Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project
KHRP
Established 1992
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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

Kurdish Human Rights Project
11, Guilford Street, London WC1N 1DH, England
Tel: +44 (0)20 7405 3835
Fax: +44 (0)20 7404 9088
khrp@khrp.org
www.khrp.org

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Submissions for consideration by the Editorial Board should be sent to:

KHRP Legal Review
Kurdish Human Rights Project
11, Guilford Street, London WC1N 1DH, England
Tel: +44 (0)20 7405 3835
Fax: +44 (0)20 7404 9088
Email: khrp@khrp.org

Communications regarding proposed articles should be addressed to the Editorial Board at the address above or khrp@khrp.org. Contributors are encouraged to contact the relevant editors regarding drafts or proposed contributions with abstracts of proposed articles preferred.

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Kurdish Human Rights Project
KHRP
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11 Guilford Street

London WC1N 1DH

Tel: +44 (0)20 7405 3835

Fax: +44 (0)20 7404 9088

khrp@khrp.org

www.khrp.org

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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	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
İHD	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
UN	United Nations

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 2:	Right to education
Article 3:	Right to free elections

Protocol No 2 to the Convention

Article 7:	Right of appeal in criminal matters

Section 1: Legal Developments & News

Armenia passes Constitutional Referendum

On 27 November 2005, a Constitutional Referendum was held in Armenia. Council of Europe observers noted that Armenia had not taken the opportunity offered by the referendum to ensure that the electoral process was organised in full compliance with Council of Europe standards. They found that the transparency of the referendum was hampered by the decision of the parliamentary opposition to call on their members to withdraw from the electoral commissions. Similarly, the Attorney General's refusal to investigate specific cases of fraud, for instance stuffing of ballot boxes or falsification of electoral registers, served to cast doubt on the authorities' professed determination to promote rule of law and democracy. In this context, the few voters who were prosecuted for voting more than once appeared to be mere scapegoats, allowing the authorities to evade their political responsibilities.

Nevertheless, the referendum is a positive outcome and is to be welcomed. The new constitutional provisions represent a major test of Armenia's political determination to bring the country genuinely closer to European values. The key challenges now faced by Armenia include not only to adopt the legislative reforms which were blocked by the former unsuitable Constitution, but also to create a political climate respectful of European standards. Armenia's progress towards this goal will be judged in particular during the parliamentary and presidential elections to be held in 2007 and 2008 respectively.

CPT to visit Armenia and Azerbaijan in 2006

As part of its program of regular visits, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) plans to examine Armenia and Azerbaijan later in 2006. The Committee will visit places where people are deprived of their liberty to inspect the way that they are treated. It will be the CPT's fourth visit to Azerbaijan and its third to Armenia.

OSCE report on Azerbaijani elections finds electoral process fails to meet international standards

The OSCE body responsible for monitoring elections, the Office for Democratic Institutions and Human Rights (ODIHR) has released its Final Report on the 6 November 2005 parliamentary elections in Azerbaijan. The Report states that the elections did not meet a number of OSCE commitments and Council of Europe standards for democratic elections. The complaints and appeals process did not, according to the Report, provide adequate redress for shortcomings, either prior to or after elections. Particular reference was drawn to the fact that few effective sanctions were imposed on local executive authorities who interfered in the election process in violation of the law. The report concluded with 30 recommendations to the Azerbaijani Government concerning election administration, the legal framework for elections, media independence, freedom of assembly and women's participation.

Improvements still required in Azerbaijani electoral process after partial repeat of elections

Repeat parliamentary elections were held on 13 May in 10 of the 125 parliamentary constituencies of Azerbaijan. A Presidential Decree mandated that repeat elections were to be held in those constituencies in which the Central Election Commission and the Constitutional Court annulled the results of the November 2005 election. The elections were observed by an OSCE/ODIHR Limited Election Observation Mission, who followed the campaign environment, the administrative preparations and the functioning of the complaints and appeals procedure. The mission found that there was an improvement in come aspects of the process, but there is a need for ongoing electoral reform.

In particular, the mission was concerned about the composition of the election commissions, instances of interference by local authorities in the election process and the handling of complaints and appeals by election commissions and courts. It noted a number of irregularities in the conduct of voting, counting and tabulation processes. However, it did welcome the posting of results protocols by polling stations on the Central Election Commission website on the morning after the election.

Syria to grant Kurds citizenship

A 43-member delegation representing all the Kurdish tribes in Syria met recently with Ba'ath Party official Muhammad Sa'id Bakhtian. They discussed restoring citizenship

to Kurds at the earliest possible opportunity. This idea was already raised by the Syrian government last year as part of a "comprehensive plan" to develop the Syrian-Iraqi-Turkish border region, and has been linked to international pressure placed on Syria following alleged Syrian complicity in the assassination of former Lebanese Prime Minister Rafiq Al-Hariri in February 2005. Kurds who have lived in Syria since the state was formed are recognised citizens. However, around 200,000 Syrian-born Kurds, or 20% of the Syrian Kurdish population, were stripped of their Syrian nationality following the 1962 al-Hasaka census, ostensibly on the grounds that they had entered the country from Turkey. Affected Kurds cannot vote, own property or own passports.

Detention of human rights defenders increases in Syria

Concerns remain amongst the international human rights community about the growing pattern of increased harassment of human rights defenders in Syria over recent months. Between 14 and 17 May 2006, nine human rights defenders and political activists were detained. Nidal Derwiche, Ghaleb Amer, Anouar Bunni, Suleiman Achmar, Khalil Hussein, Abbas Abbas, Mahmoud Issa and Safouan Tayfour were all arrested between 16 and 18 May 2006 and no information has yet been obtained about their whereabouts or their treatment. Michel Kilo was detained on 14 May 2006, and has been formally charged with "weakening national morality" and "inciting partisan struggles". The repression resulted from the circulation on 12 May 2006 of a petition signed by 500 people, calling for an improvement in the relations between Lebanon and Syria.

In March 2006, Syrian authorities arrested four human rights defenders, Ali al-Abdullah and two of his sons, Muhammad and Omar, as well as Muhammad Najati Tayyara, former vice-president of the Human Rights Association in Syria (HRAS). It was not the first time that Ali and Muhammad al-Abdullah had been arrested for their human rights work. In February 2005 Dr. Ammar Qurabi, a human rights defender spokesman for the Arab Human Rights Organisation, and Dr. Kamal al-Labwani, another human rights defender, were arrested on their return from a trip abroad.

UN Special Rapporteur on Human Rights and Counter-Terrorism visits Turkey

The UN Special Rapporteur on Human Rights and Counter-Terrorism, Martin Scheinin, visited Turkey from 16 to 23 February 2006. Following his visit, he made a number of recommendations. In particular, he urged that a new definition of terrorism be established in order to ensure compatibility between counter-terrorism laws and international

human rights standards. He noted that the definition contained in the anti-terror law, passed in Turkey in 1991, was too broad and vague. Under this law, Article 1 defines terrorism in regard to its purpose or aims rather than referring to specific criminal acts. This might lead to situations where people are convicted of terrorist offences without sufficient connection to acts of terror. As a result, certain counter-terrorist measures taken by the State may have consequences that are incompatible with human rights.

The UN Special Rapporteur noted that many efforts had been undertaken by the Government in the field of human rights. For instance, a zero-tolerance policy was implemented with regards to torture and improvements in conditions of detention. However, he had not found evidence that independent and impartial mechanisms to investigate allegations of torture and ill-treatment of terrorism suspects had been established. Moreover, he regretted that no effective monitoring system for conditions of detention existed. He encouraged the recent adoption of the Law on Compensation for Damage Arising from Terror and Combating Terror (Law No 5233), but voiced concerns that it was confined solely to material compensation. Finally, the UN Special Rapporteur recalled the importance of non-discrimination, particularly towards the Kurdish population.

Turkey signs Convention on the Prevention of Terrorism

On 19 January 2006, Turkey signed the Convention on the Prevention of Terrorism in Strasbourg. This Convention was drafted after the 11 September 2001 attacks in New York and Washington, and is meant to complement conventions prepared for the common fight against terrorism over the last 40 years. It covers cooperation among States concerning the prevention of terrorist attacks. Thirty-one member states of the Council of Europe have signed the Convention, though none has ratified it, The Convention must be ratified by at least 6 Council members (including 4 EU members) before it can enter into force.

New statistics reveal continued level of human rights abuses in Turkey

In its 2005 report, the Human Rights Association (İHD) noted that in the province of Mardin, 129 human rights violations out of a total of 138 were perpetrated by security forces. These 129 breaches concerned violations of the right to liberty effected by the security forces as well as the gendarmerie and executive guard members or village protectors (*muhtar*). The report also focused on the right to life, right to freedom

of thought and expression, and freedom to work. More recently, Interior Minister Abdulkadir Aksu stated that in the last three years, 203 security officials had been killed and 1,325 terrorists caught in clashes with the outlawed PKK. He further noted that 359 terrorists had been killed, 577 caught and 589 given themselves up since 2003.

These figures must be placed in the context of the recent escalation of violence and unrest in south eastern Turkey at the end of March 2006, during which at least 15 people of Kurdish origin were killed and hundreds were injured. The violence began in Diyarbakır and spread quickly to most other Kurdish provinces. Clashes were also reported in Istanbul. Ten thousand Turkish soldiers have been sent to the border region, bringing the total number of troops in the area up to 50,000. On 18 April, security forces raided the offices of the pro-Kurdish Democratic Society Party in Diyarbakır on the grounds that the leaders of the party refused to accept the Government's definition of the PKK as a terrorist group. The situation has also resulted in widespread detentions, including eighty children aged between 12 and 18 who face between 10 and 15 years in jail on charges of belonging to a criminal organisation, damaging state buildings and attacking police vehicles. Dozens of adults also face jail sentences for their involvement in the protests. The European Union has since expressed its concerns over the clashes and urged Turkey to improve its human rights record in respect of the Kurds.

Turkey remains at top of European Court annual table of violations

The European Court of Human Rights 2005 annual table of violations revealed that Turkey had the highest number of judgments against it, with 270 decisions finding at least one violation. One-hundred and twenty-five of these concerned concerned fair trial and length of proceedings, whilst the remainder mostly concerned breaches of the right to life, the right to be free from torture and inhuman or degrading treatment, the right to liberty and security, the right to freedom of expression, the right to an effective remedy and the right to enjoyment of property. The full table is attached at Appendix 1.

UN Committee on Rights of Child considers Turkey's report

On 17 May 2006, the UN Committee on the Rights of the Child started its three week session considering the initial report of Turkey on how it is implementing the provisions of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, prostitution and child pornography. Questions have so far been raised on the lack of legal provisions to punish crimes committed through the Internet, collaboration with NGOs working in the field of child rights, measures to expand rehabilitation centres

for victims of sexual abuse, complaint lodging procedures, the role of the juvenile police and kidnapping girls for marriage. The Committee will release its formal, written concluding observations and recommendations on the report towards the end of its session, which will conclude on 2 June 2006.

CPT visits Turkey

A delegation of the CPT carried out a one-week visit to Turkey between 6 and 14 December 2005. The delegation focused on three issues: the current situation as regards the treatment of persons in the custody of law enforcement agencies and developments in F-type (high security) prisons, in particular with regards to activities for inmates and the regime applied to prisoners serving a life sentence, and the procedures for the administration of electroconvulsive therapy in psychiatric establishments. The delegation visited law enforcement and prison establishments in various provinces, and met with the prosecutorial authorities, bar associations and branches of the human rights association in Adana, Istanbul and Van. Certain issues related to the conditions of detention of Abdullah Öcalan were also discussed with the Turkish authorities in Ankara.

Trial of Saddam Hussein continues

The trial of Saddam Hussein at the Iraqi Special Tribunal in Baghdad resumed in January 2006, after a series of delays and difficulties, with a new judge in charge of proceedings. The Court had sat for only seven days since it opened on 19 October 2005, and only two of the original five judges remain. The initial head of the Tribunal, Rizgar Amin, resigned last month, following accusations from government officials that he was too lenient towards the defendants. His deputy was moved aside following allegations that he has been a member of the Baath party. A third judge stepped down last year citing a possible conflict of interest. The trial is now presided over by a new judge, Raouf Abdul Rahman.

The Iraqi Special Tribunal follows Iraqi civil law, where the judge is the chief investigator and there is no jury. Although established under basic principles of international law, the trial procedure deviates from past war crimes or crimes against humanity tribunals on some key points, including Hussein facing a possible death sentence and being tried by Iraqi nationals Iraqi citizens. The international human rights community has expressed some concern over the legitimacy and ambit of the Tribunal, including the application of the death penalty, whether or not the Court is able to provide a fair trial – since guilt

does not have to be proved beyond reasonable doubt but instead the Tribunal has to be "satisfied" of guilt – and as the Tribunal was established during occupation.

Hussein and his associates currently face several charges. At present, he and seven co-defendants are accused of killing 143 men in the mostly Shia town of Dujail in July 1982, after a failed assassination attempt against him. Many others, including women, men and children, were wrongly arrested and held in Lia in the Sumawa desert for four years, and their fruit groves were destroyed. On 4 April 2006, the Tribunal announced fresh charges against him and six others for the killing and displacement of tens of thousands of Iraqi Kurds during the Anfal campaign in 1988. The simultaneous attack on Halabja is expected to be dealt with in separate charges. The Court is also believed to be preparing cases that include the 1991 Shia and Kurdish uprisings, the launching of the 1980-1988 Iran-Iraq war and the 1990 invasion of Kuwait. It is not yet clear whether Hussein and his co-defendants will face execution if found guilty in the Dujail cases before the Anfal and other trials conclude.

Iraqi Parliament approves new government

After five months of negotiations following December's general elections, the Iraqi Parliament approved a new government on 20 May 2006, including members of the main Shia, Kurd and Sunni parties. However three crucial ministries - national security, interior and defence – still have not been agreed. Mr Nouri Maliki (Shia) was appointed Prime Minister and Acting Interior Minister. Two Deputy Prime Ministers have also been chosen - Barham Salih, a Kurd and an official of President Jalal Talabani's Patriotic Union of Kurdistan party since 1988, who will also act as National Security Minister; and Salam Zaubai, a Sunni from the main coalition, the Iraqi Accordance Front. Mr Zaubai will act as Defence Minister until this post is filled. Dr Hussain Shahristani (Shia) was elected Oil Minister, Hoshiyar Zebari (Kurd) will be Foreign Minister and Hashim Al-Shebli, (Sunni) Justice Minister. Of the remaining 31 appointments, 18 were Shia, 6 Kurd, 6 Sunni and 1 Christian.

These appointments follow the election of the Presidency Council on 22 April 2006, when Mr Jalal Talabani was elected President of Iraq, with Mr Adel Abdul Mahdi and Mr Tareq al-Hashemi as Vice-Presidents.

Alarming increase in executions in Iran

Following the election of President Mahmoud Ahmadinejad last year, the rate of executions in the country has increased alarmingly. Between 20 January and 20 February 2006 alone, the judicial authorities executed 10 prisoners and condemned another 21 to the death sentence. A member of the opposition, Hojat Zamani, was executed on 7 February 2006 after a trial that the international human rights community fear did not meet international standards. Iran has also executed minors under the age of 18, despite being party to both the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, which prohibit the imposition of the death penalty for crimes committed before the age of 18.

Lord Woolf reviews European Court working methods

On 21 December 2005, the former Lord Chief Justice of England and Wales, Lord Woolf, issued a report reviewing the working methods of the European Court of Human Rights. This review sought to identify administrative measures which could help the Court deal with its ever-growing workload. 44,100 new applications were lodged with the Court in 2004, and the number of cases currently pending stands at 82,100. This is projected to rise to 250,000 in 2010.

The Report made several recommendations, notably that the Court should deal only with properly completed application forms, that satellite offices should be established in countries to determine the admissibility of applications, that greater use should be made of national ombudsmen, and other methods of alternative dispute resolution should be encouraged. Moreover, the report recommended that the Court should deliver more pilot judgments and deal summarily with repetitive cases.

In spite of the above, the President of the European Court of Human Rights, Luzius Wildhaber, expressed optimism over the Court's future at his annual press conference. He referred to the increase in annual productivity and also to the recent support from European governments. He noted that the number of judgments delivered by the Court in 2005 had risen by 54% and that the number of cases terminated by a judicial decision had gone up by 36%.

European Court establishes fifth section

On 13 December 2005, the European Court elected Peer Lorenzen from Denmark as

the President of the new Fifth Section, for a three year term beginning on 1 March 2006. On this date, the judges were divided into five Sections. A table setting out the new composition of the Court is attached at Appendix 2.

Committee of Ministers amends rules on supervision of execution of judgments

On 10 May 2006, the Committee of Ministers adopted new rules which specifically grant them a discretion to consider submission by NGOs and National Institutions of the Promotion and Protection of Human Rights about the execution (or non-execution) of a judgment or the terms of a friendly settlement (rules 9 and 15) . These supplement the old rules under which Applicants could – and continue to be able to – make submissions to the Committee with regard to payment of the just satisfaction or the taking of individual measures.

The Decision of the Committee of Ministers and the new Rules are attached at Appendix 3.

Appointment of new Council of Europe Commissioner for Human Rights

Following an election on 5 October 2005, Thomas Hammarberg succeeded Alvaro Gil-Robles as the Council of Europe's Commissioner for Human Rights. The official handover ceremony was held on 4 March 2006 in Strasbourg. One of the first issues addressed with by the new Commissioner was how to "fight terrorism with legal means".

New UN Human Rights Council created and members elected

On 15 March 2006, the United Nations 60th General Assembly passed a resolution approving the creation of the new UN Human Rights Council. The Council is the result of several months' tense negotiation, which resulted in the United-States, Israel, the Marshall Islands and Palau voting against the proposed text. The new Council will replace the much-criticised Human Rights Commission in June 2006, and will serve as the main United Nations forum for dialogue and cooperation in the field of human rights, helping member states to comply with their obligations and issuing recommendations to the General Assembly. Contrary to the former Commission, the Council will meet year round and not only six weeks in a year. The Commission will be abolished on 16 June

2006 and the Council's first meeting will take place on 19 June 2006.

In accordance with General Assembly Resolution 60/251 of 15 March 2006, 13 of the 47 seats belong to the Africa Group, 13 to the Asian Group, 6 to the Eastern European Group, 8 to the Latin American and Caribbean Group and 7 to the Western Europe and Other Group. Following elections on 9 May 2006, all groups obtained or exceeded the 96-vote majority needed to fill their allocated number of members, with the exception of the Eastern European Group, where only the Russian Federation, Poland and the Czech Republic won seats. The other three seats were decided in two further rounds of secret voting. A full list of members is set out at Appendix 4. It is worth noting that Turkey did not come forward as a candidate for membership to the Council.

ARTICLES

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

Stuart Kerr[1]

The Trial of Orhan Pamuk: challenging Turkey's commitment to the EU

"Thirty thousand Kurds and a million Armenians were killed in these lands and nobody dares to talk about it. I do." Orhan Pamuk, Das Magasin, 9 February 2005

When the decision to commence accession negotiations between Turkey and the EU was made in October 2005, it was accompanied by a quiet optimism that the Republic had entered a new era, in which human rights standards would continue to improve, that diverse cultural and linguistic rights would be recognised, and that freedom of expression, the cornerstone of a mature and functioning democracy, would be respected. However, that optimism lost some of its shine over the ensuing months, as it was tainted by slow moving improvements in human rights standards, the ferocity of renewed hostilities in the south-east Kurdish region of Turkey, and a number of prosecutions under the new penal code initiated against journalists, writers, cartoonists, publishers and academics. Most notably, internationally acclaimed author, Orhan Pamuk, was indicted on 30 June 2005 under Article 301 of the Turkish Penal Code for "publicly denigrating Turkish national character" in making the above statement.

By the time of the first hearing in the trial of Pamuk on 16 December 2005 in Istanbul, the issue of freedom of expression in Turkey and the outcome of the trial had become a key issue which was a litmus test for commentators, analysts and observers to gauge the pace of progress. For while Pamuk's case attracted the most attention because of the celebrity of the accused, it was also becoming evident that the new Penal Code introduced on 1 June 2005 was being widely utilised in an apparently over-zealous fashion. This article assesses Turkey's commitment to EU reforms and accession, as evidenced by the events

1 Barrister, 8 King's Bench Walk, with the grateful assistance of KHRP Development intern, Rebecca Sammut

within Pamuk's trial.

The trial

The first hearing in Orhan Pamuk's trial took place on 16 December 2005, before a packed courtroom of international observers, politicians and journalists. The hearing was adjourned after approximately 45 minutes of legal submissions from those acting for Pamuk, those representing nationalist interests, and the public prosecutor.

The lawyers defending Pamuk questioned the legality of the indictment, in the light of the fact that the offence was alleged to have taken place before Article 301 of the Penal Code had come into force, and that the indictment lacked particularity on other aspects of the charge, such as the scene of the offence. The defence argued that the deficiencies in the procedure were clear enough that it was not necessary to adjourn for any clarifications, and called for the charge to be dismissed.

The public prosecutor, meanwhile, submitted that the trial be adjourned on the basis that, if it were correct that Article 301 could not be applied to the current offence, then it would be necessary to obtain permission to prosecute the defendant from the Ministry of Justice. The judge acceded to the submission of the public prosecutor and adjourned the trial until 7 February 2006.

In the interim, it was widely reported[2] that the adjournment provided officials of the European Parliament and other institutions of the EU an opportunity to put political pressure on the Minister of Justice, in order to ensure that the criminal charges against Pamuk would be brought to a halt. On 22 January 2006, the Justice Ministry announced they had no authorisation to open a case in the frame of the new Turkish Penal Code[3], and the charges were dropped.

EU related legal reforms

Since 2001, in response to the EU's demands, the Turkish government has instituted a broad spectrum of legal reforms intended to facilitate the harmonisation of its laws with those of the EU. Many of those reforms have been welcomed not only by human rights organisations, but also by the wider international community. Ankara has made progress in regard to international human rights instruments and made changes to

2 Turkish Daily News, 7th January 2006

3 www.zaman.com/?bl=national&alt=&trh=20060123&hn=28943

domestic legislation in order to comply with the Copenhagen Criteria. However, the half-hearted implementation of these laws and the continuing application of other restrictive laws have called into question the State's genuine commitment to reform. As will be explained below, the December 2005 trial of Orhan Pamuk was no exception.

The challenges to freedom of expression enshrined in Turkey's new Penal Code have had the simultaneous consequences of encouraging liberals to voice opinions of Turkey's past (in discussing the Armenian issue) and its current treatment of unrecognised minorities (the Kurdish issue), whilst inspiring 'nationalist elements of society' to challenge outwardly and defy reforms initiated by the accession process. Orhan Pamuk writes, "[o]n the one hand, there is the rush to join the global economy; on the other, the angry nationalism that sees true democracy and freedom of thought as Western inventions."

Implementing EU reforms at the domestic level

Despite national widespread training in human rights law for judges and prosecutors (undertaken jointly by the Turkish Ministry of Justice, in conjunction with the Council of Europe and the British Department of Constitutional Affairs and the Foreign and Commonwealth Office), there remains a lack of ability, or of willingness, to take up and utilise human rights law, particularly the ECHR, in the domestic setting. Accordingly, it can be concluded that the independence of public prosecutors from the Ministry of Justice is incomplete, coupled with either a lack of willingness on the part of the judicial system as a whole to take this training on board, or alternatively other influential actors deeply imbedded in the judicial system and therefore cannot be treated or identified in isolation from the Government. As Pamuk himself recognises, "[t]he first duty of a government that is to carry Turkey into Europe is to defend the freedom of expression of its citizens, not that of its judges and prosecutors."

Although, under the new Penal Code, Public Prosecutors have been granted independence from the Ministry of Justice, it is apparent that as yet they have not developed the requisite confidence for the role. Moreover, the inability or unwillingness to utilise international human rights law when making decisions hinders real implementation of progressive reforms. One of the pervasive consequences of this is that the public may perceive that Turkey's accession to the European Union has been imposed upon the country. Among nationalists, this view goes further, in that the reforms initiated by the accession process challenge the unity and integrity of the Turkish State. If the prosecutors had charged Pamuk under the old law (Articles 159 and 312), they would not have been able to act independently and the Ministry would have had no reason not to give permission to prosecute.

This attitude demonstrates a prevalent belief amongst prosecutors that their actions will not be scrutinised and thus they feel sufficiently secure in ignoring international law, despite the human rights training they have undertaken. This belief that individuals will not be held to account for their actions is also manifest in the actions of the police and security forces in the recent violence in the predominantly Kurdish south-east of Turkey, following the funerals of four of the fourteen militants killed by security forces. Independent observers reported that the police and security forces responded to demonstrations with excessive, indiscriminate and disproportionate force, for which they have not been punished, and there has been no indication that the perpetrators will be held accountable.

There is clearly a widespread and deep-rooted intolerance towards enlightened but marginalised voices expressing views that contradict the unity and homogeneity of the Turkish Republic. Moreover, there is evidence to suggest that there also exists a stronghold of nationalist opinion that feels threatened and excluded by the prospect of Turkey joining the EU. The suggestion that a spurious case was opened against Pamuk in order to create a backlash against Turkey's accession reveals a mistrust of the benefits of accession, a problem exacerbated by the formal and informal restrictions on the voicing of opinion and thus, the prospect of meaningful dialogue.

The behaviour of the prosecutors, both in initiating the case against Orhan Pamuk and in the way the case was conducted, shows that there is a lack of belief in the benefit of the reforms brought about by the accession process. There have been conflicting messages emanating from Ankara contributing to the feeling that the reform process is largely cosmetic. Prime Minister Erdoğan has made comments which suggest he considers judicial and legislative reforms to be a simple means to membership of the EU, not a valuable process in themselves[4], and by not fully enforcing their implementation, the Turkish state can remain an undiluted and inviolable entity. Outside observers should not be surprised if the general populace sees the Government's commitments to the reforms as disingenuous, and accordingly challenges them.

This has resulted in confusion over where decision-making powers truly lie. It is apparent that prosecutors would not have pursued the case had it not been for organised nationalist complainants, and not the merits of initiating the prosecution. It is feared that the new Penal reform has been cynically instituted, merely in order to appease the EU, without being backed-up by sincere commitment from the judiciary or the executive. According to Pamuk, "[a]lthough Turkey has made various 'reforms' concerning freedom of expression, sometimes it seems that these have been made for show and not

4 "A Change in Mantality is Needed", 18 September 2004, http://www.qantara.de/webcom/show_article.php/_c-301/_nr-37/_p-1/i.html?PHPSESSID=586932399788bbaf8

out of conviction."

It remains to be seen how events will unfold in a case where the prosecutor is independent and does not need to seek permission to prosecute from the Ministry of Justice, i.e. a case concerning Article 301 where the alleged offence occurred after June 2005. How will the prosecutor respond to the pressure of a situation of this kind? Will the Ministry of Justice overstep its newly imposed boundaries?

The use and misuse of Article 301 of the new Penal Code — so indicative of Ankara's attitude towards many human rights issues— demonstrates that even with the combination of new laws, human rights training and the independence of prosecutors, there is not yet a sufficient shift in attitude which allows for views and counter-views to be debated without fear of criminalisation.

Conclusion

Respect for freedom of expression is a fundamental characteristic of the pro-EU accession view of the 'Turkey of the future'. Without this respect, Turkey is bereft of the discussion and exchange of ideas that has the potential of winning commitment to, and respect for, the process of accession and the reforms therein. In disrespecting freedom of expression, Ankara denies the validity of questioning the reform process, thereby entrenching opposition and encouraging hostility to marginal voices both of a nationalist and liberal nature. Thus, the question of accession is reduced to simply an issue of sovereignty vs. hegemony, and accession's complex and multi-faceted nature is left unresolved.

The aims of reforms proscribed by the process of joining the EU are designed to be irreversible, so that the values they represent become so entrenched in the society and judiciary that they will not be overturned or corrupted. An established democracy should accept its own history, recent or distant. The constant thread which has run through many of the cases involving prosecutions under freedom of expression legislation relate to a tension between those seeking to preserve the self-image of the Turkish Republic and those people or peoples who may seek to challenge it. Until discussion of controversial matters is allowed to flourish, there will continue to be impediments to Turkey's democratisation, and ultimately, to its aspirations to join the EU.

Narine Gasparyan, Advocate to the Chamber of Advocates of the Republic of Armenia[5]

Promotion of human rights protection mechanisms and establishing additional legal remedies under the new Constitution of the Republic of Armenia

I. INTRODUCTION

On 21 September 1991, the Republic of Armenia (hereinafter referred to as ''Armenia") declared its independence by holding a referendum in which the vast majority of its citizens voted for succession from the Soviet Union (USSR). Armenia was internationally recognised as an independent state on 23 September 1991. After proclaiming its independence, Armenia was faced with several urgent tasks, including adopting appropriate political and legal frameworks, rebuilding the economy and strengthening its democratic and human rights institutions.

One of the cornerstones of a democratic state governed by the rule of law is the establishment of appropriate systems and mechanisms for the protection and effective implementation of human rights. The adoption of a new Constitution represented one of the first steps towards this goal. After declaring independence, it took Armenia four years to decide on the terms of its new Constitution, which was adopted in 1995 ('the 1995 Constitution'). For the first time, this confirmed fundamental human rights and freedoms at the constitutional level and attempted to create a system which would achieve the effective implementation and protection of human rights.

Following its adoption, further democratic developments, Armenia's integration into international and regional organisations[6] and the adoption of several human rights

5 Narine Gasparyan is Rule of Law Staff Attorney to of the Armenian Representative Office of American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) and a lawyer working with the human rights NGO Forum. She also leads NGO called "Legal Guide".

6 Currently the Republic of Armenia has permanent representative missions to the following international and regional organisations: Black Sea Economic Cooperation (BSEC); Commonwealth Independent States (CIS); Council of Europe; European Union (EU); North Atlantic Treaty Organisation (NATO); Organisation for Security and Cooperation in Europe (OSCE) and United Nations (UN). URL: http://www.armeniaforeignministry.com. For more information on the

instruments created a need to further amend the 1995 Constitution. In this respect, one of the main contributory factors was the accession of Armenia into the Council of Europe and the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention').

Since its accession to the Council of Europe on 25 January 2001, Armenia had entered into a number of commitments, which were primarily defined in Parliamentary Assembly Opinion No. 221 (2000) on Armenia's Application for Membership into the Council of Europe[7]. Constitutional reform was one of the major changes on the agenda. One of the aims of the constitutional reforms, which started in 2001, was to ensure that the norms of the Constitution of Armenia complied with the Council of Europe requirements and internationally recognised standards. Armenia therefore started to initiate constitutional reform. However, a national referendum of May 2003 rejected the constitutional revisions because the voters did not agree with the proposed draft changes. Further, constitutional amendments were proposed and debated and these, according to the deadlines set out in Resolutions 1361[8] and 1405[9] (2004) of the Parliamentary Assembly of the Council of Europe, should have been adopted by a constitutional referendum by no later than June 2005. However, the deadline was not met by the Armenian authorities. In order to ensure timely adoption of the constitutional amendments, the Armenian authorities and the Working Group of the European Commission for Democracy through Law (the ''Venice Commission") signed a memorandum on further co-operation on 2 June 2005. This led to the referendum of 27 November 2005, by which the new Constitution of Armenia was finally adopted ("the new Constitution").

Therefore, the amendments to the Armenian Constitution was one of the major steps towards ensuring Armenia's compliance with the political, legal, economic, social and cultural frameworks set out in the Council of Europe requirements. This process had a major impact on the future development and promotion of the rule of law in Armenia, which will be further explained below. Although the new Constitution established many important improvements and guarantees, this article will only consider the new

membership of Armenia to prominent international organisations go to http://www.armeniaforeignministry.com .

7 Opinion No. 221 (2000) of the Parliamentary Assembly of the Council of Europe on Armenia's application for membership of the Council of Europe. Assembly Debate on 28 June 2000 (21st Sitting), text adopted by the Assembly on 28 June 2000. URL- http://assembly.coe.int/Documents/AdoptedText/TA00/eopi221.htm

8 Council of Europe, Parliamentary Assembly, Resolution 1361 (2004)on Honouring of obligations and commitments by Armenia. Assembly debate on 27 January 2004 (3rd Sitting) (see Doc.10027, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Mr André and Mr Jaskiernia). Text adopted by the Assembly on 27 January 2004 (3rd Sitting).

9 Council of Europe, Parliamentary Assembly, Resolution 1405 (2004) on Implementation of Resolutions 1361 (2004) and 1374 (2004) on the honouring of obligations and commitments by Armenia. Assembly debate on 7 October 2004 (31st Sitting) (see Doc. 10286, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Mr André and Mr Jaskiernia). Text adopted by the Assembly on 7 October 2004 (31st Sitting).

rights and freedoms guaranteed at the constitutional level and the additional domestic remedies and mechanisms for improving the promotion and the protection of human rights and fundamental freedoms in Armenia.

II. Review of the Constitution of Armenia from the Human Rights Protection Standpoint

A. Promotion of Human Rights Protection Mechanisms under the new Constitution of Armenia

1. Human rights and freedoms under the new Constitution of Armenia

The promotion of human rights protection mechanisms is directly linked to the reforms in the field of judiciary, advocacy and prosecution. The new Constitution sets forth norms and regulations that considerably enhance the independence of the judiciary and create a solid basis for the effective administration of justice in accordance with internationally recognised standards[10]. There are also provisions in the new Constitution that ensure the independence of the prosecution and underline the role of the prosecution in the protection of human rights. Similarly, relevant reforms were undertaken in the field of advocacy; however those reforms were mainly effected by the earlier adopted Law on Advocacy[11], rather than by the Constitution.

Under the new Constitution, the vast majority of human rights and fundamental

10 The new Constitution introduced several important improvements to ensure the independence of judiciary; in particular the Council of Justice will consist of judges and legal scholars only and **sittings of the Justice Council shall be chaired** by the Chairman of the Court of Cassation without the right to vote**. Furthermore, under the new Constitution the** independence of the judiciary is guaranteed by the Constitution and laws of Armenia rather than the President as defined by the Constitution of 1995. The draft Judicial Code, which is likely to be adopted in mid 2006, goes further and sets forth establishment of "High School of Judicial Training" which will ensure continuing training of judges and provide training for judicial candidates. There are also a number of other improvements, which taken together, creates a very solid base for promoting the independence and impartiality of judiciary.

11 In January 2005, a new Law of the Republic of Armenia on Advocacy came into force. The new law provides guarantees for increasing the independence of advocates, enhancing the professional role and authorities of the institute of Advocacy as a unit as well as promoting human rights protection mechanisms. One of the major achievements under the law from the human rights protection point of view is that the state guarantees legal aid to people in some civil cases along with criminal law cases. Also, the introduction of the Public Defender's Office is a major step towards improving the human rights protection mechanisms given that the public defenders are independent from the financial constraints of clients and work in accordance with the established rules and regulations. The Office and the ODIHR are helping to draft a new Charter for Public Defender's Office. A Code of Ethics, as well as qualification and disciplinary procedures, will equally be elaborated. The Office will also help to train selected public defenders.

freedoms are defined under the second chapter entitled 'Fundamental Human and Civil Rights and Freedoms'. However, there are several other human rights and freedoms which are defined in other chapters of the Constitution. Some of those rights fall under the positive obligations of the State which require the protection of certain rights and freedoms of the people under its jurisdiction. An example of this is Article 3 of the Constitution, which states:

> *"The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value.*
>
> *The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law.*
>
> *The state shall be limited by fundamental human and civil rights as a directly applicable right"*[12].

The second and third clauses of Article 3 of the new Constitution are innovative provisions since the 1995 Constitution did not contain such a declaration. The 1995 Constitution simply provided "guarantees" for the protection of human rights and freedoms based on the Constitution and the relevant domestic laws, in accordance with the principles and norms of international law. In contrast, the wording in the new Constitution puts direct positive obligations on the state. This provision has a very wide scope of application, covering the legislative, executive and judicial branches since it provides that they should comply with internationally recognised standards.

Another example of human rights being defined in other chapters rather than in Chapter 2, is Article 101 (6) of the Constitution, which defines the right of every person to apply to the Constitutional Court of Armenia. This is also a new provision in the Constitution that will be discussed in detail in Chapter B Section 2 of this article.

2. Extending the scope of the human rights and freedoms at the Constitutional level

It is worth noting that the new Constitution has significantly changed the definition of the scope of human rights and freedoms and their protection at the constitutional level, especially in respect of the restriction of certain rights. For example, both the 1995 Constitution and the new Constitution identify the rights of liberty and self-immunity. Article 18 of the 1995 Constitution stated:

> *"Everyone is entitled to freedom and the right to be secure in their person. No*

12 The Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Art. 3.

> *one may be arrested or searched except as prescribed by law. A person may be detained only by court order and in accordance with legally prescribed procedures."*[13]

In contrast, Article 16 of the new Constitution, which concerns the right of liberty and security, has several essential differences. Actions or events which would restrict the right of liberty are explicitly defined. Further, the new Constitution also provides the fundamental guarantees which must be provided to a person deprived from liberty, including *inter alia* the right to appeal, the right to be informed promptly, in a language that he understands, of the reasons for his arrest, and regarding the lawfulness and ability to challenge the restriction of his liberty.

Important amendments were also made in the sphere of protection of the right to a fair trial, as set out in Article 6 of the European Convention. According to the new Constitution, everyone should be entitled to the right of effective remedy of legal defence of his/her rights and freedoms before the courts as well as before other state bodies. The new Constitution also provides for a right of public hearing within a reasonable time by the court.

Several provisions of the new Constitution are valuable not only for their legal, but also for their political significance, as they principally change previous views and political approaches. Such amendments include dual citizenship and the abolition of the death penalty. After the ratification of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty[14], it followed that Article 15 of the new Constitution would reflect this Protocol. Article 15 guarantees that everyone the right to life and no one shall be deprived of his life. As a result of these changes, the President of Armenia reduced forty-two death sentences to life imprisonment on 2 August 2003. The Council of Europe welcomed President Robert Kocharian's decision.

The issue of dual citizenship was one of the most debated issues in Armenia. The Working Group of the Constitutional Amendments Package would only accept the abolition of the prohibition of dual citizenship. More specifically, Article 30.1 of the new Constitution defines that the rights and obligations of the person who has dual citizenship are to be regulated by law, whereas Article 14 of the 1995 Constitution stipulated that an Armenian citizen could not be a citizen of another state.

13 Constitution of the Republic of Armenia adopted by referendum of 5 July 1995, Article 18.

14 Armenia ratified Protocol NO. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty (Strasbourg, 28.IV.1983 Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS 155) as from its entry into force on 1 November 1998) on 29 September 2003 and the Protocol entered into force for Armenia on 1 October 2003.

In a new development, the new Constitution now guarantees such human rights as the right to apply to the international bodies for protection of human rights and freedoms, the right to have legal assistance at the moment of arrest and the provision that any criminal charge must be brought against a person in compliance with the international treaties ratified or approved by Armenia.

3. The European Convention on Human Rights and the scope of the rights and freedoms guaranteed by the new Constitution

In general, a large number of articles included in Chapter 2 on "Fundamental Human and Civil Rights and Freedoms" are a reproduction of the corresponding articles of the European Convention. For example, Article 16 of the new Constitution explicitly incorporates most of the provisions of Article 5 of the European Convention in relation to the right to liberty and security. Similarly, the first sentence of Article 17 of the Constitution reaffirms the content of Article 3 of the European Convention.

The verbatim introduction of some of the norms of the European Convention into the Constitution of Armenia will ensure direct application of those norms since according to the first clause of Article 6 of the Constitution:

> *The Constitution of the Republic of Armenia shall have supreme legal force and the norms thereof shall apply directly*[15].

Furthermore, under the Constitution of Armenia, the norms of the European Convention as well as other treaties ratified by Armenia shall also apply directly given that:

> "The international treaties are a constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the agreement shall prevail. The international treaties not complying with the Constitution cannot be ratified"[16].

After the ratification of the European Convention, judges as well as advocates and legal scholars of Armenia have been actively studying the application of European Court case law in other jurisdictions and have been discussing approaches for effective and smooth incorporation of this case law into Armenian legal and juridical frameworks.

