.flag.blackened.net/revolt/wsm/ws/2004/801hijab.html

The above statement demonstrates that it is not acceptable to superimpose the Western perception of the Islamic headscarf on the question whether Muslim women in countries such as Turkey, Germany or France should be deprived of their basic right to education and therefore to equal opportunities because they choose to manifest their religion and beliefs. It is worth remembering at this stage that freedom of religion and the right to education are basic universal human rights that are enshrined in and protected by numerous international treaties and covenants.

The Western culture does not necessarily represent an appealing alternative to Muslim women who prefer to retain their own identity by practising their religion and enjoying their culture. This poses a problem in light of the increasing number of Muslim immigrants to the Western world. Western societies believe in secularism, where a society automatically assumes religious beliefs to be either widely shared or a basis for conflict in various forms. In government, secularism is seen as a policy of avoiding entanglement between the government and religion; of non-discrimination among religions (providing they do not deny the primacy of civil laws), and of guaranteeing human rights of all citizens, regardless of their creed (and if conflicting with certain religious rules, by imposing the priority of the Universal Human Rights)³⁶¹.

Is a violation of basic human rights the only way of achieving secularism? How important is secularism that comes at such a high cost? Article 18 of the International Covenant on Civil and Political Rights states that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. This begs the question: what is so offensive about a Muslim woman wearing the Islamic headscarf? The Human Rights Watch 2000 report "Combating Restrictions on the Headscarf" concludes that

"in Turkey the wearing of the headscarf by students or elected representatives has not presented a threat to public order, health or morality, and it is difficult to imagine circumstances in which it might."

There are better chances for a society to achieve secularism by respecting different cultural and religious practices, and showing mutual tolerance and respect, rather than deciding that the hijab is a symbol of sexual discrimination, fundamentalism or oppression of women. However, the fact that the ban only affects Muslim women who still constitute a minority in France is in itself discrimination, and the fact that Muslim women in Turkey who choose to wear the Islamic scarf are deprived of education constitutes oppression. Banning the headscarf in France will not make the integration

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of the Muslim community in France any easier; in fact it is more likely to make the Muslim community feel marginalised. Muslim women in France view the move to ban the headscarf as an effort to make them “colourless”³⁶² and one such woman stated:

“Nobody wants to hear that Muslim women are actually saying – I think they wear the headscarf by choice (...) isn’t it discrimination to have advertisements showing semi-naked women?”³⁶³

In Turkey, discussions on headscarves have included religious fundamentalism, political uses of religious symbols and oppression of girls and women. Headscarves do not pose a threat to public safety and morals of others nor do they impinge on the rights of others. They are not inherently disruptive nor do they undermine the education system. Lets face it: if it is the oppression of girls and women that Turkey wishes to address - albeit only in part - it can start by eradicating violence against women and changing the attitude of its predominantly patriarchal society where women mostly have sexual and reproductive functions³⁶⁴. How can denying women make a state more secular? It simply denies a group of women the right to equal opportunities by reason of their beliefs and religion. The headscarf ban has denied thousands of women the right to education whether temporarily or permanently. Turkish authorities have stated that the scarf is “a flag of aggressive political Islam and threatens the secular order of Turkey”. Open support for women who wear the headscarf is also grounds for persecution. Previous governments have attempted to justify their policies by stating that the headscarf is a demonstration of the wearer’s rejection of Turkey’s secular society. It is not clear that the attire of individual Muslim women justifies such an opinion, or even that the opinion could justify a limitation of the right.

In January 2001, the UN Special Rapporteur on the elimination of all forms of religious intolerance published his report on his 2000 visit to Turkey. The Report strongly questioned the Turkish Republic’s view of itself as a secular state, stating that the Directorate of Religious Affairs wields “excessive powers of religious management such that religious practice appears to be regimented by the Government and Islam is treated very much as a ‘State affair’”. On the headscarf question, the interim report recommended that “legitimate concerns over the political exploitation of religion” should be put on a firmer footing in law while allowing free expression of dress within legitimate limits established to this end. The Special Rapporteur did not however, elaborate on the legitimate limits to free expression of dress³⁶⁵.

362 BBC Worldwide News 19 December 2003

363 BBC Worldwide News 19 December 2003

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365 Memorandum to the Turkish Government on Human Rights Watch’s Concerns with Regard to Academic Free-

It follows that using secularism as a reason for banning the headscarf does not stand, especially in the case of Turkey and France. However, there are times when the lifting of the veil is required. For example, a Florida judge rejected a woman's request to have her face covered by a veil in the photograph on her state driver's licence. The judge pointed out that whilst he did not believe that the woman herself posed a threat to national security, he was concerned that allowing veils on identification photographs was something that could be exploited by terrorists and therefore be a threat to national security. The United States has not however adopted the discriminatory blanket approach that Turkey or France has adopted. In Washington, the Justice Department announced the Government's support of a Muslim girl's right to wear the headscarf in a public school. The Assistant Attorney General for the Civil Liberties Department stated that:

“No student should be forced to choose between following her faith and enjoying the benefits of a public education.”

Alexander Acosta also said that the Muslim girl in question was first told that she could not wear her hijab on 11 September 2003, the second anniversary of the tragic events that unfolded on 11 September 2001. She was informed by school officials that other children were frightened by her headscarf. Acosta added:

“Fear does not justify violating someone's religious liberties.”³⁶⁶

The hijab dispute continues to spread. In the United Kingdom, 15 year-old Shabina Begum has had very little formal education in the last two years. She was excluded from school for wearing the jilbab, a full-length dress that conceals the shape of a woman's arms and legs and which does not form part of the school uniform. In July 2004, a High Court judge, Mr Justice Bennett dismissed the case saying that Shabina Begum had failed to show that her exclusion from school breached her human rights. The Judge added that the “Uniform Policy” was necessary to “protect the rights and freedoms of others who did not want to be like Shabina and wear a jilbab”. On 2 March 2005, the Court of Appeal ruled that Denbigh High had unlawfully excluded Miss Begum and had also denied her the right to manifest her religion and access to suitable and appropriate education. Lord Justice Brooke said the school should have recognised that Miss Begum had the right to manifest her religion in public under the European human rights convention.

The Court of Appeal decision is at odds with the decision of the European Court of Human

dom in Higher Education and Access to Higher Education for Women who wear the Headscarf. HRW briefing Paper – 29 June 2004

Rights in *Leyla Sahin v. Turkey*. This judgment expresses the fears of those who support the banning of the headscarf namely, that recognising the rights of devout Muslims threatens the rights of others. However, this fear seems to be ill-founded as, on a day to day basis in Turkey, tolerance of difference can be seen on the street and organisations with largely secular memberships standing up for the right to wear the headscarf. In France, when 24 young women wearing headscarves were threatened with expulsion from the Saint-Exupéry school in Mantes-la-Jolie, thousands of students organised strikes and solidarity demonstrations that were met with mobilisations of the riot police who made baton charges and arrests. In Germany, the Constitutional Court ruled that a teacher who wears the Muslim headscarf does not violate the current law or principles in relation to religious neutrality of educators. The Court's ruling in September 2003 explicitly declared that individual states are free to approve the wearing of headscarves or other religious symbols in the school system. The states have to find "arrangements acceptable to everyone when balancing religious liberty and the neutrality requirement." Following the Court's decision, seven of the sixteen states in Germany have declared that they plan to create a legal basis for banning Muslim teachers from wearing the Islamic headscarf. Those who support the banning of the headscarf argue that this piece of fabric is not a religious symbol at all but rather stands for the oppression of women. The monk's habit and the crucifix, however, are both seen as an expression of the "nearly 2,000-year Christian culture of the occident"! The Muslims are a religious minority in Germany but it is hard to see how allowing women to wear their Islamic headscarves will turn Germany into a Taliban state.

The West perceives the veil as a sign of oppression of women. This statement cannot be generalised as many educated Muslim women choose to wear the headscarf as part of their cultural and religious identity. Variety is the spice of life and true secularism lies in allowing people to be who they are and using their common features to unite them. Depriving women of the freedom to enjoy and manifest their religion and denying them the opportunity of acquiring education will do little, if anything, to better the position of women in society - nor will it put an end to or eradicate religious fundamentalism. On the contrary, lack of education is only likely to lead to ignorance and greater emphasis on religion and religious practices, thus encouraging fundamentalism. Secularism has been used as one of the main reasons if not the only reason for banning of the headscarf in Turkey and in France. Real secularism requires both complete separation between religious institutions and the state, and the creation of a single, public and free education system independent of all private interests. Neither of these two conditions exists either in France or in Turkey. Secularism is not concerned with insignia or clothing³⁶⁷. On the other hand, it should uphold the right of everyone, believer or non-believer, whatever their religion or conviction to be given a good education independent of the wealth they

possess. The state should not take sides in matters of belief. There should be complete freedom of expression and of organisation. In the words of Shirin Ebadi (Nobel Prize winner 2003)³⁶⁸:

“Know there is no other way for us as a world but to take the path of understanding, and to ensure that every human right for all humankind is observed, irrespective of gender, race, religion, nationality and social status.”

The restriction of women’s right to choose their dress violates their right to education, their right to freedom of thought, conscience and religion, their right to privacy and is discriminatory.

Section 2: Case Summaries and Commentaries

A. Case News - Admissibility Decisions and communicated cases

Right to Life

Seydo Uçar v Turkey

(52392/99)

European Court of Human Rights: Admissibility Decision of 4 January 2005

Lack of effective investigation - Death in custody - Right to life - Prohibition of torture - Right to liberty and security - Right to a fair trial - Right to respect for private and family life - Right to an effective remedy - Prohibition of discrimination - Articles 2, 3, 5, 6, 8, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant is a Turkish citizen whose son disappeared on 5 October 1999 and was found dead in prison in Diyarbakir. The facts are disputed between the parties.

According to the applicant, his son had been abducted by four people pretending to be policemen. On 11 October 1999, the applicant lodged a petition with the public prosecutor of Diyarbakir, asking whether his son was in detention into police custody. When he was notified that his son was not in custody, the applicant filed a new petition with the public prosecutor, asking for investigations. The applicant lodged another petition on 26 October 1999, stating that two police officers had been to his son's house and to his own house, looking for his son, only two days after the abduction had taken place. The applicant claimed that his son was detained and tortured by the kidnappers and then they released him to the police on 2 November 1999. Then his son was forced to sign two statements declaring, firstly, that he was responsible of Hizbullah activities in Diyarbakir and secondly, that his kidnappers were working for M. Yildirim, known by the police for conducting illegal acts in south-east Turkey. His son remained in E-type prison for eleven days until his death on 24 November 1999. The applicant was

convinced that police officers killed his son.

According to the Government, the investigations into the applicant's son's abduction were adequately and efficiently conducted. The police found the applicant's son randomly on 2 November 1999, during a routine police check and decided to take him into custody, as he appeared suspicious to them. As the applicant's son confessed that he was linked with Hizbullah activities, the State Security Court decided to place him in E-type prison where he died after eleven days on 24 November 1999. The government claimed that the applicant's son committed suicide and was found dead by prison officers. An enquiry was conducted the same day and an autopsy concluded that he had died from asphyxia and found no sign of ill-treatment. Finally, on 2 December 1999, public prosecutors took a decision of non-prosecution.

Complaints

The applicant complained under articles 2 and 3 regarding the abduction, disappearance and death in custody of his son.

The applicant raised Article 5 § 1 regarding the arbitrary detention of his son; Article 5 § 3 as his son had not been brought before a judicial authority for nine days while in police custody, and Article 5 § 3 for the lack of domestic remedy.

Invoking Article 6, the applicant alleged that his son had not had access to a lawyer in police custody.

The applicant complained under Article 8 that his son had been deprived to access to his family while in police custody.

Relying on Article 13, the applicant also complained that he had been deprived of an effective domestic remedy.

Finally, the applicant complained of a violation of Article 14 claiming that all the previous violations were the outcome of a practice of discrimination against his son related to his race and religion.

The government objected that the applicant had not exhausted all the domestic remedies available under Article 35 § 1

Held

The Court dismissed the government's claim that the applicant had failed to exhaust domestic remedies.

The Court ruled that the complaints under Articles 2, 3, 5, 6, 8, 13 and 14 were admissible and that the complaint raised important issues.

Şeker vTurkey

(52390/99)

European Court of Human Rights: Admissibility Decision of 1 February 2005

Lack of effective investigation - Right to life - Prohibition of inhuman treatment – Right to liberty and security- Right to a fair trial – Right to respect for private life and family life – Right to an effective remedy – Prohibition of discrimination - Articles 2, 3, 5, 6, 8, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant is a Turkish citizen whose son disappeared on 9 October 1999. The facts were contested between the parties.

According to the applicant, just two days after his son's disappearance, he went to the public prosecutor in Bismil and asked him to carry out an investigation about the event. Throughout October 1999, he lodged petitions with several authorities, requesting information about the circumstances. In his petitions to the Human Rights Commission of the Turkish Grand National Assembly, he complained that he had not received any response to his previous petitions and stated that his son had been threatened and followed by the police since having a fight with a policeman. In 2000, a public prosecutor demanded the applicant to provide a sample blood for identification of corpses of Hizbullah members. However, they were unable to identify the corpses.

According to the Government, the public prosecutor of Bismil launched an investigation as soon as the applicant had lodged his petition. The public prosecutor of Diyalbakir had carried out an enquiry to check the applicant's allegations, pretending that his son was in custody. Nevertheless, the Government also recognized that until 2002, the ongoing investigations had lacked efficiency. The most recent investigations revealed police suspicions that the applicant's son had been involved with Hizbullah, an illegal organisation, and revealed that the applicant's son had not been detained in custody. They also stated that the applicant's son had still not been found yet but the investigations were ongoing.

Complaints

The applicant alleged a violation of Articles 2 and 3 regarding the lack of adequate and effective investigation into his son's disappearance and his suffering concerning the

circumstances.

Invoking Article 5, the applicant complained that his son had been arbitrarily detained in custody. The applicant also raised a violation of Article 6 in relation to his son's denial of access to a lawyer in police custody.

Relying on Article 8, the applicant denounced the fact that his son was refused access to his family in police custody.

The applicant complained that he was denied access to an effective remedy, breaching Article 13.

Finally, the applicant complained of a violation of Article 14 claiming that all the previous violations were the outcome of a practice of discrimination against his son in connection with his ethnic origin.

The Government claimed that the application should be struck out and that the applicant had not exhausted all the domestic remedies as required in Article 35.

Held

The Court dismissed the Government's strike out application.

The Court held that the complaints under Articles 2, 3, 5, 6, 8, 13 and 14 were admissible and raised serious questions. Article 2 was admissible in its procedural aspect and Article 3 in its substantial and procedural context. The Court ruled that the Government's objection regarding the exhaustion of domestic remedies should be joined to the merits.