15 See the Constitution of the Republic of Armenia adopted by referendum of 27 November 2005. Article 6.

16 Ibid.

In this respect, several conferences and seminars have been organised within the past two years[17]. The study of judicial practice in Armenia shows that some advocates and judges have already started referring to the European Convention in their submissions and reasoning and started using the relevant case law before the domestic courts. This practice, however, does not seem to have general application yet. According to Hovhannes Manukyan, the Chairman of the Court of Cassation of the Republic of Armenia:

> *"Cassation Court of Armenia has used European Court's precedents in about a dozen decisions…I can't say that the European Court's decisions are often being applied in Armenia, but still some positive tendencies are seen especially thanks to the Cassation Court's decisions…"*[18]

Significant changes in the role of the Court of Cassation in the legal and juridical systems of Armenia will help to ensure that the norms of the Constitution are uniformly applied in compliance with the internationally recognised standards and in particular with the case law of the European Court. Under the new Constitution, the Court of Cassation is required to ensure the uniform application of the law[19]. The aim of the proposed amendment is to limit the level of individual and divergent interpretations of the same norms of the law in similar cases and to limit the possibility of passing arbitrary and differing decisions and verdicts in identical cases. This practice had in fact started before the adoption of the new Constitution. In particular, the Law of the Republic of Armenia on the Principles of Administration and Administrative Proceedings states that the Administrative Authorities do not have the right to apply different approach to the same factual circumstances, unless there is a basis for making a different decision[20]. This law also addresses some issues on the margin of appreciation, proportionality and arbitrariness, mainly defining the scope of the possible actions of the Administrative Authorities[21], a relatively new approach in Armenian legislation. The new Constitution now gives the task of ensuring the unified application of legal norms to just one body.

An analysis of the practices of the other Member States of the Council of Europe shows that there are a few countries that have directly incorporated the norms of the European

17 Go to http://www.a1plus.am/en/?page=issue&id=36861 for more information about the Seminar organized by the Court of Cassation of Armenia on the theme "The European Court of Human Rights and Armenia: the Present Practice and the Tendencies of Development".

18 Seminar titled European Human Rights Court and Armenia (held as part of the program focused on upgrading Armenian judges' qualification), 20 March 2006, Speech of Hovhannes Manukyan, Chairman of the Court of Cassation of the Republic of Armenia. URL: http://www.hra.am/eng/?page=issue&id=15849

19 Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Article 92.

20 Law of the Republic of Armenia on the Principles of Administration and Administrative Proceedings, 18 February 2004, Art. 7(1).

21 Ibid at Articles 6,7,8.

Convention into their constitutions or into legal acts that have the same legal force as a constitution. Cyprus is one of the countries where the protection of human rights and fundamental freedoms at the constitutional level - and consequently in the legal framework - is based mainly on international human rights treaties. More precisely, Part II of the Constitution of the Republic of Cyprus sets out the Fundamental Rights and Liberties, by incorporating the European Convention word for word, and in some instances expanding upon the human rights and fundamental freedoms defined by the European Convention[22].

The United Kingdom (UK), having no constitution, took another approach to ensure effective incorporation of the European Convention's norms as well as the case law of the European Court into its legal system by passing the Human Rights Act 1998, which incorporates provisions of the European Convention directly into UK law. The Act works in three main ways:

First, it requires all legislation to be interpreted and given effect, as far as possible, in accordance with the rights of the Convention.

Second, it makes it unlawful for a public authority to act incompatibly with the Convention's rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. The Human Rights Act came into force on 1 October 2000. Since then, a number of guidelines have been developed in the different state authorities of the UK to ensure the compliance of their activities with the Human Rights Act[23].

Third, UK courts and tribunals must take into account Convention rights in all cases. Therefore, they must develop common law in compliance with Convention rights and take into account the European Court's case law. In this respect, the Human Rights Act has gone much further than the Constitution of Cyprus, in terms of defining certain provisions and also in imposing a duty on Courts or tribunals, while determining a question which has arisen in connection with a Convention right, to take account of any:

> *(a) Judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
>
> *(b) Opinion of the Commission given in a report adopted under Article 31 of the Convention,*

22 Constitution of Republic of Cyprus of 16 August 1960, Part 2 on ''Fundamental Rights and Liberties"

23 See for example ''The Human Rights Act 1998 Guidance for Departments", Department of Constitutional Affairs, February 2000. URL: http://www.humanrights.gov.uk/guidance.htm#intro

> *(c) Decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
>
> *(d) Decision of the Committee of Ministers taken under Article 46 of the Convention…*[24]

The UK Human Rights Act 1988 is also a unique document in that it provides a possibility within the UK courts of a remedy for the breach of one of the rights and freedoms of the Convention, without having to take a case to the European Court based in Strasbourg. This is a much quicker procedure and allows UK courts to apply the European Convention on a daily basis, thereby promoting its practical application at the domestic level.

A study of the practical application of the case law of the European Court before the domestic Courts of the UK from 2 October 2000 to 13 December 2001 shows that in 90 cases out of 297 where the Human Rights Act was included in the arguments, the Act had no effect, whilst in 207 cases the Act did affect the outcome of the case, its reasoning or its procedure[25]. It is therefore evident that in the very early stages of the application of the Human Rights Act by UK domestic courts, the majority of the cases were affected.

The new Constitution of Armenia came into force on 5 December 2005. Despite the fact that neither the provisions of the Constitution nor any other legal act in force imposes direct obligations on the state authorities of Armenia to directly apply and comply with the European Convention and the case law of the European Court, the Court of Cassation has already started to effectively exercise the powers granted to it by the Constitution, namely the duty of uniformity of the implementation of the law. For example, the Council of Court Chairman (CCC)[26] passed Decision No. 85 on 23 December 2005, just eighteen days after the Constitution came into force, stating that the courts of Armenia shall not apply the norms of the Administrative Code of Violations with respect to administrative detention, given the fact that Article 16 of the Constitution prohibits application of administrative detention with respect to a person

24 See Human Rights Act of the United Kingdom 1998, received Royal Assent on 9 November 1998, and came into force on 1October 2000, Section 2 (1).

25 See Human Rights Act, Statistics based on the information supplied to the Human Rights Unit by the Human Rights Act Research Unit, Doughty Street Chambers, London, based on the cases reported in Lawtel Human Rights interactive and Butterworths Human Rights Direct from case transcripts available from 2 October 2000 to 13 December 2001. URL: http://www.humanrights.gov.uk/statistics.htm

26 Council of Court Chairmen (CCC) consists of the chairmen of the Court of Cassation, Chambers of the Court of Cassation, Courts of Appeal, Economic Court and the Courts of First Instance. The CCC has a number of administrative functions, which include but are not limited to development of the budget, administration of the courts and etc. CCC also has a number of non administrative functions such as summarising judicial practice making consultative explanations on the application of the law and etc (Artile 27 of the Law of the Republic of Armenia on Judiciary).

who committed an administrative violation[27].

Moreover, the draft Judicial Code[28] which, among other legal acts, was developed within the framework of the judicial reform of Armenia has gone even further in terms of ensuring a unified application of the law by the judiciary. In particular, paragraph 4 of Article 8 of the draft Judicial Code states:

> *The reasoning of a higher instance court or the European Court of Human Rights (including the construal of law) in a case with certain factual circumstances shall be binding for the court in a review of a case with the same factual circumstances, with the exception of the case when the court, relying on extenuating circumstances, justifies that they are not applicable to the factual circumstances at hand[29].*

Additionally, the draft Judicial Code of Armenia guarantees citizens the right to rely on the provisions of the European Convention while arguing his/her case before the domestic courts. This is an additional guarantee aimed at ensuring effective application of the constitutional rights and freedoms and the unified application of the legal norms. Paragraph 3 of Article 8 of the draft Judicial Code specifically states:

> *In the examination of his case, everyone may invoke, as a legal argument, a res-judicata judicial act of a Republic of Armenia court or the European Court of Human Rights in another case, and request that an identical approach be adopted in respect of him[30].*

The new right granted to the Court of Cassation of Armenia on ensuring the unified application of the law and the above provisions of the draft Judicial Code are somewhat similar to the rights of the higher courts of the UK which provide for a declaration of incompatibility where they find that primary legislation is incompatible with a Convention right[31]. Furthermore, it is worth noting that the continuing validity and enforcement of legislation is not affected by such a declaration. However, a finding of incompatibility confirms that the Convention rights have been breached and provides the Government with the power to use a special procedure to amend the conflicting Act

27 See Council of Court Chairmen, Decision No: 85 of 23 December 2005.

28 Draft Judicial Code of Armenia is expected to be adopted before the National Assembly's (Parliament) summer recess in mid 2006.

29 Draft Judicial Code of Armenia, Art. 8 (para. 4). The Ministry of Justice of Armenia has submitted draft of the Judicial Code of the Republic of Armenia for public discourse on 21 February 2006.

30 Ibid at Art. 8 (para. 3).

31 See Human Rights Act 1998, Section 4.

of Parliament quickly[32].

In particular, the new authority granted to the Court of Cassation of Armenia is of particular value in ensuring the unified application of the constitutional and legislative norms where the Court is interpreting legal norms. However, it is evident that, despite the considerable improvements at the constitutional level in terms of promoting the protection of human rights in Armenia, the constitutional amendments require further serious reforms in the legislative and executive spheres to ensure the practical application of the constitutional guarantees. In this respect, Chapter 9 on the ''Final and Transitional Provisions of the Constitution" imposes certain duties upon the legislative and other relevant authorities in terms of ensuring the current legislation of Armenia complies with the new Constitution. In particular, Article 117 of the Constitution provides:

> *1) The National Assembly shall make appropriate the acting laws to the amendments of the Constitution during one year;*
>
> *…*
>
> *2) The social rights provided in the Constitution shall be valid to extent specified by the appropriate laws…*[33]

Chapter 9 also defines certain timeframes for the entering into force of certain provisions of the Constitution to ensure a harmonised application of the norms of the Constitution and the legal acts to be adopted or amended.

One of the most important and timely issues is extending the scope of the practical application of the norms of the European Convention and the case law of the European Court at the domestic level. It will be interesting to observe the level of progress in terms of direct application of the European Convention before the Courts and other relevant state authorities. The Court of Cassation as well as other international and regional organisations tends to support the opinion that:

> *The sides [the Chairman of the Court of Cassation of the Republic of Armenia and the Special Representative of the Secretary General to the Council of Europe] agreed that the amendment of the Judicial Code is a must. Hovhannes Manukyan represented separate provisions of the Code and mentioned that it refers to almost all the fields of the court system. He also referred to the execution of authorization of the Court of Cassation given by the Constitution*[34].

32 Study Guide - 2nd Edition, Human Rights Act 1998, October 2002, para. 2.27

33 See the Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Art. 117.

34 See news coverage-- URL: http://www.a1plus.am/en/?page=issue&id=37093

Consequently, the reforms should be carried out at both the legislative level and within the activities of advocates and the judiciary, in order to ensure the day-to-day effective application of the case law of the European Court. It is evident that the draft Judicial Code, which is anticipated to be adopted by mid-2006, is aimed at ensuring legal reforms and thus assuring the compliance of the legal and juridical frameworks of Armenia with the accepted case law of the European Court and internationally recognised standards. As far as the reform in the field of advocacy is concerned, the newly adopted Law on Advocacy does not contain any reference to the European Convention. However, the Regulation on Organising and Handling Qualification Examinations for Issuing a Licence on Practicing Law adopted on 14 March 2004 by the Board of the newly established Chamber of Advocates defines questions on the European Convention in the tests for passing qualification examinations. In particular, out of 2,400 questions, 200 are on the Constitution of Armenia and the European Convention[35]. This is a considerable step forward in the field of advocacy given the rapidly developing need for direct and day-to-day application of the European Convention before the domestic courts and other relevant state and administrative authorities.

B. New Remedies under the Constitution of Armenia

1. Establishment of the Institute of Ombudsman at the Constitutional level

The adoption of the Constitution on 27 November 2005 was a landmark step towards ensuring the compliance of the Armenian Constitution with the European standards in the fields of the respect for human rights, democracy and the rule of law. According to the Venice Commission, the constitutional amendments adopted on 27 November 2005 represent an undoubted improvement as compared to earlier drafts[36].

One of the considerable changes towards the improvement of human rights protection mechanisms was the Constitution's stipulations regarding the Institution of Ombudsperson (also referred to in this Article as "Human Rights Defender" or "Ombudsman"), which was one of the most important guarantees for the institution's effective operation[37]. Article 83.1 expressly defines the terms and conditions of election

35 Regulation on Conducting Qualification Examinations for Issuing License on Practicing Law, Articles 3.

36 See the European Commission for Democracy through Law (Venice Commission) Final Opinion on Constitutional Reform in the Republic of Armenia. Adopted by the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005), para. 40, page 8.

37 See Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on the Institution of Ombudsman, para. 7(i). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 8 September 2003

of the Human Rights Defender, in addition to its role and main duties. Although Armenia adopted a Law on Ombudsman in October 2003 there was no provision on the creation of an Ombudsman in the 1995 Constitution of Armenia. The adoption of the law resulted from a commitment Armenia undertook when joining the Council of Europe.

In its Resolution 1304(2002) on the "Honouring of obligations and commitments by Armenia," adopted on 26 September 2002, the Parliamentary Assembly of the Council of Europe (PACE) invited Armenia "…to no longer defer the adoption of the law on the Ombudsman no longer"[38]. The main issue in this respect was whether the provision of the 1995 Constitution of Armenia requiring state officials to be appointed by the President also applied to the appointment of the Ombudsman[39]. The Council of Europe and the Venice Commission considered whether the establishment of the Institution of the Ombudsman should depend on the Constitutional Amendments and finally decided to proceed with the adoption of the Law on Ombudsman prior to the Constitutional amendments being agreed. In the meantime, however, the PACE disagreed with some of the fundamental provisions of the law. Despite the fact that PACE eventually accepted the law, pending the revision of the Constitution, it warned that, because the Ombudsman was to be appointed by the President of the Republic as prescribed by the 2003 Law, this method of appointment of the Ombudsman was not in conformity with the Recommendation 1615[40] on the Institution of Ombudsman. PACE considered this to be unsatisfactory since such a system does not provide "sufficient guarantees for the independence of the Ombudsman, who must have the citizens' full confidence"[41] That position was supported by the political opposition of Armenia, who insisted on a fair and transparent procedure, giving the National Assembly and opposition parties an opportunity to nominate a candidate to an Ombudsperson by ''voting", in accordance with internationally accepted standards.

The current regulation on the election of the Ombudsperson under Article 83.1 of the Constitution seems to solve this issue, since according to the first paragraph of Article

(see Doc. 9878, report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mrs Nabholz-Haidegger).

38 See Resolution 1304(2002) of the Parliamentary Assembly of the Council of Europe on "Honouring of obligations and commitments by Armenia" adopted on 26 September 2002.

39 See Constitution of Armenia adopted by referendum of 5 July 1995, Article 55 (5).

40 See Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on the Institution of Ombudsman. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 8 September 2003 (see Doc. 9878, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Nabholz-Haidegger).

41 See Resolution 1361 (2004)[1] of the Parliamentary Assembly of the Council of Europe on Honoring of obligations and commitments by Armenia, para. 11. Assembly debate on 27 January 2004 (3rd Sitting) (see Doc. 10027 , report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-Rapporteur: Mr André and Mr Jaskiernia). Text adopted by the Assembly on 27 January 2004 (3rd Sitting).

83.1:

> *The National Assembly shall elect the Ombudsman for a period of 5 years by 3/5 majority of total number of deputies*[42].

As far as the other provisions of the Law on Ombudsman are concerned, it is significant that there were continuing debates and arguments about the scope of the activities of human rights defenders and their role in the protection of human rights. In the spring of 2005, the Constitutional Court of Armenia, based on the application submitted by the President of Armenia, considered the compliance of Article 7 of the Law on Ombudsman with the Constitution of Armenia. According to Article 7 of the Law on Ombudsman, he/she had the right to:

> *"… Give recommendations to the court, guaranteeing the enforcement of citizens' right to a fair trial, in accordance with the Constitution of the Republic of Armenia and international norms"*[43].

The Constitutional Court, in its verdict of 6 May 2005, declared this article unconstitutional and divested the Ombudsman of any right to interfere with the pending judicial process. However, under the new Constitution of Armenia:

> *The Ombudsman is an independent official who implements the protection of the violated human rights and fundamental freedoms by state bodies, local self-government bodies and their officials*[44].

This provision provides a possibility for enhancing the mechanisms for protecting human rights and the promotion of the rule of law, and of the Ombudsman's role in ensuring the proper behaviour of public administration. Evidently, the institute of the Ombudsman in Armenia is not considered to offer a judicial remedy as it is in the majority of other jurisdictions; however, the international community accepts that courts and the non-judicial institution of the Ombudsman have complementary functions[45]. Nevertheless, there are certain differences and characteristics that are distinctive to each of the institutions. The major differences are that an Ombudsman cannot make legally binding

42 See Constitution of Armenia adopted by referendum of 27 November 2005, Article 83.1.

43 See the Law of the Republic of Armenia on Ombudsman, 2003, paragraph 1of Article 7 (the wording of paragraph 1 of Article 7 had been changed after the Decision of the Constitutional Court of the Republic of Armenia).

44 See Constitution of Armenia adopted by referendum of 27 November 2005, Article 83.1.

45 See for example 888 Meeting, 16 June 2004, 4 Human Rights, 4.5. The Institution of Ombudsman-Parliamentary Assembly Recommendation 1615 (2003), para. 7. See also, "Human rights and non-judicial remedies – The European Ombudsman's perspective" Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the London School of Economics and Political Science. London, 30 November 2005, para.4.

decisions. Unlike the Courts, an Ombudsman cannot give a definitive interpretation of the law and the decisions and/or conclusions of an Ombudsman are not binding, whereas the judgments, decisions and verdicts of Courts are legally binding[46].

The question of the legally binding character of the decisions and/or conclusions of an Ombudsman has been much discussed amongst the international community. It is accepted that it is not justifiable to give an Ombudsman such power where the rule of law and democracy are strong, since public authorities usually follow an Ombudsman's decisions/conclusions or recommendations in any case. In the countries where the scope of the rights and the role of an Ombudsman are wider, such as Finland, where the Parliamentary Ombudsman shares many duties with the Chancellor of Justice and has wide ranging supervisory and investigative powers, his or her recommendations carry a lot of weight in the absence of a court precedent. In Finland, the Ombudsman enjoys considerable respect and his or her legal opinions are usually strictly followed, partly because of its prosecutorial powers.[47]. This is quite a different approach.

In accordance with the Law of the Republic of Armenia on Ombudsman:

> *The Ombudsman shall not consider those complaints that must be settled only by Court. Likewise, the Defender shall discontinue consideration of a complaint if after commencing the process of consideration the interested person files a claim or an appeal with the Court.*

This reaffirms the principle of complementarity as far as the functions and the roles of the judiciary and the Institute of the Ombudsman are concerned. As for the effectiveness of the institution of the Ombudsman in Armenia in terms of the promotion and the protection of human rights and freedoms, so far there has been no survey or analysis of the impact of the Institute on the improvement of human rights protection mechanisms. However, according to the former Human Rights Defender of Armenia:

> *"Human Rights Watch's estimate on the situation on Armenia is far more critical than in the previous years... the…Armenian authorities had the opportunity to improve the situation in 2005 but they missed it. Nevertheless … there is some progress in the treatment of arrested and detained citizens"*[48]

46 Ibid, para. 4. See also Article by Edward Osmotherly CB Chairman of the Commission for Local Administration in England, June 2000, paragraph on ''The main differences". URL: http://www.lgo.org.uk/judicial_review.htm

47 URL: http://en.wikipedia.org/wiki/Ombudsman#Sweden

48 See the interview of Former Human Rights Defender of Armenia with ARMINFO correspondent. URL: http://www.arminfo.am/news-issue1272.shtml

2. Reforms in the field of Constitutional Justice

The improvements made by the new Constitution in the field of constitutional justice are worth special mention. In fact, the concept of "constitutional justice" was used for the first time in the new Constitution[49]. The core feature is the extension of the authorities and the subjects entitled to apply to the Constitutional Court.

The 1995 Constitution had exclusive jurisdiction over issues concerning the determination of the conformity of laws with the Constitution, the resolutions of the National Assembly, the orders and decrees of the President of the Republic and the resolutions of the Government, as well as determining whether their commitments comply with the Constitution. Also under the Constitution of 1995, the Constitutional Court had the power to determine if insurmountable obstacles facing a presidential candidate existed or if the elimination of such obstacles was necessary; to determine whether there were grounds for the removal of the President of the Republic; to determine whether there were grounds for the application of sections 13 and 14 of Article 55 of the Constitution[50]; to determine whether the President of the Republic was incapable of continuing to perform his or her functions; to determine whether there were grounds for the removal of a member of the Constitutional Court, to facilitate his or her arrest or the initiation of administrative or criminal proceedings through the judicial process and finally to decide on the suspension or prohibition of a political party[51].

Under the new Constitution, new powers were granted to the Constitutional Court of Armenia, most of which were motivated by legal reform, for example, the Constitutional Court now has the power to decide on the constitutionality of decisions made by local government bodies. There were also some changes in the wording of the article that specifically defined the type of act which could be passed by the Constitutional Court, with respect to certain matters under its jurisdiction. The Constitutional Court may, under the Law on the Constitutional Court[52] adopt findings and conclusions. The Constitutional Court adopts findings on the basis of the majority of votes of the total

49 Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Art. 93.

50 Section 13 and 14 of Article 55 of the Constitution adopted by referendum of 5 July 1995 read as follows: …l3) shall decide on the use of the armed forces. In the vent of an armed attack against or of an immediate anger to the Republic, or a declaration of war by the National Assembly, the President shall declare a state of martial law and may call for a general or partial mobilization.
Upon the declaration of martial law, a special sitting of the National Assembly shall be held;
14) in the event of an imminent danger to the constitutional order, and upon consultations with the President of the National Assembly and the Prime Minister, shall take measures appropriate to the situation and address the people on the subject...

51 Constitution of the Republic of Armenia, adopted by referendum of 5 July 1995, Arts. 100-101.

52 Law of the Republic of Armenia on the Constitutional Court, 9 December 1997, Article 65.

number of Members of the Court, with the exception of the case foreseen by Article 63 of the same law[53]. The Constitutional Court adopts conclusions by a vote of at least two-thirds of the total number of Members of the Court.

Remarkable improvements have also been made with regards to access to the Court. Under the new Constitution, the courts[54] and the Prosecutor General have been granted the right to apply to the Constitutional Court regarding issues of the constitutionality of legal provisions related to specific cases within their proceedings[55]. Similarly, the Human Rights Defender may apply to the Constitutional Court regarding the issues of the compliance of normative acts listed in clause 1 of Article 100 of the Constitution (which defines the scope of the authority of the Constitutional Court as well as the rights of persons to apply to it) with the provisions of Chapter 2 of the Constitution[56].

Paragraph 6 of Article 101 of the new Constitution provides that, in conformity with the procedure set forth in the Constitution and the law on the Constitutional Court, the application to the Constitutional Court may be filed by:

> *"every person in a specific case when the final judicial act has been adopted, when the possibilities of protection in court**s** have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged";*

This is a major change and it will provide an opportunity to convert the Constitutional Court into a body rendering constitutional justice and ensuring both physical persons and legal entities, an effective legal mechanism for challenging the constitutionality of legal provisions and norms applied by the judiciary. The Codes of Civil and Criminal Procedure of the Republic of Armenia set forth certain procedures by which the courts of general jurisdiction can address the cases where the applicable legal acts contradict the Constitution. However, the courts of general jurisdiction are not entitled to address

53 Art. 63 Consideration of the issue of suspending or prohibiting the activities of a political party
With regard to issues foreseen by Point 9 of Article 100 of the Constitution, the Constitutional Court may be appealed to by
1) the President of the Republic;
2) at least one-third of deputies.
When exercising this power, the Constitutional Court exercises the rights determined in Articles 59 and 60 of this Law. The Constitutional Court may decide to suspend or terminate the activities of a political party if violations of the Constitution or the requirements of the relevant law on the political parties have been detected in the activities of that party. When exercising this power, the Constitutional Court shall reach a decision by at least two-thirds of the total number of the Court's Members voting.

54 The Constitution does not specify which courts are entitled with the right to apply to the Court, it is rather general and all courts of Armenia fall under this category.

55 See Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Art. 101 (7)

56 See Constitution of the Republic of Armenia adopted by referendum of 27 November 2005, Art. 101(8).

those issues directly, despite the fact that the Constitution had to apply directly in accordance with the Constitution of 1995[57]. In civil proceedings, the court can suspend the proceedings and apply to the Council of Court Chairmen (hereinafter referred to as "CCC") in order to initiate a procedure concerning the case as established in the Law on the Judicial System[58]. The criminal proceedings, by the initiative of the court or at the request of the participants in the proceedings, can be suspended, after which the court shall apply to the CCC to initiate proceedings[59]. The CCC shall then request the Armenian President to mediate in addressing the Constitutional Court concerning compliance with the Constitution of a certain law, resolution by the National Assembly, decree or an order by the president, or a government resolution[60]. The Constitutional Court of Armenia could, under the mentioned regulations, pass a decision based on the application of the President[61]. However closer examination of the practice shows that the procedure provided by the Codes of Civil and Criminal Procedure was too complicated and in practice was rarely applied[62]. Hence, this new function of the Constitutional Court of Armenia was urgently needed for the effective exercise of constitutional rights and freedoms. It will provide the possibility of direct challenge to the constitutionality of a law provision applied by the judicial act in question.

Historically, around the world, the most important duty of Constitutional Courts or other bodies entitled to exercise the judicial review over the protection of the Constitution and constitutional rights and freedoms, has been the responsibility to protect the rights and freedoms established by constitutions.

Essentially, the Constitutional Court of Armenia has appellate jurisdiction over all other courts with respect to matters of constitutional justice, whilst in all other matters the Court of Cassation is considered the highest court[63]. Apparently, starting from 5 December 2005, when the new Constitution entered into force, every person is entitled to apply to the Constitutional Court to challenge the constitutionality of legislation applied by judicial acts. This norm of the Constitution does not limit the scope of the rights and freedoms to be challenged, but rather guarantees a right to challenge the compliance of the applied legal provision in the final judicial act in question i.e. a judgment, a decision

57 See the Constitution of the Republic of Armenia adopted by referendum of 5 July 1995, Art. 6.

58 See Article 106 (2) of the Code of Civil Procedure of the Republic of Armenia.

59 See Article 31 (2) of the Code of Criminal Procedure of the Republic of Armenia.

60 See Article 27 of the Law of the Republic of Armenia on Judicial System.

61 Article 36 (1) of the Code of Criminal Procedure of the Republic of Armenia.

62 See Judicial Reform Index for Armenia, American Bar Association December 2004. URL: http://www.abanet.org/ceeli/publications/jri/jri_armenia_2005_eng.pdf . See also Judicial Reform Index for Armenia, American Bar Association December 2002. URL: http://www.abanet.org/ceeli/publications/jri/jri_armenia.pdf

63 Ibid, at Art. 92.

or a verdict, with the Constitution[64].

It is significant to note that the Constitution sets forth certain remedies to be exhausted before applying to the Constitutional Court for final consideration of the constitutionality of the legal provision.

Article 18 of the new Constitution guarantees another new, very important right, which states that:

> *Everyone shall in conformity with the international treaties of the Republic of Armenia be entitled to apply to the international institutions protecting human rights and freedoms with a request to protect his/her rights and freedoms.*

Currently, for the protection of their rights and freedoms, those who are under the jurisdiction of Armenia can apply to the European Court of Human Rights, which is considered the most effective human rights protection body, among other international and regional Human Rights Treaty Body mechanisms available to Armenia.

Four of the Human Rights Treaty Bodies (i.e.; the Human Rights Committee (HRC), Committee on the Elimination of Racial Discrimination (CERD); Committee against Torture (CAR) and the Committee on the Elimination of all forms of Discrimination against Women (CEDAW)) may, under certain circumstances, consider individual complaints or communications from individuals.

The HRC may consider individual communications from people under the jurisdiction of the member states if the State party concerned ratifies the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Similarly CEDAW may consider individual communications relating to States parties based on the Optional Protocol to the Convention on Elimination of all forms of Discrimination against Women. The CAT may consider individual communications relating to State parties who have made the relevant declaration under Articles 21[65] and 22[66] of Convention against Torture. When the Optional Protocol to the Convention against Torture enters into force[67], a sub-committee will be established, which will allow in-

64 Ibid, at Article 101 (6).

65 Article 21 of the Convention against Torture defines the right of a State Party to declare under Article 21, that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

66 Article 22 of the Convention against Torture gives private individuals, in certain circumstances, the right to lodge with the Committee against Torture (CAT) complaints regarding the violation of one or more of its provisions by a State party to the Convention.

67 The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

country inspections of detention centres in collaboration with national institutions. Finally, CERD may consider individual communications relating to States parties who have made the necessary declaration under Article 14 of the International Convention on the Elimination of Racial Discrimination (ICERD).

The table below shows Armenia's status of ratification or accession to the relevant Optional Protocols and declarations that are necessary for submitting individual complaints to HRC, CERD, CAT and CEDAW.

International Covenant on Civil and Political Rights (ICCPR)	Acceded on 23 September 1993
First Optional Protocol to the ICCPR	Ratified on 23 September 1993
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Acceded on 12 October 1993 No Declaration was made under Articles 21 and 22 of the Convention
Optional Protocol to the Convention against Torture	Not signed, ratified or acceded (as of 8 May 2006)
Convention on the Elimination of All Forms of Discrimination against Women	Acceded on 13 October 1993
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Not ratified or acceded (as of 13 March 2006)
International Convention on the Elimination of Racial Discrimination (ICERD)	Acceded on 23 July 1993 No declaration was made

Punishment " … shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession…". URL: http://www.ohchr.org/english/countries/ratification/9_b.htm

The International Covenant on Economic, Social and Cultural Rights (Armenia acceded the Covenant on 13 December 1993) and the Convention and the Rights of the Child (Armenia acceded the Convention on 22 July 1993) do not provide for individual complaints procedures. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Worker's Convention)[68] provides for an individual complaints procedure, but this has not yet entered into force. The procedure will only enter into force when a minimum of ten states parties to the Migrant Worker's Convention have made the necessary declaration. Armenia has not yet ratified the Migrant Worker's Convention[69].

The above chart shows that currently state parties and individuals under the jurisdiction of Armenia can apply to the HRC only. The treaty bodies, including the HRC, are not courts, and therefore do not issue a judgement or any other legally binding acts or have any means of enforcing its decisions/concluding observations ("views").

CAT in its conclusions and recommendations to Armenia made a recommendation to "make the declarations provided for in Articles 21 and 22 of the Convention"[70]. Similarly, CEDAW urged Armenia:

> *"…to sign and ratify the Optional Protocol to the Convention and to deposit, as soon as possible, its instrument of acceptance of the amendment to article 20, paragraph 1 of the Convention on the Committee's meeting time"*[71].

Despite all these recommendations made by CEDAW and CAT, Armenia has not ratified the Optional Protocol to CEDAW and has not made any declaration with respect to Articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Hence the norm was introduced into the Constitution (i.e. the right of individuals to apply to the international institutions for the protection of their rights and freedoms), although this currently does not have a wide application.

Further, it is open to debate whether one could challenge the effective implementation

68 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by the General Assembly of the United Nations at its 45th session on 18 December 1990 (A/RES/45/158).

69 See the Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004. Office of the United Nations High Commissioner for Human Rights. URL: http://www.unhchr.ch/pdf/report.pdf

70 Committee against Torture, Conclusions and recommendations of the Committee against Torture, Armenia, A/56/44, paras.33-39, 17 November 2000, para. 39 (i).

71 The Committee on the Elimination of all forms of Discrimination against Women, Concluding observations, Armenia, adopted up to December 31, 2003 based on the initial report of Armenia (CEDAW/C/ARM/1 and CORR. 1) at its 344th 345th and 349th on 14 and 16 July (See CEDAW/C/SR.344,345 and 349), para. 66.

of the constitutional right to apply to international institutions for the protection of ones rights and freedoms if the state does not undertake relevant steps towards ratifying relevant optional protocols and/or making relevant declarations to ensure the exercise of the constitutional rights of people.

III. Conclusion

The review of the new rights and freedoms guaranteed by and the provision of additional remedies established by the new Constitution of Armenia emphasises the enhancement of the domestic human rights protection, the level of integration of the norms of the European Convention and the established case law of the European Court into the domestic legal and juridical frameworks. The new Constitution of Armenia has introduced radical changes in the sphere of human rights protection, mainly by:

a) Enhancing the scope of the human rights and freedom guaranteed by the Constitution;

b) Introducing some norms of the European Convention into the Constitution;

c) Defining the exact scope and the precise aims of the limitation of certain rights and freedoms at the constitutional level;

d) Adding new domestic remedies, such as an individual right to apply to the Constitutional Court for challenging the constitutionality of a law provision applied by the judicial act in question;

e) Establishing the Institute of Ombudsman at the Constitutional level;

f) Establishing a scheme with the Court of Cassation for ensuring the unified application of the laws at the judicial level;

g) Recognising the right to apply to international institutions protecting human rights and freedoms with a request to protect individual rights and freedoms.

However, the above list is not exclusive, since the aim of this article was to highlight those changes and improvements that enhance the human rights protection mechanisms and add new rights and remedies.

Ultimately, the adoption of the new Constitution has been a major step towards the

further improvement of the legal, social, economic and political lives of Armenians. The above analysis shows that, despite the amendments in the field of human rights protection guaranteed at the constitutional level, further adoption of legislative and executive frameworks are on the agenda in order to ensure the effective and practical implementation of the rights and freedoms guaranteed by the Constitution. As the Report on Constitutional Reform Process in Armenia (Doc. 10601), produced by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, states:

> *"The revision of the Constitution is a pre-condition for the fulfilment of some of the most important commitments that Armenia undertook upon its accession to the Council of Europe. These include the reform of the judicial system, local self-government reform, the introduction of an independent ombudsman, the establishment of independent regulatory authorities for broadcasting and the modification of the powers of and access to the Constitutional Court…"*[72]

Major steps towards the reform of the judicial system at the Constitutional level, including the drafting of the Judicial Code as well as ensuring the unified application of the legal norms at the domestic level, have already been undertaken. In addition, the implementation of an independent Ombudsman is guaranteed by the new Constitution. However, certain important activities in the field of enhancing effective human rights protection by law and in practice, as discussed in this Article, are still to be undertaken to ensure full compliance with the requirements of the Council of Europe and internationally recognised standards.

72 See the Report Constitutional reform process in Armenia of Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Doc. 10601, 21 June 2005, para. I (1). URL: http://assembly.coe.int/Documents/WorkingDocs/doc05/EDOC10601.htm

Paul Troop, Barrister, Tooks Chambers[73]

The exercise of state power and its consequences for universal jurisdiction for war crimes

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Introduction

On Saturday 10 September 2005 in a closed court, District Judge Workman, the Senior District Judge at Bow Street Magistrates' Court ordered an arrest warrant for General Doron Almog for war crimes contrary to the Geneva Conventions Act 1957. Almog was due to arrive at Heathrow Airport the following day.

Police Officers from the Metropolitan Police's Crimes Against Humanity Department were waiting at Immigration Control. However, Almog did not disembark from the aeroplane that Sunday morning. Apparently acting on a tip-off, the Israeli Embassy's Military Attaché boarded Almog's aeroplane at Heathrow and informed him of the warrant. Almog left on the same aeroplane without the arrest warrant being effected.[74]

73 Instructed in Application for an Arrest Warrant against General Doron Almog, Bow Street Magistrates' Court, 14 September 2005.

74 See BBC news report of Monday 12 September 2005, available at: http://news.bbc.co.uk/1/hi/uk/4237620.stm

There was limited media coverage in the UK press. However, there was extensive media coverage in Israel. The Israeli Foreign Minister Silvan Shalom was quoted as describing it as an "outrage".[75] It is reported that intense lobbying has been carried out by the Israeli government to force to the UK to change the law that allowed the arrest warrant to be issued. It is believed that the arrest warrant was the first warrant issued under the Geneva Conventions Act 1957, despite this statute being in force for almost 50 years.

The incident illustrates both the exceptional nature of the decision to prosecute a national of another state for alleged war crimes and also the political pressure that a state can be put under where such a prosecution is a possibility. This article examines these tensions, questions why such incidents are so rare and offers some alternative proposals for the future.

Background

Although Almog's arrest was sought for a number of alleged offences, the warrant was issued for the war crime of extensive destruction of property. The background to this was events that took place in early 2002. At that time, Almog was the General in charge of the Israeli military's Southern Command, the area that included the Gaza Strip. On 9 January 2002, an Israeli officer and three soldiers were killed when Palestinian militants detonated a bomb under a Merkava tank. Hamas claimed responsibility. The individuals thought to be responsible were themselves killed by the Israeli Military later that day. However, despite these killings, the following night the Israeli Military carried out an operation in which 59 civilian houses in Rafah City, Gaza, were destroyed. The Israeli military issued a press release stating that the operation was carried out in response to the preceding attack. In an interview on Israeli television, Almog explicitly stated that the property destruction operation was in retaliation for the earlier killings. Despite this, the Israeli government had taken no steps to investigate or prosecute Almog.

The Obligation to Seek Out and Prosecute Contained in the Geneva Conventions

The Geneva Conventions Act 1957 implements the UK's obligations under Articles 146 and 147 of the Fourth Geneva Convention. Article 147 defines grave breaches of the Conventions and includes such offences as wilful killing and wanton destruction of property. Article 146 was a novel article at the time that provided for universal jurisdiction for such crimes. Previously, such jurisdiction was extremely limited and confined to

75 See: http://news.bbc.co.uk/1/hi/uk/4246848.stm

offences such as slave trading[76] and piracy.[77] This new article obliged contracting parties not merely to enact penal legislation but to bring alleged perpetrators before its courts, regardless of their nationality. The relevant parts of the article are as follows:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case…"

The article provides for universal jurisdiction for war crimes. There is a great contrast between the text of the Geneva Conventions and a convention agreed at around the same time, the Convention for the Prevention and Punishment of the Crime of Genocide 1948.[78] Unlike the Geneva Conventions, the Genocide Convention only specifies that genocide shall be tried by a competent tribunal in the state in the territory of which the act was committed or by an international tribunal for which the contracting parties have accepted jurisdiction.[79]

The obligation has been enacted by the Geneva Conventions Act 1957. As the law currently stands, in order to institute a prosecution for grave breaches of the Geneva Conventions, this must be done by or with the consent of the Attorney General.[80] However, this is subject to the Prosecution of Offences Act 1985 which provides that such a restriction "shall not prevent the arrest without warrant, or the issue or the execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence."[81] This means that the Attorney General need not play any part in the issuing of an arrest warrant for an individual wanted for war crimes.

76 Slave Trade Act 1873.

77 See for example US v Klintock, 18 US 144 (1820).

78 Implemented in the UK by the Genocide Act 1969, which has now been superseded by the provisions of the International Criminal Court Act 2001.

79 See Article 6.

80 Section 1A(3)(a) Geneva Conventions Act 1957.

81 Section 25(2)(a) Prosecution of Offences Act 1985.

It is not known whether the government was conscious at the time of passing of the Prosecution of Offences Act 1985 that it would have the effect of allowing applications for such arrest warrants to be made. If this was not clear from the wording of the statute, it would certainly have become clear following earlier applications where the District Judges recognised the existence of the power to issue an arrest warrant.[82]

Failures to Implement

The prosecution of non-citizens in the UK, where it is possible, is extremely rare. The arrest warrant for Almog of 2005 was only a warrant; the decision whether or not to prosecute had not been taken by the police and the consent of the Attorney General had not been sought or obtained. It is believed that there have been no prosecutions under the Geneva Conventions Act 1957 in its near 50 years of existence.