Mansur Pad and Others v Turkey

(60167/00)

European Court of Human Rights: Communicated in March 2005

Extra judicial killing – Lack of effective investigation – Right to life – Prohibition of torture – Right to liberty and security – Right to a fair trial – Right to an effective remedy – Prohibition of discrimination – Limitation on use of restrictions on rights – Articles 2, 3, 5, 6, 13, 14 and 18 of the Convention

Facts

This is a KHRP assisted case. The applicants are all Iranian citizens who live in Iran, except for one applicant who is an Iraqi national and one other who lives in Sweden.

On 7 May 1999, seven relatives of the applicants were attacked and captured by Turkish soldiers near the Turkish border. They were abused and killed by the soldiers. The Turkish Government expressed its responsibility for the events. The families of the seven victims lodged complaints with the Iranian authorities and requested effective investigations by the Ministry. On 9 June 2000, as they did not receive any information from the investigation, the applicants asked the Turkish authorities to carry out an enquiry. The Turkish authority did not make any investigation into the events.

Communicated under Articles 2, 3, 5, 6, 13, 14 and 18 of the Convention.

Kanil Uzun v Turkey

(37410/97)

European Court of Human Rights: Communicated in April 2005

Right to life - Right to respect for private and family life – Right to an effective remedy - Protection of property - Articles 2, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No1 of the Convention

Facts

This is a KHRP assisted case. The applicant's mother was killed on 16 September 1994 in her home by a shell explosion. The applicant and his family lodged a complaint with the police department. The authorities failed to carry out an investigation in the events and to find out where the bomb was coming from. On 30 October 2002, the prosecutor of Kiğı decided to open proceedings against two soldiers for negligence as they failed to inform the prosecutor about the death of the Applicant's mother.

Communicated under Articles 2, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No 1 of the Convention

Prohibition of Torture and Inhuman or Degrading Treatment

Tangüner and Tangüner v Turkey

(36218/97)

European Court of Human Rights: Admissibility decision of 5 October 2004

Destruction of home and property – Prohibition on torture – Right to respect for private and family life - Articles 3, 5, 6, 8, 13 and 18 of the Convention and Article 1 of Protocol No. 1

Facts

This is a KHRP assisted case. The applicants, Mr Mehmet Tangüner and Mr Mihti Tangüner, are Turkish nationals who were born in 1931 and 1939 respectively and live in Diyarbakır.

Until 25 March 1995 the applicants were living in the village of Uğrak, located within the administrative jurisdiction of the province of Diyarbakır. They alleged that the security forces intimidated them, accused them of aiding and abetting the PKK and forced them to become village guards. The applicants alleged that they left the village, and learnt that their houses had been burnt down by soldiers.

This version of events was disputed by the Government. The Government claimed that an investigation by the domestic authorities established that no military operation had been conducted in the Uğrak village and that the village had not been evacuated. The applicants left the village of their own free will due to financial problems and there is no evidence that their houses were destroyed by members of the security forces. Part of the houses had been taken down by the applicants themselves and part destroyed by the weather. The Government disputed the applicants' allegations that they had been asked to become village guards and stated that no PKK activity had been observed in the Uğrak village area.

Complaints

The applicants complained, under Article 3 of the Convention, that the treatment to which they were subjected by members of the security forces and their forced eviction from their village amounted to torture.

Invoking Article 5 of the Convention, the applicants submitted that they were deprived of their right to security of person on account of their forced eviction from their village by members of the security forces.

The applicants alleged that the impossibility of challenging the destruction of their family homes and possessions represented a denial of their right of access to court for a determination of their civil rights, within the meaning of Article 6 of the Convention.

They further alleged, under Article 8 of the Convention, that their right to respect for their family life and home was violated on account of the unjustified destruction of their houses and possessions.

The applicants complained that, contrary to Article 13 of the Convention, there were no effective remedies to challenge the destruction of their houses.

Invoking Article 18 of the Convention, they submit that the interferences referred to

above with the exercise of their Convention rights were not designed to secure permitted Convention purposes.

Invoking Article 1 of Protocol No. 1, the applicants complained that they were deprived of their right to the peaceful enjoyment of their possessions on account of the destruction of their houses and possessions by the security forces.

Held

The Court held that the application was inadmissible.

In relation to Article 3, the complaint was manifestly ill-founded as the applicants had failed to produce any concrete evidence in support of their allegations.

In relation to Article 5, the complaint was manifestly ill-founded, as the applicants' insecure personal circumstances arising from the alleged loss of their homes did not fall within the notion of security of person as envisaged in Article 5(1) of the Convention.

Referring to their alleged forced eviction from their homes and village, the applicants invoked a breach of Articles 3, 6, 8, 13 and 18 of the Convention and Article 1 of Protocol No. 1. The documents produced by the applicants did not provide sufficient *prima facie* evidence of their version of events. The Court noted that in September 2002 the applicants returned to their village and have been living there ever since. The applicants had failed to corroborate their allegation that they were forced to leave their village by the security forces because they did not agree to become village guards. For these reasons, this part of the claim was declared inadmissible as being manifestly ill-founded.

Right to Liberty and Security

Sinan Tanrikulu, Servet Ayhan and Firat Anli v Turkey

(29918/96), (29919/96), (30169/96)

European Court of Human Rights: Admissibility Decision of 24 February 2005

Arbitrary detention – Prohibition of torture – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of association – Right to an effective remedy – Prohibition of discrimination – Limitation on use of restrictions on rights – Individual petition – Articles 3, 5, 6, 10, 11, 13, 14, 18 and 34 of the Convention

Facts

This is a KHRP assisted case. The applicants are Turkish nationals. The first and the second

applicants were members of the Human Rights Association and the third applicant was the president of the HADEP provincial headquarters of Diyarbakir. On 27 February 1995, the public prosecutor ordered searches to be carried out at the Human Rights Association of the Diyarbakir branch and in the HADEP Diyarbakir headquarters. The applicants were placed in police custody and questioned. According to the applicants, they were ill-treated while in custody but the medical reports declared no sign of ill-treatment. The public prosecutor decided to pursue them for acts of propaganda on behalf of the PKK. On 8 April 1996, the State Security Court acquitted the applicants for lack of evidence. On 30 December 1997, the first applicant was granted compensation for his unlawful detention following the petition he had lodged. An investigation was launched by the authorities regarding the allegations of ill-treatment during custody. On 11 March 1999, the administrative authorities decided that, due to lack of evidence, the nine policemen should not be prosecuted. This was appealed to the Supreme Administrative Court which, on 31 May 2001, struck out the case.

Complaints

Relying on Article 3, the applicants complained about the ill-treatment they had suffered.

The applicants complained under Article 5 § 1, that they had been arrested and detained illegally. The first and the second applicant alleged that as lawyers, they had been questioned by the police in violation of Article 5 § 1. The first and the second applicants also submitted that they had they been detained and interrogated by the police in violation of Article 5 § 1. The applicants alleged that the time of their detention was excessive, in violation of Article 5 § 3.

The first and the second applicants complained under Article 6 that the tribunal was not impartial and independent.

The first and the second applicants also alleged a breach of Article 10 as they had been accused of communicating with foreign persons and institutions. The third applicant complained that he had been prosecuted because of his political activities in violation of Articles 10 and 11.

The first and the second applicants raised a violation of Article 13 for lack of effective remedy

The first and the second applicants complained that they were victims of discrimination in violation of Article 14 because of their political opinions.

The first and the second applicants alleged that the restrictions applying on their rights were in breach of Article 18.

Finally, the first and the second applicants submitted under Article 34 that they had been pursued because of their activities in helping victims of human rights violations.

Held

The Court ruled that the complaint under Article 5 § 3 was admissible

The Court held that the complaints under Article 5 § 1, regarding the fact that the first and the second applicants had been interrogated by police, although they were lawyers, were admissible.

The Court ruled that the complaints of the first and second applicants under Article 5 § 1 regarding the detention and the interrogation by the police in presence of other police officers, was inadmissible.

The Court ruled that the complaints under Articles 6, 10 and 11 were inadmissible as the applicants had been acquitted by a domestic court and could no longer be considered as victims.

The Court found the complaint under Article 13 inadmissible, as this article applied only to a violation of the rights of the applicant.

The Court ruled that the violations of Articles 3, 14 and 18 were inadmissible as the applicants had provided no evidence in support of their allegations.

Finally, the Court held that the complaint under Article 34 was inadmissible as the applicants alleged no violation of their right to an individual petition.

Freedom of expression

Noyan Tapan v Armenia

(37784/02)

European Court of Human Rights: Admissibility decision of 21 October 2004.

Refusal to grant broadcasting licence to private news agency and television company – Freedom of expression - Right to fair trial – Prohibition of discrimination – Protection of

property - Articles 6, 10 and 14 of the Convention and Article 1 of Protocol No.1.

Facts

This is a KHRP-assisted case. The applicant, Noyan Tapan Ltd, is a privately owned Armenian news agency and television company established in 1991. The applicant company submits that, since 1997, it had applied on several occasions to the relevant public authorities to obtain a television broadcasting licence but was repeatedly refused. In 1999, the applicant company entered into an agreement with another private company, the “Lotus” television company, to jointly produce a set of the applicant company’s television programmes. Under the terms of the agreement, Lotus allowed the applicant company to broadcast over band 35 for which Lotus held a broadcasting licence.

In September 2001 Lotus complained to the applicant company about the quality and content of its production. The applicant company refused to agree to the changes to the agreement put forward by Lotus. Lotus applied to the Television Network of Armenia, seeking to shut down the applicant company’s transmitter. The electricity supply to the transmitter was cut off. The applicant company submitted that the unilateral withdrawal from the agreement by Lotus was the result of Government pressure, as the management and shareholders of Lotus were assaulted and threatened by national security officers in September 2001 and were instructed to stop broadcasting the applicant company’s television programmes.

In 2001, the applicant company instituted proceedings for damages against Lotus in the Commercial Court, seeking also to oblige Lotus to resume its broadcasts. In 2002, the Commercial Court partly granted the applicant company’s claims, finding that Lotus had violated the agreement. On 19 February 2002 the National Commission of Television and Radio announced licensing competitions for various broadcasting frequencies, including band 35. The applicant company and two other companies, “Shoghakat” and “Yan TV”, submitted bids for band 35. Lotus did not participate in the competition. Shoghakat was announced as the winner on 2 April 2002. No reasons were provided for this decision. The applicant company submits that the refusal of its bid by the Commission was driven by the Government’s intention to limit and ultimately silence the applicant company’s independent voice in the run up to the Armenian presidential elections in February 2003.

The applicant company applied to the Commercial Court, claiming that the competition had been conducted in violations of the law and seeking to invalidate its results. The company’s claims were rejected by the Court in May 2002. The company appealed unsuccessfully to the Court of Cassation, whose judgment was given on 12 July 2002. The Commission subsequently announced licensing competitions for other bands. The applicant company bid for bands but was refused a licence.

Complaints

The applicant company complained under Article 6 of the Convention that the Court of Cassation's decision of 12 July 2002 was not sufficiently reasoned. It further submitted that the removal of its counsel from the courtroom in the proceedings before the Court of Cassation deprived it of effective legal representation and violated the principle of equality of arms.

The company complained that the decision of the Commission of 2 April 2002 interfered with its right to freedom of expression. It claimed that the Commission did not act in a manner prescribed by law and that the unlawful decision was the result of distrust by the Government towards the political content of the applicant company's broadcasts.

The company further invoked Article 14 of the Convention in conjunction with Article 6 as far as the court proceedings that terminated with the decision of 12 July 2002 were concerned and in conjunction with Article 10 regarding the Commission's decision of 2 April 2002.

The company complained under Article 1 of Protocol No. 1 that the decision of the Commission of 2 April 2002 unlawfully interfered with its right to peaceful enjoyment of its possessions. It submitted that it enjoyed a possession in the broadcasting licence awarded to it.

The company complained about the refusals by the Commission to grant a broadcasting licence following the further licensing competitions, invoking Articles 6, 10 and 14 of the Convention and Article 1 of Protocol No. 1.

Held

The court decided to adjourn the examination of the applicant company's complaints concerning the removal of its counsel from the courtroom and interference with its right to freedom of expression. In relation to Article 10, the court declared that it could not, on the basis of the file, determine the admissibility of this part of the application and therefore decided to communicate this complaint to the Government. The remainder of the application was declared inadmissible, as explained below.

As to the Court of Cassation's decision of 12 July 2002, the Court recalled that Article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The question of whether a court has failed to fulfil the obligation to state reasons can only be determined in the light of the circumstances of the case. Having regard to the Court of Cassation's reasoning in its decision of 12 July 2002 and the margin of appreciation left to the domestic courts in such matters, the Court found no indication that the Court of Cassation failed to fulfil

its obligation to state reasons. This part of the application was therefore manifestly ill-founded within the meaning of Article 35(3) of the Convention.

As to the Commission's decision of 2 April 2002, the Court recalled that it may only examine complaints in respect of which domestic remedies have been exhausted. It noted that the applicant company did not raise this issue before the domestic courts. This part of the application was therefore manifestly ill-founded.

The court found that there was no evidence to substantiate the applicant company's allegation that the domestic courts were being influenced by political considerations and therefore found the claim under Article 14 to be manifestly ill-founded.

In relation to the complaint under Article 1 of Protocol No. 1, the Court recalled that withdrawal of a licence to run a business activity in certain circumstances may constitute an interference with the right to the peaceful enjoyment of one's possessions. However, here, the applicant company never possessed and was never awarded or deprived of a broadcasting licence. The refusal by the Commission to grant a licence could therefore not be regarded as an interference with the applicant company's rights guaranteed by Article 1 of Protocol No. 1 and this part of the application was rejected.

The complaint in relation to the Commission's refusals to grant a broadcasting licence following the subsequent licensing competitions was inadmissible as the applicant company had failed to exhaust domestic remedies as required by Article 35(1).

Düzgören v Turkey

(56827/00)

European Court of Human Rights: Admissibility Decision of 28 September 2004

This is one of a series of KHRP cases brought to the European Court of Human Rights.

Distribution of a leaflet concerning a conscientious objector – Right to a fair trial – Freedom of expression – Right to an effective remedy – Articles 6, 8, 9, 10, 11, 13 of the Convention and Article 1 of Protocol No.1

Facts

The applicant, Koray Düzgören, is a Turkish national, who was born in 1947 and lives in London.