The first prosecution for torture under section 134 of the Criminal Justice Act 1988 that implements the Convention against Torture 1984 ("CAT") was the case of *R v Zardad* in the Central Criminal Court. Zardad had been found living in London by the BBC. He was eventually convicted in 2005 following a retrial after the first jury were unable to agree on a verdict. He was subsequently sentenced to 20 years' imprisonment for both torture and hostage taking carried out in Afghanistan between 1992 and 1996. Although the prosecution is positive progress, the fact that this prosecution was the first to implement the UK's obligations under CAT, again demonstrates that such prosecutions are exceptional.

The War Crimes Act 1991 was also enacted at a very late state. This statute, which criminalises certain criminal conduct in violation of the laws of war that took place in Germany or areas occupied by Germany between 1939 and 1945, was only enacted some 50 years after the conduct concerned. There have been next to no prosecutions under this act and it seems highly unlikely that there are going to be any more in the future.[83]

Lack of implementation is a pattern that is repeated among other contracting states to the Geneva Conventions. Almost every country of the world is a contracting party to the Geneva Conventions, if not the Additional Protocols, and therefore have signed up to Articles 146 and 147 and the obligations contained in them. In addition, the conventions

82 *Case against Gujarati Chief Minister Narendra Modi*, Bow Street Magistrates' Court (2003) and *Application for Arrest Warrant Against General Shaul Mofaz* ICLQ vol 53, July 2004 pp 769-774.

83 The conviction of *R v Anthony Sawoniuk* (1999) in the Central Criminal Court for killing of Jews in Belorussia in 1942 is one example. The report of an unsuccessful appeal is available at [2000] 2 Cr App R 220.

are without now doubt part of customary international law.[84] The International Committee of the Red Cross, as the "guardian" of International Humanitarian Law, maintains a database of national implementing legislation and related cases.[85] However, this database confirms that the examples of prosecution of grave breaches of the Geneva Conventions are exceptionally rare.[86] As José Ayala Lasso, former United Nations High Commissioner for Human Rights pointed out in 1996:

> "A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."[87]

Amnesty International have reported that since the Second World War, only approximately a dozen countries around the world that have conducted investigations, commenced prosecutions and completed trials based on universal jurisdiction or extradited individuals to a state willing to prosecute.[88]

Possible Causes

The Limited Applicability of the Geneva Conventions

There are a number of possible causes of the arrest warrant for Almog being the first to be issued. One may be the circumstances in which the Geneva Conventions Act 1957 applies. The statute criminalises "grave breaches" of the Geneva Conventions of 1949 and the First Additional Protocol to the Geneva Conventions of 1977. However, they only apply where there is an international armed conflict between contracting parties to the conventions, or to occupation following such a conflict. Because the Occupied Palestinian Territories were occupied by Israel in 1967 following a war with other contacting parties, in particular Egypt and Jordan, and Israel has remained in occupation since that time, the conventions apply. Both the International Court of Justice and the Israeli High Court have confirmed this.[89]

84 See Secretary General's Report on the Statute of the International Criminal Tribunal for the Former Yugoslavia, submitted pursuant to UN Security Council Resolution 808 (1993) at paragraph 35.

85 At: http://www.icrc.org/ihl-nat.

86 See further: Redress and International Federation of Human Rights: Legal Remedies for Victims of "International Crimes": Fostering an EU Approach To Extraterritorial Jurisdiction, March 2004.

87 To the Commencement Class of 1996 of the Columbia School of International and Public Affairs.

88 http://web.amnesty.org/pages/uj-index-eng. The states listed are Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the United Kingdom and the United States.

89 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, paragraph 101.

Although the Geneva Conventions Act 1957 does not apply to internal armed conflicts, this alone is not sufficient to explain the lack of such prosecutions under it. Although not every conflict will engage the protection of the Geneva Conventions and the First Additional Protocol, there are still many conflicts around the world where the Geneva Conventions do apply.

General Reluctance of the UK Government to Exercise Jurisdiction

In addition, prosecutions seem to be equally as rare under other international instruments that do not require an international conflict to apply to engage the principle of universal jurisdiction. Many other similar international instruments oblige states to criminalise the relevant conduct. These include the International Convention against the Taking of Hostages (implemented by the Taking of Hostages Act 1982), the Cultural Property Convention 1954,[90] the Biological and Toxic Weapons Convention 1972 (implemented by the Biological Weapons Act 1974), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1976, the Chemical Weapons Convention 1993 (implemented by the Chemical Weapons Act 1996) the Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 (the "Ottowa Convention", implemented in the UK by the Landmines Act 1998). The implementation of these instruments varies. Some statutes, such as the Taking of Hostages Act 1982, criminalise conduct regardless of the nationality of the accused, whereas other statutes only criminalise conduct where the accused is a "United Kingdom person" or a UK national. However, the most well known is probably CAT. CAT obliges contracting states to prosecute those alleged to have committed acts of torture within a state's jurisdiction regardless of their nationality. This obligation has been implemented in the UK by sections 134 and 135 of the Criminal Justice Act 1988. For this reason, it provides the best illustrative comparison. However, despite torture and other forms of inhuman and degrading treatment continuing to be a widespread problem in many areas of the world, there have similarly been few prosecutions for torture under the principle of universal jurisdiction.[91] Because of this, it is unlikely that the limited scope of the Geneva Conventions and the First Additional Protocol are a significant cause of the failure to prosecute for grave breaches of these instruments.

90 Ratified by the UK in 2004. Consultation on implementation is apparently underway.

91 Redress and International Federation of Human Rights: Legal Remedies for Victims of " International Crimes": Fostering an EU Approach To Extraterritorial Jurisdiction, March 2004.

Impunity

Another possible relevant factor is impunity. Accountability for alleged crimes that is pursued through foreign courts is generally very inferior to that pursued through domestic courts. It is difficult, complex, expensive and heavily dependent on political acceptance of the process. As such, it is very much a remedy of last resort. However, where the state to which the alleged perpetrator belongs is unwilling or unable to prosecute, there are few alternatives. The International Criminal Court is a theoretical possibility, but many states, the United States and Israel included, are not participating parties.

In the case of the Israel-Palestine conflict, the impunity of alleged perpetrators on both sides can be compared. Palestinian militants who commit or aid, abet or procure the commission of war crimes such as the wilful killing of Israeli civilians in suicide bombings would be equally liable to arrest and prosecution under the Geneva Conventions Act 1957. Furthermore, the Palestinian Authority has demonstrated that it is both unwilling and unable to prosecute such breaches.

However, Israel exercises the power to prosecute and punish Palestinian militants. Hearings take place in both civil courts and military courts for offences varying from stone throwing to killing. Israel also uses administrative detention for periods of up to 6 months at a time to those not convicted but considered to be a security risk. In the circumstances where the arrest of a wanted individual is considered to be an excessive risk, Israel has implemented its policy of "targeted killing" of wanted individuals. As such, there is little need for Israel to rely on other countries to prosecute individuals for crimes against its citizens.[92]

In comparison, Israel rarely investigates or prosecutes soldiers for alleged offences.[93] In a few exceptional cases, prosecutions have been brought where foreign citizens have been killed. An example is the case of Tom Hurndall who was killed in the Gaza Strip. However, this prosecution resulted from huge pressure on the Israeli authorities from the Hurndall family. Despite a prosecution for manslaughter, a UK Coroner following the inquests into the death of Tom Hurndall and also the death of James Miller in the Gaza Strip, has recommended that further investigations into the deaths should take place.[94]

92 Although such prosecutions have taken place. See for example *R v Tabassum and Others*, Central Criminal Court (2004) and *R v Sharif and Another*, Central Criminal Court (2005), where family members of a suicide bomber in Israel were prosecuted for inciting a terrorist act and failing to alert the authorities to a terrorist act.

93 See Human Rights Watch, *Promoting Impunity, the Israeli Military's Failure to Investigate Wrongdoing*, June 2005 Vol. 17, No 7(E).

94 See: http://news.bbc.co.uk/2/hi/uk_news/england/london/4896800.stm.

However, although impunity may provide a partial explanation as to why an arrest warrant was sought in this particular case, it does not explain why there have been no other arrest warrants or prosecutions. There is sadly nothing exceptional about impunity for war crimes. Although the circumstances in which Israel investigates and prosecutes its own soldiers are limited, many other states, the USA included, appear equally unwilling to investigate or prosecute their soldiers.

Other Factors

There are many other potential factors whose impact is extremely difficult to measure. These include State and Diplomatic Immunity,[95] lack of awareness on the part of lawyers and victims, funding difficulties and difficulties conducting a thorough investigation and obtaining reliable evidence. However, one factor that seems to be a likely cause of state unwillingness to facilitate the exercise of jurisdiction is the effect of state power and the political dimension. Following the issuing of the warrant for the arrest of Almog, the UK government was reportedly subjected to intense lobbying, despite having no part in the decision to issue a warrant. This issue will be explored further below.

Politics and International Relations

From the reaction to the issuing of the arrest warrant, it seems likely that there is another significant factor that influences the prosecution for war crimes under the principle of universal jurisdiction and this is the political dimension. In addition to the strongest possible representations from the Israeli Foreign Ministry, it was reported that the then Prime Minister, Ariel Sharon, cancelled a planned visit to the UK in response to the arrest warrant.[96] In addition, the Israeli government is apparently lobbying the UK government to change the law in relation to arrest warrants. This is reported to be currently under active consideration by the UK government.[97] There is also pressure on the government from domestic supporters of Israel. In a letter to the Foreign Office and Attorney General, James Arbuthnot MP, Parliamentary Chairman of Conservative Friends of Israel sought a change to the law such that it would be impossible to issue a warrant under the Geneva Conventions Act without the prior consent of the Attorney General.[98] From answers to Parliamentary questions, it appears that the UK government

95 Arrest Warrant of the 11 April 2000 (Democratic Republic of Congo v Belgium) 14 February 2002, General List Number 121. The law in this regard is developing, see for example: *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

96 The Times, 17 September 2005.

97 http://www.guardian.co.uk/humanrights/story/0,,1701276,00.html.

98 See: http://news.bbc.co.uk/1/hi/uk_politics/4270664.stm.

is currently considering whether to give the prosecuting authority, presumably the Attorney General's office, and a "role in whether the person is arrested".[99]

The reaction from Israel is perhaps unsurprising. There is a general unwillingness on the part of states to allow other states to try their citizens. Some of these concerns are legitimate, others perhaps less so. The principles of state and diplomatic immunity are partially founded on these concerns. States will also be particularly sensitive to other states seeking to prosecute their citizens where that state has previously declined to prosecute the person concerned.[100] If a state is theoretically able to initiate a prosecution, but has not done so, the obvious conclusion is that the state concerned does not wish the individual to be prosecuted. A decision by another state to prosecute is therefore likely to cause a certain amount of tension in relations with that other state. Rather than being an indictment of an individual, there is the perception that such a prosecution is the indictment of the entire government.

It is also important to note the differences between "domestic" crimes and crimes attracting universal jurisdiction. A domestic offence will invariably be considered as contrary to the interests of the country in which it is committed. This may not necessarily be the case for war crimes. The commission of war crimes may be a deliberate policy of a belligerent. Alternatively, a war crime may be committed by an individual carrying out a lawful order in an unlawful way. In such circumstances, the responsible state may not consider it in its own interest to hold those responsible to account. Although there has been much debate as to the negative effect of the commission of war crimes on the responsible state, this has generally been in the context of peacekeeping operations. Despite this debate, for both peacekeeping operations and wars of aggression, there appears to be a general unwillingness on the part of responsible authorities to prosecute their own troops.

It may well be the case that this factor has caused other countries of the world to be unwilling to be as progressive as the UK was in implementing its obligations by enacting effective legislation.

The decision for the Attorney General to initiate the prosecution in the case of *R v Zardad*, referred to above, must have had some regard to the political ramifications. It may be no coincidence that Zardad was from Afghanistan, a country at that time with a government in a state of flux and with extremely limited influence. If the individual had been a citizen of the United States, a country of the European Union, Russia or some

99 See Hansard, House of Commons, 13 February 2006, Column 1120.

100 See for example *Arrest Warrant of the 11 April 2000 (Democratic Republic of Congo v Belgium)* 14 February 2002, General List Number 121.

other more powerful state than Afghanistan, the decision to prosecute would certainly have been a more difficult one for the UK government to take.

The "War on Terror"

The role of politics can also be seen in relation to another recent phenomenon, namely the USA's "War on Terror" ("WOT"). Here though, the prosecution of extra territorial offences has been more demonstrative of the power of the prosecuting state rather than of a commitment to universal justice for war crimes.

In pursuit of the WOT, the US has sought to detain, with a view to putting on trial, individuals from more than 40 countries all around the world. According to a list released by the Pentagon on 19 April 2006 in response to a Freedom of Information request, the detainees are from a range of countries and territories as diverse as Australia, Bangladesh, Belgium, Bosnia and Herzegovina, Canada, Chad, China, France, Pakistan, Russia, Somalia, Sudan, Tunisia, United Kingdom, Uzbekistan, the West Bank, and many Middle Eastern states. As the only current super power, the US has little to fear from prosecuting nationals of other states. It is interesting to note that the list of detainees includes nationals of all the other permanent members of the UN Security Council.

Conversely, the US has taken all possible steps to prevent its own nationals from being prosecuted by any other nation or international body. The clearest example of this is the US' refusal to ratify the Rome Statute of the International Criminal Court and its efforts to undermine the Court. These included Security Council Resolutions 1422 and 1487 that sought to give immunity to nationals of states who have not ratified the Rome Statute when acting in operations authorised or established by the UN. The US has additionally sought to conclude bilateral impunity agreements with various states, with the threat of withdrawal of military aid and economic support with states that fail to sign the agreements. The list of signatories to such bilateral agreements includes some of the poorest and least powerful countries in the world, further demonstrating the susceptibility of the principle of universal jurisdiction to the exercise of state power.[101]

The US prosecution of its own military personnel for alleged war crimes has also been extremely limited. For example, despite the media outcry following the revelations of abuse taking place in the Abu Ghraib Detention Centre, the Detainee Abuse and Accountability Project[102] in a report dated April 2006 concluded that there continue

101 The list of signatories is available on the Amnesty International Website at: http://web.amnesty.org/pages/int_jus_icc_imp_agrees.

102 By the Numbers: Findings of the Detainee Abuse and Accountability Project, April 2006, Volume 18, No 2(G). A joint

to be serious failures by the US to investigate or prosecute alleged detainee abuse. Examples given included a non-judicial punishment awarded where death had resulted and investigators had found probable cause to recommend charges of murder and conspiracy. In addition, it is reported that there have been no prosecutions for responsibility under the principle of command responsibility[103] and only a handful of officers had been prosecuted at all.

This selective approach to the principle of universal jurisdiction boils down to the exercise of the US's superior force. In a similar way, in the context of the Israel-Palestine conflict, the prosecution of Palestinians but Israel's failure to prosecute its own soldiers results in a perception that the justice meted out is actually the exercise of force.

Justice v Force

One function of a justice system, including that of an international justice system, is to replace the exercise of force with an alternative that is acceptable and accessible to both the powerful and the weak. Prosecutions that are only carried out on behalf of the powerful against the weak or that are carried out selectively are unlikely to promote acceptance of the principle of universal jurisdiction. Although they purport to be the exercise of justice, they are more likely to be viewed as the exercise of state power. Because of this, their functions of replacing the exercise of force will be extremely limited or even counterproductive.

As pointed out plaintively by a detainee appearing before the USA's Combat Status Review Tribunal:

> "What is the benefit of this court? I cannot speak freely. It's not going to do me any good. I want to go in front of a judge and speak freely. You are using force. There is a difference between justice and force."[104]

If the UK government changes the law to prevent individuals from being able to obtain an arrest warrant because of the outcry by the Israeli government against the issuing of an arrest warrant for the arrest of Almog, this too is likely to be widely perceived as demonstrating the susceptibility of the principle of universal jurisdiction to state power.

project by the Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Human Rights First.

103 Where a superior knew or should have known that crimes were being committed and failed to take steps to prevent it: Article 86(2) of Additional Protocol I to the Geneva Conventions.

104 Combat Status Review Tribunal transcripts available at: http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html, Set_44_2922-3064, page 3 of 143.

It is submitted that if the government were to change the law to take the decision on whether to issue an arrest warrant out of the hands of an independent member of the judiciary and instead put control in the hands of the executive, this would seriously undermine the development of the principle of universal justice for war crimes. The simple fact that the law would have been changed primarily because of lobbying by and on behalf of a powerful country with which the UK has good diplomatic relations would signal to other nations, with whom relations are not so favourable or who are less powerful, that accountability for war crimes is dependent on state power rather than on a commitment to universal accountability. Few other countries could have influenced a change in the law in such a way.

A change would also make the obtaining of an arrest warrant much more difficult. Despite the fact that the only parties to be aware of the arrest warrant for Almog being issued were the applicants, the court and the police, nonetheless the Israeli embassy was informed of its existence by a leak within 24 hours of the warrant being issued. The police declined to investigate either the leak or the role of the Israeli Military Attaché in facilitating Almog's release. There would be a much greater risk of information being released if the process was required to include a governmental department in the decision-making process at the earliest stage. It may also delay the process sufficiently to allow a suspect sufficient time to flee the jurisdiction, thereby completely undermining the rationale for seeking a warrant.

Alternatives

Rather than changing the law to restrict the possibility of obtaining an arrest warrant that might cause political tension, there may in fact be simpler alternatives that would not undermine the principle of universal jurisdiction for war crimes.

If the exercise of state power is undermining the development of universal jurisdiction, as it clearly seems to be, one solution would be to seek to minimise the exercise of state power in this arena.

Although the application for the arrest warrant for Almog was made by lawyers representing individual victims from the Gaza strip, the decision to issue the arrest warrant for Almog was taken by an independent member of the judiciary according to the law and without input from the executive. There is a clear advantage in terms of promoting universal jurisdiction for war crimes for a decision to be made in this way. Where a decision to prosecute is instead made or influenced by the executive, there is the clear risk that it is either affected by political pressure or even if this is not the case, there

is a risk that it will be perceived to be so influenced. Either is detrimental to universal jurisdiction for war crimes.

In the United Kingdom, the difficulty is compounded by the fact that it is extremely difficult to challenge the decision to prosecute (or not to prosecute).[105] In a domestic context, this has certain advantages. In addition, it relies on the presumption that upholding the law will be in the interests of the country. However, in an international context, prosecuting for war crimes may not necessarily be considered to be in the interests of the country. Prosecuting a country's own soldiers may even be considered contrary to the interests of the country for the reasons set out above. Prosecuting another country's soldiers may seriously damage relations with that country.

Giving the government the discretion to prosecute without laying down transparent principles as to how that discretion should be exercised exacerbates the problem. By the government reserving to itself the power to decide whether a prosecution should be initiated or allowed, it is at the same time giving credence to arguments that the decision to prosecute is a political decision. This is aggravated by the current state of affairs where the decision to exercise extra territorial jurisdiction in criminal matters is exceptional.

An alternative would be to remove the government's veto over such a prosecution entirely and replace it with more objective methods of supervision. It appears that although some other countries do reserve the right to veto prosecutions, such provisions are not universal. A number of countries have no such provision.[106]

For domestic offences, in deciding whether to prosecute, the Crown Prosecution Service will consider the Code for Crown Prosecutors issued by the Director of Public Prosecutions pursuant to section 10 of the Prosecution of Offences Act 1985.[107] This document outlines essentially a two-part test, which considers firstly an evidential test, and secondly a public interest test.

Such a code does not apply to the exercise of a veto by the Attorney General over prosecutions for grave breaches of the Geneva Conventions, so it is not clear on which principles the veto will be exercised. In addition, although the DPP is linked to the Attorney General in that the latter superintends the former, the Attorney General is chief legal advisor to the government. It is not at all clear whether the Attorney General

105 See for example *R v Commissioner of Police for the Metropolis ex parte Blackburn (number 1)* [1968] 2 QB 118 at 136, *R v Commissioner of Police for the Metropolis, ex parte Blackburn (application for mandamus) (number 2)* [1973] QB 241 and *R v DPP ex parte Kebeline* [2000] 2 AC 326.

106 See: Redress and International Federation of Human Rights: Legal Remedies for Victims of "International Crimes": Fostering an EU Approach To Extraterritorial Jurisdiction, March 2004 at Annex C.

107 Current version, November 2004 available at: http://www.cps.gov.uk/publications/docs/code2004english.pdf.

considers it relevant to take into account political considerations. Because of this, there is the likely perception that political considerations may influence the decision in which way to exercise the veto. Equally, the current arrangements provide little defence, if the Attorney General has exercised the veto on purely objective legal grounds, against states and individuals who claim that the decision was political.

One alternative would be to adopt a similar code in relation to the decision whether or not to prosecute for war crimes. This would go some way towards minimising the perception of the exercise of such jurisdiction as purely political power. The current code could even be applied with only limited changes. The evidential test could be applied with only minor amendments. So too could the public interest test, provided that political considerations were excluded from the matters to be taken into account in making the decision whether to prosecute. Other additional matters would need to be considered, such as whether the state of which the accused is a national is unwilling or unable to prosecute. Where an international crime is involved, transparency in relation to the principles and reasoning for the decision whether to prosecute would have the benefit of promoting the principle of universal justice for international crimes.

In addition to removing the veto, it might be advisable to have decisions taken by an agency at greater distance from central government, such as the DPP rather than the Attorney General.

Although the government might be unwilling to relinquish its veto over prosecutions, the trade-off would give the government a defence to allegations of political prosecution in that decisions were taken on a transparent basis according to objective criteria by an agency at "arms' length" from the government.

Conclusion

Although the Geneva Conventions, to which almost every country of the world is a signatory and which amount to customary international law, contain an express obligation to search for and prosecute those alleged to have committed grave breaches of the Conventions, implementation of this obligation is extremely rare. A number of possible factors that contribute to this have been examined above. However, from the tension caused by the issuing of the arrest warrant for Almog, political pressure must have been a significant factor. Rather than removing the right of a victim to apply for an arrest warrant which would undermine the implementation of the UK's obligations under the Geneva Conventions, alternatives should be considered that do not have this effect. A strong case can be made for removing the veto entirely and replacing it

with an objective and transparent system for making decisions as to both arrest and prosecution.

Fatma Benli, Attorney, Turkey

Legal evaluation of the ban imposed on university students who wear the headscarf subsequent to the European Court of Human Rights ruling in *Leyla Şahin v Turkey*

INTRODUCTION

On 10 November 2005 the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that the obstruction of Leyla Şahin's education by means of the headscarf ban in Turkish Universities is acceptable in a democratic society[108] (the '*Leyla Şahin* case').

This article assesses the ECtHR's decision in the above case in light of the Court's own founding principles, asks whether the ban is legitimate and tests the integrity of the grounds cited to justify the ban. The impacts of the ruling on comparable cases, and on the future of the ban are also examined, concluding with a more general evaluation.

THE JUDICIAL PROCESS

The headscarf ban began with a circular in 1998, first in Istanbul University and later in other universities, which directed that students with beards and students wearing the headscarf would be refused admission to lectures, courses and tutorials. When the applicant Leyla Şahin, then a fifth year medical student, transferred from Cerrahpaşa Medical School to Uludağ Medical School, she was not even allowed to enter the faculty campus, even though she had the same education entitlements as other students who were permitted to continue with their studies. Having unsuccessfully challenged this decision to the highest court in Turkey, she applied to the ECtHR as a means of last resort.

108 This evaluation is based on the ECtHR's seven-page press release, judgment and the dissenting opinion; case no 44774/98, retrieved from http://www.echr.coe.int.

When the ECtHR declared the application admissible on 2 July 2002, this was in itself a first. In 1993, the then European Human Rights Commission had found the applications of Şenay Karaduman and Lamia Akbulut, who had both applied to the Court concerning the prohibition of the use of a picture of them wearing a headscarf on their diplomas during an earlier chapter of the ban, to be inadmissible.

Six years later, on 29 June 2004, the 4th Chamber rejected Leyla Şahin's application. The Court accepted that Leyla Şahin's deprivation of her right to freedom of religion was an interference, but concluded that such interference was acceptable in the Turkish context. Leyla Şahin asked for the case to be referred to the Grand Chamber, and the five-judge panel accepted her application.

On 10 December 2005, after a public hearing, the Grand Chamber rejected Leyla Şahin's application by a majority vote. The Grand Chamber examined the application from the standpoint of freedom of religion and right to education. Reiterating the reasoning put forward in the decision of the 4th Chamber, and bearing in mind Turkey's special circumstances, the Grand Chamber concluded that the interference and violations of fundamental rights concerning the headscarf were acceptable and legitimate.

THE GENERAL ASSESSMENT OF THE GRAND CHAMBER'S GROUNDS FOR ITS DECISION IN LEYLA ŞAHİN v TURKEY

1. The grounds for the Court's finding that the State interference in freedom of education and religion was acceptable

The Grand Chamber recognised that, in banning the headscarf, the state was interfering with the individual's right to publicly express her religion,[109] but went on to state that the ban was acceptable if it was imposed to protect the rights of third parties, to preserve public order, and to safeguard the principles of secularism and equality in Turkey.

The Grand Chamber accepted that freedom of religion is a fundamental principle in a democratic society, but emphasised that that Article 9 of the European Convention on Human Rights ("ECHR") does not cover all acts motivated by religious beliefs. The Grand Chamber stressed that in a democratic society, the right to education is indispensable to the furtherance of human rights and benefiting from higher education institutions is a natural result of exercising one's right to education, and that the state is the agency

109 Concurring opinion of Judge Rozakis and Vajic

responsible for ensuring effective access to education. The Court further stated that the denial of Leyla Şahin's access to various lectures and examinations because she wore the Islamic headscarf constituted a restriction on her right to education. It accepted that Leyla Şahin was entitled, by her scores in the university entrance examinations, to go to university and study the subject of her choice. However, the interference triggered by her wearing of a headscarf was found to be necessary for "protecting the rights and freedoms of others and maintaining public order."

The Grand Chamber noted that Leyla Şahin continued to wear the headscarf despite Turkish Judicial decisions. The Court found that the Turkish judiciary's decisions were sufficient to ensure that the ban was provided for in law, and emphasised that Leyla Şahin had continued to wear the scarf in spite of these rulings. It further held that the existence of a circular of the higher education institutions had meant Leyla Şahin was sufficiently aware of the restriction on her right to education prior to her registration at the university.

The Grand Chamber emphasised that the principle of laicism aims to protect the individual from extremist groups. The court stated that the effect of the application of a compulsory Islamic rule in a majority Muslim country where there were some extremists should be taken into consideration. The importance of gender equality was also emphasised.

Given the above, the Grand Chamber stated that it would not intrude upon the state's margin of appreciation within the Turkish context. The judgment stated:

> *"As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course … Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief … and does not confer on people who do so the right to disregard rules that have proved to be justified. … In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued. …Consequently, there has been no breach of Article 9 of the Convention."*

2. Assessment of the decision in light of the Court's founding principles and precedents

The Court stated that the authorities were entitled to a margin of appreciation in fulfilling their responsibilities when legislating for a sensitive issue like the headscarf question. However, the Court's jurisdiction is subsidiary and its role is not to impose uniform solutions.[110] At this point, the decision conflicts with the ECtHR's aim, as laid out in the Convention, of removing individual injustice. The ECtHR is a judicial mechanism founded for the explicit purpose of preventing human rights violations and establishing high democratic standards *universally*.[111] However, in the Leyla Şahin decision, the Court said that it respected the relevant institutions' margin of appreciation, and conceded that university officials cannot set themselves up to the institutions' regulations by applying principles of proportionality and justice. In saying this, the ECtHR effectively denied the force of its own existence. After all, if every country can plead its own special circumstances in order to limit the rights within the European Convention, then there will be no role for the ECtHR and it will be impossible to develop any universal standards.

In allowing states to avoid scrutiny by claiming their margin of appreciation, the ECtHR is avoiding its own duties. The violation of the freedom of religion, guaranteed under the Convention, is not a local problem but one of importance to all state parties to the ECHR. The *Leyla Şahin* ruling avoids establishing a criterion which can be applied to all member states on the grounds that there is no consensus in Europe. However, as Judge Tulkens points out in her dissenting opinion, there is no diversity of practice in European universities.[112] When Leyla Şahin was deprived of her education, she went abroad and completed her education successfully and without problems in another Council of Europe member state. No practice remotely resembling that in force in Turkey can be found in higher education in any other European state. It would be surprising if a democratic state founded on the rule of law behaved otherwise.

France has introduced different practices concerning the headscarf, but the ban is only applicable to primary and secondary school students. Moreover, French schoolchildren can still receive an education of their choice in private primary and secondary schools. In French universities there is no ban or nor indeed any problem concerning the headscarf.

Democracy depends vitally on recognising diverse views and giving them the space

110 Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Para 2

111 Vahap Çoşkun, Zaman Gazetesi, 06/07/2004

112 Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Para 3

to live. The ECtHR was founded to defend individuals' freedoms and rights to express diverse views against state interference. However, in the *Leyla Şahin* case, the Court merely reiterates an abstract reasoning from the Turkish Constitutional Court, in marked contrast to its own judicial tradition. It appears that the ECtHR applies a different standard in such cases and this undermines the confidence of the Turkish public in its standard of justice. This decision suggests that when Islamic values are on the agenda, universally held values and an understanding of justice are suspended while fear, suspicion and prejudice take over the decision-making process.[113] Any decision based primarily on the state's right to a margin of appreciation and "special circumstances" applying exclusively to that state, conflicts directly with the Court's founding principles.

3. The gap between the situation described in the reasoning of the judgment and the real situation as experienced by students subject to the headscarf ban

Leyla Şahin went to the Court to seek redress for violations of her individual rights. However, the Court based its decision on circumstances that did not apply in Leyla Şahin's case. The ruling makes false observations specifically about Leyla Şahin, and generally about women wearing the headscarf in Turkey.

In its summary of the complaint in the introduction to the judgment, the Grand Chamber states that Leyla Şahin "argues that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers." However Leyla Şahin never made such a complaint, and the suggestion that she did gives some indication of the bias in the development and writing of this judgment. Women who wear the headscarf like Ms Şahin do not believe she is entitled to pass such a judgment. Everyone in Turkey knows very well that just because somebody does not wear a headscarf does mean that they are a "non-believer." Nobody claims that it does, and there is no argument on this issue. Leyla Şahin and her attorneys stated that while students in various attire could receive education, only those wearing headscarf were discriminated against. The Court was therefore misguided about Leyla Şahin's claim.

The ECtHR chose to give unconditional credence to ungrounded and contentious assertions about Leyla Şahin and women wearing the headscarf in Turkey, such as that they negatively influenced students who chose not to wear the headscarf and violated others' rights. In the ruling, subjective, false and contentious arguments about Leyla

113 Şefik Sevim, "Bilinç, birliktelik ve mücadele çözüm getirecektir = The Conscious, solidarity and struggle will be bring the solution" Haksöz Dergisi, p.65.

Şahin were used to justify the ban. The ruling gave weight to general statements contained in the Turkish Constitutional Court's decisions which bore no relevance to Leyla Şahin's situation. Yet the Court neglected to investigate the accuracy or relevance of the statements and therefore the degree of accurateness of these issues was not investigated. As a result, the abstract and theoretical statements in the ECtHR's decision did not fit the real factual characteristics of the case in question.[114]

In reaching its decision, the Grand Chamber, relied on the Turkish Constitutional Court decisions which had reviewed whether the headscarf decision was compatible with the ECHR and Turkish domestic laws. The Grand Chamber assumed that the reasoning contained in the Constitutional Court's decisions were correct and adopted them in its own ruling. The Court's careless examination neglected its own responsibility as regards to both procedure and content.

When the Court assessed the objection, it used concepts like equality, pluralism, women's rights or secularism as grounds to reject Leyla Şahin's case, whereas in fact, ideas such as freedom from discrimination, equality, women's rights and secularism require that women should not be discriminated against on the grounds of their choice of dress. The ruling implied that what had to be protected against was a hypothetical threat to the rights of women who do not wear the headscarf. The very real violation of Leyla Şahin's rights was not considered significant. If Turkey's special circumstances were an important matter of consideration, then the Grand Chamber should have assessed the accuracy of the picture of Turkish society supplied by the Government.

The Court stated, "The obvious purpose of the restriction was to preserve the secular character of educational institutions." It explained, "Secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience." If that was true, secularism as defined by the ECtHR's should be a guarantor of Leyla Şahin's right to complete her education freely. The principle of secularism could only justify protecting the right to exercise one's own religion, not for prohibiting it.[115] Secularism does not mean discriminating among students depending on their dress, or excluding from the environment every last thing related to religion.

Turkey's special circumstances and secularism require impartiality. No one should be forced to uncover or to cover their head. As a matter of fact, as Judge Tulkens pointed out in her dissenting opinion, "The majority thus considers that wearing the headscarf

114 Mustafa Erdoğan, Retrieved on 01/07/2004, from www.liberal-dt.org.tr

115 Mustafa Erdoğan, Retrieved on 02/07/2004, from www.liberal-dt.org.tr

contravenes the principle of secularism. In so doing, they take up position on an issue that has been the subject of much debate, namely the signification of wearing the headscarf and its relationship with the principle of secularism."

The Court ignored a number of Turkey's special circumstances including, for example, the fact that although Turkey is a supposedly secular state, it has a Religious Affairs Directorate under the Office of the Prime Minister, which controls and manipulates certain sects of Islam. By giving priority to a particular interpretation of religion, the Directorate infringes on the principle of impartiality between religions. The Court also ignored the fact that the State, which is supposed to be indifferent to all beliefs, was paying close attention to whether Leyla Şahin was performing her religious duties or not. In a secular state, Leyla Şahin's decision on whether or not to cover her head should not have had any practical effects on her life.

The principle of secularism in a democratic society, where different religions or beliefs coexist, requires the state to be neutral towards religions or beliefs while executing its duties concerning education (denominational neutrality). According to the United Nations' Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief dated 25 November 1981,[116] the state should make no distinction, exclusion, restriction or preference based on a particular religion or belief.

Secularism requires the state to be as impartial as possible between religions and not to discriminate negatively or positively between citizens who belong to various religions. Secularism is possible only when the state is indifferent to all beliefs, and does not prevent the majority from exercising their religious beliefs. Leyla Şahin received tuition in a secular education system for five years. The fact that secularism is a fundamental principle of the Turkish Republic should not mean that adult students are prohibited from wearing the headscarf. Basic principles are instituted to protect people's interest; protecting principles by violating individuals' rights is not the appropriate solution.

The Court assumed that since students had registered at a secular institution, they are bound to obey the institutions' rules. The Court ignored the fact that there were no rules regulating student's attire when Leyla Şahin registered. It claimed that the ban on headscarves did not harm the essence of Leyla Şahin's right to education. However, the Court ignored the fact that in Turkey there is a unitary education system. That is to say, students who wear the headscarf have no alternatives and cannot go elsewhere to study. Leyla Şahin may have earned a diploma by studying abroad, but since such a diploma is not recognised within Turkey, it has no practical effect or significance.

116 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief dated November 25 1981, article 2(2).

The Court claimed that practicing university students are free to manifest their religion in accordance with habitual forms of Muslim observance. However, Leyla Şahin was denied access to university precisely because her wearing of the headscarf was motivated by her religious beliefs. Indeed, the Higher Education Council has banned the wearing any kind of hat, beret, or even wig.[117] There is no regulation for a uniformed dress code in Turkish universities—only an interference for those students who wear the headscarf. Clearly then, Leyla Şahin was not free to practice or observe her beliefs.

The ECtHR restated the reasoning of the Turkish Constitutional Court's rulings, arguing that an administration could impose limitations on the freedom of individuals in order to maintain public order and to protect the rights and freedoms of others. The Court grounded its reasoning on "the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."[118] However, Leyla Şahin was very concretely deprived of a right she was entitled to, and the ECtHR did not weigh the impact of that deprivation.

Therefore, as stated in the dissenting opinion, the Court paid no attention to whether the supposed threat to the rights and freedoms of others had been violated. The ruling indicates that the Court's opinion was based on false assumptions regarding Leyla Şahin and women who wear the headscarf in Turkey. The Court accepted the misinformation as fact without investigating its accuracy.

There is no evidence, or even allegation, that Leyla Şahin as an individual had ever attempted to impose any religious principle on a third party. She completed her education in three different universities, two of them in Turkey, without a problem. Prior to 1998, many students studied and graduated while wearing the headscarf. Not a single specific example was put forward of women wearing the headscarf restricting other women's rights. The Court's job is to judge the situation on the basis of tangible facts, not according to claimed aims or intentions. A person's attire does not pose a threat to public order. Wearing or not wearing the headscarf does not influence others' rights negatively. Would it be reasonable to claim that persons wearing long hair negatively affect those who keep their hair short, or that people who wear long hair want to restrict the rights of the short haired, and must therefore be forced to cut their hair short too?

As Judge Tulkens wrote in her dissenting opinion, "Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court's case-

117 Higher Education Council's circular dated 27/03/2002, numbered B.30.2.MAR.0.00.00.01/2959

118 ECtHR's press release: Leyla Şahin v. Turkey, parg 115

law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (*Smith and Grady v. the United Kingdom*, judgment of 27 September 1999, § 89). Such examples do not appear to have been forthcoming in the present case."

The Grand Chamber clearly stated, "[they did] not lose sight of the fact that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts". Linking the headscarf directly with extremists and fundamentalist movements simultaneously obscured the reality within Turkey, and suggests hypothetical incidents which could be used to justify the ruling. Contrary to the Court's claim, there are no grounds for suggesting that a student who happens to wear a headscarf is likely to be a fundamentalist or an extremist. There have been no incidents or patterns of incidents in Turkey which have required the banning of the headscarf for the purpose of restraining an extremist political movement.

The majority opinion accepted the ban on headscarves as appropriate due to Turkey's special circumstances and "pressing social needs" but neglected to provide any concrete evidence of this pressing social need. There was no suggestion that Leyla Şahin wore the scarf in an ostentatious or aggressive manner, or in a manner that was intended to exert pressure, to provoke a reaction, to proselytise or to spread propaganda, or to undermine the convictions of others. The respondent Government did not put forward any such claim about Leyla Şahin. There was no evidence before the Court to suggest that Leyla Şahin had any such intention. As the dissenting opinion stated, "it had been neither suggested nor demonstrated that there was any disruption in teaching or in everyday life at the University, or any disorderly conduct, as a result of Leyla Şahin's wearing the headscarf. Indeed, no disciplinary proceedings were taken against her."[119]

The Court accepted the suggestion made by the Turkish Constitutional Court that wearing the headscarf might result in pressure on other women in the same environment who do not wear the headscarf. It therefore ruled that the ban on headscarves could lawfully be applied in order to protect the rights of others who do not wear the headscarf. In this reasoning, the Court ignored that this claim was not warranted by the actual situation in Turkey, and the Court also ignored that real discrimination was being inflicted on women wearing the headscarf, women who had earned the right to go university but were left at the university gates while their peers were allowed to enter.

Preventing students, who choose to wear the headscarf because of their beliefs, from obtaining an education punishes them for alleged intentions and ideas that are supposedly

119 Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Para 8.

projected upon them. The ECtHR took into consideration a possible future threat and permitted constraint to be imposed on certain freedoms in the absence of a manifest threat. Individuals should not be prevented from exercising their fundamental rights on the basis of hypothetical incidents. Mere assumptions cannot justify the violation of a right by themselves.

The Court found that in an environment in which everyone dresses as they wish, a ban on the headscarf is "just." Yet the very essence of pluralism is an accommodation between people with varying perceptions concerning social life (language, race, life style, sexual orientation, religion, attire etc). Moreover, women's rights are unlikely to be effectively protected by telling women what they can and cannot wear, or depriving women of their right to education and work when they do not follow the rules laid down for them.

The Grand Chamber implied that pressuring or forcing women to cover their head is against the principle of equality. As Judge Tulkens stated in her dissenting opinion,

> *"the majority considered wearing the headscarf is synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant. The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will."*

The Grand Chamber claimed women's rights and equality of sexes make this ban justifiable, but set aside a woman's right to make a choice concerning her personal future. Indeed, it is a serious insult to women to assume that a woman cannot freely chose to wear a headscarf, but must be wearing it at the behest of someone else. This assumes that women do not have the will to make a personal decision, yet choice of attire is part of women's freedom and that choice will be conditioned by her personal ideas and beliefs.

The Grand Chamber found that forcing a woman to remove her headscarf was justifiable on the principle of equality, but disregarded the fact that students wearing the headscarf are openly discriminated against. Leyla Şahin passed the same university entrance exam as other students, but was deprived of her right to education. The principles of equality and freedom from discrimination demand that institutions should not categorize people according to their attire. Depriving women who wear the headscarf, in accordance with their religious beliefs, of the education they deserve, cannot achieve practical educational equality for men and women.

In its reasoning, the Court stated that "It is quite clear that throughout [its] decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained." It ignored the fact that discriminating against people on the basis of their attire does not protect "public order." There were no incidents during the five years which Leyla Şahin had studied. Denying women who wear the headscarf entry into university premises - first students, and recently student's mothers- has indeed disturbed public order.

The ECtHR accepted that the ban on headscarves is legitimate. However, any legitimacy comes from public acceptance of public policies, and all surveys indicate that the majority of the Turkish public was against the ban.[120]

As stated in the dissenting opinion, "The applicant did not, on religious grounds, seek to be excused from certain activities or request changes to be made to the university course for which she had enrolled as a student … She simply wished to complete her studies in the conditions that she had obtained when she first enrolled at the University and during the initial years of her university career, when she had been free to wear the headscarf without any problem." The damage sustained by the applicant – who was not only deprived of the possibility to complete her studies in Turkey because of her religious convictions, but also maintained that it was unlikely that she would be able to return to her country to practice her profession because of the difficulties that existed in Turkey in obtaining recognition for foreign diplomas.[121] There is no benefit to be gained for Turkish society by prohibiting the headscarf on university premises that can be set in the balance against the personal *in concreto* cost to Leyla Şahin. Creating inequality directed against students wearing the headscarf provided no concrete benefits for anyone.

Therefore, the Grand Chamber casts doubt on its own perception of justice by not changing the decision of the 4th Chamber, which has since been criticised by European and US-based legal experts. The decision conflicts with the objective situation in Turkey, offends the public's sense of justice and its confidence in the ECtHR. Despite the fact that fundamental issues of human rights were at stake in the *Leyla Şahin* case, the court effectively ruled that countries could apply varying standards, justify them with completely hypothetical future violations, and flatly ignoring serious patterns of human rights violations.

120 "Anketler Ve İnsan Hakları Kuruluşlarının Raporları Işığında Başörtüsü Yasağının Değerlendirilmesi" (Assessment of the ban on headscarf in the light of the surveys and the report of the Human Rights Foundations). Retrieved from www.akder.com.tr.

121 Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Parg 17.

4. Assessment of the legal dimension of the ban on headscarf

In assessing the legitimacy of the *Leyla Şahin* decision, the ECtHR referred to the university's regulations and the court decisions. Instead of relying on its own precedents, the ECtHR referred to Turkish law, quoted the Council of State's decisions, and treated the Constitutional Court's reasoning as reliable. Moreover, it ignored the fact that the dicta contained in a Constitutional Court decisions does not substitute for law. It ignored Provisional Article 17 of the Higher Education Law which leaves choice in dress free, and reflects the will of the Parliament. Similarly, the ECtHR ignores the fact that under the Turkish legal system rights cannot lawfully be restrained through a mere circular or regulation. The Court assumed that Leyla Şahin must have been aware of possible restrictions on headscarf prior to her registration, yet she was a fifth year medical student when the ban was initiated.

As a matter of fact, no matter which body sets the rules, the reality in Turkish domestic law is that fundamental rights cannot be restricted without direct provision by law. According to Article 13 of the Turkish Constitution, restricting a fundamental right is only possible—for reasons of public health or public order and provided that the essence of the rights are not affected—by a clear provision in law.

In Turkish law, including the so-called Revolutionary Laws passed during the time of Atatürk, there is no law that regulates women's attire. Indeed it is difficult to imagine how such a law could be passed in a democratic country. Fundamental rights cannot be restricted through interpretation of court decisions. Article 153 of Section 2 of the Constitution states, "In the course of annulling a law or a provision thereof, or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation". This provision explains that when the Constitutional Court annuls a law, it cannot stand in place of the legislature.

Provisional Article 17 of the Higher Education Law states, "Attire is free in higher education institutions provided that this does not contravene current law." Neither current law nor the Constitution banned the headscarf. It is difficult to see how a prohibition can be interpreted from the term "free." As a matter of fact, in the relevant decision the Constitutional Court says, "Words used in legal texts must be understood according to legal terminology. It is normal to implement legal rules as long as they are in force, even if they are outdated or contradict contemporary social or economic conditions. Using some ideas or justification to abandon this rule, and thereby attempting to interpret or

correct the law would mean standing in place of the legislature, changing law through interpretation and imputing to the law what is not there."[122]

At this point, the Constitutional Court explicitly confirms that judicial decisions cannot substitute law and cannot be used as a legal justification for limiting a fundamental right. When the Grand Chamber ruled in favour of the ban, it was ignoring the Turkish legal system, the powers of the Constitutional Court as defined by the Constitution, the impossibility of Courts legally establishing such a ban and the basic legal criteria which must be fulfilled to establish such a ban. The Court concluded that Leyla Şahin could foresee that the ban would be applied because of the existence of the circulars and the Supreme Court's decisions. Nevertheless, it ignored the fact that she was, in practice, able to continue her education for a five-year period while wearing the headscarf and that this situation did not run counter to the law.

ASSESSMENT OF THE PRACTICAL APPLICATION OF THE HUMAN RIGHTS GUARANTEED BY THE TREATIES

Human rights, as the Court recognised, are not theoretical or abstract. They also have practical consequences. For instance, freedom of conscience means that no one can say that an idea can be thought but not expressed. Freedom of religion and conscience requires that the individual be allowed to express and exercise his beliefs and consciousness. Article 9 of the Convention ensures not only the freedom to have a religion (the internal conviction) but also the freedom to manifest that religion (external expression of that conviction).[123]

Freedom of thought, conscience and religion is guaranteed by all international human rights treaties, including Article 18 of the United Nations International Covenant on Civil and Political Rights (ICCPR), which states "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." Even under martial law it is unacceptable not to uphold article 18. The UN Human Rights Committee's interpretation of this article confirms that the freedom of the individual to reveal their religion or beliefs is guaranteed by the ICCPR, and expands its application to a variety of areas including the individual's choice of attire.[124] This

122 The Constitutional Court's decision dated 12.03.1992, numbered 21169 sayılı R.G., 08.01.1992 tarih, 1992/7E., 1992/2 K.

123 Dissenting opinion of Judge Tulkens (Leyla Şahin v. Turkey) Parg 6.

124 United Nations Committee on Human Rights (1993, July 30), Article 18: The Freedom of religion, conscience and

statement explains that wearing special headgear is important in conserving religious life. The aim here is to broaden exercise and expression of these fundamental freedoms and rights as much as possible. If a student is unable to study or enter university because of her head covering, in spite of the fact that she qualified by passing an entrance exam, then she is unable to exercise the rights guaranteed by those treaties.[125]

Freedom of thought, conscience and religion involves exercising and manifesting beliefs as required by those beliefs. If individuals are not allowed to manifest their beliefs in order to remove the social visibility of the religion, then there is no effective freedom of religion.

THE BROAD CONSEQUENCES OF THE GRAND CHAMBER'S DECISION ON *LEYLA ŞAHIN v TURKEY*

1. Impact of the decision on the ongoing ban on the headscarf

The Grand Chamber's decision that the ban on headscarves is justifiable does not make the ban compulsory. The application requested confirmation that the ban is *per se* a violation of the Convention. The Court rejected this demand, but gave no decision as to whether wearing the headscarf contradicts the Convention. Moreover, the Court has no right to make such a decision, but can only determine whether the interference is compatible with the Convention.

The ECtHR's philosophy of human rights is "the fewer the restrictions the better." Exceptions can be tolerated but never encouraged and supported.[126] No international human rights treaty, including the ECHR, could be interpreted as regulating or prescribing individuals' attire.[127] Categorising women according to their attire would be discrimination, a violation of their right to education, a violation of their freedom of thought and a violation of their privacy.[128] By contrast with authoritarian systems, in all democratic structures, an individual's freedom to choose their attire is indispensable.

thought, General Evaluation 22.

125 Human Rights Watch, Turkey: Headscarf Ruling Denies Women Education and Career (= Başörtüsü kararı kadınların eğitim ve çalışma hakkını inkar ediyor). Retrieved on November 16 2005, from http://www.hrw.org/ english/ docs/2005/11/16/turkey12038.htm.

126 Belgium Stasi Commission: "Başörtüsü Yasaklanamaz = The Headscarf cannot be banned" May 17, 2005 Zaman Gazetesi, "Dünya Türbana çözüm arıyor= The World searches a solution for headscarf."

127 PAKDİL Necdet, "The institutions of the law and democracy". Hukuk ve Demokrasi Dergisi, 1(10) (2005), p.44.

128 Levent Korkut, Zaman Gazetesi, July 03, 2004.

The Court's ruling that the ban is justifiable in the light of conditions within Turkey is not an open instruction or authorisation to enforce a permanent ban on the headscarf.[129] The ruling should not be interpreted to the effect that Turkey and other state parties to the ECHR must now ban the headscarf, or as a guarantee that the Court may not annul the ban at some later date. In practice, the ban has not been not extended to other European countries following the ruling in the *Leyla Şahin* case.

V. CONCLUSION AND GENERAL ASSESSMENT

Resolution No. 1464(2005) of the Parliamentary Assembly of the Council of Europe dated 2 January 2005, called on all member states to, "fully protect all women living in their country against all violations of their rights based on or attributed to religion." Unfortunately, in reaching its decision in the *Leyla Sahin* case, the ECtHR seemed to ignore this resolution, but there is no reason why Turkey should not take steps to implement it.[130]

Women who wear the headscarf as a religious duty are currently deprived of a variety of rights.[131] Not allowing women to choose their dress freely and depriving them of their right to education, their freedom of religion and conscience and their right to privacy, constitutes state discrimination against women.[132] The ruling is a negation of every principle of civilisation, including freedom of religion and conscience, the right to education, the right of non-discrimination, the rights to equality, tolerance and legitimacy.[133] By judging the situation in Turkey in a subjective manner, the ECtHR contributed to the hardship of women who wear the headscarf. This decision will not lead to progress women's freedom and status in Turkey, but to their regression.

Although it may seem that, in its ruling, the Court has missed an important opportunity to stand firmly behind principles of freedom of religion, expression, and non-discrimination, it must not be forgotten that the ECHR is a living instrument. Through

129 Necdet Pakdil, "The impact of international treaties on internal legal rules". Hukuk ve Demokrasi Dergisi, 1(10), p.44.

130 Mustafa Erdoğan, Retrieved from http://www.network54.com/Forum/353569/ thread/1132075580/last-1132144402T %DCRBAN+YASA%D0INA+%C7% D6Z%DCM++HALKIM+MECL%DDS'%DDNDE.

131 Human Rights Watch, "Turkey: Headscarf Ruling Denies Women Education and Career (=Basörtüsü kararı kadınların eğitim ve çalışma hakkını inkar ediyor). Retrieved on November 16 2005, from http://www.hrw.org/ english/ docs/2005/11/16/turkey12038.htm.

132 Human Rights Watch, The Committee for Human Rights Watch, "Memorandum to the Turkish Government on Human Rights Watch's concern with regard to academic freedom in Higher Education and access to Higher Education for women who wear the headscarf", June 29 2004.

133 Atilla Yayla, "ECtHR's decision and the totalitarian minds (I)", Retrieved on November 20 2005, from www.liberal-dt.org.tr.

its ever-developing jurisprudence, it may be possible to change the decision with the emergence of new conditions and through forthcoming applications to the Court in related cases.

Şehnaz Turan, Lawyer, President of Foundation for Society and Legal Studies (TOHAV) and Board Member of the EU–Turkey Civic Commission

The situation of the internally displaced in southeast Turkey

It is estimated that, during the 1980s and 1990s conflict between the Turkish Government and the Kurdistan Workers Party ('PKK') in Southeast Turkey, over 3,000 towns and villages were destroyed and up to 3 million villagers, the vast majority of whom were Kurdish, were forcibly displaced. Most of these villages remain destroyed today, with no plans for their reconstruction, denying the villagers their right to return. Many of the internally displaced (CIDPs) have no choice but to live in temporary housing in the big cities, suffering from severe economic, housing and health problems. This article provides an analysis of the problems faced by those who were forcibly displaced as a result of the conflict, and considers the effectiveness of the few measures that have been enacted by the Turkish authorities to address these issues. Ultimately, it concludes that the fate of the internally displaced people from the Kurdish regions of Turkey will continue to be contingent on the political situation in the Southeast.

Background

As a result of the armed conflict between the Turkish Government and the PKK which began in 1984, a State of Emergency was brought into force in the Southeast of Turkey. It was first introduced in five provinces and subsequently expanded to cover thirteen. The State of Emergency was finally brought to an end throughout Turkey on 30 November 2002.[134]

During this period, many Kurds[135] applied to the European Court of Human Rights (ECtHR) claiming that their rights had been violated. A large number of judgments by the ECtHR indicated that the Turkish Government was responsible for numerous human rights abuses, including the forced evacuation of villages, extra judicial killings and torture. Currently, there are approximately 1,500 applications pending before the

134 '(TOHAV), Foundation for Society and Legal Studies, '*IDPs and the Law on Compensation*' www.tohav.org

135 There is no exact figure of Kurdish population in Turkey. However it is estimated that 20 million Kurds are living within the borders of Turkey.

ECtHR regarding displaced persons, which account for approximately 25% of all cases pending against Turkey. [136]

The ECtHR has also observed in its various judgements regarding the plight of displaced persons that, whilst village evacuations occurred in the context of violent confrontations between the security forces and members of the PKK, the security forces had "deliberately destroyed the homes and property of applicants, depriving them of their livelihoods and forcing them to leave their villages. [137]

The most distinctive characteristic of the displacement of Kurds during the 1990s was that it was frequently conducted in strict defiance of the rule of law. The concerted policy of evacuating and burning villages and hamlets in rural areas of the Southeast began in 1990, and reached its peak in the period between 1993 and 1995[138]. Evacuations were concentrated in provinces that were under State of Emergency rule. The State of Emergency regime granted the Regional Governor the authority to "order the temporary or permanent evacuation of villages, winter stations…and arable fields in areas within his territorial jurisdiction to make necessary arrangements for the general security". At the same time, these provisions imposed responsibilities on the authorities such as providing alternative housing and financial support. However, in practice, governors did not exercise their authority in accordance with legal provisions. Evacuation and burning of villages as well as food embargoes and bans on access to pasturelands were applied in an arbitrary and unlawful manner.

Estimated numbers of how many Kurds were displaced during this period differ widely[139]. According to the Human Rights Committee of the Turkish Parliament, the number of evacuated and destroyed is approximately 3,428, affecting around 380.000 people[140]. NGOs on the other hand consider all people compelled to leave their homes because of feelings of insecurity, armed clashes or military-imposed food embargoes, as well as threats by the security forces, the PKK and village guards[141] as forced migrants.

136 EC Regular Report on Turkey, 2005, www.europa.eu.int

137 *Dogan and Others v. Turkey* (Applications nos. 8803-8811/02, 8813/02 and 8815-8819/02); Available at www.echr.coe.int

138 KHRP, *Internally Displaced Persons: The Kurds in Turkey*, June 2002.

139 In addition to the internally displaced, more than 13,000 people fled across the border to northern Iraq, about 9,300 of whom were settled in the Makhmour camp. See UNHCR, *Briefing Paper on Voluntary Repatriation of Turkish Refugees from Northern Iraq* (May 1, 2004).

140 The evacuated villages in the southeast and the Internally Displaced Question Research Commission" of the Turkish Assembly, Report 1997. However, according to NGOs including TOHAV, TIHV, IHD, and GOC-DER, the number of forcibly displaced people is more than 3 million

141 The village guard system was set up in 1985. Villagers were provided with arms and paid a significant sum by the Turkish Government to 'protect' their villages. Selected and managed by tribe leaders and local gendarme commanders who had a vested interest in the overcoming of the PKK, the village guard system effectively involved the arming and

They therefore put forward figures for the number of IDPs ranging from 1-3 million.

The state did not allow any international assistance in the immediate aftermath of the displacement of the Kurds, and it was out of the question for international organisations to gain access to IDPs through humanitarian channels during that period. Therefore, tackling the problems posed by IDPs was left entirely to the initiative of the Turkish domestic authorities.

The Consequences of Displacement

The short-term economic and humanitarian consequences of this mass migration have been disastrous[142]. The economy of the region has deteriorated even further. The destruction of the forests, grazing areas and livestock, and the imposition of the production quotas have also negatively affected the economy.

Internal displacement of the Kurds has resulted in the dramatic growth of urban populations with a high level of unemployment in recent years. Large numbers of IDPs have moved to big cities, mainly in the larger provinces of the Southeast. For example, the population of Diyarbakir - the largest city in Southeast Turkey - grew from 400,000 to about 1.5 million by 1997, and there are estimated to be 10,000 street children in the Diyarbakir area.[143] Many of the displaced Kurds in metropolitan cities live together with their relatives, sometimes with more than thirty people residing in a house intended for a single family.

The European Commission, in its 2005 Progress Report on Turkey, noted that the situation of IDPs remains critical, with many living in precarious conditions[144]. It observed that several factors hamper the return of IDPs: the continued relative economic underdevelopment of the East and Southeast; the absence of basic infrastructure; the lack of capital; limited employment opportunities; and the security situation. In particular, the existence of a large number of landmines constitutes a strong disincentive to return. It is reported that landmines killed 20 people and injured 20 in the first seven months of 2005. Moreover, the discretion of the governor plays a crucial role in the implementation of the legal and administrative provisions regulating return.

turning of civilian Kurdish villagers against their own kin, creating a paramilitary force. Many village guards still remain in the abandoned villages, occupying houses and property which are not their own, and have been responsible for further extra-judicial killings of displaced people trying to return

142 Kirisci June 1998, pp. 198-199

143 EC, **Turkey 2003 Progressive Report**

144 EC Regular Report on Turkey, 2005, www.europa.eu.int

The Plight of IDPs

General

According to a 2002 survey carried out by Göç-Der[145] (Association for Migration of Social Solidarity and Culture), the basic problems encountered by the migrants post-migration can be classified as follows:

- Employment-income-economic problems;
- Educational-nutrition-health problems;
- Adaptation problems and the problems that are based on linguistic-cultural differences;
- Fear/psychological uneasiness caused by the nature of the migration experience and the constant activation of such feelings due to being treated/regarded as potential criminals; and,
- Problems of loneliness that require immediate attention.

Housing

The Council of Europe has referred to the housing problems faced by IDPs in its Recommendation to Turkey in 22 March 2002,[146] which stated that:

> "The Turkish Government has failed to provide emergency assistance to people forcibly displaced in the Southeast, including persons displaced directly as a result of the actions of Turkish military and security forces. These people have not been provided with any shelter or food in the immediate aftermath of the displacement. The Government has not arranged for any temporary accommodation in tents or collective facilities and the displaced persons could count only on their relatives or scarce assistance from humanitarian organisations. Although the Government has constructed some housing in the

145 'The research and solution report on the socio-economic and socio-cultural conditions of the Kurdish citizens living in the Turkish republic who are forcibly displaced due to armed-conflict and tension politics; the problems they encountered due to migration and their tendencies to return back to the villages www.gocder.com/report.doc'

146 **Recommendation 1563 of the European Council Parliamentary Assembly "***Humanitarian situation of the displaced Kurdish population in Turkey*" 18 September 2002 Doc. 9547; 'The Parliamentary Assembly has urged several recommendations to Turkey concerning the IDPs, such as, refrain from any further evacuations of villages; ensure civilian control over military activity in the region and make security forces more accountable for their actions, involve representatives of the displaced population in the preparation of return programmes and projects, …"

towns, the numbers are far from sufficient.

> *The majority of the displaced rural population of Kurdish origin live in urban centres in dramatic conditions and extreme poverty, creating specific integration problems for local communities. Overcrowded places have usually inadequate heating, no sanitation and inadequate infrastructure.* Malnutrition, insufficient and dirty drinking water, improper disposal of sewage and garbage are common problems. Istanbul hosts a big number of Kurdish Turks (estimates vary from 1 to 3 million)."

For example, a displaced family of 63 people now live together in a 90m² house in Hakkari. Moreover, NGOs argue that the limited housing initiatives provided by the authorities favour former village guards[147] and that some displaced in Istanbul, Adana and Mersin still live permanently in tents, following job opportunities and settling close to their family.

According to the 2002 survey carried out by Göç-Der, basic provisions such as electricity and water are lacking and IDPs face social exclusion. Tent life is taking on a settled character rather than a temporary one, with migrants living in tents throughout the year. Tents are usually pitched close to rivers and fields, with the landowner or employer determining the place location of the pitch. The most significant factor underlying the newcomers' decision in choosing their new settlement area is the presence of next of kin, relatives and acquaintances. Displaced people in these circumstances are generally employed in seasonal or temporary jobs in agriculture. At the end of the season, they have no choice but to move to new places to find more work.

Health[148]

IDPs in Southeast Turkey face the following barriers in the context of their health, which will be explained further below:

- Unhealthy conditions in new settlement areas, increasing the risk of diseases such as tuberculosis and malaria or mental illness;

- Limited access to women's healthcare services, as a result of economic problems, lack of health and other social insurance and cultural, linguistic and religious differences;

147 Human Rights Watch, October 2005, ***Still Critical for Displaced Kurds*** http://www.hrw.org/reports/2005/turkey0305/

148 Norwegian Refugee Council – Global IDP Project

- Inadequate infrastructure and a shortage of medical personnel;

- Denied green cards which would allow them better access to healthcare services

The unhealthy conditions in the new settlement areas lead to the spread of many different diseases among the migrant population. Diseases such as tuberculosis and malaria, which are in a continuous state of decline both in Turkey in general and throughout the world, are found in these settlements.[149]

There are several additional factors which contribute towards an increase in health problems, such as lack of adequate infrastructure, unhygienic conditions in new living areas, nutrition problems, fear, psychological uneasiness and anxiety stemming from living in an alien environment.[150]

Moreover, most of the IDPs encounter difficulties in obtaining a "green card". [151] Since only indigent people can receive a green card, villagers who own substantial property which could otherwise provide them with income to finance their own healthcare, often do not qualify for a green card, in spite of the fact that they are denied access to that property. If they do qualify, the security forces can still obstruct their application because a series of officials, including the head of the local security forces, must sign the application. This necessitates an anxious journey back to their village in order to obtain a signature from the nearest gendarmerie commander. [152]

The situation of displaced women in Southeast Turkey

Women IDPs face the following specific problems, which are expanded on below:

- Language problems make access to social services for Kurdish women more difficult;

- High levels of unemployment, poverty and inadequate shelter seriously affect the state of women's health;

- Research done among displaced women revealed symptoms such as headaches, sleeping disorders and extreme timidity;

149 www.gocder.com/report.doc' p.68-II

150 *Ibid*, p.79-II

151 The social insurance of the State which is for the poor people.

152 Journal Ulkede Ozgur Gundem, April 2001

- Batman Bar Association identified asserted forced displacement as one of the main reasons for the increasing suicide rates among women in Southeast Turkey;

- Displaced men have more opportunity to socialise with other people and have more freedom, whilst women live in isolation in their new residence

There are tens of thousands of women in the region who do not speak Turkish and speak only Kurdish. This leads to significant difficulties. As Kurdish language cannot be used in public life, language problems make it difficult for women to even go to the doctor. They have nightmares of being unable to describe their problems, of being misunderstood, or of being reproached and insulted.

Sixty-four percent of rural women and 50% of those living in urban areas have health problems.[153] Infrastructure services such as roads, drinking water, electricity and communication are important for women's health, particularly mothers. The lack of wells and drinking water is also a great obstacle to the creation of a healthy environment. Adverse conditions such as crowded living conditions; malnutrition; lack of heating; insufficient water supply; inadequate treatment of waste water; unemployment and poverty, all cause infectious, though entirely preventable diseases which spread through and tear apart communities. The first people to be effected are women whose bodies have been emaciated as a result of giving birth to too many children. Health facilities, medical personnel and equipment in the region are inadequate. When the lack of knowledge among some women of key health matters is added, women's health emerges as a major problem.

The development of psychological problems is common following the trauma of migration, particularly among women, which can then lead to post traumatic stress disorder ('PTSD')[154]. According to data collected by TOHAV, headaches, sleeping disorders, adaptation disorders, the frequent recollection of the traumatic event, frequent nightmares, emotions recalling the traumatic experience and alienation are all symptoms of PTSD.

High level of suicide rate among women in Southeast Turkey

In March 2001, the Batman Bar Association conducted research into suicide by women, finding that forced displacement was one of the main reasons for the increase in suicide in the region. In the course of this research, it was found that most of the people who

153 www.gocder.com/report.doc

154 TOHAV; Foundation for Society and Legal Studies, Torture Rehabilitation Centre; "*2002 Torture Report*"

had committed suicide had been forcibly displaced and had migrated to Batman in or after 1985.[155]. Between 2000 and 2001, ninety-eight of those who attempted to commit suicide were female. The Batman Bar Association report indicated that there is a connection between suicide attempts and feelings of isolation, despair, hopelessness and alienation. Those who move to big cities often feel that they do not belong in their new environment. Reports indicate that women from the Southeast who migrate to bigger cities believe that in their small villages they had their own identity and their own way of living.

The report also noted that male migrants have more opportunities to socialise with other people and have more freedom, while women tend to live in isolation in their new homes. It states, "There are no social activities for young girls who migrated from the Southeast to big cities. For them, life is limited to within the walls of their houses and they feel the pressure of strict traditions that limit their lives".

Limited access of displaced children to housing, health services and education

In its 2001 report,[156] the UN Committee on the Rights of the Child expressed concern at the high number of internally displaced children in Turkey, who were forced to leave their homes in the 1990s. The Committee was also concerned about their limited access to housing, health services and education. It recommended that Turkey ensure access to appropriate health and education services and adequate housing to internally displaced children and their families. Further, it invited Turkey to collect data and statistics in order to ascertain how many children are displaced and what their needs are, with a view to developing adequate policies and programs.

"Law on Compensation for Damage Arising from Terror and Combating Terror" (Law no 5233)

Internal displacement in the Southeast has generated some of the most sustained, widespread and ongoing violations of human rights in Turkey in recent years, although it has not received much public attention until recently. By evicting several hundred thousand people from their rural homes, the security forces to a significant extent displaced Kurdish communities from their traditional territorial heartland in the Southeast.

155 Human Rights Foundation of Turkey, Reports, March 2001, sect. 2

156 UN Committee on the Rights of the Child, 8 June 2001, paras. 59-60

While forced displacement in the other Kurdish regions triggered strong international reactions by western countries and the UN, the displacement of Kurds in Turkey went relatively unnoticed in diplomatic circles for a long time. In the course of Turkey's efforts to start accession negotiations with the EU, international pressure grew and the Government finally began a dialogue with international agencies on the problem of internal displacement. So far, however, the policy discourse that is taking shape under international guidance promotes a depoliticised approach that disconnects forced displacement from its roots, namely the Kurdish question in Turkey.[157]

The 2002 visit to Turkey of the UN Special Representative on IDPs, Francis Deng, represents a milestone, after which the Government began to collaborate with the UN on internal displacement in Turkey. [158] Dr. Deng called on the government to formulate a clear, transparent policy on return and encouraged the government to involve intergovernmental organisations and civil society in the process.

Under pressure from the Council of Europe and the UN, the Turkish Assembly passed the "Law on Compensation for Damage Arising from Terror and Combating Terror" (Law no 5233). The law offers internally displaced people compensation for their material losses. However, as was highlighted in Sharon Linzey's article "Kurdish minority rights and Turkey's Compensation Law for Internally Displaced Kurds", published in Legal Review (2005) Issue 8, the law and its implementation has been strongly criticised. A brief summary of these criticisms follows: [159]

- First, the aim of the law is to compensate pecuniary damages. Thus, the suffering and pain caused by the displacement is not covered;

- The law compensates for material damages via the damage assessment commissions which are established at a provincial level. The commissions are composed of civil servants and one representative of the local bar association. With the exception of the local lawyer, all the members are appointed by the state. The lack of involvement of relevant, independent

157 See also, Bilgin Ayata and Deniz Yukseker; 'A belated awakening: National and international responses to the internal displacement of Kurds in Turkey'

158 Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 2002/56 Addendum; Profiles in displacement: Turkey E/CN.4/2003/86/Add.2, 27 November 2002

159 TOHAV,(Foundation for Society and Legal Studies); *IDPs and the Law on Compensation,* (July 2004) ,*The Evaluation and Implementation Process Report of "The Law on Compensation for Damage Arising from Terror and Combating Terror' on Grounds (*September 2005); www.tohav.org ; see also KHRP Legal Review (2005) Issue 8 at page 71 and KHRP Fact Finding Mission Report "The Status of Internally Displaced Kurds in Turkey and Compensation Rights", September 2005

bodies raises serious doubts over their capacity to reach fair conclusions when assessing damages;

- The law requires a strict casual connection between the damage caused and the actions of the state. There are possible consequences of the conflict which may result in damage, despite there being no immediate causal connection. This raises the issue of the objective responsibility of the state. However, the principle of the objective responsibility of the state is not included in the law on compensation. Moreover the compensation amounts awarded are often by no means sufficient to cover the damage caused, rebuild victims' houses and repair infrastructure;

- Under the law, claims must be submitted within one year of it coming into force in order to potentially benefit. In view of the scale of forced migration in Turkey, this does not allow sufficient time for all the claims to be submitted and may result in victims of displacement being unable to seek redress for their losses;

- The law requires villagers to provide documentary evidences, such as incident reports describing how the damage occurred, and its extent in order to substantiate their loss. In practice, the damage assessment commissions reject applications due to the failure to submit the required documents even though it is not possible for applicants to submit such documents. Moreover, in most of the cases, the gendarmerie often refuses to provide such documents for security reasons.

- The most important issue for the applicants is their inability to submit title deeds due to the absence of a cadastre (land registry) system and the social structure of the region. Although they are the possessor (zilyetlik) on their hands, this is not taken into account by the commissions, despite the case law of ECtHR;

- The law contains many exclusions. Those who have been convicted under certain provisions of the Criminal Code - such as article 169 which deals with aiding and abetting a terrorist organisation - are excluded from applying under the law, even if they were not guilty of the offence. This is completely against the principle of equality contained in the Turkish Constitution;

- The law also contains no provision for legal aid to assist villagers in preparing their claims or assessing the amount of compensation proposed

by the commission. Considering the low levels of education amongst the villagers and the complicated nature of the law, having legal representatives is very important for the IDP applicants. Unfortunately, the Legal Aid Services of some Bar Associations, including the Istanbul Bar, do not accept applications for legal aid due to restrictive provisions of the "Law on Legal Aid". For example, in its 2004 working period, the Istanbul Bar Association Legal Aid Service provided legal aid in 3250 instances, but none of these were IDPs. The law must be changed to that IDP applicants are provided with legal assistance free of charge.

In addition to the above, there remain a number of obstacles to return for any successful applicants. According to official figures, there are 57,601 village guards still on duty, and authorisation to return to the villages is sometimes only granted if returnees are willing to serve as village guards. Further, landmines and the renewal of armed clashes present other impediments to return.

Conclusion

Disease, malnutrition, unemployment, lack of education, disenfranchisement from broader society and a host of psychological and emotional problems transmitted from one generation to the next, combined with a high birth rate, can only lead to chaos and the degeneration of wider society. Given the few and ineffective measures that have been enacted by the Turkish authorities to address the situation of IDPs in southeast Turkey, it is clear that their situation remains an endemic problem, which still falls to be resolved. Furthermore, without a durable and peaceful solution to the conflict in the Southeast - which inherently creates new IDPs, sustains the village guard system and the embedded discriminatory attitude towards all displaced Kurds - no programme of rehabilitation and return to village can work. The international community is duty bound to intervene and insist that Turkey addresses the resolution of the conflict and help her develop a plausible mechanism for compensation. More than insist however, it must actively support such a process. Without international political and economic support, the Turkish state will never be in the position to implement a durable plan for peace, let alone any compensation scheme; and the plight of IDPs will not only continue but also spread more widely within the region.

Section 2: Case Summaries and Commentaries

A. ECHR Case News - Admissibility decisions and communicated cases

Prohibition of torture

Ayaz v. Turkey
(44132/98)

European Court of Human Rights: Decision of admissibility of 21 March 2006

Prohibition of ill-treatment- Right to an effective remedy- Articles 3 and 13 of the Convention.

Facts
This is a KHRP assisted case. The applicant is a Turkish national, born in 1965. He lives in Berlin, Germany. The facts of the case were disputed by the parties.

At the time of the events giving rise to the application, the applicant was a student at the Free University of Berlin and member of the student Union. In 1993, the applicant and several other members of the student committee arranged to travel to Iraq to liaise with a university. They planned to travel to Iraq via İstanbul. On 3 August 1993, the applicant and his colleagues arrived at Atatürk Airport in Istanbul, where they were arrested by the border police. The applicant and five other people were separated from the group and sent to the anti-terrorism section of the security directorate of Gayrettepe. There the police beat the applicant, threatened him with rape and insulted him. The following day, he was taken back to the airport and released. On 6 August 1993, he went to the local office of the Human Rights Foundation in İstanbul to complain about his ill-treatment. The doctor noted several serious injuries. The applicant commenced domestic proceedings against the police officers involved. However, on 18 May 1995 the Administrative Court of Istanbul issued a decision of non-prosecution against the police officers. On 2 May 1997, the case was automatically submitted to the Council of State, which confirmed the decision of the Administrative Court. The applicant's lawyer was

not made aware of this decision until 9 March 1998.

Complaints
The applicant complained that the ill-treatment he suffered whilst in custody was in breach of Article 3 of the Convention.

The applicant complained that during all the proceedings, he had never been heard in court and no decisions were notified to him, in breach of his right to an effective remedy under Article 13 of the Convention.

Held
The Court declared both complaints admissible, rejecting the Government's objections regarding the lateness of the application and the non-exhaustion of domestic remedies. The Government had raised an objection before the Court concerning the non-respect of the "six-month" regulation, claiming that this should have started running from 2 May 1997, the date of the Council of State decision, rather than the date when the applicant's lawyer became aware of the decision. The Court noted that the Government could not prove that notice of the decision of 2 May 1997 had been given to the applicant prior to March 1998 and therefore, the six-month period only started when he became aware of this final decision.

Sukhovoy v. Russia
(63955/00)

European Court of Human Rights: Admissibility decision of 24 November 2005

Prohibition of torture- Right to a fair trial- Right to an effective remedy- Articles 3, 5, 6 and 13 of the Convention.

Facts
The applicant, Kirill Yuryevich Sukhovoy, is a Russian national, who was born in 1982 and lives in Ivanovo.

On 4 January 2000, the police arrested a group of teenagers, including the applicant, who had allegedly robbed and beaten up two passers-by. The applicant was interrogated as a witness in the absence of a lawyer. According to the applicant, he was beaten up by a police officer at the time of interrogation in order to extort his confession. On 5 January 2000, the investigator issued an order for the applicant's detention on suspicion of having committed robbery. His mother retained a private lawyer for his defence and informed

an investigator about it. On 14 January 2000 the applicant was charged with robbery and on 25 February 2000 he was questioned as an accused, on both occasions in the presence of a state-appointed lawyer.

By a judgment of 26 June 2000 the applicant was convicted of robbery and sentenced to eight years' imprisonment. On 20 July 2000, the Ivanovo Regional Court dismissed the applicant's appeal and upheld the judgment.

The applicant's mother complained to the prosecutor's office about the applicant's alleged ill-treatment by the police. The prosecutor of the relevant district of Ivanovo refused to open proceedings as the applicant has never complained about his health or ill-treatment by police officers during the criminal proceedings against him. However, it was established that he had spent eight hours in the police station without a warrant for his detention in breach of the Code of Criminal Procedure, and that he had been unlawfully interrogated. These violations were communicated by the prosecutor's office to the head of the investigation department of the district police, and the responsible police officers were subjected to disciplinary sanctions. On 27 October 2000, following the applicant's mother's appeal, the prosecutor's office was ordered to conduct an investigation. Following the investigation, the prosecutor refused on several occasions to open criminal proceedings and this was upheld by the Ivanovo regional Court on 24 December 2002.

Complaints

The applicant complained under Article 3 that the conditions of his detention amounted to inhuman and degrading treatment. He also complained under Article 3 of the Convention that he was beaten up in the course of his interrogation.

The applicant complained under Article 5 § 1 (c) that his detention pending trial was unlawful, and that after his arrest on 4 January 2000 he was not informed promptly of the reasons for his arrest and of the charge against him, in breach of Article 5 § 2.

He further argued under Article 5 § 3 that he was not brought promptly before a judge or other officer authorised by law or released pending trial.

The applicant maintained under Article 6 § 1 that the judgment in his criminal case was based on inadmissible evidence and that the trial court failed properly to assess materials of the case. He further complained under Article 6 § 2 that an official report of one of the policemen, who took him to the police station, stated that he had arrested "criminals".

The applicant claimed that the conditions of his detention breached his rights under Article 6 § 3 (b) and (c) in that he could not prepare his defence properly and was denied legal assistance during his first interrogation. He also complained that the key investigator was a friend of the victim.

The applicant claimed that the investigation into his complaints did not comply with requirements of Article 13 of the Convention.

Held
The Court declared admissible, without prejudging the merits, the applicant's complaint concerning the conditions of his detention under Article 3.

The Court declared the remainder of the application inadmissible, finding in particular that the disciplinary sanctions against the police officers were a sufficient remedy for the applicant's unlawful detention.

Jašar v. the Former Yugoslav Republic of Macedonia
(69908/01)

European Court of Human Rights: Decision of admissibility of 11 April 2006

Prohibition of torture and ill-treatment- Right to an effective remedy- Articles 3 and 13 of the Convention.

Facts
The applicant, Mr Pejrusan Jašar, is a national of the former Yugoslav Republic of Macedonia and is of Roma origin. He was born in 1965 and lives in Štip.

In April 1998 the applicant and his friend F.D were having a drink. Two others customers were gambling. The man who lost pulled out a gun and several shots were fired. Five police officers arrived at the scene of the incident. One of them caught the applicant by his hair and he was taken to the police station with his friend. The applicant alleged that he had been beaten during the night in custody. His friend was also beaten and the following day, they were both released. The applicant went to the Emergency Aid Unit, where he was issued a medical certificate. It indicated that the applicant had sustained several bodily injuries but it did not specify their possible origin, their timing or the way in which they had been inflicted. The applicant had never been charged with any offence after those incidents.

In May 1998 he lodged a complaint with the Štip Basic Public Prosecutor's Office against an unidentified policeman and he also submitted a compensation claim against the respondent State and the Ministry of the Interior for the non-pecuniary damage he had suffered. One year later, having heard nothing about his complaint, the applicant's legal representative sent a first letter to the public prosecutor, which was followed by a second letter since no response had been received, but to no avail. On 25 May 1998 the applicant opened civil proceedings, submitting a compensation claim against the respondent State and the Ministry of the Interior for the non-pecuniary damage he had suffered as a result of the violence to which he had been subjected while in police custody. On 22 March 1999 the Štip Court of First Instance dismissed the applicant's claims as ill-founded. The applicant lodged an appeal which was dismissed by the Štip Court of Appeal on 5 October 1999, as was as his subsequent request for supervisory review.

Complaints

The applicant complained under Article 3 of the Convention that he had been subjected to acts of police brutality amounting to torture, inhuman and/or degrading treatment.

He also alleged that the prosecuting authorities had failed to carry out an effective investigation capable of leading to the identification and punishment of the police officers responsible for the treatment in breach of the procedural limb of Article 3 of the Convention.

The applicant complained that he has been denied effective remedy in breach of Article 13 of the Convention, read in conjunction with Article 3.

Held

The Court considered that the complaints under Articles 3 and 13 raise serious issues of fact and law under the Convention, whose determination requires an examination of the merits.