On 1 April 1998 the applicant, who is a journalist, together with N. A., distributed a leaflet concerning the conscientious objector O. M. U., outside the Ankara State Security

Court. The applicant also handed the leaflet to the Public Prosecutor at the Ankara State Security Court. The leaflet, entitled “*Freedom to think - an initiative against the crime of thought*” contained the press release issued by O. M. U on 1 September 1995.

On 4 June 1998 the military Public Prosecutor at the General Staff Court in Ankara filed a bill of indictment, accusing the applicant of discouraging people from performing military service. On an unspecified date, criminal proceedings against the applicant commenced before the General Staff Military Court in Ankara. On 9 March 1999 the Court convicted the applicant and sentenced him to two months’ imprisonment and to a fine of 1,520,000 Turkish liras.

The applicant appealed unsuccessfully, on the basis that he should not have been tried by a military Court and that the act which he had committed could not be considered an offence.

On 17 July 1999 the applicant left Turkey in order to avoid imprisonment.

Complaints

The applicant contended under Article 6(1) of the Convention that he was not heard by an independent and impartial tribunal since he was tried in a military Court.

The applicant alleged under Article 8 of the Convention that there has been an unjustified interference with his right to respect for his private and family life since he had to leave Turkey in order to avoid imprisonment.

The applicant submitted under Articles 9, 10 and 11 of the Convention that his prosecution and conviction for producing and distributing a leaflet infringed his rights under these Articles.

The applicant claimed under Article 1 of Protocol No. 1 that his conviction deprived him of his right to exercise his profession since his contract with Channel 8 was terminated as a result of pressure exerted by the authorities. In this connection, the applicant complains that he is now earning less than what he was earning with Channel 8.

The applicant complained under Article 13 of the Convention that he did not have an effective domestic remedy in respect of his above-mentioned grievances.

Held

In relation to the complaint under Article 6(1), the Court considered that it cannot on the basis of the case file, determine the admissibility of this complaint and that it was

therefore necessary, in accordance with Rule 54(2)(b) of the Rules of the Court, to give notice of it to the respondent Government.

In relation to the submissions under Articles 9, 10 and 11, the Court held that the complaints fell under Article 10 and would be considered under that provision only. Notice would be given to the respondent Government.

The complaint under Article 13 was held to be admissible.

The Court held that the complaint under Article 8 was inadmissible. It considered that even assuming that there were compelling reasons in the mind of the applicant to leave Turkey and thus to be separated from his family, it could not be said that this was on account of a direct interference by the respondent Government with the private and family life of the applicant. Consequently, the Court rejected this part of the application as manifestly ill-founded within the meaning of Article 35 of the Convention.

The applicant's complaint under Article 1 of Protocol 1 was held to be manifestly ill-founded.

Şanar Yurdatapan and Others v Turkey

(47248/99)

European Court of Human Rights: Admissibility Decision of 8 March 2005

Right to a fair trial - Freedom of expression - Articles 6 and 10 of the Convention

Facts

This is a KHRP assisted case. The applicant is a Turkish national who lives in Turkey. In 1995, the initiative for freedom of expression (IFE), a general civil disobedience, was launched in support of the writer, Y Kemal, prosecuted for his articles. On 23 July 1999, the applicant published and distributed a banned leaflet called "Freedom of Thought". Subsequently, he lodged a complaint against himself with the public prosecutor, claiming that he should be prosecuted for his action. On February 2000, the applicant was found guilty for seeking to dissuade people from serving in the military by the military court. He was sentenced to two months' imprisonment and a fine.

Complaints

The applicant complained under Article 6 that he had not had access to a fair trial.

The applicant argued a breach of Article 10 regarding his conviction for having published

and distributed a leaflet including a speech from a conscientious objector.

Held

The Committee of three judges ruled under article 28 that the complaint did not comply with articles 34 and 35; and consequently was inadmissible.

Right to an Effective Remedy

Charzynski v Poland, Tadeusz Michalak v Poland

(15212/03) and (24549/03)

European Court of Human Rights: Admissibility Decision of 1 March 2005

Length of legal proceedings- Right to a fair trial – Right to an effective remedy - Articles 6 and 13 of the Convention

Facts

The applicants had lodged applications with domestic courts in Poland. They considered that the time they had to wait for a hearing was not reasonable and prevented them from having access to an effective remedy. Nevertheless, they did not lodge an application under a new domestic act (the “2004 Act”), which had established a new remedy allowing complaints to be made to the courts about the length of proceedings while these proceedings are still pending. The 2004 Act allows the appellate court to find violation of Article 6 of the Convention and to grant compensation to the complainant(s). The court can also require the lower court to accelerate the proceedings.

Complaints

The applicants complained under Article 6 that they were denied the right to a fair hearing and under Article 13 that the domestic remedies were not effective.

Held

The Court ruled that the complaints were inadmissible. The applicants had failed to exhaust domestic remedies as they had ignored the 2004 Act, which provided the applicants with a right to complain before domestic courts about the length of the procedure while proceedings were still pending. The court based their reasoning on the 2004 Act, which had been instituted in response to the condemnation of Poland by the Court in *Kudła v Poland*. In this case, the Court ruled that there were no effective remedies in Poland regarding the right to a hearing in a reasonable time and consequently there was a violation of Article 13.

Protection of Property

Siddika Süleymanoğlu & Meliha Yasul v Turkey

(37951/97)

European Court of Human Rights: Admissibility Decision of 7 December 2004

Eviction and destruction of villages - Right to a fair trial - Right to an effective remedy - Prohibition of discrimination - Protection of property - Articles 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No 1 of the Convention

Facts

This is a KHRP-assisted case. The applicants are both Turkish nationals and were living in the village of Ağartı in the South-East of Turkey, which was declared a state of emergency in 1987. The facts are in dispute between the parties.

According to the applicants, the police started pressurising the villagers in 1993, as they believed the villagers were assisting the PKK. In October 1993, the villagers were required to leave the village. In November 1993, the police started threatening the villagers to abandon the village. Mrs Süleymanoğlu's son was injured during the events and they left the village together. The police came back in May 1994 and continued to threaten the villagers. Mrs Yasul decided to leave her home as well. On 15 October 1995, the villagers found out that the police had burnt their homes.

According to the Government, the villagers evacuated the village willingly for security reasons as they were under threats from members of the PKK. The Government also claimed that the houses were not destroyed by intentionally setting them on fire but that the damage was caused by the weather conditions and the bad state of the houses.

Complaints

Invoking Articles 6 and 13, the applicants complained that they did not get any access to an effective domestic remedy to contest the destruction of their properties.

The applicants alleged a violation of Article 8 as a result of the destruction of their homes and of the forced evacuation of the village. They claimed that they did not receive any assistance from the national authorities.

Relying on Article 1 of Protocol No 1, the applicants also complained about the damage and the refusal of access to their properties.

Finally, the applicants raised Article 14 in conjunction with Article 8, claiming discrimination on account of their Kurdish origin. They also raised a violation of Article 18 of the Convention.

The Government claimed that the six-month time limit had not been respected and that the applicants had not exhausted all available remedies.

Held

The Court ruled that the 6-month delay had been exceeded in respect of the complaint regarding destruction of their properties. The events took place on 15 September 1995, so the 6-month period started on that date; but the application was presented to the Court on 10 June 1997. The applicants' complaints in relation to the destruction of the properties were therefore declared inadmissible.

The Court noted that the applicants had not lodged any complaints with the domestic courts, as they had considered that a trial would have not been successful regarding the insufficiencies of the investigations. Therefore, the Court held that the complaints under Articles 6 and 13 should be examined under the general obligation of Article 13. Consequently, the Court ruled that the complaint under Article 6 was inadmissible.

The Court decided that the Applicants had not sufficiently supported their allegations in relation to Articles 14 & 18 and therefore declared them inadmissible.

The Court declared that the applicants' complaints regarding the denial of access to their properties, the forced eviction and the impossibility of return to their village were admissible under Articles 8, 13 and Article 1 Protocol 1.

Von Maltzan And Others, Von Zitzewitz & Others And Man Ferrostaal & Alfred Tpfer Stiftung v. Germany

(71916/01), (71917/01) and (10260/02).

European Convention of Human Rights: Grand Chamber Admissibility Decision of 2 March 2005

Right to a fair trial – Right to respect for private and family life - Prohibition of discrimination – Protection of property- Articles 6§1, 8 and 14 of the Convention and Article 1 Protocol No 1 of the Convention

Facts

The applicants are 68 German nationals, a Swedish national and two entities incorporated under German law after the reunification of Germany. After the reunification of

Germany, they claimed for the indemnification and compensation for those who were expropriated after 1949 in the German Democratic Republic or between 1945 and 1949 in the former Soviet Occupied Zone of Germany. They applied for restitution of their properties but the relevant authorities rejected their applications.

Complaints

The applicants complained under Article 1 of Protocol No. 1 that the domestic legislation does not respect the rights of property in connection with the refusal of restitution and the amount of compensation or indemnification they had received.

Relying on Article 14 in connection with Article 1 of Protocol No 1, the applicants claimed that they had been discriminated as they had been refused a right to ask for the restitution of their properties unlike other categories of people. The applicants also raised a breach of Article 8 in this respect.

Finally, the applicants alleged a violation of Article 6 § 1 regarding the length of the proceedings before the Federal Constitutional Court.

Held

The Court held that the complaint under Article 1 Protocol No 1 was inadmissible as the present case did not concern “existing possession” but claims of possession. Consequently, the complaint did not fall under the provisions *ratione materiae* of Article 1 Protocol No 1

Therefore, the Court ruled that Article 14 taken in conjunction with Article 1 Protocol No 1 and Article 8 taken in conjunction with Article 14 and Article 1 Protocol No 1 were also inadmissible.

The Court held that Article 6 § 1 was inadmissible regarding the exceptional situation of the German reunification.

Manoilescu & Dobrescu v Romania & Russia

(60861/00)

European Court of Human Rights: Admissibility Decision of 3 March 2005

Nationalisation - Right to liberty and security – Right to a fair trial – Protection of property - Articles 5, 6 of the Convention and Article 1 of Protocol No 1 of the Convention.

Facts

The applicants are Romanian nationals who live in Germany and France respectively. They inherited a building from A.D. who was sentenced to jail in 1950 and died in prison in 1963. This building was nationalised in 1950 and it was exchanged to the Soviets States in 1962. It is currently the property of the Russia Embassy in Romania. In 1996, the applicants lodged a complaint in order to obtain restitution of the building. The relevant administrative Committee ruled on 18 June 1997 that the property had to be restored to the applicants. This decision was upheld on 12 January 1998 by a judgment of a first-instance court. The applicants did not obtain the enforcement of their decisions by the Romanian authorities and lodged an appeal. The Court of appeal ruled that the building was the property of Russia and accordingly, the Court was not competent in this case to order the restitution of the building.

Complaints

The applicants complained that A.D.'s imprisonment breached Article 5.

The applicants claimed that the domestic proceedings breached Article 6 § 1 as the proceedings were unfair and they were unable to enforce the administrative decision.

Finally, the applicants raised a violation of Article 1 of Protocol No. 1, as they did not obtain restitution of their property.

Held

With regard to Romania:

The complaint under Article 5 was inadmissible as Romania was not a State Party to the Convention at the time of the events and therefore the Court was not competent to examine the claim.

The Court found that the complaint under Article 6 § 1 was inadmissible.

The Court found that the claim under Article 1 Protocol No 1 was also inadmissible as the State authorities' failure to take enforcement measures with regards to restitution was justified by the public interest and the necessity of not disrupting relations between Romania and Russia.

With regard to Russia:

The Court ruled that the complaint was inadmissible as the applicants were not under the jurisdiction of Russia.

B. Substantive

Right to life

Seyhan v Turkey

(33384/96)

European Court of Human Rights: Judgment of 2 November 2004

Disappearance and deprivation of life – No violation of Article 2 (loss of life) – Violation of Article 2 (inadequate investigation) – Articles 2, 5 and 13 of the Convention.

Facts

The applicant, Süleyman Seyan, is a Turkish national who was born in 1962. He now lives in France. He is the son of Suleyman Seyhan, who disappeared on 30 October 1995 and whose body was found on 6 March 1996.

According to the applicant, on 28 October 1995, following the murder of three civilians by PKK members, police and village guards carried out an operation in the Dargeçit (Mardin) district, where the Seyhan family then lived. Approximately one hundred people were arrested.

On the morning of 30 October 1995 the applicant's father and one of his sisters were made to board a military vehicle by a soldier and a village guard. They, and a number of other people, were taken to a place where they were tortured. His sister was subsequently released, but the applicant and his family received no further news of Süleyman Seyhan.

On 6 November 1995 the applicant's mother asked the Dargeçit Public Prosecutor to bring proceedings. An investigation was launched and a statement taken from Mrs Seyhan. She said that three village guards, whose names she supplied, had been present on the morning her husband disappeared. The public prosecutor took statements from the guards and from gendarmes identified by a third party.

The Government denies that the applicant's father or sister were taken into custody and cites the police station custody record – which does not feature their names – as proof

On 6 March 1996, a decomposing and decapitated body was found under stones at the bottom of a well in Korucu village, Dargeçit. On the same day, the Dargeçit Public

Prosecutor heard the brother of the deceased, who stated that four or five days before the discovery of the body, the Seyhan family had received an anonymous telephone call indicating that the body of their relative was in a well in Korucu.

The body and a burial licence were delivered to the family of the deceased. An enquiry into the death of Suleyman Seyhan followed.

Complaints

The applicant complained under Articles 2, 5 and 13 of the Convention.

Held

The Court held that the procedural obligations implied by Article 2 had been violated, and a violation of Articles 5 and 13 was found. No material violation of Article 2 was found. The respondent State was ordered to pay damages to the Applicant.

Commentary

It was not established beyond reasonable doubt that the State was responsible for the disappearance and death of Mr Seyhan, therefore there was no material violation of Article 2.

As to the investigation into the circumstances of the death, the simple fact that the authorities are informed of a death gives rise to an obligation to fully investigate the circumstances of that death (*Ergi v Turkey*; *Yaşa v Turkey*; *Hugh Jordan v United Kingdom*). The Court noted that although at first sight the initial inquiries appeared to comply with the requirements of Article 2, the conduct of the investigation thereafter, once the authorities had been informed of the suspicions concerning the village guards, could not be considered to have been exhaustive or satisfactory. The Public Prosecutor had failed to organise a face-to-face meeting between the village guards and the applicant's mother, who had identified them, and relied on their statements without seeking to establish the precise sequence of events on the day in question. Nor was there any evidence that they had sought to check the truth of the guards' statements or made any attempt to interview possible witnesses. In those circumstances, the Court found that the Turkish authorities had not conducted an adequate and effective investigation into the disappearance and death of the applicant's father and held unanimously that there had been a violation of Article 2 on that account.

Issa and Others v Turkey

(31821/96)

European Court of Human Rights: Judgment of 16 November 2004

Death of Iraqi nationals near the Turkish border - Jurisdiction of States – Right to life – Articles 2, 3, 5, 8, 13, 14 and 18 of the Convention.

Facts

This is a KHRP assisted case. The six female applicants, Mrs Halima Musa Issa, Mrs Beebin Ahmad Omer, Mrs Safia Shawan Ibrahim, Mrs Fatime Darwish Murty Khan, Mrs Fahima Salim Muran and Mrs Basna Rashid Omer, are Iraqi nationals who were born in 1950, 1970, 1951, 1939, 1949 and 1947 respectively and live in northern Iraq.

The first applicant brought the application on her own behalf and on behalf of her deceased son, Ismail Hassan Sherif. The remaining applicants brought the application on their own behalf and on behalf of their deceased husbands, Ahmad Fatah Hassan, Abdula Teli Hussein, Abdulkadir Izat Khan Hassan, Abdulrahman Mohammad Sherriff and Guli Zekri Guli respectively. The fourth applicant also brought the application on behalf of her deceased son, Sarabast Abdulkadir Izzat.

The facts of the case are disputed.

According to the applicants, they are shepherdesses who earn their living by shepherding sheep in the valleys and hills surrounding their village of Azadi in Sarsang province near the Turkish border. Their deceased relatives were likewise employed.

On the morning of 2 April 1995 a group of shepherds from the village of Azadi in Sarsang province near the Turkish border left the village to take their flocks to the hills. They encountered Turkish soldiers who were allegedly carrying out military operations in the area and who immediately abused and assaulted them. The women were told to return to the village and the men were led away.

On 3 April 1995 the Turkish army withdrew from the area around the village and the villagers carried out a search for the seven shepherds who had gone missing. In an area close to where the seven shepherds had last been seen with the Turkish soldiers they found the bodies of Ismail Hassan Sherif, Ahmad Fatah Hassan, Abdulkadir Izat Khan Hassan, Sarabast Abdulkadir Izat and Abdulrahman Mohammad Sherriff. The bodies had several bullet wounds and had been badly mutilated - ears, tongues and genitals were missing. On 5 April 1995 the bodies of Abdula Teli Hussein and Guli Zekri Guli were also found in a state similar to that of the bodies of the other five shepherds.

The six applicants had since filed several petitions with the authorities of the region requesting that an investigation be conducted into the deaths of their relatives. They applied to the Governor of Dohuk and gave statements. The Governor said that the deaths would be investigated. However, the applicants have not been informed of any follow-up to the Governor's undertaking.

According to the Government, a Turkish military operation had taken place in northern Iraq between 19 March 1995 and 16 April 1995. The Turkish forces had advanced to Mount Medina. The records of the armed forces did not show the presence of any Turkish soldiers in the area indicated by the applicants, the Azadi village being ten kilometres south of the operation zone. There was no record of a complaint having been made to any of the officers of the units operating in the Mount Medina region.

Complaints

Substantive complaints were made under Articles 2, 3, 5, 8, 13, 14 and 18 of the Convention.

Held

The Court found that the applicants' relatives did not come within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention and that it was therefore not necessary to examine the applicants' complaints under the Convention.

Commentary

The established case-law indicated that the concept of "jurisdiction" for the purposes of Article 1 of the Convention had to be considered to reflect the term's meaning in public international law, according to which a State's jurisdictional competence was primarily territorial. In exceptional circumstances, the acts of Contracting States performed outside their territory or which produced effects there might amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.

In *Loizidou v Turkey*, it was held that the concept of 'jurisdiction' within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. A Contracting State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating in the latter State.

This was a clear and important indication from the Court that Article 1 of the Convention

cannot be interpreted so as to allow a State party to perpetrate ECHR violations on the territory of another State which it could not perpetrate on its own territory.

The essential question to be examined was therefore whether at the relevant time Turkish troops had conducted operations in the area where the killings took place. The standard of proof employed by the Court in seeking to determine this issue in the light of documentary and other evidence was “beyond reasonable doubt”.

Notwithstanding the large number of troops involved in military operations in northern Iraq, it did not appear to the Court that Turkey exercised effective overall control of the entire area. The situation was therefore distinguished from that in *Lozidou v Turkey*. In finding that the applicants’ relatives were not within the jurisdiction of the respondent State as a result of the latter’s extra-territorial acts, the Court made the following observations:

The applicants had not given any particulars as to the identity of the commander or of the regiment involved in the impugned acts, nor had they given a detailed description of the soldiers’ uniforms. There was moreover no independent eyewitness account of the presence of Turkish soldiers in the area in question or of the detention of the shepherds.

There was no independent eyewitness account of the presence of Turkish soldiers in the area in question or of the detention of the shepherds. The Court could not disregard the fact that the area where the applicants’ relatives were killed was the scene of fierce fighting between PKK militants and KDP peshmergas at the relevant time, and was unable to determine whether the shepherds were killed by gunfire discharged by Turkish troops.

Makaratzis v Greece

(50385/99)

The European Court of Human Rights: Grand Chamber Judgment of 20 December 2004

Right to life - Prohibition of torture - Right to an effective remedy - Articles 2, 3 and 13 of the Convention.

Facts

The applicant is a Greek national who lives in Greece. On 13 September 1995, he was pursued by the police. Eventually, he stopped his car but refused to get out. According

to the applicant, the police started shooting at his car. According to the Government, the police was shooting in the air. Finally, an officer managed to break into the applicant's car. The applicant was arrested and taken to the hospital where he remained for nine days.

Complaints

The applicant alleged that the police officers had put his life at risk and that no proper investigations were carried out in violation of Articles 2, 3 and 13.

Held

The Court found a violation of Article 2.

Commentary

The Court ruled that the fact that the police put the applicant's life at risk was sufficient to fall within the scope of Article 2.

The Court found a violation of Article 2 in that the national authorities had failed to establish a legislative and administrative framework regulating the use of firearms by the police. The Court also found a violation of Article 2 regarding the lack of effective investigation.

The Court considered that no separate issue arose under Articles 3 and 13.

Menteşe and Others v Turkey

(36217/97)

European Court of Human Rights: Judgment of 18 January 2005

Adequate and effective investigation into deaths – right to life – Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention, Article 1 of Protocol No. 1

Facts

This is a KHRP assisted case. The applicants, Mr Abdullah Menteşe, Ms Zühra Bozkuş, Ms Hatun Demirhan, Mr Mustafa Demirhan, Ms Ayşe Harman and Mr Süleyman Maço, are Turkish nationals who were born in Lice and currently live outside of Diyarbakir, Turkey.

The facts are disputed in this case.

The applicants claim that there was gunfire during the night of 12 to 13 May 1994

outside their village, Yolçatı, Lice District, Diyarbakır. Soldiers entered the village and ordered all the villagers to gather near the village mosque. They asked them whether there were any PKK members in the area and whether they had been giving them food. The villagers replied that PKK activities were frequent in the area. The soldiers started to burn the houses in the village. Many villagers were sent away from the village, soldiers took away men under sixty years old and others fled. On 17 May 1994, the corpses of twenty-six persons were found near the village. The applicants are the relatives of the dead and those whose houses were burnt down.

The Government claims that an armed clash took place on 13 and 14 May 1994 in the vicinity of the village in which four soldiers were killed. Corpses were found on 15, 16, 17 May. The Government maintained that investigations were initiated to find the perpetrator of the killings. In 2000, the Lice Public Prosecutor issued a search warrant for the perpetrators of the killings, which would remain valid for twenty years. In 2001, 2002 and 2003 Lice gendarme officers visited the village and reported that there was no new evidence concerning the incidents, and that it was impossible to establish the identities of the perpetrators.

Complaints

The applicants invoke Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

Held

The Court held that there had been no violation of Article 2 in relation to four of the applicants' allegations that their relatives were killed in circumstances engaging the responsibility of agents of the State but held that Article 2 was violated in relation to the failure of the Turkish authorities to conduct an adequate and effective investigation into the circumstances surrounding these deaths.

The Court found no violation of Articles 3 and 8 in respect of the killing of the applicants' relatives or the alleged destruction of their houses. No violation of Article 1, Protocol No.1 was found in relation to the alleged destruction of the houses.

The Court held that there had been no violation of Articles 5(1), 13, 14 and 18.

The Court found that Article 13 had been violated in respect of the applicants' complaints regarding their relatives' deaths, but not in relation to the applicants' complaints regarding destruction of their property.

The Court held that it was not necessary to consider the applicants' complaints under

Article 6(1).

The Government was ordered to pay damages, costs and expenses.

Commentary

A preliminary objection was made by the Government on the grounds that the applicants had not exhausted all domestic remedies available to them as the criminal investigation was pending. The applicants replied that they were not required to exhaust domestic remedies as they were inadequate and ineffective. The preliminary objection of the Government was dismissed by the Court.

In relation to Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances (*Orhan v Turkey*). The burden of proof is “beyond reasonable doubt”. The Court was unable to draw a complete picture of the factual circumstances surrounding the four deaths.

The Court noted that Article 2 requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (*McCann and Others v the United Kingdom; Kaya v Turkey*). The authorities must act of their own motion, once the matter has come to their attention, and 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 investigatory procedures (*İlhan v Turkey*). The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. There is a requirement of promptness and reasonable expedition.

In this case there were striking omissions in the course of the investigations: the first on-site inspection at the crime scene was made in 2001, almost seven years after the incident; the report by the doctor at the Lice Health Clinic had limitations and deficiencies; the bullets which had been recovered from the bodies were not sent for ballistic examinations; the investigation had been neither prompt nor adequate.

In relation to the destruction of the applicants’ property, there was not sufficient, consistent or reliable evidence to establish to the necessary degree of proof that the security forces damaged the applicants’ home and property as alleged.

Prohibition of torture

Çelik and İmret v Turkey

(44093/98)

European Court of Human Rights: Judgment of 26 October 2004

Injuries sustained in detention in police custody – Prohibition of torture – Articles 3 and 13 of the Convention.

Facts

The applicants, Abdurrahman Çelik and Kasim İmret are Turkish nationals who were born in 1958 and 1947 respectively and live in Batman.

In May 1998, the applicants, accused of acting as couriers for the PKK, were arrested. They allege that they were subjected to torture and ill-treatment in police custody. They claim they were blindfolded and immersed in high-pressure cold water. They had to stand naked and electric shocks were administered to various parts of their bodies including their sexual organs. The applicants state that their testicles were squeezed and that their hands and legs were tied. They were severely beaten, deprived of food and water and prevented from using toilet facilities. They were also kept in isolation, subjected to unbearable noises, insulted and threatened with death. The applicants stated that they had been forced to sign statements whilst blindfolded.

In November 1999 the International Law and Foreign Relations Directorate of the Ministry of Justice sent a letter to the Public Prosecutor's office in Batman informing the latter about the applicants' allegations before the European Court of Human Rights.

In February 2001, on a bill of indictment filed by the Batman Public Prosecutor, nine police officers were charged with ill-treatment of the applicants in order to obtain a confession from them. Thirteen hearings followed. In May 2003, the policemen were acquitted on the basis of insufficient evidence.

Complaints

The applicants invoked Articles 3 and 13.

Held

The Court held that there had been a violation of Article 3 of the Convention in the case of Abdurrahman Çelik, but not in the case of Kasım İmret. It held that there was a violation of Article 13 of the Convention in conjunction with Article 3 of the Convention

in the case of each of the applicants.

Abdurrahman Çelik was awarded 10,000 euros in respect of non-pecuniary damage, and Kasım İmret 5,000 euros. Both applicants were awarded jointly 3,000 euros for costs and expenses, less 625 euros granted by way of legal aid.

Commentary

The Court reiterated that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (see *Çolak and Filizer v Turkey*; *Selmouni v France*; *Aksoy v Turkey* and *Ribitsch v Austria*).

Çelik underwent four medical examinations, which resulted in reports that were consistent with his allegations of ill-treatment. Kasım İmret produced insufficient evidence for the Court to conclude that Article 3 had been violated on account of the alleged ill-treatment.

Under Article 13, an effective investigation was required, which included a prompt response by the authorities which was essential for maintaining public confidence in adherence to the rule of law and in preventing any appearance of State collusion in, or tolerance of, unlawful acts. The Court considered that the complete inactivity of the authorities for one year and six months in response to the serious allegations raised by the applicants and the pace of the subsequent proceedings did not comply with the requirement of promptness.

Yaman v Turkey

(32446/96)

European Court of Human Rights: Judgment of 2 November 2004.

Injuries sustained in detention in police custody – Prohibition of torture – Right to an effective remedy – Right to Liberty and Security – Articles 3, 5, 10, 11, 13, 14, 18 and 34 of the Convention.

Facts

This is a KHRP assisted case. The applicant, Abdülsamet Yaman, is a Turkish national who was born in 1964 and now lives in Germany.

The applicant was the provincial leader of HADEP (People's Democracy Party) in Adana. On 3 July 1995, he was taken into custody by police officers from the Adana Security Directorate. He alleges that he was blindfolded, put into a car and threatened. He claims that he did not realize that the people who had abducted him were police officers nor did he know where he was taken. He was detained and interrogated for nine days, until 11 July 1995.

In custody, the applicant alleges that he was blindfolded, stripped naked and immersed in cold water; he was attached by his arms to the ceiling pipes and made to stand on a chair. Electric cables were attached to his body and he was left suspended while electric shocks were administered and his testicles were squeezed. The applicant was interrogated about his work, his connections with the PKK and as to why he had helped torture victims apply to the European Commission of Human Rights.

On 11 July 1995, Mr Yaman was examined by a medical expert who found scab wounds on his right knee and inside both wrists and noted that the applicant complained of numbness in his left arm and pain in the right side of his chest. On the same day, he was brought before the Adana Magistrates' Court, where he denied the veracity of the statements that had allegedly been taken from him by the police. The court ordered his detention on remand. He alleged that on the way back to Adana Prison, the policemen accompanying him beat him with rifle butts and truncheons. On 12 July 1995 the prison doctor found, among other things, bruises on the applicant's upper left arm and lesions on his back. On 9 October 1997 the applicant was examined by a doctor from the Turkish Human Rights Foundation who noted that he was suffering from pain in the gums, inability to eat due to missing teeth, pain in the chest and pain and restricted movement in the wrists and knees. The report referred to his ill-treatment and the prison conditions as the reasons for his medical condition.

The Government contended that the allegations were deceitful and were a ploy used by a terrorist organisation to dishonour the fight against terrorism.

Complaints

The applicant invoked Articles 3, 13, 5, 10, 11, 14, 18 and 34 of the Convention.