The Government submitted that the applicant had not exhausted all domestic remedies: for example, they claimed that he could have requested protection of his legal rights before the Supreme Court. The Court rejected the Government's submissions, considering that as such an action may be used only where the law does not provide for another means of judicial protection, and national law provides for the possibility of instituting criminal proceedings and of bringing a civil action for damages, it was not apparent that the applicant could have availed himself of the possibility of bringing an administrative dispute before the Supreme Court. Furthermore, when there are several remedies available, the victim is not required to pursue more than one. Moreover, it considered that those domestic remedies can not be seen as effective ones.

In relation to the six-month rule, the Government contended that although the proceedings before the public prosecutor were still pending, the six-month period had started to run after the applicant had been served with the Court of Appeal's judgment of 5 October 1999. The Court rejected these submissions, finding it could not consider that the application was lodged outside the six-month period, as the public prosecutor's investigation, requested by the applicant, is officially still open. Accordingly, the Court declared the application admissible.

Right to liberty and security

Hakobyan & others v Armenia
(34320/04)

European Court of Human Rights: Communicated on 6 December 2005

Right to liberty and security- Right to a fair trial- Freedom of expression- Freedom of peaceful assembly and association- Freedom from discrimination- Articles 5, 6, 10, 11 and 14 of the Convention

Facts
This is a KHRP assisted case. The applicants, Mr Hakob Hakobyan, Mr Gor Martirosyan and Mr Hamlet Petrosyan, are Armenian nationals, born in 1967, 1969 and 1959 and residing in the towns of Armavir, the village of Nairi and the village of Nalbandyan respectively.

The applicants are members of Armenian opposition parties: Mr Hakob Hakobyan and Mr Hamlet Petrosyan are members of the 'National Unity' party and Mr Gor Martirosyan a member of the 'Republic' party. A number of rallies organised by the opposition parties were held in Yerevan in March and April 2004. The applicants intended to attend demonstrations to be held on 5, 9 and 12 April 2004.

On 30 March 2004, the police visited the home of the first applicant and asked him to attend the police station. The applicant complied, believing that the purpose was to introduce himself to the head of the police station. The applicant was in fact arrested on suspicion of illegal possession of firearms. The record of arrest also alleged that he had resisted arrest. The following day, the Armavir Regional Court sentenced him to seven days' administrative detention for resisting arrest and using foul language. The hearing lasted no more than two minutes. The applicant was not given access to legal

representation or permitted to make submissions or examine witnesses. He served the full sentence, which expired on 6 April 2004.

On 2 April 2004, the second and third applicants were also arrested, the second on suspicion of hiding a wanted person at his home whilst the third was given no information for the reason of his arrest until three hours later, when he was given an administrative document stating that he had used foul language when being taken to the police station for a questioning in connection with a traffic accident. The third applicant refused to sign this document. Both were sentenced by the Armavir Regional Court to seven and four days' administrative detention respectively. The hearings lasted a few minutes and the applicants were not permitted to make representations or examine witnesses. They were also denied access to legal representation. The second applicant was sentenced to seven days' administrative detention, whilst the third received a sentence of four days. Both sentences were served in full.

On 6 April 2004, the final day of their sentence, the first and third applicants were released and taken to the Armavir Regional court where, after a brief hearing, they were sentenced to a further seven days of administrative detention on the basis that they had used obscenities at the police station. On 9 April 2004, the same events occurred to the second applicant, who was sentenced to a further four days' administrative detention and placed in the same cell as the first and third applicants. The applicants complained to the Ombudsman that they had been unlawfully taken to the police station and that their trial was not fair. However, no action was taken in response and the applicants were all released on 13 April 2004 having served their sentences in full.

Following their release, the applicants were subjected to continued observation and interference by the police. Between 20 and 24 April 2004, the three applicants lodged complaints with the Ombudsman about the continuing police observation. On 6 August 2004, they were told that their case was still under consideration.

Complaints

The applicants complained that their detention was arbitrary as they were in fact detained because of their political allegiances and their intention to attend opposition party demonstrations in violation of Article 5(1) of the Convention. They further argued that the failure to inform the applicants of the legal and factual nature of their arrests and to provide them with access to their legal representatives amounted to a violation of Article 5(2) and 5(4) of the Convention respectively.

The applicants complained under Article 6(1) that they were deprived of a fair and

public hearing by not being allowed the opportunity to examine witnesses, to detail their defence and that they were denied legal representation. The second applicant complained that the failure to inform him of the accusations against him interfered with his right to a fair trial, violating Article 6(3)(a) of the Convention. All three applicants also complained that the refusal to allow them access to a lawyer prior to or during the hearing and to be given adequate time to prepare their defence amounted to violations of Article 6(3)(b) and (c). The applicants also complained that the refusal to allow them the opportunity to examine witnesses violated Article 6 (d) of the Convention.

The applicants claimed that their detention amounted to punishment for their political allegiances interfering with their right to freedom of expression, violating Articles 10 and 11 of the Convention.

The applicants complained under Article 13 of the Convention that no remedy was available to them against their convictions. The time-limits for appeals against the first sentence imposed had expired by the time of their release on 13 April 2004. They were also subject to intimidation from the authorities which inhibited them from appealing their second detention sentences, denying them an adequate remedy.

Communicated under Articles 5, 6(1), 6(3)(a)-(d), 10, 11 and 13 of the Convention.

Tadevosyan v. Armenia
(41698/04)

Ill-treatment – Right to liberty and security – Fair trial – Freedom of assembly and expression – Right to private and family life – Right to an effective remedy – Freedom from discrimination – Articles 3, 5, 6, 8, 10, 11, 13 and 14 of the Convention

European Court of Human Rights: Communicated on 24 January 2006

Facts
This is a KHRP assisted case. The applicant, Mr Myasnik Tadevosyan, is an Armenian national who was born in 1944 and lives in the village of Mrgashat, Armenia.

The applicant is the Chairman of the Armavir regional branch of the "National Unity" party, one of the major opposition parties. Prior to his retirement, the applicant worked in law enforcement for 30 years, including ten years as chief of police of the Metsamor Police Station.

During April and May 2004, a series of rallies were held by opposition parties in Yerevan calling for a "referendum of confidence" in the incumbent President.

On 4 April 2004 two police officers came to the applicant's home and took him to the Metsamor Police Station, where an administrative case was initiated against him for using offensive language towards the officers. The applicant alleges that the Chief of Police informed him that he was being arrested so that he could not participate in the demonstration due to be held the following day.

On 5 April 2004, the applicant was brought before a court for a brief hearing at which he had no legal representation and there was no examination of the witnesses. He was sentenced to ten days' administrative detention for "maliciously disobeying the lawful order of the police officer". The applicant served his sentence in full and subsequent to his release was subjected to frequent police visits to and searches of his home.

On 20 May 2004, the applicant was visited by three police officers at his home who informed him that the Chief of the Police Station wanted to talk to him. At the station he was asked to sign a statement that he had used offensive language when stopped by police officers the previous night. The applicant refused and when he spoke to the Chief of Police he was told that he was to be detained for ten more days.

At his court hearing, which was brief, the applicant was again unrepresented and no witnesses were examined. The applicant was sentenced to ten further days' administrative detention for using foul language against the police, obstructing them from performing their work and refusing to obey their lawful orders. The applicant tried to explain that the police reports were false but the judge did not address his submissions.

The applicant served his sentence in full in a cell measuring 10 square metres along with nine other prisoners. According to the applicant, there were no beds, there was poor ventilation, access to toilet facilities and drinking water was limited to two times per day, and he was given only one meal a day.

Complaints

The applicant submitted that the circumstances of his arrests and detentions as well as his treatment while in police custody were degrading and therefore in violation of Article 3 of the Convention.

The applicant submitted that his detentions were arbitrary and unlawful in breach of Article 5(1) of the Convention.

The applicant complained that he was deprived of a fair and public hearing in respect of each of his detentions, in breach of Article 6(1).

The applicant complained that his right to respect for his private and family life was violated since he was not allowed to contact his family, either by way of visits or by written correspondence, while in detention. Moreover, he was not allowed to correspond with a lawyer.

The applicant complained that there was no legitimate aim to the restrictions on the exercise of right to freedom of expression under Article 10 of the Convention. Rather, his detentions were merely a pretext to unlawfully interfere with the opposition campaign of peaceful protests in April and May 2004.

The applicant submitted that his arrests and detentions violated Article 11 of the Convention since it was aimed at silencing his political opposition, which he expressed by, *inter alia*, attending political demonstrations.

The applicant complained that his right to an effective remedy under Article 13 of the Convention was violated since the option to appeal was not available for him.

The applicant submitted that because of his political opinion and active involvement with the 'National Unity' opposition party, he was targeted and subjected to discriminatory treatment in breach of Article 14 of the Convention.

Communicated under Articles 3, 5, 6, 8, 10, 11, 13 and 14 of the Convention.

Saddam Hussein v. Albania and 20 others
(23276/04)

European Court of Human Rights: Admissibility decision of 14 March 2006

Right to life- Prohibition of torture and ill-treatment- Right to liberty and security- Right to a fair trial- Prohibition of the death penalty in all circumstances- Articles 2, 3, 5, 6 and Protocols Numbers 6 and 13 to the Convention.

Facts
The applicant, Mr Saddam Hussein, is an Iraqi national who was born on 28 April 1937. He is the former President of Iraq and is currently detained there.

On 20 March 2003 a coalition force, composed of the 21 States involved in the case under the leadership of the United States, invaded Iraq. In early April US forces captured Baghdad. A "Freedom Message" announced the creation of the Coalition Provisional Authority (CPA), a civilian administration that would exercise powers of government temporarily. On 13 December 2003, the applicant was captured near Tikrit by US soldiers. On 8 June 2004 the UN Security Council adopted Resolution 1546, which planed the cessation of the CPA by 30 June 2004 and the founding of a Sovereign Interim Government. Earlier than foreseen, on 28 June 2004 CPA's authority was transferred to the new Iraqi Interim Government. On 30 June 2004 the applicant was deferred to the Iraqi Government for trial.

Complaints

The applicant complained about his arrest, detention and handover under Article 2 of the Convention.

The applicant also relied on Article 3 of the Convention to complaint about his arrest, detention and handover.

The applicant also relied on Article 5 of the Convention for the same complaints.

He complained under Article 6 of the Convention about the ongoing trial.

The applicant alleged a breach of Article 1 of the 6th and 13th Protocols, prohibiting the death penalty in all circumstances. Indeed, he maintained that he would be executed following a finding of guilt after a "show trial" for which he lacked even the basic tools of defence.

The applicant argued that he fell within the jurisdiction of the respondent States, whom he considered continued to hold *de facto* power in Iraq even after the June 2004 transfer. Indeed he stated that, since the coalition States were, and continued to be, the occupying powers, they are responsible for respecting human rights in Iraq. Moreover, the applicant maintained that, since he was arrested and detained, he was under the authority and control of the coalition States. Finally, he stated that, the military agents responsible for the impugned treatment were and continued to be under the control of the respondent States.

Held

The Court considered that the applicant had not established that he fell within the jurisdiction of the respondent States on any of the bases alleged, within the meaning of Article 1 of the Convention. The applicant had not invoked any established principles

of international law proving that he fell within those States' jurisdiction on the basis that they were part of a coalition. Indeed all operations were under the leadership of the United States.

Moreover, even if he could have fallen within a State's jurisdiction because of his detention by it, he did not show that any one of the respondent States had any responsibility for, or any involvement in, his arrest and detention (see, *Issa and Others v. Turkey*, No. 31821/96, §§ 71-82, 16 November 2004 and *Öcalan v. Turkey* [GC], No. 46221/99, § 91, ECHR 2005). From then on, the Court unanimously declared the application inadmissible.

Right to fair trial

Çetinkaya and Çağlayan v. Turkey
(3921/02)

European Court of Human Rights: Admissibility decision of 5 January 2006

Prohibition of torture- Right to Liberty and Security- Fair trial- Right to an effective remedy- Prohibition of discrimination- Articles 3, 5, 6, 13 and 14 of the Convention.

Facts
The applicants, Ms Fahriye Çetinkaya and Mr Akın Çağlayan, are Turkish nationals who were born in 1978 and 1980 respectively, and live in Istanbul.

On 29 July 2001, the applicants were arrested on suspicion of having participated in an illegal demonstration in Ümraniye. The second applicant alleged that, while being arrested by the police, people on the street heard the accusations against him and attacked him, and the police did not protect him. He was examined by a doctor, whose medical report found that he had an abrasion on his upper lip and a hyperaemia on the right side of his chest. The report stated that a specialist should be consulted in relation to these injuries. The first applicant did not allege ill-treatment at this stage.

In their statements dated 31 July 2001, both applicants admitted having organised and participated in illegal demonstrations in support of the PKK. In August 2001 they appeared before the public prosecutor, where they denied all the allegations made against them and stated they had been signed under intimidation. They filed two separate petitions with the Fatih Public Prosecutor, complaining about their ill-treatment during their arrest and detention in police custody.

On 1 November 2001, the first hearing regarding their alleged involvement with the PKK was held before the Istanbul State Security Court. The court declared the case was without jurisdiction and transferred the case file to the Ümraniye Criminal Court of First Instance. The criminal case against the applicants is still pending before the Ümraniye Criminal Court of First Instance.

Regarding the ill-treatment, on 5 March 2002 the Fatih Public Prosecutor rendered a decision of non-prosecution,, holding that the first applicant's injuries were caused by the people who had attempted to lynch him prior to his rescue and arrest by the police. On 25 March 2002, the second applicant filed an objection against the decision of non-prosecution. On 6 May 2002 the Beyoğlu Assize Court dismissed his objection.

On 9 August 2002, the Public Prosecutor rendered a decision not to prosecute in respect of the police officers who were allegedly responsible for the first applicant's ill-treatment. On 3 September 2002 she filed an objection against this decision. On 17 December 2002 Beyoğlu Assize Court dismissed her objection.

Complaints

The applicants complained that they were subjected to various forms of ill-treatment in police custody, in violation of Article 3 of the Convention.

The applicants complained that their arrest and detention were in breach of Article 5 of the Convention.

The applicants then alleged under Article 5 § 5, in conjunction with Article 13, that it was not possible for them to claim compensation for a violation of Article 5 in the domestic courts.

The applicants further claimed violations of Article 6 § 3 (a) and (b) of the Convention, as they were not informed promptly of the nature and cause of the accusations against them and alleged that they were deprived of their right to defend themselves as they were not allowed to consult a lawyer during their questioning by the police.

The applicants invoked Article 6 and 13 in conjunction with Article 3, arguing that they were denied access to a court for their complaints concerning the ill-treatment they suffered during their arrest and whilst in custody, and that there was no effective investigation into the treatment to which they were subjected while in police custody.

Finally, the applicants complained, under Articles 13 and 14 of the Convention, about the difference in the procedure applicable to offences determined by the State Security

Court.

Held
The Court observed that the essence of the applicants' complaint under Article 6 concerns the domestic authorities' alleged failure to mount an effective criminal investigation into the alleged ill-treatment by the police officers. The Court considered that it could not determine the admissibility of these complaints and that therefore it was necessary to give notice of this part of the application to the respondent Government.

The Court considered that the applicants' arrest and detention may be considered to have been "in accordance with a procedure prescribed by law" under Article 5 and that it could not determine the admissibility of the complaints under Article 5 §§ 3, 4 and 5 of the Convention. Therefore, it was necessary to give notice of this part of the application to the respondent Government.

The Court noted that the proceedings are still pending and so the complaints under Article 6 § 3 (a), (b), (c) and (d) were premature.

The Court examined the applicants' allegation under Article 14 and rejected this complaint as being ill-founded. The Court recalled that the distinction made between the types of offences tried by the State Security Courts and the ordinary criminal courts has an objective and reasonable justification based on the gravity of the crimes under consideration (see, for example, *İçöz v. Turkey*, no. 54919/00, partial admissibility decision of 9 January 2003, and, *mutatis mutandis*, *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999).

The Court decided to adjourn the examination of the applicants' complaints concerning their alleged ill-treatment in police custody and their right to an effective remedy in this regard; the length of their detention in police custody, the alleged deprivation of their right to challenge the lawfulness of their arrest and the lack of available compensation in this respect. The Court declared the remainder of the applications inadmissible.

Right to respect for private and family life and home

Right to enjoyment of property

İçyer v. Turkey
(18888/02)

European Court of Human Rights: Admissibility decision of 12 January 2006

Obligation to secure the rights and freedoms defined in the Convention - Right to a fair trial- No punishment without law - Right to respect for private and family life - Right to an effective remedy - Prohibition of discrimination - Prohibition of abuse of rights- Forceful eviction from home – Articles 1, 6, 7, 8, 13, 14, 17, Article 1 of Protocol No. 1 of the Convention.

The facts
The applicant, Aydin İçyer, is a Turkish national who was born in 1946 and until October 1994 lived in Eğrikavak, a village of the Ovacık district in Tunceli (Turkey).

On 3 October 1994, the inhabitants of Eğrikavak were forcibly evicted from their village by security forces on account of disturbances in the region. The security forces also burnt down the applicant's home and he and his family subsequently moved to Istanbul. On 4 October 1994 the applicant lodged a petition with the Public Prosecutor's Office in Ovacık, which declined its jurisdiction and sent the case to the Administrative Council in Ovacık. On 25 October 1995, the Administrative Council informed the applicant that there would not be an investigation into his allegations, as the perpetrators could not be identified. On 26 October 2001, the applicant requested permission to return to his village and was told his request would be considered under the 'Return to Village and Rehabilitation Project'.

According to the Government, the inhabitants of Eğrikavak had voluntarily left their village because of intense terrorist activities in the region and threats issued by the PKK. There was nothing preventing villagers from returning to their villages and some had already done so.

The Government subsequently submitted that Damage Assessment and Compensation Commissions were set up in 76 provinces under the Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism (the 'Compensation Law of 27 July 2004'). The Government claimed that those who had suffered damage as a result of terrorism or of measures taken by the authorities to combat terrorism could lodge

an application with the relevant commission and claim compensation. According to the Government, 170,000 had already applied, whose applications were pending before the commissions. The Government also claimed that many villagers had already been awarded compensation for the damage they had sustained.

Complaints

The applicant complained that the authorities' refusal to allow him to return to his home and land resulted in a violation of the States' obligation to secure the rights and freedoms defined in the Convention under Article 1.

The applicant maintained that his right to a fair trial under Article 6 of the Convention was denied.

He argued that Article 7 of the Convention was violated since the authorities refused to allow him to gain access to his possessions. He further complained under Article 8 of the Convention that his right to respect for private and family life and home was violated.

The applicant complained under Article 13 of the Convention that he was denied an effective remedy since an effective domestic remedy did not exist.

The applicant also argued under Article 14 of the Convention that the authorities' refusal to allow him to enjoy his property was discriminatory.

The applicant further complained that the security forces' actions were in breach of Article 17 (prohibition of abuse of rights).

He also argued that his right to enjoyment of property was violated in breach of Article 1 of Protocol No. 1 to the Convention.

Held

The case was declared inadmissible.

Commentary

In relation to the applicant's claims under Article 8 and Article 1 of Protocol No 1, the Court examined the Government's objection that the applicant had failed to exhaust the new remedy introduced by the Compensation Law of 27 July 2004 was well-founded. It observed that the applicant could return to his village without any hindrance from the authorities and that he could claim compensation under the new law for the damage he

had allegedly sustained as a result of the authorities' refusal to allow him to gain access to his possessions for a substantial period of time.

As to the applicant's contention that he should not be required to exhaust the new remedy offered by the Compensation Law, which had entered into force after he had lodged the present application, the Court acknowledged that the assessment of whether domestic remedies have been exhausted is normally made with reference to the date of the introduction of the application. However, in exceptional cases the Court may adopt a different position and depart from this rule if the circumstances of those cases justify such a departure. The Court considered that there are several factors which favoured an exception from this rule in the present case. Firstly, section 7(c) of the Compensation Law covers the type of damage suffered by the applicant and recent practice of the compensation commissions indicates that the new remedy is accessible and provides reasonable prospects of success. Secondly, the most appropriate strategy to be followed in situations where the Court points to structural or general deficiencies in national law or practice is to ask the respondent Government to review, and where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court (*Broniowski v. Poland* judgment ([GC], no. 31443/96, § 191, ECHR 2004).

The Court therefore considered that the applicant should be required by Article 35 § 1 of the Convention to lodge an application with the relevant compensation commission under the Compensation Law of 27 July 2004 and to claim compensation for the damage he sustained as a result of his inability to gain access to his possessions. The applicant's complaints under Article 8 and Article 1 of Protocol No. 1 were therefore rejected under Article 35 of the Convention for non-exhaustion of domestic remedies.

In respect of the applicant's complaints under Article 13, the Court noted that the compensation commissions seemed to be operational in 76 provinces, including Tunceli and Diyarbakır, which could be considered the epicentre of the internal displacement phenomenon, and that there were already 170,000 people seeking a remedy before the commissions. It found that the remedy was available in practice since those that had sustained damage in cases of denial of access to property, damage to their property or death or injury could successfully claim compensation via the Compensation Law of 27 July 2004. It followed that the applicant's complaint under Article 13 was manifestly ill-founded.

There are approximately 1,500 similar cases from south-east Turkey (where applicants complain about their inability to return to their villages) registered before the Court. This decision strongly suggests that they will all be declared inadmissible and the applicants will be told to apply to the Compensation Commissions under the Compensation Law

of 27 July 2004. The Court considered that the availability of this remedy satisfied the 'effective' test established in the case of *Doğan and Others v Turkey* (application nos. 8803-8811/02, 8813/02 and 8815-8819/02). In this judgment, the Court identified the presence of a structural problem with regard to internally displaced people and indicated possible measures to be taken in order to put an end to the systemic situation in Turkey. The steps taken by the authorities following the judgment, including enacting the Compensation Law of 27 July 2004, with a view to redressing the Convention grievances of those denied access to their possessions in their villages meant that the Government was deemed by the Court to have fulfilled its duty to review the systemic situation at issue and to introduce an effective remedy.

B. ECHR Substantive Cases

Right to life

Kaya and Others v Turkey
(33420/96; 36206/97)

European Court of Human Rights: Judgment of 22 November 2005

Death in police custody, extrajudicial killing – Right to life, Prohibition on inhuman treatment or punishment, Unlawful arrest and detention, Respect for family life – Articles 2, 3, 5, 6, 8, 13, 14, 18.

Facts
This is a KHRP assisted case. The applicant, İbrahim Kaya, is a Turkish national who was born in 1972. He, along with nine other applicants, made an application to the Court in relation to the death of their relatives Neytullah İlhan, Abdullah İlhan, Halit Kaya Ahmet Kaya Ali Nas, Lokman Demir, Hamit Yılmaz, Abdulhalim Yılmaz and Beşir Nas in January 1996, all of whom died whilst in the custody of the police.

On 15 January 1996, the applicants' relatives were being transferred from Taşkonak gendarmerie station to Kordu gendarmerie station where they were being held for alleged links to the PKK. The minibus they were being transported in was attacked on the road to Güçlükonak. The gendarmes escorting the relatives in a separate vehicle returned fire. The shooting, which lasted around 30 minutes, ended with the minibus

being destroyed and its occupants killed. The body of the driver, Beşir Nas, was found a few metres from the minibus, with gunshot wounds. The bodies of the other ten people in the minibus were burnt to ashes. According to the report on the scene of the incident, 27 cartridges were found around the vehicle. Several marks made by bullets and rockets were found on the vehicle and three rockets found nearby. The public prosecutor's office opened an investigation, in the course of which a number of statements were taken.

Complaints

The applicants complained under Article 2 § 1 of the Convention that their relatives were the victims of an extrajudicial execution.

They further complained that the authorities had failed to conduct a serious inquiry into their relatives' deaths in breach of Article 2 § 2 of the Convention.

They also complained under Article 3 of the Convention about the suffering they themselves had undergone as a result of the death of their relatives.

They asserted that their relatives had been detained unlawfully in breach of Article 5 § 1 of the Convention.

The applicants also argued that the length of their relatives' detention exceeded the reasonable time requirement of Article 5 § 3 of the Convention.

In addition, relying on Article 8 of the Convention, the applicant İbrahim Kaya complained that his right to respect of private and family life was breached, in particular since he had been unable to provide his father with a proper religious funeral and had been unable to return to his village since the incident.

The applicants further complained under Article 6 of the Convention in conjunction with Articles 13 and 14 that the lack of effective investigations deprived them of their right to access to a court and their right to an effective remedy.

Held

With regard to the alleged violations of Article 2, the Court held that the allegations that the applicants' relatives had been the victims of an extrajudicial execution were not based on reliable evidence such as confirmation by eyewitness statements or other evidence but rather were based more on hypothesis and speculation. Further, the Court did not hold that a violation of Article 2 had occurred in failing to prevent the deaths.

The Court did however, unanimously, hold that there had been a violation of Article 2

in that the authorities had not conducted an adequate and effective investigation into the incident. First, the respondent Government had failed to carry out a full autopsy. Second, the investigations at the scene of the incident had not been conducted with the thoroughness as necessitated by such cases. Finally, with one exception, no statements had been taken from the gendarmes responsible for escorting the minibus until more than six years after the incident.

The Court held that despite the deep suffering undoubtedly caused to the applicants by the death of their relatives, their allegations of an extrajudicial execution by agents of the State had not been proven. Moreover, based on the material before it, it did not appear that the level of severity required by Article 3 in situation of that particular kind had been attained. The Court thus held unanimously, that there had been no violation of Article 3.

The failure to officially record the applicants' detention and to provide details such as the date of the arrest, the place of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it was deemed by the Court as being incompatible with the very purpose of Article 5. Further, the Government failed to produce a copy of the statement made by an individual alleging the relatives' links to the PKK upon which they were taken into custody. In those circumstances the Court held, unanimously, that there had been a violation of Article 5.

The Court noted that İbrahim Kaya had not supplied evidence in support of his allegations, and thus held, unanimously, that there had been no violation of Article 8.

With regard to the complaints under Articles 6, 13 and 14, the Court decided to examine them under Article 13. Having found the judicial investigation had not provided an adequate basis on which to establish the circumstances in which the applicants' relatives had died, the Court held that there had been a violation of Article 13, the requirements of which went beyond the obligation to conduct an inquiry imposed by Article 2.

In light of all its findings, the Court did not consider it necessary to examine the complaint under Article 18 separately.

The Court awarded the applicants EUR 15,000 each for non-pecuniary damage. It awarded EUR 5160 to İbrahim Kaya and EUR 3000 to the other applicants jointly for costs and expenses.

Commentary

In this case, the Court held that there had been a violation of Article 2 in that the

authorities had failed to carry out an effective and adequate investigation into the deaths of detainees in their custody. However, the Court considered that the respondent Government had taken all the necessary steps to protect the lives of the applicants' relatives and therefore did not find a violation of Article 2 in this respect.

The Court recognised the difficult situation in south-east Turkey, where a state of emergency had been in force at the time of the events and where the risk of an incident was higher compared to the rest of the country. However, the Court did not regard as contentious the measures taken by the security forces with regard to the custody, escorting and transferring arrangements for detainees. There were four guards escorting the detainees in the minibus, which was in turn escorted by a gendarmerie vehicle, whilst the whole area was under military control. It was not possible for the authorities to prevent the departure of the convoy or to alter the route since they only became aware of the imminent attack minutes before it took place. Further, the Court considered that the authorities could not be criticised for not having taken additional measures, since the existence of a real and substantial risk had not been sufficiently foreseeable.

In relation to Article 3, the Court did not hold that the severity of the psychological pain and suffering inflicted on the applicants was of a sufficient severity to amount to a breach of that Article.

Kanlıbaş v. Turkey
(32444/96)

European Court of Human Rights: Judgment of 8 December 2005

Right to life- Prohibition of torture- Articles 2 and 3.

Facts
This is a KHRP assisted case. The applicant, Hüseyin Kanlıbaş, is a Turkish national who was born in 1960. He lives in Izmir.

The applicant is the brother of Ali Ekber Kanlıbaş, a local PKK leader who died in January 1996 during an armed confrontation with the security forces. On 7 January 1996 the gendarmerie forces on duty in the Kangal area were informed that a group of about ten armed PKK militants had moved into the surroundings of the neighbouring village of Yellice. A military operation was launched in the morning of the following day and at about midday a very violent clash began between the security forces and the militants they were hunting. Five of the attackers, including Ali Ekber Kanlıbaş, were killed. An

investigation was immediately opened, which revealed that Ali Ekber Kanlıbaş had a bullet wound which had destroyed his left eye, a wound ten centimetres square at the level of his right shoulder, two chest wounds, two more wounds over the left kidney and a 20-centimetre-long section of his leg had been destroyed.

On 13 January 1996 Mr Kanlıbaş's body was handed over to the applicant. He took the body out of its coffin to wash it in accordance with religious tradition and noticed that his brother had suffered mutilation. On 24 January 1996, the applicant wrote to the Human Rights Association in Diyarbakır complaining of the mutilations inflicted on his brother's body. On 8 May 1998, the Kangal public prosecutor's office discontinued proceedings against "the forces of the Amasya command post and the security forces" accused "of negligence in the performance of judicial duties, of transgressing the threshold of absolute necessity [for the use of force] and of ill-treatment".

Complaints

The applicant complained that the Turkish authorities had not conducted an appropriate and effective investigation into the circumstances surrounding the death of his brother in breach of Article 2 of the Convention.

The applicant complained under Article 3 of the Convention about the mutilations inflicted on his brother's body.

He also complained under Article 3 of the Convention about the suffering he himself endured as a result of the failure to adequately investigate the suffering.

The remainder of the complaints were declared inadmissible in April 2005: see Issue 8 of KHRP Legal Review for a summary.

Held

The Court held unanimously that there had been a violation of Article 2 on account of the inadequacy of the investigation conducted in the case.

The Court held unanimously that there had been a violation of Article 3, in respect of the applicant, on account of the inadequacy of the investigation conducted into the mutilations.

The Court awarded Hüseyin Kanlıbaş EUR 7,500 for non-pecuniary damage and EUR 10,000 for costs and expenses. It also awarded EUR 12,500 to the dependants of his deceased brother for non-pecuniary damage.

Commentary
The Court reiterated that Article 2 together with Article 3 enshrines one of the basic values of the democratic societies making up the Council of Europe. In relation to Article 2 procedural limb, the Court noted that an official investigation was in fact opened by the Sivas public prosecutor's office. However, the Court was not convinced that the prosecuting authorities and the military authorities concerned had acted with the speed, impartiality and determination necessary to establish as thoroughly as possible the circumstances of the armed clash and the responsibilities arising from it. The mere fact that the Turkish Government had been unable to list all the troops who had taken part in the engagement illustrated the incomplete and inadequate nature of the inquiry. Moreover, the applicant had been practically excluded from the judicial investigation.

With regards to the suffering of the applicant, the Court stressed that whether a family member of a "killed person" is a victim of treatment contrary to Article 3 will hinge on the existence of certain factors which renders the applicant's suffering distinct from the emotional distress inevitably caused by the loss of a close relative. Knowing that the absolute prohibition of Article 3 gives the authorities the obligation to undertake an effective investigation, in the instant case, the Court held that there had been a violation of Article 3 of the Convention.

Şeker v. Turkey
(52390/99)

European Court of Human Rights: Judgment of 21 February 2006

Right to life-Prohibition of torture- Lack of an effective investigation- Disappearance and killing-Right to an effective remedy - Prohibition of discrimination- Articles 2, 3,5,6,8,13,14 and 38 of the Convention.

Facts
This is a KHRP assisted case. The applicant, Mr Mehmet Mehdi Şeker, is a Turkish national of Kurdish origin, who was born in 1971 and lives in Bismil. The facts of the case where disputed by the parties.

On 9 October 1999, the applicant's son, Mehmet Şah Şeker, left his workplace in Bismil but never arrived home. Three days later, two people informed the applicant that they had seen four persons forcing someone into a car. The applicant believed that this was his son and alleged that his son was abducted and killed by agents of the State.

The applicant had tried to file numerous petitions and had requested that the authorities carry out an investigation about the disappearance of his son. No action was taken until the beginning of 2000, when the applicant was requested by the public prosecutor at the Diyarbakır State Security Court to give a blood sample in order to compare his DNA with that of corpses found in the houses of alleged Hizbullah members. On 14 October 2004, the applicant was informed that the DNA analysis could not be carried out as there was insufficient DNA in the bones of the corpses.

In March 2005, one of the applicant's legal advisers informed the applicant that he had seen a copy of the university identity card of Mehmet Şah Şeker in the file against the leaders of the Hizbullah. The applicant requested the public prosecutor at the Diyarbakır State Security Court to provide him with this document; the prosecutor was unable to do so.

Complaints

The applicant submitted that his son was arrested and detained by members of the Turkish security forces and was now presumed dead, in violation of Article 2 of the Convention.

The applicant alleged that the abduction and disappearance of his son and the suffering that he had endured on account of his son's disappearance was in violation of Article 3 of the Convention.

He alleged under Article 5 of the Convention that his son had been deprived of his liberty unlawfully. The applicant further contended that the investigation was not effective, violating his right of access to a court under Article 6, and his right to an effective remedy under Article 13.

He submitted under Article 6 and 8 of the Convention that his son had been denied access to a lawyer and contact with members of the family while in police custody. The applicant also maintained that the authorities had withheld information from him under Article 8.

He also complained that there was an administrative practice of discrimination towards people of Kurdish origin, in breach of Article 14, in conjunction with Articles 2, 3, 5, 6, 8 and 13 of the Convention.

In his post-admissibility observations, the applicant invited the Court to find that the Government had failed in his duty to assist the Court because it failed to submit crucial documents, in violation of Article 38.

Held
The Court held that there was no proof "beyond reasonable doubt" that the abduction of the applicant's son was carried out by State agents, and subsequently his death. Therefore, Article 2 of the Convention had not been breached.

However, the Court did consider that the domestic authorities had failed to carry out an adequate or effective investigation, violating the procedural limb of Article 2.

The court did not consider any special factors existed which would justify a finding of a violation of Article 3.

As regards the applicant's complaints under Articles 5, 6 and 8, the Court reiterated that it has not been established beyond reasonable doubt that any State agent was involved. Therefore, there was no factual basis on which to conclude that there had been a violation of either Articles 5, 6 or 8.

The Court considered the applicant's complaint under Article 13 and held that the applicant had been denied an effective remedy. Further, the Court found no evidence of discrimination under Article 14.

The Court considered that as it had found a violation of Articles 2 and 13 of the Convention, the further examination of the applicant's submission under Article 38 was not necessary.

The Government was ordered to pay EUR 10,000 for non-pecuniary damage to the applicant and the beneficiaries of the estate of Mehmet Şah Şeker jointly and EUR 7,000 for costs and expenses.

Commentary
In relation to Article 2 substantive, the Court recalled that it adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar presumptions of fact. In the instant case, the Court considered that the circumstances in which the applicant's son disappeared remain a matter for speculation and supposition. Accordingly, there was an insufficient evidentiary basis on which to conclude that the applicant's son was, beyond reasonable doubt, abducted and subsequently killed by State agents in police custody as alleged by the applicant. Therefore, the Court did not hold a violation of Article 2 of the Convention.

The applicant complained that, as a relative of the primary victim, he had suffered a

violation of Article 3 in his own right. The Court recalled that it is difficult for families of human rights victims to establish a breach of Article 3 for their own. Indeed, the suffering of the applicant must go beyond a dimension and character distinct from the emotional distress, and 'special factors' must exist which justify such a violation. The Court has held that these special factors will be established according to the authorities' reactions and attitudes rather than to the particular facts and circumstances of the death or disappearance. In the instant case, the Court observed that there was nothing in the content or tone of the authorities' replies could be described as inhuman or degrading treatment. The Court noted that even if the inadequacy of the investigation may have caused the applicant suffering, no special factors existed which would justify finding a violation of Article 3.

Although the Court had not found it to be proved beyond reasonable doubt that agents of the State carried out or were implicated in the disappearance of the applicant's son, however, that does not preclude the complaint in relation to Article 2 from being "arguable" for the purposes of Article 13. The authorities thus had an obligation to carry out an effective investigation into the circumstances surrounding the disappearance of the applicant's son. Here, no effective investigation can be considered to have been conducted in accordance with Article 13 and therefore the Court found a violation.

Uçar v. Turkey
(52392/99)

European Court of Human Rights: Judgment of 11 April 2006

Right to life-Prohibition of torture and ill-treatment- Right to liberty and security-Right to a fair trial-Respect of private and family life- Right to an effective remedy-Prohibition of discrimination- Articles 2, 3, 5, 6, 8, 13 and 14.

Facts
This is a KHRP assisted case. The applicant, Mr. Seydo Uçar, is a Turkish national who was born in 1948 and lives in Gaziantep. The facts of the case were disputed by the parties.

On 5 October 1999, the applicant's son, Cemal Uçar, was abducted by four persons, believed to be policemen. Between 11 and 26 October 1999, the applicant filled petitions with the Public Prosecutor's office at the Diyarbakır State Security Court and the Diyarbakır public prosecutor. He urged the authorities to carry out an investigation and requested to be informed of the whereabouts of his son. Cemal Uçar was detained from

5 October to 2 November 1999. During his detention, he was kept blindfolded, deprived of food and was subject to electric shocks. On 2 November 1999 he was brought to the city stadium in Diyarbakır and released.

Within 3 to 5 minutes of the kidnappers' departure, police arrived and arrested Cemal Uçar. The police found an identity card in his pocket, which the applicant alleged was placed there by his kidnappers. He was taken to the Diyarbakır State Hospital and examined by a doctor who noted that he had several injuries on various parts of his body.

On 10 November 1999, Cemal Uçar was forced by the police to sign a statement which claimed he was responsible for the organisation of Hizbullah activities in Diyarbakır. On the same day, he appeared before the public prosecutor and subsequently before the Diyarbakır State Security Court, where he denied any involvement in such activities. The court ordered him to be detained on remand. He was transferred to Diyarbakır E-type prison, where he died on 24 November 1999. Following an investigation, it was found that Cemal had committed suicide.

Complaints

The applicant alleged that the death of his son in Diyarbakır E-type prison gave rise to a violation of Article 2 of the Convention.

He also alleged under Article 2 that the authorities had failed to carry out an adequate and effective investigation into his death.

The applicant complained under Articles 3 and 5 of the Convention that his son had been abducted and tortured by kidnappers who were acting with the support, knowledge and acquiescence of the authorities. He also submitted under the same Articles that his son had been subjected to coercion while in police custody.

The applicant claimed that there had been no effective investigation into his son's abduction and ill-treatment in breach of Article 3 of the Convention. He further contended that he had suffered anguish and distress on account of the disappearance of his son and the failure of the authorities to investigate the disappearance in violation of Article 3 of the Convention.

He further maintained under Article 5 § 3 of the Convention that his son had been kept in police custody for nine days without being brought before a judge or other officer authorised by law to exercise judicial power, and under Article 5 § 5 of the Convention that there was no remedy in domestic law to obtain compensation for the alleged

violation of Article 5 § 3.

The applicant invoked Article 6 to complain that his son had been denied access to a lawyer when he was in police custody.

The applicant submitted under Article 8 of the Convention that he had not had access to his son when he had been in police custody.

He complained that he was denied an effective remedy under Article 13 of the Convention. The applicant also argued under Article 14 that there was an administrative practice of discrimination on grounds of ethnic origin.

Held
The Court found that there was insufficient evidence to conclude, beyond reasonable doubt, that the applicant's son was killed by state agents or by inmates of the prison where he died and that the authorities' investigation into his death was adequate. Therefore, the Court concluded that there had been no violation of Article 2.

The Court found that there was insufficient evidence on which to conclude that the applicant's son was, beyond reasonable doubt, abducted and tortured by or with the connivance of State agents and that it can neither be established that there was a breach of Article 3 in relation with the applicant's own suffering.

The Court further held that there had been no violation of Article 5 in respect of the disappearance of the applicant's son. However, it did find that there had been a breach of Article 5 § 3 with respect to the length of the detention of the applicant's son in police custody. The Court also found a violation of Article 5 § 5 with respect to the lack of an enforceable right to compensation in the domestic order.