Held

It was held that there had been a violation of Articles 3, 13, 5(3), 5(4), 5(5) and no violation of Articles 14 and 18.

17,700 euros were awarded to the applicant in respect of non-pecuniary damage, and 8,659 euros less 725 euros legal aid awarded for representatives' costs.

Commentary

In finding a violation of Article 3, the Court noted that the applicant was not medically examined at the beginning of his detention and did not have access to a lawyer or doctor of his choice while in police custody. A subsequent medical report and medical note referred to scabs, bruises and lesions on various parts of the applicant's body. Independent medical reports in 1997, 2000 and 2001 were consistent with the applicant's allegations of ill-treatment. The Court observed that the Government had not provided a plausible explanation for the marks and injuries identified on the applicant's body. The Court found that the ill-treatment involved very serious and cruel suffering that could only be characterized as torture.

In finding a violation of Article 13, the Court was struck by the fact that criminal proceedings against the police officers involved had not produced any result on account mainly of the substantial delays throughout the trials and the application of the statutory limitations in domestic law.

In relation to Article 5(3), the Court had already accepted on a number of occasions that the investigation of terrorist offences undoubtedly presented the authorities with special problems. That did not mean, however, that the authorities had *carte blanche* to arrest suspects and detain them in police custody, free from effective control by the courts whenever they considered that there had been a terrorist offence. Article 5(3) had been violated.

The Court noted that the applicant was unable to challenge his detention in police custody, since the nine-day period was in conformity with the Turkish law at the relevant time. Finding that the lawfulness of the applicant's detention was not decided "speedily", the Court held that there had been a violation of Article 5(4).

The Court observed that, as the applicant's detention in police custody was in conformity with domestic law, he did not have a right to compensation. There had, therefore, been a violation of Article 5(5).

Hassan Ilhan v Turkey

(22494/93)

European Court of Human Rights: Judgment of 9 November 2004

Destruction of home and property - Inhuman Treatment - Private and Family Life - Protection of Property - Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Facts

The applicant, Hasan İlhan, was a Turkish national who was born in 1921. His son, Mr Abdülmecit İlhan was given permission to continue the application on behalf of his deceased father in 1996.

The facts are disputed in this case. The Commission, in order to establish the facts disputed by the parties, conducted an investigation with the assistance of the parties, pursuant to former Article 28(1)(a) of the Convention.

According to the applicant, in April 1992, his home, vineyards and orchards had been burned down and destroyed by members of the security forces in Kaynak hamlet, near the village of Yardere, Mardin, south-east Turkey.

He submitted that, in the vineyard and orchard, he owned, 5,000 vines, 120 peach trees, 700 fig trees, 500 almond trees, 700 apricot trees, 460 prune trees and ten thousand oak trees were burned down. The applicant owned 10 hectares of land.

In March 1993 the applicant was on his way from Mardin to the hamlet. He was stopped and searched at Akıncılar Military Post, thrown into the station, beaten up and abused. The soldiers burned the documents he was carrying in relation to his requests for compensation.

According to the Government, on 21 April 1992 military units attached to the Mardin Gendarme Headquarters carried out an operation in the village of Ahmetli with the aim of taking precautionary measures to protect the lives and property of the inhabitants of the village from the PKK. The allegations made by the applicant concerning the destruction of his house, its contents and orchards and finally the allegation that the applicant had been ill-treated at Akıncılar gendarme station were completely baseless. The applicant's land could not have accommodated the number of trees that he claimed had been burned down.

Complaints

The applicant invoked Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention. He subsequently withdrew his complaint under Article 5.

Held

The Court concluded that there had been a violation of Articles 3, 8, 13 and Article 1 of Protocol No.1.

The applicant had failed to pursue the remedies available in domestic law and it was therefore unnecessary to consider Article 6(1). It was unnecessary to give separate consideration to Article 18.

No violation of Article 14 was found. Judge Loucaides and Judge Mularoni issued partly dissenting opinions as they did not concur with the majority view that Article 14 had not been violated.

The applicant was awarded 33,500 euros in respect of pecuniary damage (for the destruction of his buildings, household goods, trees, livestock and for loss of income, the cost of alternative housing for him and his family). 14,500 euros were awarded for non-pecuniary damage. The Court awarded the sum of 15,000 euros exclusive of VAT, less 2,652 euros received by way of legal aid from the Council of Europe, for the applicant's legal costs and expenses.

Commentary

The Court noted that it was a matter of dispute whether or not the applicant's house, fruit and oak trees and vineyards had been burned down by soldiers. In a case such as this one, in which there are contradictory and conflicting accounts of what actually occurred, the Court particularly regretted the absence of a thorough domestic judicial investigation.

The Court faced a situation where State agents had provided conflicting information relating to the facts of the case. No explanation, let alone a satisfactory one, had been given for this. It considered that such serious contradictions directly affected the credibility of the version of the facts as presented by the Government and justified the drawing of inferences as to the well-foundedness of the applicant's allegations.

The Court made a finding of fact that gendarme soldiers went to the applicant's hamlet on or around 21 April 1992, and burned the applicant's family home and its contents as well as, subsequently, the fruit orchards and trees.

Sunal v Turkey

(43918/98)

European Court of Human Rights: Judgment of 25 January 2005

Prohibition of detention – Right to a fair trial – Right to an effective remedy – Prohibition of discrimination – Articles 3, 6, 13 and 14 of the Convention.

Facts

The applicant is a Turkish national who lives in Turkey. He was arrested on 1 April 1996 and was placed in police custody. According to the applicant, he had suffered from ill-treatment whilst in detention. According to the Government, the applicant had been under the influence of drugs and alcohol and had consequently injured himself. He was released the following day without any charge. The applicant lodged a complaint against the police officers for ill-treatment. The domestic courts ruled that there was not sufficient evidence to pursue the police officers.

Complaints

The Applicant complained under Article 3 regarding his ill-treatment in police detention.

The Applicant also complained that he had been denied an effective remedy in breach of Articles 6 and 13.

Finally, the Applicant alleged a violation of Article 14.

Held

The Court found there had been a violation of Articles 3 and 13.

Commentary

The Court held that there had been a violation of Article 3 as the Government did not provide sufficient evidence to explain the applicant's injuries during custody. The Court repeated that the Government was under an obligation to justify the injuries that happened to a person in detention.

The Court found a violation of Article 13 as the applicant had been denied access to his case file and his right to submit his own version of the events. He had also been denied the possibility of presenting witness evidence.

Having regard to the findings of a violation that it had just reached, the Court considered that it was unnecessary to examine separately the complaints under Articles 6 and 14.

Right to liberty and security

Talat Tepe v Turkey

(31247/96)

European Court of Human Rights: Judgment of 21 December 2004

Delay in being brought before a judge or other officer authorized by law – Right to Liberty and Security - injuries sustained in detention in police custody – Prohibition of torture – Articles 3, 5, 6, 13 and 14 of the Convention.

Facts

This is a KHRP assisted case. The applicant, Talat Tepe, is a Turkish national who was born in 1961 and lives in Istanbul.

The applicant was arrested on 9 July 1995 on suspicion of aiding and abetting an illegal terrorist organisation. This occurred pursuant to an order for his arrest made in 1992 on the basis of statements given by two members of the PKK to the police in relation to an attack on Hersan Police Station. The applicant was taken into custody at the Istanbul Security Directorate, from where he was taken to the Istanbul Atatürk Airport and by plane to Bitlis Security Directorate.

The applicant alleged that he was subjected to ill-treatment in the Bitlis Security Directorate, which included beatings, electric shock treatment, blindfolding, verbal insults, hosing with cold water, being stripped naked and deprived of food. The applicant signed a statement confessing that he had aided members of the PKK. He was then seen by a doctor in Bitlis, who noted in his report that there were no marks on the body or injuries consistent with the use of force. The applicant alleged that the doctor neither spoke to him nor examined him. Before the Diyarbakir Public Prosecutor on the same day as this medical examination, the applicant argued that his statement had been made under duress. He then went on his own to another doctor whose report substantiated that the applicant had been tortured whilst in custody in Bitlis. On 6 June 1996 the Diyarbakir State Security Court acquitted the applicant of the charges due to lack of evidence.

There was a domestic investigation into the length of the applicants' detention and his claims of ill-treatment. The outcome of this investigation was that on 18 March 1998 the Supreme Administrative Court upheld a decision by the Provincial Administrative Council holding that there was no evidence to substantiate the applicant's claim that the police officers had committed the alleged crime of torture.

Complaints

The applicant invoked Articles 3, 5, 6, 13 of the Convention. He invoked Article 14 and alleged that he was subjected to discrimination on the ground of his Kurdish origin.

Held

The Court held that there had been no violation of Articles 3, 5(1) and 14.

The Court found a violation of Articles 5(3), 5(4) and 13.

The Court deemed it unnecessary to consider Article 6(1).

The applicant was awarded sums in respect of pecuniary and non-pecuniary damages and costs and expenses.

Commentary

The Court noted that, even in the most difficult circumstances, such as the fight against terrorism and organised crime, Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment.

The Court observed that the only evidence that corroborated the applicant's allegations of torture was the medical report dated 15 August 1995. There were omissions in this report, which did not look like a standard medical report. Further, the applicant did not submit it to the domestic authorities.

In relation to Article 5(1), the Court noted that the arrest warrant for the applicant was based on statements previously provided by two members of the PKK. The Court noted that the fact that the incriminating statements dated back to 1992 and were later withdrawn by the suspects did not remove the existence of a reasonable suspicion against the applicant and did not have an effect on the lawfulness of the arrest.

The applicant complained under Article 5(3) of the Convention that he was held in police custody for twelve days without being brought before a judge or other officer authorized by law to exercise judicial power. The Court recalled that in *Brogan and Others*, it held that detention in police custody, which had lasted four days and six hours without judicial control, fell outside the strict constraints as to the time laid down by Article 5(3) of the Convention, even though its purpose was to protect the community as a whole against terrorism.

Nevmerzhitsky v Ukraine

(54825/00)

European Court of Human Rights: Grand Chamber Judgment of 5 April 2005

Prohibition of torture – Right to liberty and security - Articles 3 and 5 of the Convention.

Facts

The applicant is a Ukrainian national who lives in Ukraine. He was formerly the manager of a branch of the Poltava Bank. He was detained from 8 April 1997 to 22 February 2000, charged for unlawful practices as manager. His detention was extended five times, exceeding the maximum statutory period of permitted detention. He was submitted to ill-treatment during his detention. On 19 February 2000, the applicant was convicted of aggravated forgery and abuse of power. He was sentenced to five years and six months' imprisonment and all his personal property was confiscated. The applicant was released on 23 February 2000 following an amnesty.

Complaints

The applicant complained under Article 3 about the conditions of his detention.

Relying on Article 5 (1)(c) and 5(3), the applicant complained about the length and the lawfulness of his detention.

Held

The Court found violations of Article 3 and 5 of the Convention.

The Court found that the Ukrainian Government had failed to fulfil their obligation under Article 38(1)(a) to provide all necessary facilities to enable the Court to establish the facts in the case

Commentary

The Court noted that the Ukrainian Government had failed to provide it with a number of important documents concerning the applicant's health and the decisions to prolong his detention and to force-feed him, and had also failed to provide any convincing explanation for their refusal to comment on particular questions raised by the Court or to provide relevant documents and decisions and medical reports in the case. The Court therefore considered that it could draw inferences from the Government's conduct.

Bearing in mind the difficulties arising from the establishment of the facts in the case and in cases similar to it, and in view of the importance of a Government's cooperation in Convention proceedings, the Court found a violation of Article 38(1)(a).

The Court ruled that there had been a violation of Article 3 regarding the condition of the applicant's detention. The Court also considered that the force-feeding carried out on the applicant without medical justification during his detention constituted torture and consequently breached Article 3. Finally, the Court found a violation of Article 3 for degrading treatment as the applicant had suffered from a lack of medical treatment and assistance during his detention.

The Court held a violation of Article 5(1)(c) as the applicant's detention was illegal. The decisions to prolong the detention were not taken by an independent authority but by prosecutors.

Finally, the Court ruled that the prolonged detention was not necessary and justified and that the applicant was not promptly brought before a judge, in breach of Article 5(3).

Right to a fair trial

Canevi and Others v Turkey

(40395/98)

European Court of Human Rights: Judgment of 10 November 2004

Right to a Fair Trial – Independence and impartiality of a tribunal comprising one military judge – Article 6(1) of the Convention.

Facts

The applicants, Şehmus Canevi, Abdülmecit Canevi and Gıyas Turgut, are all Turkish nationals who were born in 1965, 1965 and 1950 respectively.

On 29 October 1995, a vehicle belonging to Şehmus Canevi, in which all three applicants were travelling, was stopped by the police. The police searched the vehicle and found ten kilograms of heroin and a pistol.

Proceedings against the three applicants ensued. In April 1997 a tribunal composed of two civil judges and a military judge found the applicants guilty of drug-trafficking offences. Each was sentenced to ten years' imprisonment and a fine of 648,125,000 Turkish liras.

Complaints

The applicants complained under Article 6(1) that the tribunal which had decided their

case was not independent and impartial as an army officer was sitting.

They further complained under Article 6 that the proceedings had been unfair in that their representative had not been allowed to question the head of the narcotics department.

Held

The Court held that there had been a violation of Article 6(1) in relation to the independence and impartiality of the tribunal. The further complaints under Article 6 did not fall within the jurisdiction of the Court.

The Court noted that where a violation of Article 6(1) is upheld, the appropriate remedy is the retrial of the applicants by an independent and impartial tribunal. The applicants were awarded 2,000 euros for costs and expenses.

Commentary

Similar issues had been raised in *Incal v Turkey* and *Çıraklar v Turkey*.

The central question for the Court in relation to the complaints under Article 6(1) was whether the applicants' apprehensions about the independence and impartiality of the tribunal could be objectively justified. The Court found that they could.

The Court noted that appearances themselves are of importance: in a democratic society, a Court system should inspire confidence in its citizens, and apprehensions about the independence and impartiality of the tribunal posed a threat to this confidence.

Unal v Turkey

(48616/89)

European Court of Human Rights: Judgment of 10 November 2004

Right to Fair Trial – Independence and impartiality of a tribunal comprising one military judge – Article 6 and 3 of the Convention.

Facts

The applicant, Süleyman Ünal, is a Turkish national born in 1977. At the time of the claim, he was detained in Bergama.

On 1 May 1998 the applicant was arrested and placed in police custody on suspicion of having held up a TIKB (Union of Revolutionary Communists of Turkey) sign at a

meeting. The police stated that it had been necessary to use force to arrest the applicant as he was resisting arrest.

On 4 May, an identification procedure was carried out using photographs and videos of the meeting. The applicant said that he recognized himself. On the same day, the applicant admitted that he was a member of TIKB, and had conducted activities at the heart of the organisation.

On the following day, the applicant was examined by a doctor, who produced a report stating that the applicant showed no marks of beatings or other violence. He admitted the alleged facts of his arrest, confirmed the contents of the medical report and of the identification procedure. On the same day, before the judge, the applicant admitted holding up the sign in question, but denied belonging to the TIKB. On the evening of the same day, the applicant was again examined by the doctor, who noted a red patch on the right wrist, pains in the groin and in the area of the lower ribs and pelvis.

On 8 May, the applicant was charged with aiding and abetting an illegal organisation, the TIKB. On 11 May, the applicant repudiated his statements and the report of the identification procedure, claiming that these had been made under duress. The applicant claimed to have been beaten, slapped and verbally abused by the police, threatened with further ill-treatment and forced to sign the documents.

In July, the applicant was sentenced to three years and nine months' imprisonment. Reports of the identification procedure and arrest, as well as video evidence were deemed to support the statements made by the applicant in custody. The applicant appealed unsuccessfully.

Complaints

The applicant complained under Articles 6 and 3.

Held

The complaint under Article 6(1) was admissible and a violation of Article 6(1) was found. The other complaints were inadmissible.

Commentary

The applicant complained under Article 6 that the tribunal that had heard his case was not impartial and independent as it included a military judge. The applicant also complained that he had not had the benefit of legal representation in custody, that his right to defend his case had been harmed as he was detained in a town other than the one where the case took place. Further, statements, which he claimed had been obtained

under duress, had been used as evidence against him.

The Court has considered many similar cases concerning the impartiality and independence of tribunals (see *Özel* and *Özdemir*). The government had not advanced any argument that could persuade the Court to reach a different conclusion in the present case. The tribunal was not impartial and independent.

As the tribunal was not impartial and independent, the Court was not required to go on to consider the applicant's other complaints. It noted that *Akkaş v Turkey* had considered the admissibility of Statements; *Özertikoğlu* had considered the requirements for the preparation of the defence case, and *Serdar Özcan* had considered the absence of legal representation in custody.

In relation to Article 3, although the Court accepted that it is difficult for individuals to obtain proof of ill-treatment suffered in custody, it found that the medical reports did not substantiate the applicant's allegations of beatings in custody. It noted that the applicant had not complained about this ill-treatment before the judge on 5 May and had therefore not taken sufficient steps to bring his complaint to the attention of the authorities.

Özüpek and Others v Turkey

(60177/00)

European Court of Human Rights: judgment of 15 March 2005

Trial by Tribunal including one military judge – right to fair trial – Article 6 of the Convention

Facts

This is a KHRP assisted case. The applicants, Mr Osman Özüpek, Mr Duran Özdemir and Mr Hüseyin Avni Yazıcıoğlu, are Turkish nationals who were born in 1973, 1965, and 1960. The first and second applicants live in Ankara and the third applicant lives in Trabzon, Turkey.

The applicants were employed by the Culture and Education Department of the Sincan District Council in Ankara and were involved in the organisation of public activities and events during religious and national days. Upon the instructions of the mayor and deputy mayor, on 31 January 1997 the applicants organized a special night called the "Jerusalem Night". The applicants also organized a five-minute play for the evening, which was written by the first and third applicants. The mayor of Sincan and the Ambassador to

Iran made speeches before the play began.

The applicants were taken into police custody on 5 and 6 February 1997. They were accused of disseminating propaganda in support of an armed, illegal organisation, namely the Hezbollah. They denied the charges. The prosecution called for the applicants to be sentenced pursuant to Article 169 of the Criminal Code and Article 5 of the Anti-Terrorism Law. In October 1997, the Ankara State Security Court found the applicants guilty as charged, sentenced them to three years and nine months' imprisonment and debarred them from public service for three years. The applicants appealed unsuccessfully.

Complaints

The applicants complained under Article 6 that they had not received a fair trial by an independent and impartial tribunal due to the presence of a military judge on the bench of the Ankara State Security Court.

Held

The Court held that there had been a violation of Article 6(1) as regards the complaint relating to the independence and impartiality of the Ankara State Security Court.

The respondent State was ordered to pay the applicants, jointly, 1000 euros in respect of costs and expenses. The Court also considered that, in principle, as a violation of Article 6 had been found, the most appropriate form of relief would be to ensure that the applicants are granted a retrial by an independent and impartial tribunal in due course.

Commentary

The Court found it understandable that the applicants who were prosecuted in a State Security Court for aiding and abetting an illegal organisation should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal Service. On that account, they could legitimately fear that the Ankara State Security Court might allow itself to be unduly influenced by considerations that had nothing to do with the nature of the case. In other words, the applicants' fears as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified.

Right to respect for private and family life

Sabou and Pircalab v Romania

(46572/99)

European Court of Human Rights: Judgment of 28 September 2004

Right to respect for family life - Freedom of expression - Right to an effective remedy Articles 8, 10 and 13 of the Convention.

Facts:

The applicants are Romanian journalists. During April 1997, they published a series of articles denouncing the practices of the President of Baia Mare first-instance tribunal. The President lodged a complaint with a domestic court on grounds of defamation. On 15 December 1997, the first applicant was sentenced to ten months' imprisonment and his parental and electoral rights were suspended, in addition to the right to exercise his profession, for the duration of the detention. The second applicant was ordered to pay a fine.

Complaints

The first applicant alleged that the deprivation of his parental right by the domestic court was against Article 8.

The applicants complained under Article 10 that their right to freedom of expression had been breached by the domestic court.

Finally the first applicant raised a violation of Article 13 in conjunction with Article 8 as he had been denied an effective remedy to contest the lawfulness of the deprivation of his parental rights.

Held

The Court found violations of Articles 8, 10 and 13.

Commentary

The Court ruled that there had been a violation of Article 8, as the applicant's deprivation of his parental rights was an additional punishment and not a legitimate measure taken in order to protect children interests.

In relation to the violation of Article 10, the interference by the authorities in the applicants' rights had not been justified and the condemnations faced by the applicants had been disproportionate.

Finally, the Court held a violation of Article 13 taken in conjunction with Article 8, as the applicant had been denied an effective remedy to contest the deprivation of his parental rights.

Taskin and Others v Turkey

(46117/99)

European Court of Human Rights: Judgment of 10 November 2004

Environment – operation of gold mining activities - Right to respect for family and private life – Articles 2, 8, 6 and 13 of the Convention.

Facts

The original applicants were Mr Sefa Taşkın, Mr Hasan Geniş, Mr Tahsin Sezer, Mr Ali Karacoğlu, Mr Muhterem Doğrul, Mr İzzet Öçkan, Mr İbrahim Dağ, Mr Ali Duran, Mr Sezer Umaç and Mrs Günseli Karacaoğlu who are Turkish nationals. The wife of Mr İzzet Öçkan, Mrs Ayşe Öçkan, pursued his application upon her husband's death. The applicants lived in Bergama and the surrounding villages at the material time.

The case concerned the granting of permits to operate a gold mine in Ovacık, in the district of Bergama.

The Ministry of the Environment issued an operating permit to the Ovacık gold mine in 1994, after considering a report on its impact. Bergama residents, including the applicants, applied for a judicial review of the decision to issue the operating permit, based on their concerns about the use of cyanide to extract gold, risks of contamination of water, destruction of flora and fauna and risks to human health. This application was dismissed by the Administrative Court in July 1996. The Administrative Court's decision was overturned by the Supreme Administrative Court in May 1997.

The Supreme Administrative Court found that there were risks to the local eco-system and to human health and safety by the use of sodium cyanide. It concluded that the disputed operating permit did not serve the public interest and that the safety measures taken by the company were insufficient to eliminate the risks. The Ministry of the Environment's decision to issue an operating permit was subsequently annulled by the Administrative Court in October 1997. This judgment was upheld in April 1998.

In October 1998, January and March 1999, the company made renewed applications for a permit. The Prime Minister intervened and the Supreme Administrative Court advised that its 1997 judgment could not be interpreted as constituting an absolute

ban on the use of cyanide in the mining operations. The Prime Minister instructed the Turkish Institute of Scientific and Technical Research (“TÜBİTAK”) to prepare a report on the impact of cyanide use. In October 1999, TÜBİTAK concluded that the risks posed by the mine had been removed or reduced to acceptable levels. In January 2000, the Ministry of the Environment indicated its approval of the mining activities. On 5 April 2000, the Prime Minister’s Office issued a report authorizing the mining operations in light of the report.

Eighteen Bergama residents applied for judicial review with regard to the Prime Minister’s Office report of 5 April 2000. The Izmir Administrative Court held that the disputed decision could circumvent a final judicial decision and was incompatible with the principle of the rule of law.

The company began mining operations in April 2001, following Ministry of Health authorization of the use of the cyanidation process at the mine for a one-year period.

In a judgment of 10 January 2002, the Izmir Administrative Court, on an application by the Izmir Bar Association, decided to suspend execution of the provisional permit issued by the Ministry of Health, holding that the issuing of such a permit was incompatible with the rule of law. In December 2002 the Administrative Court dismissed the application for judicial review brought by the Izmir Bar Association against the provisional permit on the ground that it did not have standing to bring the proceedings. In November 2003 the Supreme Administrative Court upheld the Administrative Court’s judgment. In a judgment of 27 May 2004 the Izmir Administrative Court set aside the provisional permit issued by the Ministry of Health on 22 December 2000.

On 29 March 2002 the Council of Ministers adopted a “decision of principle” stating that the gold mine could continue its activities. This decision was not made public, and on 23 June 2004 the Supreme Administrative Court ordered a stay of execution of the Council of Ministers’ decision further to judicial review proceedings by the Izmir Bar Association.

Proceedings before the Administrative Courts are pending.

Complaints

The applicants alleged that the operating permits issued for a gold mine and the related decision-making process violated Articles 2 and 8 of the Convention. In addition, they claimed that they had been denied effective judicial protection, in breach of Article 6(1) and Article 13 of the Convention.

Held

The Court found that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.

A violation of Article 6(1) was found.

The Court noted that the complaints under Articles 2 and 13 were, in essence, the same as those submitted under Articles 8 and 6(1) of the Convention and that it was therefore not necessary to examine them separately.

The applicants were awarded 3,000 Euros each.

Commentary

In relation to Article 8, the Court pointed out that Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (see *López Ostra v. Spain*).

The Court pointed out that in a case involving State decisions affecting environmental issues there are two aspects to the inquiry that it may carry out. First, the Court may assess the substantive merits of the national authorities' decision to ensure that it is compatible with Article 8. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual (see *Hatton and Others v the United Kingdom*). In this case it was the second aspect that merited the Court's detailed attention.

In relation to Article 6(1), the Court pointed out that, for this Article in its "civil" limb to be applicable, there must be a dispute over a "civil right" which can be said to be recognized under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Article 6(1) was deemed applicable in the light of these tests.

The resumption of the gold mine's operations on an experimental basis on 13 April 2001, on the basis of ministerial permits issued as a direct result of the Prime Minister's intervention, had no legal basis and was tantamount to circumventing a judicial decision. Such a situation adversely affects the principle of a law-based State, founded on the rule of law and the principle of legal certainty.

Matheron v France

(57752/00)

European Court of Human Rights: Judgment of 29 March 2005

Right to respect for private life - Article 8 of the Convention

Facts

The applicant is a French national who is currently imprisoned in France. He was convicted in 2000 for international drug-trafficking on the basis of evidence coming from other proceedings and obtained from telephone tapping.

Complaints

The applicant complained under Article 8 that the evidence obtained in separate proceedings and used against him were not admissible as it was impossible for him to contest their validity.

Held

The Court held that there had been a violation of Article 8 as the applicant should have had the right to contest criminal evidence obtained from telephone tapping.

Freedom of expression

Maraşlı v Turkey

(40077/98)

European Court of Human Rights: judgment of 9 November 2004

Newspaper article on the integration of Turkey into the EU and the Kurdish problem – conviction of journalist not necessary in a democratic society – freedom of expression – Articles 6, 9, 10 and 14 of the Convention.

Facts

The applicant, Recep Maraşlı, is a Turkish national who was born in 1956. He now lives in Germany.

The applicant wrote an article entitled “*Kurdistan: will it become a common colony of Europe?*” in “*Newroz*”, a weekly newspaper published in Istanbul. The article discussed how political developments on the question of the integration of Turkey into the European Union may have a bearing on the solution of the Kurdish problem.

In February 1995, the Public Prosecutor at Istanbul State Security Court accused the applicant of disseminating propaganda against the unity of the Turkish nation and against the ‘indivisible unity of the State’. In December 1996, that Court found the applicant guilty and ruled that the impugned article amounted to separatist propaganda. The applicant was sentenced to one year, eight months and ten days’ imprisonment and a fine of 111,111,111 Turkish liras. In June 1997 the Court of Cassation upheld the judgment.

Complaints

Complaints were made under Articles 6, 9, 10 and 14.

Held

The Court held that there had been a violation of Article 10, and of Article 6(1) in relation to the independence and impartiality of the State Security Court. It held that no separate issues arose under Article 10 taken in conjunction with Article 14.

The applicant was awarded 5,000 euros in respect of non-pecuniary damage and 1,370 euros in respect of costs and expenses.

Commentary

The Court stated that the complaints that relied upon Articles 9 and 10 should be considered from the standpoint of Article 10 alone.

It was not in dispute between the parties that the conviction complained of constituted an interference with the applicant’s right to freedom of expression protected by Article 10(1). Nor was it contested that the interference was prescribed by law and pursued a legitimate aim, that of protecting territorial integrity, for the purposes of Article 10(2). The Court therefore confined its examination of the case to the question as to whether the interference was ‘necessary in a democratic society’.

The Court observed that although passages in the article painted an extremely negative picture of the Turkish State in a hostile tone, they did not encourage violence, armed resistance or insurrection and did not constitute hate speech. In the Court’s view, that was an essential consideration (contrast *Sürek v Turkey (no.1)* and *Gerger v Turkey*) in the assessment of the necessity of the measure.

Following the cases of *Ceylan v Turkey*, *Öztürk v Turkey* and *İbrahim Aksoy v Turkey*, the applicant’s conviction was disproportionate to the aims pursued.

The Court rejected the applicant’s contention that he was discriminated against on

account of his political opinions, in violation of Article 14.

Kalin v Turkey

(31236/96)

European Court of Human Rights: Judgment of 10 November 2004

Newspaper articles – criminal conviction for producing separatist propaganda – Right to freedom of expression – Articles 10, 6, 7, 14

Facts

This is a KHRP assisted case. The applicant, Özkan Kalın, is a Turkish national who was born in 1964 and lives in Lausanne.