The Court held that there has been no violation of Article 6 of the Convention, since the charges against the applicant's son were dropped after his death. So, the Court was no longer in a position to examine the proceedings as a whole or to examine the impact of the absence of representation at the initial stage of the proceedings.

The Court held that there had been a violation of Article 8 of the Convention.

The Court found a violation of Article 13 of the Convention in respect of the disappearance and ill-treatment of the applicant's son.

The Court held that there has been no violation of Article 14 of the Convention.

The Court awarded the applicant EUR 10,500 for non-pecuniary damage and EUR 10,500 for costs and expenses.

Commentary

The Court recalled that the obligation to protect the right to life under Article 2 requires an effective investigation when individuals have been killed. The Court underlined that this obligation is maintained even if it is not established that the killing was caused by an agent of the State. Moreover, whether or not members of the deceased's family have lodged a complaint about the killing is not decisive. Indeed, the fact that the authorities were informed of the killing gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation concerning the death. The nature of the investigation depends on the circumstances of each case. In the instant case, the Court held that there was nothing which demonstrated that the death of the applicant's son was caused by a State agent and nothing which proves that the prison authorities failed to conduct the routine monitoring of the prison ward in which the applicant's son was incarcerated. Accordingly, the Court concluded that there had not been a breach of Article 2 of the Convention.

The Court noted that the protection of "family life", under Article 8 of the Convention, implies an obligation for the State to act in a manner which allow such family relations to develop normally (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 45). The Court considers that when a person is arrested his ability to communicate rapidly with his family is of great importance. The Court noted that the instant case concerned the State's failure to ensure regular communications between persons in custody and their relatives. Indeed, at the material time there was no legal provision in Turkish law concerning this issue: the legislative amendment which provided the notification of the arrest of a person to a family member or another person designated by the detainee only entered into force in 2002. As a result, the Court considered that the detention of the applicant's son in police custody for nine days without contact with his family constituted a violation of Article 8.

Bader and Others v. Sweden
(13284/04)

European Court of Human Rights: Judgment of 8 November 2005

Right to life- Prohibition of torture- Articles 2 and 3

Facts
The applicants, Mr. Kamal Bader Muhammad Kurdi, Mrs. Hamida Abdilhamid Mohammad Kanbor and their two minor children are Syrian nationals, born in 1972, 1973, 1998 and 1999 respectively. They are currently living in Sweden.

Soon after their arrival in Sweden in August 2002, the applicants made several requests for asylum which were all rejected, and a deportation order was served on them. In January 2004, the family submitted a new application for asylum to the Aliens Appeals Board and requested a stay of execution of the deportation order. They referred to a judgment that had been delivered on 17 November 2003 by the Regional Court in Aleppo (Syria) which stated that Mr. Bader had been convicted, in absentia, of complicity in a murder and sentenced to death. The Regional Court in Aleppo stated that since this judgment had been delivered in the accused's absence, it could not be re-opened. Mr. Bader denied the charges.

In April 2004 the Aliens Appeals Board, rejected the applicants' request for asylum. They considered, on the basis of research carried out by a local lawyer engaged by the Swedish Embassy in Syria, that, if Mr.Bader returned to Syria, the case against him would be re-opened and he would receive a full retrial. If he was convicted, he would not be given the death sentence, as the case was "honour related". The board therefore found that the applicants' fears were not well-founded and that they were not in need of protection. On 19 April 2004, following the European Court of Right's indication under Rule 39 (interim measures) of the Rules of Court, the Migration Board granted a stay of execution of the deportation order until further notice. The stay is still in force.

Complaints
The applicants complained that, if deported from Sweden to Syria, the first applicant would face a real risk of being arrested and executed contrary to Articles 2 and 3 of the Convention.

Held
The Court held there was a breach of the applicant's right to life under Article 2 of the Convention.

The Court also found a violation of the prohibition of torture or inhuman or degrading treatment under Article 3 of the Convention.

The Government had suggested the Court consider the matter under Protocol No. 13 (abolition of the death penalty in all circumstances), but the Court did not find this necessary.

Commentary

This case represents the first time that the Court has found a violation of both Articles 2 and 3 of the Convention in connection with the expulsion of an alien who risked undergoing a denial of a fair trial in the receiving State, the consequence of which would certainly be the death penalty.

The Court reiterated that even if the death penalty was still permissible under Article 2, an arbitrary deprivation of life pursuant to capital punishment would be prohibited. Indeed, the most rigorous standards of fairness must be observed in the proceedings leading to death sentence (see *Öcalan v. Turkey*). The Court noted that the Swedish Government had obtained no guarantee from the Syrian authorities that Mr. Bader's case would be re-opened and that the public prosecutor would not request the death penalty at any retrial (see *Soering v. United-Kingdom* and *Mamatkulov and Askarov v. Turkey*). In those circumstances, the Swedish authorities would be putting Mr. Bader at serious risk by sending him back to Syria.

Moreover, the Court noted that since executions are carried out in Syria without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause the first applicant considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out. The Court considered that the death sentence imposed on the first applicant following an unfair trial would inevitably cause the applicants additional fear and anguish as to their future if they were forced to return to Syria as there exists a real possibility that the sentence will be enforced in that country (see *Öcalan v. Turkey*, § 169).

Aydın Eren and others v. Turkey
(57778/00)

European Court of Human Rights: Judgment of 21 February 2006

Right to life- Prohibition of torture and ill-treatment- Right to an effective remedy- Articles 2, 3, 6 and 13 of the Convention

Facts
The applicants, Mr. Aydın Eren and Ms Sülyan Eren and Ms Ece Eren, are Turkish nationals born respectively in 1945, 1990 and 1992. They live in Diyarbakır. They are the father/father in law and the daughters of Orhan Eren and his wife Zozan.

On 26 September 1997, Orhan and Zozan's car was found abandoned next to the Lice-Diyarbakir road. The official report noted that no damage or marks were found on the vehicle and that the search carried out at the site had proved unsuccessful. An investigation was opened and various witnesses were heard, in particular Aydın Eren. He stated that his relatives had gone through the Mermer Gendarmerie's checkpoint and that their car had been found abandoned further along the road. Two cars parked nearby had been spotted by a driver shortly afterwards.

Aydın Eren submitted that his relative had been the victims of extra-judicial executions. He also referred to the hostility shown towards his relatives by a particular family and suggested that his relatives might also have been abducted by terrorists. An investigation was opened and various witnesses were heard, in particular the applicant as well as the family who showed hostility to his relatives. At the date of judgment, the domestic investigation had so far been unable to determine what happened to Oran and Zozan Eren.

Complaints
The applicants complained that their relatives had been the victims of extrajudicial executions in breach of Article 2 of the Convention.

They alleged a violation of Article 3 in relation to the suffering they had endured since their relatives' death.

The applicants further maintained that they had been denied an effective remedy in breach of Articles 6 and 13 of the Convention.

Held

The Court concluded that there had not been a violation of Article 2 of the Convention in relation to the disappearance. However, the Court held that there had been a violation of Article 2 of the Convention concerning the investigation.

The Court concluded unanimously that there had been no violation of Article 3 of the Convention.

The Court did not examine the complaint about the lack of effective remedy in consequence of the absence of an effective investigation under Article 6 of the Convention, considering it to fall within Article 13 instead.

The Court considered that there had been a violation of Article 13 of the Convention.

The Court awarded the applicant EUR 10,000 for non-pecuniary damage and EUR 3,000 for costs and expenses.

Commentary

The Court considered that it had not been established beyond reasonable doubt that a State employee or an individual acting on behalf of the State authorities had been involved in the disappearance of Oran and Zozan Eren, or that Turkey had failed to comply with its positive obligation to protect the couple against a known threat to their lives. Accordingly, it concluded unanimously that there had been no violation of Article 2 concerning their disappearance. Nevertheless, the Court held that there had been a violation of Article 2 of the Convention regarding the investigation. Although the authorities responsible for the investigation could not be accused of inactivity, the Court considered that the manner in which the investigation had been conducted could not be regarded as satisfactory. The investigation by the Lice prosecutor had lasted more than eight years to date, and the exact circumstances in which Mr. and Mrs. Eren disappeared had still not been clarified.

Concerning the alleged violation of Article 3, the Court noted that it had no doubt of the profound suffering caused to the applicants by the disappearance of their relatives. However, it found that their allegations regarding the extra-judicial execution of their relatives had not been substantiated. In addition, after examining the evidence, the Court considered that the level of gravity required for a violation of Article 3 in that particular type of situation had been reached in the applicants' case. The Court concluded unanimously that there had been no violation of Article 3.

Prohibition of Torture

Ülke v. Turkey
(39437/98)

European Court of Human Rights: Judgment of 24 January 2006

Inhuman and degrading treatment- Right to liberty and security- Right to respect of private and family life- Freedom of though, conscious and religion- Articles 3, 5, 8 and 9 of the Convention.

Facts
The applicant, Osman Murat Ülke, is a Turkish national who was born in 1970.

Until 1985, the applicant lived in Germany where he completed part of his schooling. He then went to Turkey, where he continued his education, eventually going on to university. In 1993, he became an active member of the Association of Opponents of War ("the SKD"), founded in 1992. Until late 1993 he represented the SKD at various international colloquies in a number of different countries. After the SKD's dissolution in November 1993, the Izmir Association of Opponents of War ("the İSKD") was founded and the applicant served as its chairman from 1994 to 1998.

The applicant was called to military service in August 1995, but refused on the grounds that he had firm pacifist convictions, and he burned his call-up papers in public at a press conference. On 28 January 1997, the court of the general staff in Ankara sentenced him to six months' imprisonment and a fine. Noting in addition that the applicant was a deserter, the court ordered the military prosecutor attached to the general staff court to enlist him. On 22 November 1996 the applicant was transferred to the 9th regiment, attached to the Bilecik gendarmerie command. There he refused to wear a uniform. Between March 1997 and November 1998 the applicant was convicted on eight occasions of "persistent disobedience" on account of his refusal to wear a military uniform. During that period he was also convicted on two occasions of desertion, because he had failed to rejoin his regiment.

In total, the applicant served 701 days of imprisonment as a result of the above convictions. He is wanted by the security forces for execution of the remainder of his sentence and at the date of judgment was in hiding. He has dropped all forms of associative and political activity. He has no official address and has broken off all contacts with the administrative authorities.

Complaints
The applicant, relying on Article 3 of the Convention, complained that he had been prosecuted and convicted on account of his convictions as a pacifist and conscientious objector.

He argued that there was a breach of his right to liberty and security under Article 5 of the Convention in respect to his 70 day imprisonment.

The applicant complained of a breach of Article 8 of the Convention for the same reasons.

The applicant complained that his right to freedom of thought, conscience and religion under Article 9 of the Convention was violated since he was imprisoned on account of his being a pacifist and a conscientious objector.

Held
The Court considered that there had been a violation of Article 3 of the Convention.

The Court noted that the facts which the applicant complained of were practically the same as those which underlay the complaints examined in the previous parts of the judgment. It accordingly took the view that it was not necessary to give a separate ruling under Articles 5, 8 and 9 of the Convention.

The Court awarded the applicant 10,000 EUR for pecuniary damage and EUR 1,000 for costs and expenses.

Commentary
The Court recalled the importance of the value enshrined in Article 3 of the Convention for democratic societies (*Soering v. United-Kingdom*). Relevant factors in establishing a breach can include the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and health of the victim. Cumulative effects should also be taken in account.

In the instant case, the Court considered that, taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant had caused him severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constituted degrading treatment within the meaning of Article 3 of the Convention.

Mikheyev v Russia
(77617/01)

European Court of Human Rights: Judgment dated 26 January 2006

Prohibition of torture – Article 3 and 13 of the Convention.

Facts
The applicant, Aleksey Yevgenyevich Mikheyev, is a Russian national who was born in 1976, and lives in Nizhney Novgorod, Russia.

On 8 September 1998, the applicant and his friend 'F', gave Maria Savalyeyeva, a teenage girl, who was later reported missing, a lift in his car. On 10 September the applicant and 'F' were arrested and questioned in relation to Maria Savalyayeva's disappearance. No charges were brought, but they were detained in custody. Whilst in custody, the applicant was forced to sign a back-dated letter of resignation from the police by his superior officer. In September a police search of the applicant's properties revealed three gun cartridges in his car. On 12 September an administrative offence report was filed against the applicant and F for disturbing the peace at a railway station. They were subsequently sentenced to five days' administrative detention. During his detention, the applicant was questioned about Maria Savalyayeva and was refused a lawyer.

The police opened a criminal investigation into the finding of the gun cartridges in the applicant's car. He was placed in custody and transferred to another detention centre where he was subjected to intensive and violent interrogation, which included being slapped and threatened with torture. Meanwhile, 'F' testified to the police that he had seen the applicant rape and kill Maria Savalyayeva.

On 19 September 1998, the applicant was questioned. He alleged that he was later tortured by the police but his complaints of ill-treatment to the deputy regional prosecutor, prompted no response. Unable to endure the torture, the applicant broke free and jumped out of the second floor window of the police station in an attempt to commit suicide. He broke his spine and was taken to hospital. Here, doctors refused to make a note about the evidence of ill-treatment undergone by the applicant.

That day, Maria Savalyayeva returned home unharmed, clarifying that the applicant had given her a lift on 8 September and let her go when she refused to spend the night with him. Following her account, the abduction, rape and murder case was closed. On the same day, the case concerning the illegal possession of gun cartridges was discontinued on the ground that, the applicant, a police officer at the time, was entitled to have

ammunition in his possession.

On 21 September 1998 a criminal investigation was instituted into the applicant's fall from the police station window but proceedings were discontinued on 21 December 1998 for lack of evidence. Thereafter, the case was reopened and closed several times. On 5 September 2002 the prosecution service discontinued the investigation, finding that no criminal offence had been committed. The case was then again reopened and closed a number of times. A forensic medical examination of the applicant was drawn up on 26 October 1998 which found several injuries, but no burns or other traces of the use of electrical current were recorded.

In 2005, two policemen who had participated in the questioning of the applicant on 19 September 1998 were charged. It was found that the police officers had administered electric shocks to the applicant using a device connected to his ears. Unable to withstand the pain, the applicant had attempted suicide by jumping out of the window. The police officers were found guilty but according to the information available to the Court, the judgment is not yet final.

The applicant's dismissal from the police force was later annulled and he was reinstated in his post. The officers responsible for his backdated dismissal were subjected to disciplinary proceedings. However, he is completely disabled and has had to leave the traffic police.

Complaints

The applicant alleged that there had been a violation of Article 3 as a result of the ill-treatment he received from police officers, while in detention.

He also alleged a breach of Article 3 and Article 13 in that the investigation into his treatment was insufficient and ineffective.

He further complained about the Government's failure to disclose the criminal investigation files, relying on Article 34 and Article 38 § 1 (a).

Held

The Court found that the severity of the ill-treatment amounted to torture and constituted a violation of the substantive limb of Article 3 of the Convention.

Finding that the investigation into the alleged ill-treatment was not adequate or sufficiently effective, the Court held that there had been a violation of Article 3 under its procedural limb.

The Court found that the applicant had been denied a sufficiently effective investigation in respect of the ill-treatment by the police and thereby access to any other available remedies at his disposal, including a claim for compensation. It therefore found that there had been a violation of Article 13.

Consequently the Court awarded the applicant 250,000 EUR in compensation.

Commentary
The Court considered the complaints on the merits of the case on the basis of the applicant's arguments and existing elements in the file and the evidence given at the hearing of Leninskiy District Court of Nizhniy Novgorod on 30 November 2005. It drew inferences from the Government's conduct in refusing to submit copies of its criminal investigation files for the Court's assessment with no explanations as to its failure to do so.

In relation to Article 3, the Court relied on four factors in finding a violation of its procedural limb. First, the Court noted that throughout the official "investigation" the applicant had provided a consistent and detailed description of who had tortured him and how. Secondly, he had witnesses to support his allegations. Thirdly, the Government was unable to explain why, if he had not been tortured, he would try to commit suicide particularly when he knew he was innocent. Finally, the Court noted that there was evidence other detainees had suffered, or been threatened with, similar ill-treatment.

The Court also held that the deliberate ineffectiveness of the Government's investigation violated Article 3. It noted that there had been significant lapses of time during the investigation that rendered it inadequate. Moreover, there was a clear link between the officials responsible for the investigation and those allegedly involved in the torture. The Court also highlighted the fact that that it took seven years for the case to reach trial.

Keser and others v. Turkey
(33238/96 and 32965/96)

European Court of Human Rights: Judgment of 2 February 2006

Inhuman treatment or punishment- Right to liberty and security- Right to a fair trial- respect of private and family life- Right to an effective remedy- Prohibition of discrimination- Purpose of the rights and freedom of the Convention- Enjoyment of property- Articles 3, 5, 6, 8, 13, 14, 18 and Article 1 of Protocol No. 1 of the Convention.

Facts

The applicants are 56 Turkish nationals. The Özkanlı family lived in Gözeler and the remainder of the applicants lived in Cevizlidere, both in the province of Tunceli, until the alleged incidents that gave rise to the applications. The facts of the case were disputed by the parties.

The inhabitants of the applicants' villages were suspected of "aiding and abetting terrorists", and accordingly underwent strict and frequent controls by the gendarmes stationed near the villages. In October 1994, the security forces surrounded the applicants' villages and assembled the residents in the village square. They swore and told them that the villages would be evacuated at once with no possibility of returning. The applicants took what they were able to carry with them and left the villages. Immediately after the evacuation, the soldiers set fire to the houses and crops. The applicants filed a petition with the Ovacık public prosecutor's office, complaining about the burning down and forced evacuation of their villages by the gendarmes. They were informed by the district governor that no investigation into the alleged events would be initiated.

Complaints

The applicants complained that the State security forces had destroyed their homes and possessions and had forced them to leave their villages in breach of Article 3 of the Convention.

They claimed that there was a breach of their right to liberty and security under Article 5 § 1 of the Convention.

The applicants maintained that they were denied the right to a fair hearing within a reasonable time in breach of Article 6 of the Convention.

They also denounced the violation of their right to respect for private and family life under Article 8 of the Convention.

The applicants alleged that they were denied the right to an effective remedy under Article 13 of the Convention.

The applicants submitted that the actions of the State security forces constituted a violation of their right to peaceful enjoyment of their possessions under Article 1 of Protocol No.1 to the Convention.

They claimed a breach of Article 14 of the Convention prohibiting discrimination, in conjunction with Articles 6, 8, 13 and Article 1 of Protocol No. 1 of the Convention.

The applicants alleged that the interference or restrictions complained of have been imposed for purposes incompatible with the Convention in breach of Article 18 of the Convention.

Held
Having considered the circumstances of the case and the applicants' failure to corroborate their allegations, the Court did not find that the applicants had met the required standard of proof in respect of their allegations that their houses had been burned or that they had been forcibly evicted from their villages by the State security forces. Therefore, the Court held unanimously that there had been no violation of Articles 3, 8 and Article 1 of Protocol No. 1.

The Court held unanimously that there had been no violation of Article 5 § 1. Indeed, the applicants had never been arrested or detained or otherwise deprived of their liberty. Their insecure personal circumstances arising from the alleged loss of their homes and possessions did not fall within the notion of security of person as envisaged in Article 5 § 1.

The Court held unanimously that it was not necessary to determine whether there had been a violation of Article 6 § 1 and decided to examine this complaint from the standpoint of Article 13.

The Court held unanimously that there had been a violation of Article 13, except in respect of the Gözeler applicants, who had no "arguable complaint" since it was disputed that they had filed complaints with the national authorities.

The Court considered the allegation of discrimination as a result of the applicants' Kurdish origin to be unsubstantiated in the light of the evidence submitted to it. It therefore held unanimously that there had been no violation of Articles 14 and 18.

The Court awarded EUR 4,000 to each applicant from Cevizlidere (with the exception of Zeliha Keser) – EUR 96,000 in total – in respect of non-pecuniary damage, and EUR 4,500 jointly in respect of costs and expenses.

Commentary
The Court observed that it must primarily have regard to the general situation prevailing in the region at the time of the alleged events. At the relevant time, violent confrontations had taken place between the security forces and members of the PKK in the state-of-emergency region of Turkey. This two-fold violence forced many people to leave their homes and move to safer places. In similar cases, the Court has also found however that

the national authorities had evacuated a number of settlements to ensure the safety of the population in the region (see, *Doğan and Others v. Turkey*).

The Court had already established in numerous cases that the security forces had deliberately destroyed the homes and properties of certain applicants, depriving them of their livelihood and forcing them to leave their villages (see, among many others, *Akdıvar and Others v. Turkey*). However, in the instant case, the Court considered that the documentary material provided by the parties, in particular the witness statements, might constitute a potentially misleading basis for any conclusion to be reached. The Court recalled that the required evidentiary standard of proof in factual allegations of the Convention rights violations is that of "beyond reasonable doubt", and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences, or of similar unrebutted presumptions of fact. In the instant case, the Court found that such evidence could not be reached and accordingly concluded that there had been no violation of Articles 3, 8 and Article 1 of Protocol No. 1.

Concerning Article 13, the Court recalled that the remedy must be "effective" in practice as well as in law, in particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. The Court noted in the present case that the administrative authorities had commenced an investigation into the applicants' allegations, but it had been limited to asking the Gendarmerie Headquarters to provide information about the applicants' allegations; no further investigations had been carried out by the authorities. The Court observed that it had previously expressed serious doubts as to the ability of the administrative councils in south-east Turkey to carry out an independent investigation, given that they were composed of civil servants, who were hierarchically dependent on the governor, and an executive officer who was linked to the security forces under investigation. In these circumstances, it could not be said that the authorities had carried out a thorough and effective investigation into the applicants' allegations of the destruction of property in their villages.

Right to a fair trial

Varlı and Others v. Turkey
(57299/00)

European Court of Human Rights: Judgment of 27 April 2006

Right to a fair trial- Right to freedom of expression- Articles 6 and 10 of the Convention

Facts
This is a KHRP assisted case. The applicants are nine Turkish nationals, Abdullah Mehmet Varlı, Kazım Yakmaz, Mehmet Reşit Irgat, Mehmet Yağmur, Kerem Soylu, Ali Şola, Reşit Koçeroğlu, İsmet Kılıçarslan and Mehmet Gürkey.

At the time of the events, the applicants were all members of HADEP, except one, who was a sympathiser. In 1996, the applicants wrote a declaration entitled "peace and fraternity" in order to focus the public attention on the Kurdish problem in Turkey. They relied on verses of the Koran in support of their arguments. In November 1996 this declaration was sent to the President, the Prime Minister and the President of the Grand National Assembly. It was also published in two daily newspapers and in HADEP's monthly bulletin in January 1997.

The applicants were prosecuted in the State Security Court under Article 312 of the Penal Code and Article 3 of the Constitution, and were sentenced to two years in prison and a fine of 1,720,000 TRL, for distributing propaganda against the State, inciting people to discriminate on the basis of race and belonging to a region, and claiming the existence of a Kurdish nation within Turkey. The Court of Cassation upheld the first decision. The applicants requested an appeal but the Public Prosecutor denied their request. The applicants served seven months of this sentence and the remainder was suspended for three years.

Complaints
The applicants complained under Article 6 § 1 of the Convention that the Court which sentenced them was not independent and impartial since there was a military judge on the panel of judges.

They also maintained that their sentence was in violation of their right to freedom of expression under Article 10 of the Convention.

Held

The Court found a violation of Article 6 § 1 because of the presence of a military judge on the panel of judges who tried and sentenced them.

The Court also found a violation of Article 10, since the declaration was made in the applicants' capacity as religious men and political figures, rather than to incite violence and armed resistance. Moreover, the declaration was addressed to several personalities and published in different newspapers for several months before legal proceedings were started against them.

The Court awarded the applicants EUR 6,000 each for non-pecuniary damages and EUR 2,000 jointly for costs & expenses.

Commentary

The Court has often dealt with cases similar to this one in which the applicants complained about the lack of impartiality and independence of the domestic court (*Özel v. Turkey, Özdemir v. Turkey* or *İncal v. Turkey*). According to the Court, the Government did not give any convincing evidence allowing to reach another conclusion in the instant case and therefore it found a violation of Article 6§1 of the Convention.

The Court also referred to its case-law regarding the alleged violation of Article 10. Indeed, it had already found a breach of Article 10 of the Convention in cases similar to this one (*Yurttaş v. Turkey, Ceylan v. Turkey, Öztürk v. Turkey, İbrahim Aksoy v. Turkey*). The Court underlined that the declaration was made in the applicants' capacity as religious men and political figures, rather than to incite violence and armed resistance. Moreover the Court noted that the declaration could not be considered as a declaration of hatred (*Sürek v. Turkey*). Finally, the Court recalled that the nature and the length of the sentence represents an element of considerable importance to evaluate if the interference in the right to freedom of expression was justified and proportionate. The Court considered that the interference was not proportionate and "necessary in a democratic society" and it therefore concluded that there had been a breach of Article 10 of the Convention.

Kyprianou v. Cyprus
(73797/01)

European Court of Human Rights: Judgment of 15 December 2005

Right to a fair trial- Freedom of expression- Articles 6 and 10 of the Convention

Facts
The applicant, Mr Michalakis Kyprianou, is a Cypriot national, who was born in 1937 and lives in Nicosia. The facts of the case are disputed by the parties.

The applicant is an advocate who has been practising for over forty years. In February 2001, he was defending a person accused of murder before the Limassol Assize Court. He alleged that, while he was conducting the cross-examination of a prosecution witness, the court interrupted him. He felt offended and asked the permission to withdraw from the case. A tense exchange followed between the applicant and the court and after a break the court by a majority sentenced the applicant to five days' imprisonment. The applicant served his prison sentence immediately. The applicant filed an appeal with the Supreme Court, which was dismissed on 2 April 2001.

Complaints
The applicant argued that he had not received a hearing by an impartial tribunal within the meaning of Article 6 § 1 of the Convention.

He submitted that he had been presumed guilty in breach of Article 6 § 2 of the Convention.

The applicant maintained that the Assize Court had failed to inform him in detail of the accusation made against him, in breach of Article 6 § 3(a) of the Convention.

The applicant submitted that his conviction violated Article 10 of the Convention.

Held
The Court held that there had been a breach of the Article 6 § 1 of the Convention.

In view of the grounds on which the Court has found a violation of Article 6 § 1 of the Convention, it considered that no separate issue arose under Article 6 § 2 and 6 § 3.

The Court held that Article 10 of the Convention has been breached by reason of the disproportionate sentence imposed on the applicant.

The Court awarded the applicant EUR 15,000 for non-pecuniary damage and EUR 35,000 for costs and expenses.

Commentary

The Court applied two tests successively to determine the impartiality of the Limassol Assize Court: one objective and one subjective.

First, according to the Court, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench. Therefore, the Assize Court failed to meet the required Convention standard under the objective test. Secondly, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements. The Court therefore found that the misgivings of Mr Kyprianou about the impartiality of the Limassol Assize Court were also justified under the subjective test.

However, the Court reiterated that there is no watertight division between the two notions, since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test).

Finally, the Court considered that the Supreme Court on appeal did not remedy the defect in question. The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first instance proceedings.

With regards to the right to freedom of expression, a lawyer's freedom of expression in a courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. However, the Court reiterated here that it is only in exceptional circumstances that restriction of defence counsel's freedom of expression can be accepted as necessary in a democratic society. The imposition of a custodial sentence for statements made in the court room would inevitably have a "chilling effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole. In the present case, the Court held that such a penalty was disproportionately severe on the applicant and was capable of having this "chilling effect". From then on, the Court considered that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression.

Sejdovic v. Italy
(56581/00)

European Court of Human Rights: Grand Chamber judgment of 1 March 2006

Right to a fair trial - Article 6 of the Convention – trial in absentia

Facts
The applicant, Mr Ismet Sejdovic, is a national of the then Federal Republic of Yugoslavia, who was born in 1972 and lives in Hamburg.

In October 1992 the applicant was said to be responsible for the killing of a man shot at a traveller's encampment (*campo nomadi*) in Rome. The Rome investigating judge made an order for the applicant's detention pending trial but the order could not be enforced as the applicant was untraceable. As a result, the Italian authorities considered that he had deliberately sought to evade justice and on 14 November 1992 declared him a "fugitive".

The applicant was assigned a lawyer who took part in the trial in his absence. In a judgment dated 2 July 1996, the Rome Assize Court convicted the applicant of murder and sentenced him to twenty-one years and eight months' imprisonment. The applicant's lawyer did not appeal.

In September 1999 the applicant was arrested in Hamburg by the German police under an arrest warrant issued by the Rome public prosecutor's office. On 30 September 1999, the Italian Minister of Justice requested the applicant's extradition. Once he had been extradited to Italy, the applicant was entitled to apply under Article 175 of the Code of Criminal Procedure for leave to appeal out of time against the Rome Assize Court's judgment.

On 6 December 1999 the German authorities refused the Italian Government's extradition request on the ground that the requesting country's domestic legislation did not guarantee with sufficient certainty that the applicant would have the opportunity of having his trial reopened. In the meantime, the applicant was released on 22 November 1999.

Complaints
The applicant complained that his right to a fair trial under Article 6 had been violated since he had been convicted *in absentia* without having had the opportunity to present his defence before the Italian courts.

He further argued that the defence conducted by his lawyer could not be regarded as effective and adequate in view of the fact that, among the defendants whom the lawyer had represented, those who had been present had been acquitted and those who had not had been convicted.

Held
The Court found a violation of Article 6 of the Convention.

Relying on Article 46 of the Convention, the Court also held that the Government had to secure the right to a fair trial, through appropriate measures, to the applicant and to other persons in a similar position, adding that the Government remains free to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.

The Court considered it unnecessary to examine the applicant's allegations that the defence conducted by his lawyer had been defective and that his identification by the Italian authorities had been imprecise and dubious since it concluded there had been a violation of Article 6.

The Court considered that, in the circumstances of the case, the finding of a violation constituted in itself sufficient just satisfaction and awarded the applicant EUR 8,000 for costs and expenses.

Commentary
According to the Court, although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of Article 6 taken as a whole is that a person "charged with a criminal offence" is entitled to take part in the hearing. The Court considered that the applicant, who had never been officially informed of the proceedings against him, could not be said to have unequivocally waived his right to appear at his trial. The domestic legislation had not afforded him sufficient certainty of the opportunity of appearing at a new trial.

The Court observed that in Chamber judgments concerning cases against Turkey regarding Article 6 violations, it has held that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she requests one (*Öcalan v. Turkey*). In the present case, the Court endorsed this approach because the issue at stake was the confidence which the courts must inspire in members of a democratic society and, as far as criminal proceedings are concerned, in the accused. In deciding whether there was legitimate reason to fear that a particular court lacked

independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Öcalan v. Turkey*).

The Court accordingly considered that in the instant case there had been breaches of the requirements of Article 6 of the Convention. A retrial or the reopening of the case represented in principle an appropriate way of redressing the violation.

The Court also considered that the shortcomings of domestic law and practice revealed in the present case could lead in the future to a large number of well-founded applications. Consequently, it declared that Italy should take appropriate measures to make provision for and regulate further proceedings capable of effectively securing the right to the reopening of proceedings, in accordance with the principles of the protection of the rights enshrined in Article 6 of the Convention.

Right to respect of private and family life, home and correspondence

Xenides-Arestis v. Turkey
(46347/99)

European Court of Human Rights: Judgment of 22 December 2005

Right to respect of private and family life and home –Prohibition of discrimination- Right to peaceful enjoyment of property – Articles 8, 14 and Article 1 of Protocol No. 1 to the Convention

Facts
The applicant, Mrs Myra Xenides-Arestis, is a Cypriot national of Greek-Cypriot origin who was born in 1945 and lives in Nicosia.

The applicant owns a half share of a plot of land in Famagusta, Northern Cyprus which was given to her by her mother. On the land there is a shop, a flat, and three houses. One of the houses was her home where she lived with her husband and children, and the rest of the properties were either used by other family members or rented out.

In August 1974, the applicant and her family were forced by the Turkish military forces to abandon their home, property and possessions. Since then she has been prevented

from having access to, from using and enjoying her home and property.

On 30 June 2003 the "Parliament of the Turkish Republic of Northern Cyprus" enacted the "Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus". A commission was set up under this "law" with a mandate to deal with compensation claims.

On 24 April 2004, two separate referendums were held simultaneously in Cyprus on the Foundation Agreement–Settlement Plan ("Annan Plan") which had been finalised on 31 March 2004. Since the plan was approved in the Turkish-Cypriot referendum but not in the Greek-Cypriot referendum, the Foundation Agreement did not enter into force.

Complaints

The applicant complained of an unjustified interference with her right to respect for her home in violation of Article 8 of the Convention.

The applicant complained that the continuous denial of access to her property in northern Cyprus amounted to a violation of her right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the Convention.

The applicant submitted that as a Greek Cypriot, the denial of her rights by the authorities made her a victim of discrimination contrary to Article 14 of the Convention.

Held

The Court held that the complete denial of the right of Greek-Cypriot displaced persons to respect for their homes in northern Cyprus since 1974 constituted a continuing violation of Article 8 of the Convention.

The Court also found a violation of Article 1 of Protocol No. 1 to the Convention, holding that the need to re-house Turkish Cypriot refugees could not justify the ongoing violation of the applicant's rights.

The Court held that it was not necessary to examine whether there had been a violation of Article 14 since the complaint amounted in effect to the same complaints, albeit seen from a different angle, as those considered in relation to Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Under Article 46 of the Convention, the Court declared that the Government was obliged to introduce a remedy which secures genuinely effective redress for the violations against the applicant as well as in respect of all similar applications pending before the Court

(said to be 1,400). Such a remedy should be available within three months from the judgment and redress should occur three months thereafter.

The Court held that the question of compensation was not ready for consideration and reserved the matter to another hearing.

Commentary

The Court followed the reasoning and findings of *Cyprus v. Turkey* (25781/94) in holding that the complete denial of the right of Greek-Cypriot displaced persons to respect for their homes in northern Cyprus since 1974 constituted a continuing violation of Article 8 of the Convention.

In finding a continuing violation of Article 1 of Protocol No. 1 to the Convention, the Court stated that there was no reason to depart from the findings in *Loizidou v. Turkey* (15318/89) and *Cyprus v. Turkey*, holding that the need to rehouse Turkish Cypriot refugees could not justify the ongoing violation of the applicant's rights. Furthermore, the fact that the Greek Cypriot population had rejected the "Annan Plan" did not bring to an end the continuing violation of the rights of displaced persons.

In its admissibility decision of 14 March 2005, the Court had already declared that it did not consider the compensation commissions established under Law 49/2003 to be an adequate and effective remedy for the purposes of Article 35 of the Convention (see summary of decision in Legal Review 2005 Issue 8). The Court went further in its judgment, by ordering that an effective remedy be established. However, the Court did not explicitly state what remedy was required to secure the protection of the rights of the 1,400 claimants. The approach favoured by the property owners would clearly involve the restoration of properties to the owners along with compensation for loss of use, while the Turkish authorities may prefer to address the issue by way of one off compensation payments. Whatever mechanism is put in place, this case demonstrates an increasing willingness on the part of the Court to use its authority to resolve large numbers of similar fact disputes through a mass claims process.

This decision is important in light of Turkey's recent Law on Compensation for Damage Arising from Terror and Combating Terror, since it indicates that, if the compensation commissions established under this law do not afford those internally displaced in Turkey an adequate remedy, it may take a strong stance in encouraging Turkey to establish a more effective compensation mechanism. However, in the light of the more recent admissibility decision in *İçyer v Turkey*, it is clear that the Court will need more evidence of the inefficacy of the Turkish compensation commissions, as relevant, to adopt such an approach.

Öçkan and others v. Turkey
(46771/99)

European Court of Human Rights: Judgment of 28 March 2006

Right to life- Right to respect of private and family life, home and correspondence - Right to a fair trial- Right to an effective remedy- Articles 2, 6, 8 and 13.

Facts
The applicants, Mr. Ali Öçkan and 314 other persons living in Bergama and the surrounding villages, are Turkish nationals.

The applicants alleged that, as a result of the Ovacık gold mine's development and operations, they had suffered and continued to suffer the effects of environmental damage; specifically, these include the movement of people and noise pollution caused by the use of machinery and explosives.

On 16 August 1989, the public limited company E.M. Eurogold Madencilik, subsequently renamed Normandy Madencilik A.Ş., received authorisation to begin prospecting for gold. On 12 February 1992, the Ministry of Energy and Natural Resources issued an operating permit valid for ten years and authorising the use of cyanide leaching in the gold extraction process. On 8 November 1994 some of the residents of Bergama and the neighbouring villages, including the applicants, applied to the Izmir Administrative Court requesting judicial review of the Ministry's decision to issue a permit. They based their arguments, *inter alia*, on the dangers inherent in the company's use of cyanide to extract the gold, and especially the risks of contamination of the groundwater and destruction of the local flora and fauna. They also criticised the risk posed to human health and safety by that extraction method.

Their request was dismissed. On 13 May 1997 the Supreme Administrative Court, to which the applicants had appealed, overturned the lower court's judgment. In compliance with the Supreme Administrative Court's judgment, the administrative court annulled the Ministry's decision to issue a permit. The company contacted various ministries in order to obtain a permit again. Several favourable opinions emerged and the mine's operation were authorised to restart. The applicants lodged a further appeal. These proceedings are still pending before the administrative courts.

Complaints
The applicants complained that both the national authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making

process had given rise to a violation of their rights guaranteed by Article 8 of the Convention.

The applicants alleged that the authorities' refusal to comply with the administrative courts' decisions had infringed their right to effective judicial protection under Article 6§1 of the Convention.

The applicants further submitted that the administrative authorities' decision to issue a permit authorising a gold mine to use the cyanidation process and these authorities' refusal to comply with the decisions of the administrative courts constituted violations, respectively, of their right to life and their right to an effective remedy under Articles 2 and 13 of the Convention.

Held

The Court held there had been violation of Article 8 of the Convention since the Government had failed to protect the applicants' right to respect of private and family life by denying them procedural guaranties.

The Court found a violation of Article 6 § 1 of the Convention since the domestic authorities had refused to comply with the administrative court's decisions and by doing so had infringed the applicants' right to judicial protection.

The Court considered it unnecessary to examine separately Articles 2 and 13 of the Convention since these complaints were, in essence, the same as those submitted under Articles 8 and 6 § 1 of the Convention.

The Court awarded the applicants EUR 3,000 each for non-pecuniary damage and EUR 5,000 jointly for costs and expenses.

Commentary

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 as well as affecting their private and family life (*López Ostra v. Spain*, § 51, *Taşkın and other v. Turkey*, No. 46117/99).

In the instant case, the Court noted that the authorities' decision to issue a permit to the Ovacık gold mine was annulled by the Supreme Administrative Court because of the evidence proving it would have no impact on the environment. After weighing the competing interests against each other, the Court based its decision on the applicants' effective enjoyment of the right to life and the right to a healthy environment and

concluded that the permit did not serve the public interest. In view of that conclusion, no other examination of the material aspect of the case with regard to the margin of appreciation generally allowed to the national authorities in this area was necessary, according to the Court.

The Court reiterated that whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8 (*McMichael v. the United Kingdom*, § 87 and *Taşkın and other v. Turkey*, No. 46117/99).

İletmiş v. Turkey
(29871/96)

European Court of Human Rights: Judgment of 6 December 2005

Right to a fair trial in a reasonable time- Right to a private and family life- Articles 6 and 8 of the Convention.

Facts
The applicant, Nazmi İletmis, is a Turkish national who was born in 1953 and lived in Izmir.

In 1975, the applicant went to Germany, where he married a Turkish national and had two children, who attended school in Germany. In 1984, a judicial investigation was opened in Turkey in respect of the applicant, who was accused of committing acts abroad contrary to the national interest. He was suspected of being a member of the Union of Turkish Students and a sympathiser of the Kurdistan Committee, having links with HEVRA (the European Organisation of Kurds of Revolutionary Turkey) and of being one of the leaders of KOMKAR (the Federation of Workers' Associations of Federal Germany).

The applicant was arrested on 21 February 1992 whilst on a trip to Turkey to visit his family and was taken into police custody for seven days. His passport was confiscated. On 27 February the applicant was released but his passport was not returned to him. Following the applicant's arrest in Turkey his family left Germany to join him.

In April 1992 the applicant was charged with separatist activities to against the State and tried in the Elazığ Assize Court. During his trial he applied several times to the provincial governor's office for a passport. These applications were refused. He was

told that his passport would be handed back to him if he produced a certificate from the court in which he was standing trial stating that there was no reason why he could not be permitted to leave Turkey. However, when he applied to the Assize Court he received the reply that it had not issued any exclusion order and that it could only supply him with a certificate to the effect that the proceedings against him were continuing. In the absence of evidence against him, the Assize Court acquitted the applicant on 1 July 1999. A passport was subsequently issued to him and the applicant returned to Germany with his family.

Complaints

The applicant complained of the length of the criminal proceedings against him, relying on Article 6 § 1 of the Convention which guarantees the right to a fair trial within a reasonable time.

The applicant further submitted that the prohibition on leaving Turkey had breached Article 8 of the Convention.

Held

The Court concluded unanimously that there had been a violation of Article 6 § 1 since the length of the criminal proceedings was excessive.

The Court held the violation of Article 8 of the Convention in respect of being prevented from leaving Turkey for 15 years.

The Court awarded the applicant EUR 25,000 for pecuniary and non-pecuniary damage and EUR 1,350 for costs and expenses.

Commentary

The Court held that the proceedings complained of had lasted for 15 years at one level of jurisdiction. Having regard to the circumstances of the case, it considered that such a period was excessive and failed to satisfy the "reasonable time" requirement. The Court accordingly concluded unanimously that there had been a violation of Article 6.

The Court considered that the confiscation of the applicant's passport and the refusal to return it for 15 years constituted an interference with the exercise of his right to respect for private life, since sufficiently strong personal ties existed which were likely to be seriously affected by an application of that measure. The Court considered that in an age when the freedom of movement, especially across borders, was considered essential for the full development of private life, especially for people like the applicant, having family, occupational and economic ties in more than one country, denial of that freedom

by a state without any good reason constituted a serious failure on its part to discharge its obligations to those under its jurisdiction. Further, the continued application of the prohibition on leaving Turkish territory did not correspond to a "pressing social need" and was therefore disproportionate to the aims permitted by Article 8.

Freedom of thought, conscience and religion

Leyla Şahin v Turkey
(44774/98)

European Court of Human Rights: Judgment of 10 November 2005

Right to respect of private and family life- Freedom of thought, conscience and religion- Freedom of expression – Prohibition of discrimination- Right to education- Articles 8, 9, 10, 14 and Article 2 of Protocol No.1 to the Convention.

Facts
The applicant, Leyla Şahin, is a Turkish national who was born in 1973 and has lived in Vienna since 1999.

The applicant comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf. At the material time, the applicant was a medical student in her fifth year at the Faculty of Medicine of Istanbul University. On 23 February 1998, the Vice-Chancellor of the University issued a circular prohibiting the admission of students with beards or those wearing the Islamic headscarf into lectures, courses or tutorials.

Between 12 March and 10 June 1998 the applicant was denied access to a number of written examinations, lectures and then enrolment on her course because she was wearing an Islamic headscarf. The Faculty of Medicine issued the applicant with a warning for contravening the Students Disciplinary Procedure Rules and on 13 April 1999 suspended her from the University for taking part in an unauthorised assembly outside the faculty protesting against the rules on dress.

On 29 July 1998 she lodged an application for an order setting aside the circular of 23 February 1998. By a judgment dated 19 March 1999, the Istanbul Administrative Court dismissed the application, holding that by virtue of section 13(b) of the Higher-Education Act (Law no. 2547) that neither the regulations in issue, nor the measures

taken against the applicant, could be considered illegal. On 19 April 2001, the Supreme Administrative Court dismissed an appeal on points of law by the applicant.

Complaints

The applicant complained under Article 9 of the Convention that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion.

She also submitted that this amounted to an unjustified interference with her right to education under Article 2 of Protocol No 1.

The applicant alleged violation of Articles 8, 10 and 14 in conjunction with Article 9 of the Convention. She maintained that the prohibition of wearing the headscarf violated her right to respect for her private life and her right to freedom of expression, and that the prohibition was discriminatory.

Held

The Court held that the interference to her freedom of religion was justified in principle and proportionate to the aims pursued and therefore could be considered "necessary in democratic society" and therefore did not violate Article 9 of the convention.

The ban on the headscarf had not inhibited the essence of the applicant's right to education as the restriction was foreseeable, pursued legitimate aims and the means used were proportionate. Therefore there had been no violation of Article 2 Protocol No.1.

Further, the Court considered that the regulations regarding the Islamic headscarf were not directed against the applicant's religious affiliation but pursued the legitimate aim of protecting the rights and freedoms of others and were intended to preserve the secular nature of educational institutions. The Court held that there had been no violation of Articles 8, 10 or 14.

Commentary

The Court found that as there was a legal basis for the interference in Turkish law, - section 17 of Law no. 2547 - read in the light of the relevant case-law of the domestic courts, it would have been clear to the applicant, from the moment she entered Istanbul University, that there were restrictions on wearing the Islamic headscarf and that she was liable to be refused access to lectures and examinations if she continued to do so. The Court therefore considered that the issue was to establish if this interference to the applicant's freedom of religion was "necessary in a democratic society". The Court

recalled that freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. That freedom entails, *inter alia*, freedom to hold religious beliefs and to practice a religion (*Kokkinakis v. Greece*, § 3 and *Buscarini and Others v. San Marino* No. 24645/94, § 34).

According to the Court, when the issue is the relationship between State and religion, the role of the national decision-making body must be given special importance (*Cha'are Shalom Ve Tsedek*, § 84; and *Wingrove v. the United Kingdom*,§58). This is particularly the case in the case of regulating the wearing of religious symbols in educational institutions. The Court recalled that in the decisions of *Karaduman v. Turkey* (No. 16278/90) and *Dahlab v. Switzerland* (No. 42393/98) the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety.

Concerning Article 2 of Protocol No 1 of the Convention, the Court reiterated that the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction (*Costello-Roberts v. the United Kingdom*, § 27). In spite of its importance, this right can be submitted to limitations. Such restrictions must not conflict with other rights enshrined in the Convention and its Protocols (*Belgian Linguistic case*, § 5; *Campbell and Cosans v. the United Kingdom*, §41). Accordingly, the first sentence of Article 2 of Protocol No. 1 must, where appropriate, be read in the light of Articles 8, 9 and 10 of the Convention. In the instant case, the Court found out that the restriction in question did not impair the very essence of the applicant's right to education.

Freedom of expression

Haydar Kaya v. Turkey
(48387/99)

European Court of Human Rights: Judgment of 8 February 2006

Freedom of expression- Right to fair trial- Freedom of peaceful assembly and of association- Articles 6, 10 and 11 of the Convention

Facts
The applicant, Haydar Kaya, is a Turkish national who was born in 1942.

At the relevant time, the applicant was chairperson of the Ankara regional branch of the Employment Party (*Emeğin Partisi*). In 1997 he was convicted of having incited the people to hatred and hostility, as a result of a statement made to the press and to the general public. He was condemned to two years of detention and a fee of 1,720,000 Turkish Lira. The applicant lodged an appeal before the Supreme Court. On 5 March 1998 the Supreme Court confirmed the first decision. Moreover, on 2 November 1998 the Employment Party expelled the applicant from the party, following an order of the State prosecutor.

Complaints

The applicant complained that his criminal conviction infringed his right to freedom of expression, in violation of Article 10 of the Convention.

He complained about the unfairness of the proceedings which resulted in his conviction, under Article 6 § 1.

Finally, he alleged that his exclusion from the party following his conviction constituted a violation of Article 11.

Held

The Court held that the applicant's conviction and sentence were disproportionate to the aims pursued, it was not "necessary in a democratic society". It had therefore been a violation of Article 10 of the Convention.

The Court held that Article 6 had been violated as the tribunal was not independent and impartial. The Court did not consider it necessary to consider the other requirements of Article 6.

Finally, the Court held that it was unnecessary to consider the issue of Article 11, as it considered the exclusion a consequence of the Article 10 violation.

The Court award the applicant EUR 3,048 in respect of non-pecuniary damage and EUR 3,000 for costs and expenses.

Commentary

The right to freedom of expression under Article 10 of the Convention is said to be a 'limited right' because there are number of legitimate aims which a member state may pursue and therefore interfere with this right. However, this interference can not be justified unless it is 'prescribed by law' and 'necessary in a democratic society'. In this case, it was clear that the interference was 'prescribed by law' but the Court held that in

this case it was not 'necessary in a democratic society'. Indeed, the Court found that the reasons given by the domestic courts could not be considered sufficient in themselves to justify the interference with the applicant's right to freedom of expression. The applicant had issued his statement as chair of the Ankara regional branch of the Employment Party and as a player on the Turkish political scene. It had taken the form of a political speech, both in its content and in the kind of terms employed. It was more a reflection of intransigence on the part of one of the parties to the conflict than an incitement to violence. The Court also noted the severity of the penalty imposed on the applicant, whose conviction had also resulted in his being excluded from the party.

The Court noted that the applicant's exclusion from the party was, by virtue of Article 312 of the Criminal Code, a direct and automatic consequence of his conviction. In view of its finding that there had been a violation of Article 10, the Court did not consider it necessary to examine this complaint separately.

Odabaşı and Koçak v. Turkey
(50959/99)

European Court of Human Rights: Judgment of 21 February 2006

Freedom of expression - Article 10 of the Convention

Facts
The applicants, Yılmaz Odabaşı and Niyazi Koçak, are Turkish nationals who were born in 1962 and 1963 respectively and live in Ankara.

In May 1996 the first applicant compiled various articles that were in several journals between 1993 and 1996 and in a book called *Düş ve Yaşam* (The Dream and the Life). The book aimed to criticise Kemalism. The second applicant published the book. On 20 November 1996 the Public Prosecutor of the Republic of Ankara charged the applicants for defamation against the memory of Atatürk and dishonour against the national anthem. On 3 June 1998, the Security Court of Ankara convicted the applicants for defamation against the memory of Atatürk. The first applicant was sentenced to a year and six months imprisonment, the second applicant was ordered to pay 2,725,000 TRL. On 5 February 1999 the Court of Cassation upheld the decision made by the Security Court of Ankara.

Complaints
The applicants alleged that their criminal convictions for writing and publishing a book

that aimed to criticise Kemalism interfered with their freedom of expression, protected under Article 10 of the Convention.

Held
The Court held that the Government did not have sufficient and relevant justification for the interference in the applicants' freedom of expression and that it was therefore in violation of Article 10 of the Convention.

The Court awarded the first applicant EUR 6,000 and the second applicant EUR 2,450 for non-pecuniary damage. The applicants were jointly awarded EUR 2,000 for costs and expenses.

Commentary
The Court noted that the guarantee of the freedom of expression is the bedrock of any democratic society. It further emphasised that, subject to Article 10 § 2 of the Convention, 'information' and 'ideas' that are offensive, scandalous, and troublesome to the Government and society should be protected in the same way as the 'information' and ideas' that are seen as harmless, inoffensive and favourably welcomed by the Government.

The sensitivity of Turkish society to the memory of Atatürk was acknowledged by the Court, in addition to the Government's wish, in prosecuting the applicants, to protect Turkish people who are attached to this emblem, from feeling attacked. The Court decided, however, that the works written and published by the applicants made no value judgment and did not attack the memory of Atatürk, but rather criticised the ideology of Kemalism. The book itself laid out Kemalist ideology in an introductory way, pulling from knowledge and work that was already available in the wider public: and the fact that these sources were not cited should not call into question their relevance. The book also encouraged the reader and particularity the Turkish Left to respond to the ideas it laid out. The Court therefore decided that the works written and published by the applicants did not incite hate speech or the use of violence. For these reasons, the Court held that the Government was not justified in interfering with the freedom of expression of the applicants as related to Article 10 of the Convention.

Özgür Radyo-Ses Radyo Televizyon Yayın Yapım ve Tanıtım A.Ş. v. Turkey
(64178/00, 64179/00, 64181/00, 64183/00, 64184/00)

European Court of Human Rights: Judgment of 30 March 2006

Freedom of expression- Right to an effective remedy- Prohibition of discrimination- Articles 10, 13 and 14 of the Convention.

Facts
The applicant, Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş., is a Turkish limited company which broadcasts radio programs and is based in Istanbul.

In 1998 and 1999 the applicant was given three warnings and two suspensions by the Higher Broadcasting Council (RTÜK). On 4 May 1998 after a debate about the corruption, the RTÜK gave the applicant a first warning arguing that the goal of the debate was to slander, defame and discredit other people. On 5 May 1998, a programme concerning the political actuality of the country was broadcast and led to the second warning. On 12 May 1998 another programme about politics resulted in the third warning. On 8 June 1998, a programme criticising Mustafa Paşa, a well-known historical figure who killed many Kurds, led to a first suspended sentence of 90 days. On 19 February 1999, a news broadcast mentioned the demonstrations following the arrest of Abdullah Öcalan. The RTÜK considered that this broadcast was inciting people to violence, hatred and separatism. It decided to sentence the applicant to a 365 day suspended sentence. The applicant lodged appeals against all those decisions but they were consistently rejected.

Complaints
The applicant company alleged that the sanctions imposed by the RTÜK entailed a violation of its right to freedom of expression under Article 10 of the Convention in conjunction with Article 14.

It also complained under Article 13 about the absence of effective remedies in Turkish legislation that would have enabled it to contest the RTÜK's decision.

Held
The Court found a violation of Article 10 of the Convention since it considered that the sentences were not proportionate to the aim and not necessary in a democratic society.

The Court considered that it was not necessary to examine the applicant's complaint separately under Article 14.

The Court held that there was no evidence of the absence of effective remedies and therefore considered that the violation of Article 13 of the Convention had not been proved.

Commentary
The Court noted that the parties were not disputing that the interference was 'prescribed by law'. The issue in the instant case was to determine if the interference was 'necessary in a democratic society'. Indeed, whilst most of the rights enshrined in the Convention require some balancing of the relevant factors, this is particularly true of Article 10. In the present case, the decision involved the balancing of the preservation of the public interest issues and the freedom of the press. The Court described what it considered to be the role of the press in a democratic society. According to the Court, freedom of expression is one of the bases of democratic societies and a condition of its progress. The Court reiterated that the freedom afforded to the press should be broad and allow for a degree of exaggeration and even provocation (*Handyside v. United-Kingdom*, § 49 and *Castells* v. *Spain,* § 42).

The Court reiterated that in a democratic society, the government's actions have to undergo not only legislative and juridical control but also the control of the press and public opinion. The Court estimated that those principles are important not only for the press but also for radio broadcasting (*Groppera Radio AG and others v. Switzerland*, § 138; *Jersild v. Denmark*, § 31; *Radio France and others v. France*, § 33).

Dicle v. Turkey (No. 2)
(46733/99)

European Court of Human Rights: Judgment of 11 April 2006

Freedom of expression- Article 10 of the Convention

Facts
The applicant, Mr. Mehmet Hatip Dicle, is a Turkish national born in 1955.

The applicant is a former DEP Member of Parliament. In March 1994 the National Assembly ordered the end of the parliamentarian immunity for some DEP MPs, including the applicant. In June 1994 the Constitutional Court ordered the dissolution of the DEP on the basis that the party threatened territorial integrity and national unity. In December 1995, the applicant was invited to take part in an event marking the anniversary of the Universal Declaration of Human Rights. As he was in prison at

the time, he sent a paper instead. In July 1996, this paper was incorporated into a book entitled "The Universal Declaration of Human Rights in Turkey". The Public Prosecutor opened an investigation against him and on 21 October 1996, the State Security Court found the applicant guilty of creating separatist propaganda. The applicant was sentenced to one year's detention and to a fine. The applicant lodged several appeals, all of them were dismissed. On 10 September 1999, following a legislative change, the State Security Court ordered the suspension of the sentence. On 30 May 2003, the State Security Court erased the sentence and the applicant's police record as he had not committed an offence during the suspension of the sentence. The applicant's police record was wiped.

Complaints

The applicant complained that the sentence was in breach of his right to freedom of thought under Article 9 of the Convention.

The applicant complained that the sentence was in breach of his right to freedom of expression under Article 10 of the Convention.

Held

The Court held the violation of Article 10 of the Convention since it considered that the applicant's sentence was not necessary in a democratic society.

The Court considered it unnecessary to examine the complaint under Article 9 of the Convention.

The Court awarded the applicant EUR 2,000 for non-pecuniary damage and EUR 1,500 for costs and expenses.

Commentary

The Court recalled that it had already examined a large number of cases raising similar issues to those in the present case and where it had found a violation of Article 10 of the Convention (*Ceylan v. Turkey*; *Öztürk v. Turkey, İbrahim Aksoy v. Turkey* and *Kızılyaprak v. Turkey*). In the instant case, the Court considered that the Government had not submitted any facts or arguments capable of leading to a different conclusion. The Court noted that the State Security Court had considered that the applicant's paper contained terms which incited hatred and hostility. However, the Court concluded that, even if the applicant's paper gave a very negative picture of the Turkish State, it did not exhort violence, hatred or armed resistance. Having examined the domestic decisions, it considered the arguments insufficient to justify an interference with the applicant's right to freedom of speech (*Sürek v. Turkey (No. 4)*, § 58). Accordingly, the Court concluded that the interference of the State within the applicant's right to freedom of expression

was not necessary in a democratic society.

Right to freedom of peaceful assembly and association

İzmir Savaş Karşıtları Derneği and Others v. Turkey
(46257/99)

European of Human Rights: Judgment of 2 March 2006

Right to freedom of peaceful assembly and association- Article 11 of the Convention

Facts
The applicants are an association, Izmir Savaş Karşıtları Derneği (Izmir Association Against War) and Ayşe Tosuner, Ali Serdar Tekin and Osman Murat Ülke, who are Turkish nationals born respectively in 1950, 1974 and 1970. They live in Izmir.

In January 1994, several members of the applicant association and its President travelled to Germany, Colombia and Brazil to attend different meetings. In June 1996, several members were sentenced by the Izmir Criminal Court under Article 43 of Law no 2908 to three months' imprisonment since they had not sought permission from the Ministry of the Interior to leave the country. The judgment was quashed by the Court of Cassation on the grounds that the Criminal Court had failed to commute the sentence into fines. The Criminal Court later complied with this decision. On 22 December 2001, the applicant association was dissolved.

Complaints
The applicants complained under Article 11 of the Convention that their right to freedom of peaceful assembly and association had been violated.

Held
The Court held unanimously that there had been a violation of Article 11 of the Convention since the permission that the applicants had been required to obtain could not be regarded pursuing a legitimate aim, namely the protection of national security or public safety.

The Court awarded Mr. Murat Ülke and Mr. Ali Serdar Tekin EUR 1,500 each and the applicants EUR 4,000 jointly for costs and expenses.

Commentary
The Court reiterated that any measure taken against associations affected both freedom of association and democracy (*Socialist Party of Turkey (STP) and others v. Turkey*).

The Court recalled that the State could not, in the name of protecting "national security" or "public safety" take any measure it happened to deem appropriate (*Klass and others v. Germany*, § 49). In the instant case, the Court held that the sentence inflicted on the applicant association could not be considered as protecting national security and public safety. The Court also pointed out that no member of the Council of Europe possessed legislation similar to Article 43 of the Turkish law stating that members of association should get a permission to leave the territory. The Court noted that this Article had been repealed in 2004.

Tüm Haber Sen and Çınar v. Turkey
(28602/95)

European Court of Human Rights: Judgment of 21 February 2006

Right to freedom of peaceful assembly and association-Right to an effective remedy- Articles 11and 13 of the Convention

Facts
The applicants are a trade union, *Tüm Haber Sen* and its president, Mr. İsmail Çınar who is a Turkish national born in 1954. He lives in Istanbul.

The trade union was founded in 1992 by 851 public-sector contract staff working in the communications field, notably for the post office (PTT) and the telecommunications service (*Türk Telekom*). A few days after its founding, the Istanbul Governor's Office sought an order for the suspension of *Tüm Haber Sen's* activities and its dissolution on the grounds that civil servants could not form trade unions. The trade union's dissolution was ordered on 15 December 1992. The applicants' appeals were all dismissed. Finally, in a judgment of 24 May 1995, the Court of Cassation ordered the dissolution of *Tüm Haber Sen*, holding that in the absence of any statutory provisions governing the legal status of trade unions for civil servants and public-sector contract workers, the applicant trade union could not claim to have any legal basis. When it was dissolved the trade union had 40,000 members working in the civil service.

Complaints
The applicants complained that the dissolution of *Tüm Haber Sen* and the enforced

cessation of its activities breached their right to freedom of assembly and association under Article 11 of the Convention.

They further rely on their right to an effective remedy under Article 13 of the Convention in conjunction with Article 11.

Held
The Court held unanimously that there had been a violation of Article 11 of the Convention on account of the dissolution of the trade union.

The Court held that it was not necessary to examine separately the complaint under Article 13 taken together with Article 11 of the Convention.

Commentary
The Court reiterated that Article 11 of the Convention presented trade-union freedom as one form of freedom of association (*National Union of Belgian Police v. Belgium*, § 38, and *Swedish Engine's Drivers Union* v. *Sweden*, § 39). *Tüm Haber Sen* had been dissolved solely on the ground that it had been founded by civil servants and its members were civil servants. The Turkish Government had provided no explanation as to how the absolute prohibition on forming trade unions, imposed by Turkish law as applied at the time on civil servants and public-sector contract workers in the communications field, had met a "pressing social need". Moreover, the Court recalled that at the material time Turkey had already ratified International Labour Organisation Convention no. 87, which secured to all workers, without any distinction between the public and private sectors, the unrestricted right to establish and join trade unions. Furthermore, even if Turkey was the only State (with Greece), that had not yet accepted Article 5 of the European Social Charter, the Charter's committee of independent experts had construed a provision which afforded all workers the right to form trade unions, as applying to civil servants as well.

The Court therefore found that in the absence of any concrete evidence to show that the founding or the activities of *Tüm Haber Sen* had represented a threat to Turkish society or the Turkish State, the union's dissolution could not be justified. The Court concluded that there had been a violation of Article 11 of the Convention.

Sørensen and Rasmussen v. Denmark
(52562/99 and 52620/99)

European Court of Human Rights: Judgment of 11 January 2006

Right to freedom of association- Article 11 of the Convention

Facts
The applicants, Morten Sørensen and Ove Rasmussen are two Danish nationals, born in 1975 and 1959 respectively. The first one lives in Århus, the second one in Haderslev.

In May 1996 when he got a job, the first applicant was informed that his terms of employment would be regulated by an agreement concluded between his employer and a trade union called SID, which was affiliated to the Danish Confederation of Trade Unions (LO), and of which the applicant was obliged to become a member. On 23 June1996, the applicant informed his employer that he did not want to pay the subscription to SID. Consequently, on 24 June 1996 he was dismissed for not satisfying the requirements of the job as he was not a member of a trade union affiliated to LO. He instituted proceedings before the High Court of Western Denmark against his employer, arguing that his dismissal was unlawful and requesting compensation. The High Court dismissed the applicant's complaint. On appeal, the Supreme Court upheld the High Court's judgment.

The second applicant was offered a job at a nursery on the condition that he became a member of SID as the employer had entered into a closed-shop agreement with that trade union. He started the job on 17 May 1999 and rejoined SID, although he did not agree with its political views.

Complaints
The applicants complained that the existence of pre-entry closed-shop agreements and their application to them violated their right to freedom of association guaranteed by Article 11 of the Convention.

Held
The Court found a violation of Article 11 of the Convention since the applicants were compelled to join a particular trade union.

Commentary
The Court recalled that the right to form and to join trade unions is a special aspect of freedom of association, and that the notion of freedom implies some measure of

freedom of choice as to its exercise (*Young, James and Webster v. the United Kingdom,* § 52*)*. Accordingly, the Court reiterated that Article 11 must also be viewed as encompassing a negative right of association that is to say a right not to be forced to join an association (*Sigurdur Sigurjónsson v. Iceland*, § 35). The Court noted that, even if compulsion to join a particular trade union may not always be contrary to the Convention, in the instant case, the compulsion strikes at the very substance of the freedom of association guaranteed by Article 11 and therefore constitutes an interference with that freedom (*Gustafsson* v. *Sweden*) The Court added that the right to freedom of association is also related to Articles 9 and 10 of the Convention protecting personal opinions. Such protection can only be effective through the guarantee of both a positive and a negative right to freedom of association (*Chassagnou and Others v. France*, § 103). The Court therefore concluded that Denmark had failed to protect the applicants' negative right to trade union freedom.

Christian Democratic People's Party v. Moldova
(28793/02)

European Court of Human Rights: Judgment of 14 February 2006

Freedom of expression- Freedom of peaceful assembly and association- Articles 10 and 11 of the Convention

Facts
The applicant, the Christian Democratic People's Party (CDPP), is a Parliamentary political party from the Republic of Moldova, which was in opposition at the time of the events.

Towards the end of 2001, the Government announced its intention to make the study of the Russian language compulsory in schools. This announcement generated a great deal of heated public debate. Against that background, the Parliamentary faction of the CDPP informed the Chişinău Municipal Council of its intention to hold a meeting on the topic. The meeting was to be held in the Square of the Great National Assembly in front of the seat of the Government. Relying on the Law on the Status of Deputies, the CDPP did not obtain prior authorisation for the meeting. The Municipal Council authorised the CDPP to hold it in a different location. The CDPP nevertheless held the meeting in front of the Government headquarters, and continued to hold regular gatherings there in January, informing the council in advance but not seeking its authorisation.

On 18 January 2002 the Ministry of Justice imposed a one month ban on the CDPP's activities because of the unauthorised demonstrations. In its decision, it made particular reference to the participation of minors at the demonstrations, in breach of the International Convention on the Rights of the Child and other conventions, and to the use of slogans which could have been interpreted as a call to public violence and an encroachment on the legal and constitutional order. On 24 January 2002, the CDPP challenged the decision of the Ministry of Justice in courts; however, their action was dismissed by a final judgment of the Supreme Court of Justice of 17 May 2002. In the meantime, on 8 February 2002, following an inquiry made by the Secretary General of the Council of Europe under Article 52 of the Convention, and having regard to the approaching local elections, the Ministry of Justice lifted the ban and the CDPP was authorised to restart its activity without annulling its previous decision of 18 January 2002.

Complaints

The applicant complained that the temporary ban violated its right to freedom of peaceful assembly and association as guaranteed by Article 11 of the Convention.

It also alleged a violation of its right to freedom of expression under Article 10 of the Convention.

Held

The Court held that the ban of the CDPP's activities was not based on relevant and sufficient reasons and was not necessary in a democratic society. It therefore concluded that there had been a violation of Article 11 of the Convention.

The Court considered it unnecessary to examine separately the alleged violation of Article 10 of the Convention as the complaint related to the same matters as those considered under Article 11.

The Court awarded the applicant EUR 4,000 for costs and expenses.

Commentary

The Court recalled here that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. Indeed, the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. The Court underlined that this applies all the more in relation to political parties in view of their essential role in ensuring pluralism and democracy (*United Communist Party of Turkey and Others v. Turkey*, §§ 44).

The Court referred to its case-law and notably *Informationsverein Lentia and Others v. Austria,* in which it had stated that the State is under the obligation to hold free elections in accordance with Article 3 of Protocol No. 1. As a result, the exceptions set out in Article 11, where political parties are concerned, are to be construed strictly. In the instant case, the Court noted that, since the CDPP's gatherings were entirely peaceful, there were no calls to violence or to overthrow the Government or any other encroachment of the principles of pluralism and democracy, it could not reasonably be said that the measure applied to it was proportionate to the aim pursued and that it met a "pressing social need". The Court found that the temporary ban on the CDPP was not based on relevant and sufficient reasons and so was not necessary in a democratic society. The Court therefore concluded that there had been a violation of Article 11 of the Convention.

Prohibition of discrimination

Bekos and Koutropoulos v. Greece
(15250/02)

European Court of Human Rights: Judgment of 13 December 2005

Prohibition of torture and Ill-treatment - Right to an effective remedy - Prohibition of discrimination- Articles 3, 13 and 14 of the Convention

Facts
The two applicants Mr Lazaros Bekos and Mr Eleftherios Koutropoulos are Greek nationals of Roma origin. Both were born in 1980 and live in Mesolonghi (Western Greece).

On 8 May 1998, the applicants were arrested by the police on suspicion of the attempted burglary of a kiosk. Both applicants alleged that they ill-treated by the police, including punching, kicking and beating, and that they were verbally abused about their Roma origins. The following day, the first applicant was charged with attempted theft and the second applicant with being an accomplice. The Public Prosecutor set a trial date and released the applicants. On their release from detention, the applicants obtained a medical certificate stating that their bodies bore "moderate bodily injuries caused in the past 24 hours by a heavy blunt instrument." In November 1999 the applicants were sentenced to thirty days and twenty days imprisonment respectively, in each case suspended for three years.

The Greek Helsinki Monitor and the Greek Minority Rights Group sent a joint letter to the Ministry of Public Order about the incident and reporting on 30 similar incidents of ill-treatment against the Roma. The Ministry launched an informal inquiry which found that two police officers had treated the applicants "with particular cruelty during their detention". The inquiry recommended that they be temporarily suspended but this was never put into effect. One of the officers was fined the equivalent of less than 59 Euros and the Chief of Police acknowledged that there had been ill-treatment. The Public Prosecutor subsequently recommended that they be tried for physical abuse during interrogation. Criminal charges against the two officers were dropped on the basis that it had not been established that they were present when the events took place.

Complaints

The applicants complained under Article 3 of the Convention that they were subjected to ill-treatment during the interrogation and while they were held in policy custody.

In addition, the applicants complained under Article 13, in conjunction with Article 3, that the Greek investigative and prosecuting authorities failed to carry out a prompt and effective official investigation into the incident.

Moreover, the applicants claimed that the prejudice and hostile attitudes from police officers towards persons of Roma origin constituted a violation of Article 14 of the Convention.

Held

The Court found out that the serious physical harm suffered by applicants and the feeling of fear, anguish and inferiority which they suffered could be categorised as inhuman and degrading treatment within meaning of Article 3 of the Convention. The Court concluded that there had been a breach of Article 3 of the Convention in this regard.

The court also held the violation of Article 3 of the Convention due to the lack of an effective investigation, because no police officer was ever punished for ill treating the applicants.

In view of the grounds on which it has found a violation of Article 3 in relation to its procedural aspect the Court considered that there was no need to examine separately the complaint under Article 13 of the Convention.

Finally, having assessed all relevant elements, the Court held that there had been no violation of Article 14 taken together with Article 3 in its substantive aspect, concerning the allegation that racist attitudes had played a role in applicant's treatment by the police.

However, the Court found that the authorities failed in their duty under Article 14 of the Convention taken together with Article 3 to take all possible steps to investigate whether or not discrimination may have played a role in the events.

Commentary

With regard to Article 14 of the Convention, the Court held that the behaviour of the police officers during the applicants' detention itself was an insufficient basis for concluding that the treatment inflicted on the applicants by the police was racially motivated. Further, in so far as the applicants relied on general information about police abuse of Roma in Greece, the Court held that it could not lose sight of the fact that its sole concern is to ascertain whether in the case at hand the treatment inflicted on the applicants was motivated by racism. Similarly, the Court did not consider that the failure of the authorities to carry out an effective investigation into the alleged racist motive for the incident should shift the burden of proof to the respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 3 of the Convention.

However, the Court considered that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Although in this case plausible information was available to the authorities that the alleged assaults had been racially motivated, there was no evidence that they carried out any examination into this question. Further, nothing was done to verify the statements of the second applicant that they had been racially and verbally abused. Additionally, no investigation had been made as to whether the police officers had previously been involved in similar incidents, nor had any investigation been conducted into how other officers at the same police station were carrying out their duties when dealing with ethnic minority groups. Thus, in this case, the authorities failed in their duty under Article 14 of the Convention taken together with Article 3 to take all possible steps to investigate whether or not discrimination may have played a role in the events.

This decision is of major importance to the Kurds' right to non-discrimination under the Convention. Following on from the decision in Nachova and others v Bulgaria (*43577/98 and 43579/98*)[160], it provides a clear indication that the Court is now considering whether or not ethnic hatred or prejudice may have played a role in the events, rather than failing to consider such complaints.

160 See summary in Legal Review 2005 Issue 8

Timishev v. Russia
(55762/00 and 55974/00)

European Court of Human Rights: Judgment of 13 December 2005

Prohibition of discrimination- Right to education- Right to freedom of movement- Articles 14, 2 of Protocol No. 1 and 2 of Protocol No. 4

Facts
The applicant, Mr. Ilyas Yakubovich Timishev is a Russian national of Chechen origin born in 1950. He lives in the town of Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation.

On 19 June 1999, the applicant was travelling by car from Nazran (in the Ingushetia Republic of Russia) to Nalchik. His car was stopped at the Urukh checkpoint on the administrative border between Ingushetia and Kabardino-Balkaria. Officers from the Kabardino-Balkaria State Inspectorate for Road Safety refused him entry, referring to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit anyone of Chechen ethnic origin. Following this incident, the applicant lodged a complaint before a court and claimed compensation for non-pecuniary damage. His claim was dismissed and he appealed unsuccessfully.

On 24 December 1999 the applicant had received compensation for the property he had lost in the Chechen Republic. In exchange for compensation, he had to surrender his migrant's card, a local document confirming his residence in Nalchik and his status as a forced migrant from Chechnya. On 1 September 2000 the applicant's children went to school, but were refused admission because the applicant could not produce his migrant's card. The headmaster agreed to admit the children informally, but advised the applicant that the children would be immediately suspended if the education department discovered this arrangement. The applicant complained unsuccessfully about the refusal to admit his children to the school.

Complaints
The applicant complained that he was refused permission to enter Kabardino-Balkaria because of his Chechen ethnic origin in violation of Article 14 of the Convention.

He also alleged a violation of his right to freedom of movement under Article 2 of Protocol No. 4.

He complained about the refusal to admit his children to their school in breach of Article

2 of Protocol No. 1 to the Convention.

Held
The Court held that there had been a violation of the right to freedom of movement of the applicant under Article 2 of Protocol No. 4 since the restriction on the applicant's freedom of movement was not in accordance with the law.

The Court held that there had been a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 4 since the applicant's right to freedom of movement was restricted on the ground of his Chechen origin.

The Court held that there had been a violation of Article 2 of Protocol No.1 to the Convention as the applicant's children had been denied the right to education provided by the domestic law.

The Court awarded the applicant EUR 5,000 for non-pecuniary damage and EUR 950 for costs and expenses.

Commentary
The Court noted that the police refused to admit "Chechens" into the territory. As a person's ethnic origin is not listed anywhere in Russian identity documents, the Court considered that such an order effectively barred the passage not only of anyone of Chechen ethnicity, but also those who were perceived as belonging to that ethnic group. According to the Court, that represented a clear inequality of treatment regarding the right to liberty of movement on account of one's ethnic origin.

Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination. Racial discrimination requires special vigilance from the authorities. For that reason, authorities must use all available means to combat racism. Once the applicant had shown that there had been a difference in treatment, it was for the Russian Government to show that the difference in treatment could be justified (*Nachova and Others v. Bulgaria*). The Government did not offer any justification for the difference in treatment between people of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considered that no difference in treatment which was based exclusively or to a decisive extent on a person's ethnic origin was capable of being objectively justified in a contemporary democratic society. The Court concluded that since the applicant's right to liberty of movement was restricted solely on the ground of his ethnic origin, that difference in treatment constituted racial discrimination within the meaning of Article 14. There had therefore been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4.

This judgment represents the first time that the Court has found a violation of Article 14 taken together with Article 2 of Protocol No.4, and one of the few cases where a violation has been found under Article 14 on the grounds of ethnic origin.

Case of D.H. and Others v. The Czech Republic
(57325/00)

European Court of Human Rights: Judgment of 7 February 2006

Prohibition of discrimination– Right to education- Articles 14 of the Convention and Article 2 of the Protocol No. 1

Facts
The applicants, who are 18 Roma children, were placed in special schools in Ostrava between 1996 and 1999, either directly or after a period in an ordinary primary school. The special schools are intended for children with learning disabilities who are unable to attend "ordinary" primary schools.

In 15 June 1999 all the applicants (apart from applicants nos. 1, 2, 10 and 12) asked the Ostrava Education Authority to reconsider the administrative decisions to place them in special schools because their intellectual capacity had not been reliably tested and their representatives had not been sufficiently informed of the consequences of consenting to their placement in a special school. However, the Education Authority informed that they did not satisfy the conditions for bringing proceedings outside the appeal procedure.

In June 1999, the applicants all lodged a constitutional appeal in which they complained of discrimination in the general functioning of the special education system. They explained that the existence of two independent educational systems had resulted in racial segregation and discrimination. Further, there was nothing in the applicants school files to show that their progress was being regularly monitored with a view to a possible transfer to primary school and that their recommendations for placement in a special school were based on grounds such as an insufficient command of the Czech language. Therefore, they asked the Constitutional Court to find a violation of their rights and to restore the *status quo ante* by offering them compensatory education.

However, the Ministry for Education denied any discrimination had taken place and said that parents of Roma children tended to have a rather negative attitude to school work. On 20 October 1999, the Constitutional Court dismissed the applicants' appeal,

partly on the ground that it was manifestly unfounded and partly on the ground that it had no jurisdiction to hear it.

Complaints

The applicants complained under Article 14 of the Convention taken together with Article 2 of the Protocol No.1 that they had been discriminated against regarding the enjoyment of their right to education on account of their ethnic origin.

Held

The Court held by six votes to one that there has been no violation of Article 14 of the Convention, taken together with Article 2 of the Protocol No. 1.

Commentary

The Court noted that the applicants' complaint was based on a number of serious arguments. However, it pointed out that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Moreover, the Court could not find that the measures taken against the applicants were discriminatory, although the Court acknowledged that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect.

Further, the Court did not consider that any evidence existed to suggest that the decision to place or retain the 18 applicants in "special schools" was a result of "racist" attitudes as they alleged. In that context, however, the Court observed that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed at that group.

This decision marks an unfortunate step backwards in the bid to expand the reach of Article 14. A request for referral of the case to the Grand Chamber was made on 5 May 2006.

Right of individual petition before the Court

Aoulmi v. France
(50278/99)

European Court of Human Rights: Judgment of 17 January 2006

Prohibition of torture and inhuman or degrading treatment- Right to family life- Right of petition before the Court- Articles 3, 8 and 34 of the Convention

Facts
The applicant, Mr. Rachid Aoulmi is an Algerian national born in 1956. He currently lives in Algeria.

The applicant entered France in 1960 at the age of four. He was married to a French national from April 1989 until January 1993 and had a daughter in 1983. He has been carrying the hepatitis C virus since 1994. In December 1988 the applicant, who had previously been convicted in 1982 and 1984 of offences including burglaries, was sentenced to 14 months imprisonment for a drug offence. A decision was also made for his permanent exclusion from France. The prison sentence was increased to four years on appeal, while the exclusion order was upheld. In addition, in 1992 the applicant was sentenced to six years imprisonment for a further drug offence, three months for forging administrative documents and two months for breaching an exclusion order.

The applicant lodged an appeal against the decision excluding him from France. His appeal was dismissed. On 9 August 1999, he was released from prison and was placed in administrative detention with a view to his removal from France. On 11 August 1999, the prefect made an order for the applicant's deportation to Algeria. On the same day the applicant applied to the Court, which immediately informed the French Government under Rule 39 of the Rules of Court that it would be desirable, in the interests of the parties and the proper conduct of the proceedings before it, to refrain from deporting the applicant to Algeria until it had given its decision. However, the applicant was put on a boat bound for Algeria on 19 August 1999. The deportation order was set aside by the Lyons Administrative Court on 13 December 2000.

Complaints
The applicant alleged that his removal to Algeria put him at risk of treatment contrary to Article 3 of the Convention on account of his state of health and his background as a member of a Harki family.

He also contended under Article 8 that his removal to Algeria would infringe his right to respect for family life.

Held
The Court held that there was no evidence that Article 3 of the Convention would be violated following the deportation of the applicant to Algeria.