The applicant was the editor of the weekly newspaper, *Yeni Ülke*, in which he wrote an article entitled: “The August heat is rising in Botan”. The article recounted events at a demonstration which had taken place in August 1991 in Nusaybin. The applicant was brought before the Istanbul State Security Court in, charged with producing separatist propaganda.

A further action was brought against the applicant for a second article, entitled “They haven’t left, they have fled”, which appeared in the same newspaper.

In relation to the charges brought in connection with the first article, the applicant was acquitted on 14 October 1992. The court did not conclude that the applicant aimed to produce separatist propaganda as prohibited by law. The Prosecutor of the Republic appealed successfully against this decision. On 14 October 1993, the State Security Court sentenced the applicant to two years’ imprisonment and a fine of 120 000 Turkish lira. The Court of Cassation confirmed this decision on 1 March 1994.

In relation to the second article, which constituted a press release by the European representatives of the PKK, the applicant was acquitted on 4 September 1992. On 20 December 1992, this decision was quashed by the Court of Cassation, which found that the article constituted a declaration by an armed and illegal organisation, contrary to the law. On 17 September 1993, the applicant was fined 250,000,000 Turkish lira.

Complaints

The applicant complained under Article 10 that his right to freedom of expression had been infringed. He also complained under Articles 7, 6(1) and Article 14 in conjunction with Articles 10 and 6.

Held

A violation of Article 10 was found.

Article 6(1) had been violated by reason of the lack of independence and impartiality of the Istanbul State Security Court.

No violation of Article 7 was found, and the Court deemed it unnecessary to consider Article 14 in combination with Articles 6 and 10.

The applicant was awarded damages.

Commentary

The articles constituted virulent criticism of the way in which the security forces lead the fight against separatist activities. The Court recalled that the State Security Court had held that the articles contained terms that aimed to attack the territorial integrity of the Turkish State and to incite hatred and hostility. The Court found that, even if certain acerbic passages painted a very negative picture of the Turkish State in a hostile tone, they did not exhort violence or armed resistance nor did they amount to hate speech.

The Court had regard to the severity of the penalty.

The Court found that the penalty given to the applicant was disproportionate to the aim pursued, and was not necessary in a democratic society.

Cumpănă & Mazăre v Romania

(33348/96)

European Court of Human Rights: Grand Chamber Judgment of 17 December 2004

Freedom of expression- Article 10 of the Convention

Facts

The applicants are both Romanian journalists who live in Romania. In April 1994 the applicants published an article in the *Telegraf* newspaper, questioning the lawfulness of a contract in which the Members of the City Council had allowed a commercial company to perform a service. The City Council sued the applicants in the domestic courts. The applicants were convicted of insult and defamation on 17 May 1999 and were sentenced to seven months' imprisonment, disqualified from exercising certain civil rights and prohibited from working as journalists for one year. In November 1996, they were released from prison by a Presidential pardon.

Complaints

The applicants alleged a violation of Article 10 as a result of the criminal conviction.

Held

The Court found a violation of Article 10 in respect of the criminal penalties imposed.

Commentary

The Court held that the interference of the authorities in the applicants' right to freedom was legitimate and consequently did not breach Article 10. The Court considered that the interference from the authorities was necessary and responded to a social need to prevent insult and defamation in the public arena.

However, the Court found there was a violation of Article 10 with regards to the manifestly disproportionate criminal sanctions imposed on the applicants. The Court considered that the imposition of a prison sentence for a press offence contradicts the principle of freedom of expression within a democracy, unless exceptional circumstances exist.

Halis v Turkey

(30007/96)

European Court of Human Rights: Judgment of 11 January 2005

Newspaper review of book by PKK leader – Conviction of journalist not necessary in a democratic society – Freedom of expression – Tribunal comprising one military judge – Right to Fair Trial – Articles 10 and 6 of the Convention.

Facts

The applicant, Atilla Halis, is a Turkish national who was born in 1969 and lives in Istanbul. He worked as a journalist for the Turkish daily newspaper “*Özgür Gündem*”.

In the 2 January 1994 edition of the newspaper, the applicant reviewed four books which each discussed the problems in Turkey's south-eastern region. The first book reviewed was “*Tasfiyeciliğin Tasfiyesi*” (“Liquidation of Liquidators”), written by Abdullah Öcalan, the leader of the PKK.

Issues of the newspaper were confiscated by order of the Istanbul State Security Court. The applicant was charged with disseminating propaganda about an illegal separatist terrorist organisation and he was found guilty. He was sentenced to one year's imprisonment and a fine of four hundred million Turkish lira. The Court of Cassation upheld this verdict.

Complaints

The applicant complained under Article 10 that his criminal conviction had infringed his right to freedom of expression, and the government maintained that the interference with the applicant's right to freedom of expression was justified under Article 10(2).

He also complained under Article 6(1).

Held

The Court held unanimously that there had been a violation of Articles 10 and 6(1).

Applying Article 41, the applicant was awarded 2,000 euros in respect of non-pecuniary damage and 1,375 euros in respect of costs and expenses.

Judge Pavlovski produced a dissenting judgment in relation to the application of Article 41 only, in which he considered that the amount of damages awarded for non-pecuniary damage was far too small in the light of the suffering caused to the applicant.

Commentary

The Court noted that it was undisputed that there had been an interference with the applicant's right to freedom of expression and the question was whether this interference was justified under Article 10(2).

Drawing upon its previous judgments concerning Article 10 (*Ceylan v Turkey*, *Öztürk v. Turkey*, *İbrahim Aksoy v Turkey*), the Court noted that it must determine whether the interference in question is 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. It noted that freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the ideas that are being discussed or reviewed, even though these ideas may amount to an apologia for violence. The Court attached particular significance to the fact that the applicant was convicted and sentenced for disseminating propaganda even though the impugned article was never actually disseminated due to the confiscation order. The nature and severity of the penalty faced by the applicant was taken into account when considering the proportionality of the interference.

Under Article 6(1), the applicant submitted that the Istanbul State Security Court that tried and convicted him was not an 'independent and impartial tribunal' capable of guaranteeing him a fair trial, because one of its members was a military judge. This complaint was upheld.

Biol v Turkey

(44104/98)

European Court of Human Rights: Judgment of 1 March 2005

Speech made at demonstration – freedom of expression – Article 10 of the Convention and Article 14 in conjunction with Article 10

Facts

The applicant, Ilknur Biol, is a Turkish national who was born in 1965 and lives in Istanbul. The applicant is a teacher by profession, who belonged to the Education and Science Workers' Union.

On 13 April 1996, the applicant participated in an open-air demonstration on 'democracy and trade-union rights'. She made a speech that was highly critical of the Ministry of Justice at that time.

In October 1996, the applicant was charged with overt vilification of the Minister and Ministry of Justice, contrary to Article 159 of the Penal Code.

The applicant denied the charges against her. She invoked the lack of objective proof that she had spoken the incriminatory words cited. She complained that the testimonies had been gathered one year after the events, and had been made after the witnesses had read the charges against her. She complained against the way in which a judicial expert had been used to carry out voice identification procedures. The applicant further contested that, even had she spoken the alleged words, their target was the Minister and not the Ministry itself. They concerned realities that were largely a matter of public knowledge.

In June 1997, the applicant was sentenced to one year's imprisonment for insulting and vilifying the Minister and Ministry of Justice. In August 1997, the applicant appealed, invoking her right to freedom of expression. She contended that the voice identification should have been conducted not by a judicial expert, but by a specialist in such matters.

The subsequent Court proceedings were set out to the Court.

Complaints

The applicant invoked Article 10. She further invoked Article 14 on the grounds that she had been discriminated against on the basis of her political opinions.

Held

Article 10 had been violated. The Court did not consider Article 14 in combination with Article 10.

Commentary

The question was whether the interference was ‘necessary in a democratic society’ for the purposes of Article 10(2). The Court held that it was not.

The words that were the subject of litigation constituted criticisms of government policy, namely the nomination of the Minister of Justice. The words did not incite violence nor did they constitute hate crime.

The Court noted that this case related to oral assertions made at an open-air demonstration, so that the applicant was denied the opportunity to reformulate, perfect or retract her words before they became public.

Previous cases had considered the question in this case, and found violations of Article 10: *Ceylan v Turkey*, *Öztürk v Turkey*, *İbrahim Aksoy v Turkey*, *Karkın v Turkey*, *Kızılyaprak v Turkey*. The Government had adduced no facts or arguments which would entitle the Court to reach a different decision in this case

Freedom of assembly

Adali v Turkey

(38187/97)

European Court of Human Rights: Judgment of 31 March 2005

Right to life – Prohibition of torture – Right to a fair trial – Right to respect for private and family life – Freedom of expression – Freedom of assembly– Right to an effective remedy – Prohibition of discrimination – Articles 2, 3, 6, 8, 10, 11, 13 and 14 of the Convention

Facts

The applicant is a Turkish national who lives in the Turkish Republic of Northern Cyprus (TRNC). The applicant is the wife of Kutlu Adali, a well-known writer for his critics of the Turkish authorities and the TRNC. He was shot dead on 6 July 1996. The applicant alleged that Turkish or TRNC agents were responsible of her husband’s murder and that she was harassed by the TRNC authorities. She also complained that she was refused permission to cross the “green line” and therefore attend a meeting held on 20 June 1997

in Southern Cyprus by the TRNC.

Complaints

The applicant complained under Article 2 in respect of the killing of her husband and the refusal of the authorities to carry out an effective investigation into his death.

The applicant alleged a violation of Articles 3, 8 and 14 in connection with the TRNC practices of harassment, intimidation and discrimination towards the applicant.

Relying on Article 6(1) and Article 13, the applicant claimed that she was denied access to an effective remedy and to a fair trial.

The applicant complained under Article 10 that the killing of her husband was an unlawful interference in his right to freedom of expression.

The applicant claimed that the refusal by the authorities to allow her to cross the “green line” in order to attend a meeting was in breach of Article 11.

Held:

The Court found a violation of Articles 2 and 11.

Commentary:

The Court did not find there had been a violation of Articles 3, 6(1), 8, 10, 13 and 14.

The Court held that there was no violation of Article 2 regarding the death of the applicant’s husband. The Court stated that it was not established beyond all reasonable doubt that public authorities were involved in the murder. Nevertheless, the Court ruled that there had been a breach of Article 2 concerning the lack of investigation into the death.

Finally, the Court found a violation of Article 11 regarding the refusal to allow the applicant to cross the “green line”. The Court considered that the interference of the authorities was illegal as the regulation governing the issue of permits to cross the green line was not based on any law.

Prohibition of discrimination

Sidabras and Džiautas v Lithuania

(55480/00) and (59330/00)

European Court of Human Rights: Judgment of 27 July 2004

Right to respect for private and family life – Freedom of expression - Prohibition of discrimination – Articles 8, 10 and 14 of the Convention.

Facts

The applicants are both Lithuanian citizens who live in Lithuania. They are former members of the Lithuanian branch of the Soviet Security Service (KGB). After independence, in 1990, they found jobs as tax inspectors at the Inland Revenue and as prosecutors respectively. In 1999, they were dismissed from their jobs in accordance with the KGB Act, banning former KGB employees from working in the public sector and certain private sectors for 10 years. The authorities ruled that the applicants fell under the restriction imposed by the law.

Complaints

The applicants complained under Article 8 taken alone and in conjunction with Article 14 regarding the restrictions applying to former KGB members.

The applicants claimed that the dismissal from their jobs and the other employment restrictions were in breach of Article 10 taken together with Article 14.

Held:

The Court found that Article 14 was applicable in conjunction with Article 8 as former members of the KGB are treated differently from people who had not worked for the KGB.

The Court held that the ban imposed, operating in various private sectors, was disproportionate and contrary to Articles 8 and 14, even though it pursued legitimate aims.

The Court ruled that there was no violation of Article 10 taken with Article 14. For the Court, the applicant's dismissals and the employment restrictions were not established in order to prevent the applicants from expressing their views.

Unal Tekeli v Turkey

(29865/96)

European Court of Human Rights: Judgment of 16 November 2004

Woman's use of maiden name after marriage – prohibition of discrimination – Article 8 of the Convention and Article 8 in conjunction with Article 14 of the Convention.

Facts

The applicant, Ayten Unal Tekeli, is a Turkish national who was born in 1965 who lives in Izmir.

Following her marriage in 1990, the applicant, then a trainee lawyer, took her husband's surname pursuant to Article 153 of the Turkish Civil Code. As she was known by her maiden name in her professional life, she continued putting it in front of her legal surname.

On 22 February 1995 the applicant brought proceedings in the Karşıyaka Court of First Instance for permission to use only her maiden name, "Ünal". On 4 April 1995 the Court dismissed the applicant's request on the ground that, under Article 153 of the Turkish Civil Code, married women had to bear their husband's name throughout their married life. She appealed unsuccessfully.

On 22 November 2001 the new Civil Code was enacted. Article 187 was worded identically to the former Article 153.

Complaints

The applicant submitted that the national authorities' refusal to allow her to bear only her maiden name after her marriage amounted to a breach of Article 8 of the Convention. She also complained that she had been discriminated against in that married men could continue to bear their own family name after they married. In that connection she relied upon Article 14 in conjunction with Article 8.

Held

The Court held that there had been a violation of Article 14 of the Convention in conjunction with Article 8.

The Court found that it was unnecessary to consider the application under Article 8 of the Convention taken alone.

The Court awarded the applicant 1,750 euros for costs and expenses.

Commentary

The applicant's complaint concerned the fact that, legally, married women cannot bear their maiden name alone after they marry whereas married men keep the surname they had before they married. The Court held that this is undoubtedly a "difference in treatment" on grounds of sex between persons in an analogous situation.

The Court reiterated that the advancement of the equality of the sexes is a major goal in the member States of the Council of Europe. In support of this, the Court cited two texts of the Committee dated 1978 and 1985, which called on States to eradicate all discrimination on grounds of sex in the choice of surname.

Of the member States of the Council of Europe, the Court noted that Turkey is the only country which legally imposes the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage. Married women in Turkey cannot use their maiden name alone even if both spouses agree to such an arrangement.

The Government submitted that the interference in question pursued the legitimate aim of reflecting family unity through the husband's surname and thereby ensuring public order. The Court observed that it is perfectly conceivable that family unity will be preserved and consolidated where a married couple chooses not to bear a joint family name. Consequently, the objective of reflecting family unity through a joint family name was found not to provide a justification for the gender-based difference in treatment complained of in this case.

Interim measures

Mamatkulov and Askarov v. Turkey

(46827/99)

European Court of Human Rights: Grand Chamber Judgment of 4 February 2005

Extradition - Right to life - Prohibition of torture - Right to a fair trial - Individual application - Articles 2, 3, 6 and 34 of the Convention

Facts

The applicants are two Uzbek nationals who are both members of the ERK "Freedom" Party in Uzbekistan. They were suspected of murder, causing injuries by the planting of a bomb in Uzbekistan, and an attempted terrorist attack on the President. The applicants fled to Turkey in March 1999 and December 1998 respectively. They were

arrested and put in detention by Turkish authorities. The domestic courts found that the applicants' offences were not of a political nature preventing extradition. They were extradited to Uzbekistan on 27 March 1999 by the Turkish authorities, even though the President of the relevant Chamber of the European Court had previously urged Turkey to take interim measures in order to stop the extradition process. The High Court of the Republic of Uzbekistan found the applicants guilty and sentenced them to prison.

Complaints

The applicants complained that their extradition to Uzbekistan had breached Articles 2 and 3.

The applicants claimed that the extradition proceedings in Turkey and the criminal proceedings in Uzbekistan were unfair and contrary Article 6(1).

Finally, the applicants raised a violation of Article 34 regarding Turkey's failure to take the interim measures required by the Court.

Held

The Court held that there was no violation of Articles 2 and 3, as there were insubstantial grounds to conclude that the applicants were facing a real risk of ill-treatment or a threat for their lives in Uzbekistan.

The Court found no violation of Article 6(1).

Finally, the Court ruled that there had been a violation of Article 34 regarding the Turkey's refusal to comply with the interim measures indicated under Rule 39 of the Rules of Court. The Court considered that the applicants' extradition had prevented the Court from effectively examining the complaint.

Protection of property

Kokol and Others v. Turkey

(68136/01)

European Court of Human Rights: Judgment of 29 March 2005

Expropriation – Protection of property - Article 1 Protocol No 1 of the Convention

Facts

The applicants are eight Turkish nationals who had been expropriated by the State in 1991 in order to build a motorway. A committee of experts assessed the value of the land and they all received a fixed sum when the expropriation took place. In 1995, the Court granted them additional compensation plus interest which they obtained after four years and eleven months of court proceedings in March 1998.

Complaints

The applicants complained under Article 1 Protocol No 1 that they had received the additional compensation for expropriation after four years and eleven months of court proceedings and consequently, the compensation had fallen in value, due to inflation.

Held

The Court held there had been a violation of Article 1 Protocol No 1.

Commentary

The Court considered that the delay in paying compensation, the low interest rates and the length of the proceedings were excessive compared to the interest provided.

Right to Free Elections

Melnychenko v Ukraine

(17707/02)

European Court of Human Rights: Judgment of 19 October 2004

Election candidacy – Prohibition of discrimination - Article 14 of the Convention and Article 3 of Protocol No 1 of the convention

Facts

The applicant is a Ukrainian national who currently lives in the United States of America where he has refugee status. The applicant was working as a security guard of the Office of the President of Ukraine. In the course of his duties, he tape-recorded a conversation of the President revealing his possible involvement in the disappearance of a journalist. Following the public revelation of the tapes, the applicant feared persecution and fled to the United States on November 2000. In 2001, criminal proceedings were instituted against the applicant for defamation. At the beginning of 2002, the applicant was nominated by the Socialist Party as a candidate for the Parliament election. The Central Electoral Commission rejected his registration as a candidate as he had held no residence

in Ukraine during the previous five years and had given false information about his residence.

Complaints

The applicant complained under Article 3 of Protocol 1 that he was arbitrarily refused registration as a candidate for elections.

The applicant alleged a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol 1 as he had been discriminated against since he had not been able to stand for election.

Held

The court considered that there was no need to examine Article 14 of the Convention separately.

The Court considered that the applicant's candidacy was truthful. Consequently, the refusal to register the applicant as a candidate for elections was in breach of Article 3 of Protocol 1 of the Convention.

Section 3: Appendices

Appendix 1: Status of Ratifications of the Principal United Nation's Human Rights Treaties

(As of 9 June 2004)

Country	CESCR	CCPR	CCPROP1	CCPROP2	CERD	CEDAW
Armenia	13 Dec 93 <i>a</i>	23 Sep 93 <i>a</i>	23 Sep 93		23 Jul 93 <i>a</i>	13 Oct 93 <i>a</i>
Azerbaijan	13 Nov 92 <i>a</i>	13 Nov 92 <i>a</i>	27 Feb 02 <i>a</i>	22 Apr 99 <i>a</i>	15 Sep 96 <i>a</i>	09 Aug 95 <i>a</i>
Iran	03 Jan 76	23 Mar 76			04 Jan 69	
Iraq	03 Jan 76	23 Mar 76			13 Feb 70	12 Sep 86 <i>a</i>
Syria	03 Jan 76 <i>a</i>	23 Mar 76 <i>a</i>			21 May 69 <i>a</i>	27 Apr 03 <i>a</i>
Turkey	23 Dec 03	23 Dec 03			16 Oct 02	19 Jan 86 <i>a</i>

Country	CEDAWOP	CAT	CRC	CRCOPAC	CRCOPSC	MWC
Armenia		12 Oct 93 <i>a</i>	22 Jul 93	<i>s: 24 Sep 03</i>	<i>s: 24 Sep 03</i>	
Azerbaijan	01 Sep 01	15 Sep 96 <i>a</i>	12 Sep 92 <i>a</i>	03 Aug 02	03 Aug 02	01 Jul 03 <i>a</i>
Iran			12 Aug 94			
Iraq			15 Jul 94 <i>a</i>			
Syria			14 Aug 93	17 Nov 03	15 Jun 03 <i>a</i>	
Turkey	29 Jan 03	01 Sep 88 <i>a</i>	04 May 95	04 Jun 04	19 Sep 02	<i>s: 13 Jan 99</i>

CESCR: International Covenant on Economic, Social and Cultural Rights, monitored by the Committee on Economic, Social and Cultural Rights;

CCPR: The International Covenant on Civil and Political Rights, monitored by the Human Rights Committee;

CCPR- OP1: Optional Protocol to the CCPR, administered by the Human Rights Committee;

- CCPR-OP2: Second Optional Protocol to the CCPR, aimed at the abolition of the death penalty;
- CERD: International Convention on the Elimination of All Forms of Racial Discrimination, monitored by the Committee on the Elimination of Racial Discrimination;
- CEDAW: Convention on the Elimination of All Forms of Discrimination against Women, monitored by the Committee on the Elimination of Discrimination against Women;
- CEDAW-OP: Optional Protocol to CEDAW;
- CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, monitored by the Committee against Torture;
- CRC: Convention on the Rights of the Child, monitored by the Committee on the Rights of the Child;
- CRC-OP-AC: Optional Protocol to CRC, on the involvement of children in armed conflict;
- CRC-OP-SC: Optional Protocol to CRC, on the sale of children, child prostitution and child pornography;
- MWC: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly in 1990 and which will enter into force when 20 States have accepted it.
- s*: Signifies that the State is a signatory to the Convention but has not yet ratified/acceded to it.
- a*: Signifies the date of accession, that is, where a State accepts the offer of the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification.

Appendix 2: Status of Ratifications of European Conventions and Treaties

(as of 21 February 2005)

Convention	Armenia	Azerbaijan	Turkey
ECHR	26 Apr 02	15 Apr 02	18 May 54
ECPT	18 Jun 02	15 Apr 02	26 Feb 88
ECE	25 Jan 02 <i>r,d</i>	28 Jun 02 <i>r, d</i>	07 Jan 60, <i>r</i>
ECST	23 Mar 04	11 Feb 04	19 May 81
ESC Rev	21 Jan 04	2 Sep 04	
ECRML	25 Jan 02	<i>s:21 Dec 01</i>	
FCPNM	20 Jul 98	26 Jun 00	
ECHR P1	26 Apr 02	15 Apr 02	18 May 54
ECHR P2			25 Mar 68
ECHR P4	26 Apr 02	15 Apr 02	<i>s: 19 Oct 92</i>
ECHR P6	01 Oct 03	01 May 02	01 Dec 03
ECHR P7	01 Jul 0	01 Jul 02	<i>s: 14 Mar 85</i>
ECHR P12	01 Apr 05		<i>s: 18.04.01</i>
ECHR P13			

ECHR: European Convention on Human Rights and Fundamental Freedoms

ECPT : European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECE: European Convention on Extradition

ECST: European Convention on the Suppression of Terrorism

ESC Rev: European Social Charter (revised)

ECRML: European Charter for Regional or Minority Languages

FCPNM: Framework Convention for the Protection of National Minorities

- ECHR P1: Protocol No. 1 to the ECHR, securing further rights (right to peaceful enjoyment of possessions, right to free elections, right to education)
- ECHR P2 : Protocol No. 2 to the ECHR, conferring upon the European Court of Human Rights Competence to give Advisory Opinions
- ECHR P4: Protocol No. 4 to the ECHR, securing further rights (inc. prohibition of expulsion of a national, prohibition of collective expulsion of aliens)
- ECHR P6: Protocol No. 6 to the ECHR, concerning the abolition of the Death Penalty in Peacetime
- ECHR P7: Protocol No. 7 to the ECHR, conferring additional rights
- ECHR P12: Protocol No. 12 to the ECHR, providing a general prohibition of discrimination
- ECHR P13: Protocol No. 13, concerning the abolition of the Death Penalty in all circumstances
- r*: Reservation made
- d*: Declaration made
- s*: Signifies that the country is a signatory to the Convention but has not yet ratified/acceded to it.

Appendix 3: KHRP Publications

CODE	TITLE	PUBLISHER	PRICE/ISBN
2005			
	The Cultural and Environmental Impact of Large Dams in Southeast Turkey – Fact-Finding Mission Report	KHRP/ National University of Ireland, Galway	£8.00 & £2.00 P&P or available www.khrp.org ISBN 1900175851
	Relatives of Human Rights Defenders at Risk – Trial Observation Report	KHRP/ Bar Human Rights Committee of England and Wales	£5.00 & £1.50 P&P or available www.khrp.org ISBN 1900175819
	‘Thirteen Bullets’: Extra-Judicial Killings in Southeast Turkey – Fact-Finding Mission Report	KHRP	£5.00 & £1.50 P&P or available www.khrp.org ISBN 1900175827
	Enforcing the Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora	KHRP/ KWP	£6.00 (& £1.50 P&P) or available www.khrp.org ISBN 1900175835
	Pumping Poverty: Britain’s Department of International Development and the Oil Industry	Written and researched by PLATFORM Research. Endorsed by KHRP and others	£10.00 from jo@planb.org or available www.planb.org or www.khrp.org
	Freedom of Expression at Risk: Writers on Trial in Turkey – Trial Observation Report	KHRP	£5.00 (& £1.50 P&P) or available www.khrp.org ISBN 1900175843
2004			
	The Trials of Ferhat Kaya – Trial Observation Report	KHRP, The Corner House, Friends of the Earth (England, Wales and Northern Ireland), Environmental Defense	£5.00 (+£1.50 P&P) or available www.khrp.org ISBN 190017586X
	The Kurds in Iraq – Past Present and Future (Turkish language)	KHRP	<i>Only available in Turkey or available to download www.khrp.org</i>
	Turkey – Situation of Kurdish Children (Turkish language)	KHRP	<i>Only available in Turkey or available to download www.khrp.org</i>
	Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts – Turkey Section	KHRP, The Corner House, Friends of the Earth (England, Wales and Northern Ireland), Environmental Defense	£5.00 (+£1.50 P&P) or available www.khrp.org ISBN 1900175797
	KHRP Legal Review 6	KHRP	ISBN 1 900175 72 X £8 available www.khrp.org

	Report on the Trial of Huseyin Cangir – Trial Observation Report	KHRP	ISBN 1 900175 76 2 £5 Available www.khrp.org
	Turkey's Implementation of Pro-EU Reforms – Fact-finding mission report	KHRP	ISBN 1 900175 73 8 £5.00 Available www.khrp.org
	Turkey – The Situation of Kurdish Children	KHRP	ISBN 1 900175 77 0 £5.00 Available www.khrp.org
	The Kurds: Culture and Language Rights	KHRP	ISBN 1 900175 74 6 £8.00
	Taking Human Rights Complaints to UN Mechanisms (Turkish language)	KHRP	Available www.khrp.org
	Kurdish Cultural and Language Rights (Turkish language)	KHRP	Available www.khrp.org
	KHRP Legal Review 5	KHRP	ISBN 1 90017572 X
	Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora (Second Edition)	KHRP/ KWP	£5.00 (& £1.50 P&P) or available www.khrp.org ISBN 1900175711
	Taking Human Rights Complaints to UN Mechanisms – A Manual (Russian language)	KHRP/ BHRC/ Platform	Only available in Armenia and Azerbaijan or www.khrp.org
	Torture in Turkey – the Ongoing Practice of Torture and Ill-treatment	KHRP	ISBN 1 900175 70 3 £8.00
2003			
03/R	Trial Observation Report – Turkey's Shame: Sexual Violence without redress – the plight of Kurdish Women	KHRP	ISBN 1 900175 69X £5.00
03/Q	The Kurds in Iraq: the past, present and future	KHRP	ISBN 1900175673 £8.00
03/P	KHRP Legal Review 4 (November 2003)	KHRP	ISBN 1900175681 £8.00
03/O	After the War: Report of the KHRP Fact-Finding Mission to Iraqi Kurdistan	KHRP	ISBN 1900175665 £5.00
03/K	Internally Displaced Persons: the Kurds in Turkey	KHRP, GÖÇ-Der, IHD Diyarbakir	£8.00

03/J	Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System – Azeri language	KHRP, PLATFORM, the Corner House, Friends of the Earth International, Campagna per la Riforma della Banca Mondiale and CEE Bankwatch	<i>Only available in Azerbaijan</i>
03/I	Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System – Russian language	KHRP, PLATFORM, the Corner House, Friends of the Earth International, Campagna per la Riforma della Banca Mondiale and CEE Bankwatch	<i>Only available in Azerbaijan</i>
03/K	Fact-Finding Mission to Iran	KHRP	ISBN 1 900175 649 £5.00
03/J	In the Wake of the Lifting of State of Emergency Rule: Report of a Fact-Finding Mission to Southeast Turkey	KHRP, BHRC, IHD	ISBN 1 900175 622 £5.00
03/I	Turkey's non-implementation of European Court judgments: the Trials of Fikret Baskaya	KHRP, BHRC	ISBN 1 900175 630 £5.00
03/H	Taking human rights complaints to UN mechanisms – A Manual	KHRP	ISBN 1 900175 614 £8.00
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Can Dunder, *Journalist in Turkey*

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