The Court held that there had been no violation of Article 8 since the domestic Administrative Court could legitimately considered that the deportation of the applicant was necessary to protect the public order and prevent penal infractions. From then on, the deportation was proportionate to the pursued aim.

The Court held that there had been a violation of Article 34 of the Convention since France did not respect the applicant's right of petition before the Court by deporting the applicant before the Court's decision.

The Court awarded the applicant EUR 7,000 for non-pecuniary damage and EUR 5,000 for costs and expenses.

Commentary
The Court reiterated that Article 3 of the Convention enshrines one of the basic values of democratic societies. For this reason, the Court has constantly recalled that Article 3 prohibits torture and ill-treatment regarding the offences to the law committed by an alien (*Ahmed v. Austria*, § 38, and *Chahal v. United-Kingdom*, §§ 73-74). Article 3 can also cover cases of very serious disease which can not be cured anywhere else other than in the country of residence (*D. v. United-Kingdom*, §§ 51-53). In the instant case, the Court considered that the applicant had not shown that his illness could not have been treated in Algeria. The fact that treatment would be less easy to obtain in Algeria than in France can not be considered decisive for the purposes of Article 3 (*Dragan and others v. Germany*).

In relation to Article 34, the Court reiterated that the obligation not to hinder the effective exercise of the right of petition precluded any interference with the right of the individual effectively to present and pursue his complaint before it (*Mamatkulov and Askarov v. Turkey,* No. 46827/99 and 46951/99). In the present case, the applicant's removal to Algeria had hampered the examination of his complaints and had ultimately prevented the Court from affording him the necessary protection from any potential violations of the Convention. As a result, the applicant had been hindered in the effective exercise of his right of petition in breach of Article 34 of the Convention. Accordingly, having regard to the evidence before it, the Court concluded that by not complying with the

interim measures indicated under Rule 39, France had failed to honour its obligations under Article 34 of the Convention in the applicant's case.

Enjoyment of property

Broniowski v. Poland
(31443/96)

European Court of Human Rights: Judgment of 22 June 2004 (merits and just satisfaction) and of 28 September 2005 (friendly settlement)

Enjoyment of property- Article 1 of Protocol No. 1 to the Convention

Facts
The applicant, Mr. Jerzy Broniowski, is a Polish national, born in 1944. He lives in Wieliczka, in the region of Małopolska.

The family of the applicant had a property in Lwów (now Lviv in the Ukraine) when this area was part of Poland, before the Second World War. The applicant's grandmother who had been living in the east of Poland was "repatriated" after Poland's borders were redrawn. The Government had promised to compensate those who had been repatriated for their loss of property. However, it had not been able to comply with its obligation to provide compensation. On 30 January 2004, an Act came into force, according to which Poland's obligations towards the applicant and all other claimants who had ever obtained any compensatory property under previous law was deemed to have been discharged. Those who never received compensation were awarded 15 percent of their original entitlement. The Constitutional Court declared both the Act and the compensation of 15 percent unconstitutional.

On 12 March 1996, the applicants lodged an application before the Court which held a violation of Article 1 of Protocol No. 1 of the Convention. The Court stated that the violation had originated in a systemic problem connected with the malfunctioning of Polish legislation and practice. The Court awarded the applicant EUR 12,000 for costs and expenses but held that the question of an award in respect of any pecuniary or non-pecuniary damage was not ready for decision at time.

After submitting different bills to the Parliament, the Polish Government asked the Court for assistance in negotiations between the parties in order to agree a friendly

settlement.

Complaints
The applicant complained that his right to get compensation for his property was breach under Article 1 of Protocol No. 1 to the Convention.

Held
In its first judgment, the Court held the violation of Article 1 of Protocol No.1.

In the friendly settlement agreement, the Court awarded 213,000 Polish zlotys, approximately 54,300 EUR, for pecuniary and non-pecuniary damage and 24,000 Polish zlotys, approximately 6,100 Euros, for costs and expenses. The Government also gave various undertakings, including the implementation of suitable legislation to provide the remaining claimants with adequate redress.

Commentary
In its principal judgment, the Court decided that the violation originated in a widespread, systemic problem as a consequence of which a group of people had been affected. The Court made it clear that general national measures were needed to implement the judgment. Those measures had to take into account the many people affected. The Court's approach to systemic or structural problems in a national legal order has been described as a "pilot-judgment procedure". The goal is to solve a national legal problem but also to ease the burden on the Court which would have to take to judgment large numbers of similar applications.

In the instant case, in determining if it could strike the list out of the application, the Court found it appropriate to consider not only the applicant's individual situation but also the measures taken to resolve the systemic problem in polish legal order identified in its first judgment. The Court noted that the friendly settlement agreement addressed the general as well as the individual aspects of the finding of a violation of the right to enjoy property. Regarding the individual applicant, the Court said that the payment to be made to him under the settlement provided him with both accelerated satisfaction of his "right to credit" and compensation for any pecuniary and non-pecuniary damage. Therefore the Court decided to strike the case out of the list.

N.A. and others v. Turkey
(37451/97)

European Court of Human Rights: Judgment of 11 October 2005

Protection of property - Article 1 of Protocol No. 1 to the Convention.

Facts
The applicants, N.A., N.A., A.A., J.Ö and H.H., are Turkish nationals, respectively born in 1926, 1956, 1954, 1949 and 1950. They are living in Antalya.

After the death of R.A, the applicants inherited a plot of land on the coast. After having obtained the necessary administrative permits, they decided to construct a hotel. On 28 October 1986, the work was under way while the Public Treasury declared the property invalid and urged the demolition of the building. The Public Treasury was successful at first instance. Moreover, the applicants were unsuccessful when they complained for the loss of their property rights. Indeed, the court considered that the property had been unlawful *ab initio*, since the shoreline is the property of the State. From then on, the applicants could not claim any compensation from the State.

Complaints
The applicants complained that their right to enjoy property was violated under Article 1 of Protocol No.1.

Held
The Court unanimously found a violation of Article 1 of the Protocol No. 1 since the applicants did not get any compensation from the State.

The Court considered that the question of just satisfaction under Article 41 of the Convention was not ready for decision and reserved it in whole.

Commentary
The Court recalled that the Convention is protecting "concrete and effective" rights. So, it is necessary to ascertain if the deprivation of property in the instant case can be regarded as an expropriation (*Brumărescu v. Romania*, § 76, *Sporrong and Lönnroth v. Sweden*, §§ 63 and 69-74, and *Vasilescu v. Romania*, §§ 39-41).

In the present case, the applicants were deprived of their property by a judicial decision which was not in any way arbitrary and fulfilled a legitimate purpose. However, concerning the compensation, a total lack of compensation for deprivation of property

could only be justified in exceptional circumstances (*Nastou v. Greece* (No. 2), § 33, *Jahn and others v. Germany*, § 111). Here, the Turkish Government had failed to give any such justification. Accordingly, the total lack of compensation for the applicants had upset the balance between the protection of property and the requirements of the general interest.

Yıltaş Yıldız Turistik Tesisleri A.Ş. v. Turkey
(30502/96)

European Court of Human Rights: Judgment of 24 April 2003 (Merits) and 27 April 2006 (just satisfaction)

Right to property- Article 1 of Protocol No.1 to the Convention

Facts
Yıltaş Yıldız Turistik Tesisleri A.Ş. is a Turkish company carrying on business in the building industry and whose registered office is in Istanbul.

In 1987, the applicant company bought nearly 4,000,000 m2 of private woodlands for 6,467,693,808 Turkish liras and obtained planning permission in respect of part of the land. A few months later, it received an order of expropriation that had been issued in 1977. On 20 October 1987, the applicant company lodged an application to have the expropriation order set aside but it was dismissed by the administrative courts in 1989. The applicant company then sought additional expropriation compensation in the civil courts. A court-appointed expert assessed the value of the property at TRL 22,658,069,013. However, at the end of the proceedings, the compensation was calculated by reference to the value of the buildings and the annual receipts from the woodlands and the applicant company received TRL 11,134,942,255.

Complaints
The applicant company complained under Article 1 of Protocol No. 1 to the Convention that the additional compensation awarded by the domestic court did not reflect the true value of the land.

Held
The Court held unanimously that there had been a violation of Article 1 of Protocol No 1 since it considered that the amount of compensation was unreasonable compared to the value of the property.

Concerning just satisfaction, the Court awarded the applicant EUR 6,100,000 for pecuniary damage and EUR 10,000 for costs and expenses.

Commentary
The Court noted that the domestic courts had assessed the compensation without taking into account the value of the land. The Court considered that the applicant company had sufficiently established that the amount of compensation determined by the domestic courts was unreasonable when compared to the value of the property and accordingly the Court held a violation of Article 1 of Protocol No.1 to the Convention in its first judgment of 24 April 2003. As regarding just satisfaction, the Court recalled that a decision establishing a violation led to the judicial obligation for the State to reestablish as much as possible the former situation (*Iatridis v. Greece* and *Katsaros v. Greece*). Therefore, the Court considered that the just compensation must correspond to the value of the property at the expropriation time in September 1987. Accordingly, the Court awarded the applicant EUR 6,100,000, representing one of the highest damages awards ever delivered.

Right to appeal

Gurepka v Ukraine
(61406/00)

European Court of Human Rights: Judgment of 6 December 2005

Inhuman Treatment or Punishment - Right to liberty and security - Fair trial - Effective remedy- Prohibition of discrimination -Right to appeal in all criminal matters - Articles 3, 5, 6, 13, 14 and Article 2 of Protocol No. 7.

Facts
The applicant, Mr Nikolay Vasilyevich Gurepka is a Ukrainian national, who was born in 1956 and lives in the city of Simferopol, the Autonomous Republic of Crimea, Ukraine.

In the course of civil proceedings for defamation brought by a Member of Parliament in which he was a co-defendant, the applicant was summoned to a court hearing in April 1998. According to him, this summons was never served on him properly. On 18 May 1998, he was imposed a fine for his failure to appear, with the right to appeal within ten days. According to the applicant, he did not receive this decision until 28 May 1998: lodged an appeal but without indicating the reasons for lodging it outside the time-limit.

His appeal was rejected as having been submitted too late.

On 12 July 1998, the applicant lodged an appeal with the Highest Court of the Autonomous Republic of Crimea, together with a request for the composition of the first instance court to be changed. He was summoned to appear before the court but he informed the court that he would not be able to attend the hearings. He was not able to attend the re-arranged hearing and finally the court decided to institute administrative proceedings against him for his repeated failure to appear before the court.

The applicant received a sentence of seven days' administrative detention for contempt of court. He was arrested and placed in a cell, which he described as cold. The Prosecutors' Office of the Autonomous Republic of Crimea lodged an extraordinary appeal and the applicant was released after spending 16 hours in detention. After this detention, the applicant went to hospital suffering from an acute form of chronic urological disease. According to him, this illness was caused by his detention in the cold cell.

The applicant lodged a further request with the Supreme Court of Ukraine for an extraordinary review of all the decisions. His request was rejected.

Complaints

The applicant complained that his detention damaged his health and harmed his reputation, causing him moral and physical suffering in violation of Article 3 of the Convention.

The applicant complained under Article 5 § 1 of the Convention that his detention was unlawful.

The applicant complained that the judicial decisions imposing the fine on him and ordering his administrative arrest and detention were arbitrary and in breach of Article 6 § 1 of the Convention. He also complained that he had not received a fair hearing in the second civil proceedings.

Moreover, under Article 6 § 1 of the Convention, the applicant complained that the court decision on his administrative arrest and detention was arbitrary.

The applicant complained that, despite the fact that he was a public prosecutor, the State failed to protect him, in violation of Article 14 of the Convention.

The applicant further complained under Article 13 of the Convention and under Article 2 of Protocol No.7 about the lack of an effective remedy against the decision ordering his

administrative arrest and detention.

Held
The Court held that there was no evidence to support the allegation of the applicant that he had suffered ill-treatment, and therefore there had been no violation of Article 3 in this respect.

The Court maintained that there was no breach of Article 5 § 1 of the Convention since the detention was "lawful" according to Ukrainian law.

The Court held that the applicant's complaint under Article 6 § 1 of the Convention must be rejected for non-exhaustion of domestic remedies according to Article 4 and 35 § 1 of the Convention.

The Court considered that, in the absence of any substantiation whatsoever, the complaint under Article 14 of the Convention was manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

The Court recalled that Article 13 of the Convention does not, as such, guarantee a right of appeal or a right to a second level of jurisdiction. Nevertheless, should the impugned proceedings be characterised as "criminal" for Convention purposes, the applicant's complaint can be examined under Article 2 of Protocol No. 7.

The Court concluded that there had been a violation of Article 2 of Protocol No. 7 to the Convention since the appeal could not be considered an effective remedy which could have satisfied the requirements of this Article.

The Court awarded the applicant EUR 1,000 for non-pecuniary damage. The applicant did not submit any claim for costs & expenses and therefore the Court made no award.

Commentary
The Court recalled that Contracting States have a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. In some countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on that right must pursue a legitimate aim and not infringe that right (*Krombach v. France*). The Court also recalled that a remedy must be independent of the authorities and must be directly available to be considered as effective (*Kucherenko v. Ukraine*).

In the instant case, the procedure was not directly accessible to the party to the proceedings and did not depend on his motion and arguments. So, the Court considered that it was not a sufficiently effective remedy for Convention purposes and held the violation of Article 2 of Protocol No. 7.

C. UN Cases

Right to Life

Yurich et al v Chile
(1078/2002)
Human Right Committee: Decision of 2 November 2005

Disappearance – right to life - Articles 5, 6(1) and (3), 7, 9(1) to (4), 10 (1) and (2), 12(4), 13, 14(1) to (3) and (5), 16, 17(1) and (2), 18(1), and 26 of the International Covenant of Civil and Political Rights.

Facts
The applicants, Norma Yurich and her daughter Jacqueline Drouilly Yurich, are Chilean nationals. Jacqueline Drouilly was born in 1949.

On 30 October 1974, agents of the National Intelligence Directorate (DINA) came to applicant's daughter's house in search of her husband, but he was not there, so they arrested her instead. The applicant's daughter and her husband were members of Movimiento de Izquierda Revolucionaria (MIR). The husband was arrested the following day. The applicant's daughter was pregnant and had been missing since her arrest.

According to witness evidence, in October and November 1974, the applicant's daughter and her husband were held in a DINA detention centre called José Domingo Cañas, where they were allegedly tortured. On or around 10 November 1974, the applicant's daughter and her husband were transferred to the Cuatro Alamos detention centre. In December 1974, according to witness evidence, the applicant's daughter and her husband were taken out of their cells by DINA agents and were never seen again.

The applicant filed three applications for legal protection with the Santiago Appeal Court on 11 November 1974, 24 February 1975 and 3 October 1975: all were dismissed.

On 17 March 1975, the Ministry of the Interior informed the Court that the applicant's daughter was not being held. On 16 July 1975 the applicant also filed a complaint with the Santiago Appeal Court in respect of the abduction of the applicant's daughter and her husband: the case was later dismissed. On 28 May 1975 and again in July and August 1975, a complaint of mass abduction was filed with the Santiago Appeal Court on behalf of 163 disappeared people, including the applicant's daughter, with a request to appoint an inspecting magistrate to the mass abductions. The request was rejected all the way up to the Supreme Court. In 1978, the Decree Law on Amnesty was passed which extinguished criminal responsibility of those who perpetrated offences in Chile during the siege of force between 11 September 1973 and 10 March 1978. On 29 March 2001, a criminal complaint was filed with the Santiago Appeal Court for the disappearance of more than 500 members of the MIR, including the applicant's daughter. The proceedings are still pending.

Complaints

The applicant alleges that her daughter was a victim of violations of Articles 5 (protection of human rights); 6(1) (right to life) and (3) (protection from genocide); 7 (torture); 9(1) to (4) (right to liberty); 10(right to liberty); 12(4) (right to enter own country); 13(protection from expulsion); 14(1) to (3) and (5) (equality before the law); 16 (right to recognition); 17 (right to private life); 18(1) (freedom of thought, conscience, and religion); and 26 (equal protection) of the Covenant.

On behalf of herself, the applicant claimed a violation of Article 7 of the Covenant, on the grounds that the loss of her daughter and the uncertainty of her whereabouts had caused her both mental and physical pain amounting to torture.

Held

The Committee held that all complaints made by the applicant on behalf of her daughter were inadmissible *ratione temporis*.

The Committee held the applicant's complaint under Article 7 of the Covenant inadmissible because the complaints were of a general nature and all domestic remedies had not been exhausted.

Commentary

The Committee regards cases of forced disappearance as a continuing offence. The Committee also noted that the Optional Protocol to the Covenant did not enter into force in Chile until 11 March 1990. Additionally, events giving rise to the communication commenced on 30 October 1974 and therefore took place prior to 23 March 1976, the date of the international entry into force of the Covenant. The Committee therefore

held that the original acts of arrest, detention and abduction, as well as the refusal to give information about the deprivation of freedom - both key elements of the offence according to the definition given in the Rome Statute - occurred before the entry into force of both the Covenant and Optional Protocol for the State party. Therefore, the case was declared inadmissible *ratione temporis.* The Committee also commented that the State had acknowledged the disappearance and taken responsibility for it.

However, five members of the Committee signed a dissenting opinion which strongly criticised the above ruling. The opinion asserted that the Committee was wrong to base its definition of disappearances purely on the definition set out in the Rome Statute; since the Committee overlooked other important criteria that are key within the ICCPR, mainly violations of Articles 9 (1) and 16. The opinion emphasised that disappearances are a continuing violation that should preclude *ratione temporis.* Further, although the State had admitted to the disappearance, it had not proved that it had used all available means to determine the whereabouts of the applicant's daughter and therefore the five dissenting members could not agree that there had been no violation.

Prohibition of Torture

Ahmed Hussein Mustafa Kamil Agiza v Sweden
(223/2003)

Committee Against Torture: Decision of 20 May 2005

Return (refouler) or extradition– Violation of Articles 3 and 22 of the Convention against Torture

Facts
The applicant, Ahmed Hussein Mustafa Kamil Agiza, is an Egyptian national who was born on 8 November 1962 and was detained in Egypt at the time of submission of the complaint.

In 1982, the applicant was arrested in Egypt for his family connection to his cousin who was alleged to be involved in the assassination of Anwar Sadat. The applicant claims he was tortured while in custody. In 1991 the applicant left Egypt for Saudi Arabia and then moved to Pakistan. In 1995, he entered Syria with his family under false Sudanese passports, in the attempt to migrate to Europe; however, the plan failed and the applicant and his family moved to Iran. In 1998, the applicant and over 100 others were tried in

Egypt *in absentia* for alleged terrorist activity directed against the State. The applicant was found guilty of belonging to the terrorist group 'Al Gihad' and was sentenced to 25 years imprisonment with out the possibility of appeal.

On 23 September 2000, the applicant and his family sought asylum in Stockholm, Sweden. On 23 May 2001 the Migration Board sought the advice of the Swedish Security Police on the applicant's case. On 30 October 2001, the Security Police informed the Migration Board that the applicant was an active and leading member of an organisation that carried out terrorist acts and that he was responsible for the activities of the organisation. They claimed he was a threat to national security. On 12 November 2001, the applicant's case was referred to the Swedish Government because the Migration Board believed that he qualified for refugee status; however the assessment of the Security Police shed a different light on the applicant's case and therefore his asylum applicant needed to be decided by the Government. The applicant denied belonging to the organisation to which the Security Police report linked him.

On 13 December 2001, the Egyptian government granted guarantees to the Swedish Government guarantees that the applicant and his family would be treated in accordance with international law if returned to Egypt. On 18 December 2001 the Government denied the applicant's request for asylum and requested that he immediately be deported. He was returned to Egypt the same day. The CIA had already agree to provide a plane to export him and were present at Bromma airport in order to perform "security checks" on the applicant and other expellees. The applicant alleged that he was tortured by Egyptian authorities upon transfer into their authority, some of which was performed by the Americans during the "security check" while the Swedish Security Police passively observed.

Between January and July 2002, the applicant's mother visited the applicant regularly and reported that her son complained of being tortured and showed visible signs of torture. The Swedish Ambassador and staff were permitted to visit the applicant on several occasions but they reported that the applicant was treated 'relatively well' and that he had not been tortured. On 5 March 2003, the Swedish Ambassador and a human rights envoy from the Swedish Ministry of Foreign Affairs met with the applicant. The Swedish Ambassador says this was the first time that the applicant had informed them that he had been tortured. The applicant said he had not mentioned the torture previously because he believed that it would have made no difference.

On 10 April 2004, a re-trail for the applicant began in Egypt before the 13th superior military court and the applicant alleged that he did not receive a fair trial. On 27 April 2004, the applicant was convicted and sentenced to 25 years imprisonment which was

later reduced to 15 years. His request to be examined by a medical expert after allegations of torture was denied. On 18 May 2004, various Swedish authorities made a special request to Egypt for an inquiry into the treatment of the applicant, but the Egyptian Government did not respond.

Complaints

The applicant asserted that his rights under Article 3 of the Convention against Torture were violated by Sweden. According to the applicant, the State should have been aware of the substantial risk to torture that he would face upon deportation to Egypt, both from the well known widespread use of torture in Egypt and from the applicant's political affiliations. The applicant further contended that the assurances that the Egyptian Government gave to the Swedish Government were not sufficient to guarantee that he would not be tortured.

Held

The Committee held that by deporting the applicant back to Egypt, the State was in breach of Article 3 of the Convention.

The Committee held that by deporting the applicant to Egypt on the same day that the deportation order was handed down by the Government, the State was in breach of its obligations under Article 22 of the Convention.

The State was given 90 days to submit a report to the Committee summarising its responses.

Commentary

The Committee sought to establish whether the State, in light of the information that was known or ought to have been known at the time of expulsion, was in breach of their obligations under Article 3 of the Convention, and specifically where there was substantial evidence that he may be subject to torture by the Egyptian authorities. The Committee ruled that the State should have known that the applicant would face the adverse risk of torture upon return to Egypt because of the widespread torture of detainees there, especially those of a political and security interest, like the applicant. The Respondent State itself considered the applicant a threat to their national security, knew that the applicant was of interest to the intelligence services of two other states (USA and Egypt), and knew that the applicant had been sentenced to 25 years imprisonment *in absentia* and was wanted in relation to his activities in alleged terrorist activities by Egypt. The Respondent State should therefore have deduced from these facts that the applicant would be in danger of torture upon arrival in Egypt.

Furthermore, the Committee declared that the diplomatic assurances of Egypt garnered by the Respondent State did not provide sufficient protection against the manifest risk of torture toward the applicant, especially because there were no sufficient means to enforce these assurances. The Committee noted that this case differed from the Committee's previous decision on the case of *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden.* In that case, the Committee had been satisfied with the assurances provided, especially because the applicant had not yet been deported. However, in the instant case, the Committee was concerned about the involvement of foreign intelligence agents both the treatment of and expulsion of the applicant, the breach by the Egyptians of the applicant's right to fair trial and the unwillingness of the Egyptian State to engage in an independent and impartial investigation.

Further, under Article 22 of the Convention, the Respondent State is obliged to allow persons in its jurisdiction the right of complaint to the Committee Against Torture. The individual must have a reasonable amount of time before the execution of the final decision in order to decide whether the individual would like to use the right of complaint to the Committee. The decision regarding the applicant's deportation was given effect on the same day that it was taken, leaving no possibility that the applicant could consider invoking Article 22 to the Committee. Therefore, the Respondent State had deprived the applicant of his right to complain.

Mostafa Dadar v. Canada
(258/2004)

Committee Against Torture: Decision of 5 December 2005

Prohibition of expulsion if a risk of torture exists- Article 3 of Convention against Torture

Facts
The applicant, Mr. Mostafa Dadar, is an Iranian national born in 1950, currently detained in Canada and awaiting deportation to Iran.

From 1968 to 1982, the applicant was a member of the Iranian Air Force. In December 1978, he was given the responsibility of commander of martial law at "Jusk" Air Force Base. He claimed that he was given that assignment, *inter alia*, because of his opposition to Ayatollah Khomeini and his strong loyalty to the Shah. The applicant was expelled and called back several times to the Air Force and subsequently became involved with the National Iranian Movement Association ("NIMA"), which staged an unsuccessful coup d'état against the Khomeini regime in 1982. In March 1982, in the aftermath of the

coup d'état, many NIMA members were executed. The applicant was arrested and taken to prison, where he had been severely tortured. On 9 July 1982, he was subjected to a false execution.

In July 1987, the applicant received a two-day medical pass to exit the prison in order to obtain medical treatment. During his two-day release, he fled to Pakistan with his wife, where the UNHCR Office in Karachi issued him with an identity card and referred him to Canada. In Canada, the applicant divorced his wife. On 31 December 1996, he was convicted of aggravated assault and sentenced to 8 years in prison, for assaulting a woman he had recently befriended, causing her to be hospitalised in intensive care and in the psychiatric ward for several weeks. His appeal against the 8 year sentence was dismissed.

In October 2000 the Minister of Citizenship and Immigration issued a Danger Opinion pursuant to the Immigration Act, declaring the applicant to be a danger to the public. As a result, in June 2001 an order was made for his deportation. In August 2001, he filed an Application for Judicial Review. The Minister consented to the application and the Danger Opinion was quashed. A subsequent Opinion was issued and quashed. On 8 March 2004, the Minister issued a third Danger Opinion. The applicant applied for judicial review. In October 2004, the Federal Court of Canada upheld the Opinion. In February 2005, the applicant filed an application for release on humanitarian and compassionate grounds. He later filed an application pursuant to s.84.(2) of the Immigration and Refugee Protection Act for release as a foreign national who has not been removed from Canada within 120 days after the Federal Court determines a certificate to be reasonable. The applicant remained in detention at the date of the decision.

Complaints

The applicant argued that there were substantial grounds for believing that he would be subjected to torture if returned to Iran, in violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Held

The Committee concluded that the deportation of the complainant to Iran would amount to a breach of Article 3 of the Convention.

Commentary

The Committee recalled that the prohibition enshrined in Article 3 of the Convention is an absolute one. It also recalled that in assessing the risk of torture, it must take into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations of human rights, which is true of

Iran. However, the Committee stipulated that the existence of such a pattern does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. The aim of the Committee's determination is to establish whether the individual concerned would be personally at risk in the country to which he would return. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

The Committee recalled its General Comment on Article 3, which states that it must assess whether there are substantial grounds for believing that the complainant would be in danger of torture if returned, and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk need not be highly probable, but it must be personal and present. In assessing the risk of torture in the present case, the Committee noted that the complainant claimed to have been tortured and imprisoned on previous occasions by the Iranian authorities because of his activities against the current regime and that, after his arrival in Canada, he was diagnosed with chronic post-traumatic stress disorder. In the circumstances, the Committee considered that substantial grounds exist for believing that the complainant may risk being subjected to torture if returned to Iran.

Freedom of expression

Velichkin v. Belarus
(1022/2001)

Human Rights Committee: Decision of 23 November 2005

Freedom of expression - Article 19§2 of the International Covenant on Civil and Political Rights

Facts
The applicant, Mr. Vladimir Velichkin, is a Belarusian national born in 1960.

The applicant is a human rights activist. On 23 November 2000, he requested authorisation to organise a meeting on 10 December 2000 to celebrate the 52nd anniversary of the signature of the Universal Declaration of Human Rights, near the "Pushkin" Public Library in the Centre of Brest. He was told that it was not possible to hold the meeting

there, but that he could organise the meeting at the "Stroitel" Stadium. The applicant complied but on the day was asked by the police to stop the meeting. He refused and was placed in a temporary detention. The following day, he was brought to the Leninsky District Court of Brest which ordered his release. Nevertheless, on 15 January 2001 the court decided to fine the applicant the equivalent of 20 minimum monthly salaries, on charges of "conduct of a meeting in a non-authorised place". The applicant lodged two successive appeals, both of which were rejected.

Complaints
The applicant claimed a violation of Article 19 § 2 of the International Covenant on Civil and Political Rights and Article 34 of the Belarusian Constitution.

Held
The Committee held there had been a violation of Article 19 § 2 of the Covenant.

The Committee held that in accordance with article 2 § 3(a) of the Covenant, the State party is under an obligation to provide the applicant with an effective remedy, including compensation amounting to a sum not less than the present value of the fine and any legal costs incurred.

The Committee also stated that the State party is under an obligation to take measures to prevent similar violations in the future.

Commentary
The Committee recalled that Article 19 of the Covenant allows restrictions only as provided by law and which are necessary for respect of the rights and reputation of others, and for the protection of national security or public order, public health or morals. It further recalled that the right to freedom of expression is of paramount importance in any democratic society, and any restrictions on the exercise of this right must meet a strict test of justification. In the instant case, the State party had not invoked any specific grounds for the restrictions imposed on the applicant's activity which, whether or not it took place within the context of a meeting, would be necessary within the meaning of article 19 § 3 of the Covenant. It was uncontested that the applicant posed any threat to the national security or order.

Accordingly, the actions of the Belarusian authorities were an unreasonable interference with the applicant's freedom of expression and his right to impart information protected by article 19 § 2 of the International Covenant on Civil and Political Rights. Further, the applicant's right of peaceful assembly set out in Article 21 of the Convention had been violated. A state can impose reasonable restrictions on public assemblies in the

interests of public safety and public order, and to protect the rights and freedoms of others. However, the Respondent State had not attempted to offer any explanation for the authorities' flat ban on all public protests and gatherings, even of a modest size, in areas within the city centre. The committee emphasised that a state has no legitimate interest in banning public gatherings merely to limit their influence, as had been done in the instant case.

Bodrožić v. Serbia and Montenegro
(1180/2003)

Human Rights Committee: Decision of 23 January 2006

Freedom of expression- Article 19§2 of the International Covenant on Civil and Political Rights

Facts
The applicant, Zeljko Bodrožić, is a Yugoslav national born in 1970.

The applicant is a well-known journalist and magazine editor. In a magazine article published on 11 January 2002, "Born for Reforms", he politically criticised a number of individuals, notably a Mr. Segrt. The latter was manager of the 'Toza Mrakovic' factory and had previously been a prominent member of the Socialist Party of Serbia. On 21 January 2002, Mr. Segrt filed private criminal complaints of libel and insult against the applicant. On 14 May 2002, the court convicted the applicant of criminal insult, but acquitted him on the charge of libel. On 20 November 2002, the Zrenjanin District Court dismissed the applicant's appeal against his conviction. On 30 December 2002, the applicant asked the Republic Prosecutor to file an extraordinary "request for the protection of legality" in the Supreme Court, but on 24 February 2003 the Prosecutor denied this request.

Complaints
The applicant claimed a breach of his rights under Article 19 § 2, freedom of expression, of the International Covenant on Civil and Political Rights.

Held
The Committee held the violation of Article 19§2 of the Covenant.

Commentary
The applicant referred to the Committee's General Comment 10 as well as the

jurisprudence of the European Court of Human Rights (*Handyside v United Kingdom* (5493/72), 07/12/1976; *Lingens v Austria* (9815/82), 08/07/1986; *Schwabe v Austria* (13704/88), 28/08/1992), the Inter-American Commission on Human Rights in Report 22/94 on Argentinian 'destacato' laws and the United States Supreme Court (*New York Times Co v Sullivan* (376 US 254), 1964 and *United States v Dennis* (341 US 494), 1951). From these authorities, the applicant recalled that Article 19 of the Covenant protects a broad area of expression, especially in political debate, and limits on this expression should be tightly construed in order to avoid chilling legitimate expression.

The Committee reiterated that Article 19 § 3 permits restrictions on freedom of expression, if they are provided by law and are necessary for respect of the rights or reputations of others. In the instant case, the Committee observed that the State party had advanced no justification for the prosecution and conviction of the applicant as being necessary for the protection of the rights and reputation of Mr. Segrt. The Committee argued that given the facts of the article regarding Mr. Segrt, a prominent public and political figure, it is difficult for the Committee to discern how the expression of opinion by the applicant amounted to an unjustified infringement of Mr. Segrt's rights and reputation. Moreover, the Committee observed, that in circumstances of public debate in a democratic society, especially in the media and concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high. It followed that the Committee held the violation of article 19 § 2 of the Covenant.

Prohibition of discrimination

Rahime Kayhan
(--8/2005)

Committee on the Elimination of Discrimination against Women: Decision of 27 January 2006

Prohibition of sex discrimination in the field of employment - Article 11 of the Convention on the Elimination of all Forms of Discrimination against Women

Facts
The applicant, Ms Rahime Kayhan is a Turkish national, who was born in 1968.

The applicant, a teacher of religion and ethics, wore a scarf covering her hair and neck. After teaching in different State schools, she was transferred in Mehmetçik Middle

School. In July 1999, she received several warnings and a deduction was taken from her salary for wearing a headscarf. She lodged an appeal and those penalties were removed from her record. In January 2000 she was informed that an investigation had begun into a claim that she did not obey regulations on appearance and that she "spoiled the peace, quiet, work and harmony of the institution with her ideological and political objectives". She submitted a written statement and on March 2000 the Ministry of Education informed her that she could defend herself orally. On 9 June 2000, she was dismissed from her position. The applicant appealed before the Erzurum Administrative Court but the court refused her appeal. She lodged a second appeal which was also refused.

Complaints

The applicant claimed a violation of Article 11 of the Convention on the Elimination of all Forms of Discrimination against Women. She complained that the action taken against her was arbitrary because it was not based on any law or judicial decision.

Held

In accordance with Article 4 of the Optional Protocol, the Committee decided that the communication was inadmissible.

Commentary

The State party argued that the communication was inadmissible under Article 4 of the Optional Protocol since the same matter had been examined by another procedure of international investigation. The State referred to the case of Leyla Şahin lodged before the European Court of Human Rights. In that case, the Court ruled unanimously that there was no violation of Article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion). The Committee referred to a previous communication, *Fanali v. Italy* (075/1980) and recalled that the identity of the applicant is one of the elements that it considers when deciding whether a communication submitted under the Optional Protocol was the same matter that was being examined under another procedure of international investigation. In the instant case, the applicant was a different individual than Leyla Şahin. The communication could not therefore be declared inadmissible on that basis.

Nevertheless, the applicant's communication was declared inadmissible since domestic remedies had not been exhausted. The Committee reiterated that a communication can not be declared admissible unless all available domestic remedies have been exhausted. Moreover, the substance of the complaint should be the same before domestic authorities and before the Committee. In the instant communication, the Committee noted that the applicant had never raised the issue of sex discrimination before the domestic authorities. Instead, the applicant based her argument on political and ideological issues:

that her rights to freedom of work, religion, conscience, thought and freedom of choice, the prohibition of discrimination and immunity of person, the right to develop one's physical and spiritual being and national and international principles of law had been violated. In contrast to the complaints made before local authorities, this communication invoked a violation of the prohibition of sex discrimination. Therefore, the Committee concluded that the applicant should have raised this issue before the domestic courts before submitting a communication to the Committee.

Appendix 1

JUDGMENTS 2005

Etat en cause / State concerned	*Affaires ayant donné lieu à un constat de* / Cases which gave rise to a finding of		*Affaires n'ayant pas donné lieu a un constat sur le fond* / Cases which gave rise to no finding on the merits		*Satisfaction équitable* / Just satisfaction	Révision	TOTAL
	Au moins une violation / At least one violation	*Non violation* / No violation	*Règlement amiable* / Friendly settlement	*Rayée du rôle* / Striking out			
Albanie / **Albania**	-	1	-	-	-	-	**1**
Andorre / **Andorra**	-	-	-	-	-	-	**-**
Arménie / **Armenia**	-	-	-	-	-	-	**-**
Autriche / **Austria**	18	2	1	-	-	1	**22**
Azerbaïdjan / **Azerbaijan**	-	-	-	-	-	-	**-**
Belgique / **Belgium**	12	1	1	-	-	-	**14**
Bosnie-Herzégovine / **Bosnia and Herzegovina**	-	-	-	-	-	-	**-**
Bulgarie / **Bulgaria**	23	-	-	-	-	-	**23**
Croatie / **Croatia**	24	1	1	-	-	-	**26**
Chypre / **Cyprus**	1	-	-	-	-	-	**1**
République tchèque / **Czech Republic**	28	1	4	-	-	-	**33**
Danemark / **Denmark**	-	1	1	1	-	-	**3**
Estonie / **Estonia**	4	-	-	-	-	-	**4**
Finlande / **Finland**	10	2	1	-	-	-	**13**
France	51	6	1	2	-	-	**60**
Géorgie / **Georgia**	3	-	-	-	-	-	**3**
Allemagne / **Germany**	10	3	-	1	1[1]	1	**16**
Grèce / **Greece**	100	2	1	1	1	-	**105**
Hongrie / **Hungary**	17	-	-	-	-	-	**17**
Islande / **Iceland**	-	-	-	-	-	-	**-**
Irlande / **Ireland**	1	2	-	-	-	-	**3**
Italie / **Italy**	67	3	7	2	-	-	**79**
Lettonie / **Latvia**	1	-	-	-	-	-	**1**
Liechtenstein	1	-	-	-	-	-	**1**
Lituanie / **Lithuania**	3	1	-	1	-	-	**5**
Luxembourg	1	-	-	-	-	-	**1**
Ex-République yougoslave de Macédoine / **Former Yugoslav Republic of Macedonia**	4	-	-	-	-	-	**4**
Malte / **Malta**	1	1	-	-	-	-	**2**
Moldova	13	-	-	1	-	-	**14**
Pays-Bas /**Netherlands**	7	1	-	2	-	-	**10**
Norvège / **Norway**	-	-	-	-	-	-	**-**
Pologne / **Poland**	44	4	-	-	1[1]	-	**49**
Portugal	6	1	3	-	-	-	**10**
Roumanie / **Romania**	21	3	5	1	3	0	**33**[2]
Fédération de Russie / **Russian Federation**	81	2	-	-	-	-	**83**
Saint-Marin / **San Marino**	-	-	-	1	-	-	**1**
Slovaquie / **Slovakia**	28	-	-	-	1[1]	-	**29**
Slovénie / **Slovenia**	1	-	-	-	-	-	**1**
Espagne / **Spain**	-	-	-	-	-	-	**-**
Serbie-Monténégro / **Serbia and Montenegro**	-	-	-	-	-	-	**-**
Suède / **Sweden**	4	-	2	1	-	-	**7**
Suisse / **Switzerland**.	5	-	-	-	-	-	**5**
Turquie / **Turkey**	270	10	6	3	1	-	**290**
Ukraine	119	-	-	1	-	-	**120**
Royaume-Uni / **United Kingdom**	15	-	3	-	-	-	**18**
TOTAL	**994**[3]	**48**	**37**	**18**	**8**	**2**	**1107**[3]

[1] Friendly settlement.

[2] Two judgments (one merits and one friendly settlement) concerned the same application.

[3] Two judgments related to two respondent States (Georgia/Russian Federation, and Hungary/Romania).

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (1/3)
EVOLUTION OF CASES (1/3)

Etat *State*	Requêtes introduites (prov.) *Applications lodged (prov.)*			Requêtes attribuées à un organe décisionnel *Applications allocated to a decision body*			Requêtes déclarées irrecevables ou rayées du rôle *Applications declared inadmissible or struck off*			Requêtes communiquées au Gouvernement *Applications referred to Government*			Requêtes déclarées recevables *Applications declared admissible*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Albania/*Albanie*	24	28	52	17	13	40	11	12	17	1	-	11	1	1	-
Andorra/*Andorre*	2	3	8	2	1	5	1	-	2	-	-	-	1	-	-
Armenia/*Arménie*	89	122	340	67	96	110	28	24	62	1	2	21	-	-	1
Austria/*Autriche*	445	421	418	324	304	301	401	253	208	71	7	31	19	21	29
Azerbaijan/*Azerbaïdjan*	266	251	172	238	151	175	45	200	120	3	15	5	-	-	3
Belgium/*Belgique*	216	247	283	117	125	169	118	135	192	11	19	18	12	11	9
Bosnia and Herzegovina/*Bosnie-Hezégovine*	94	221	212	59	137	210	-	46	70	-	5	1	-	-	1
Bulgaria/*Bulgarie*	700	986	927	517	739	821	293	298	344	37	57	73	26	34	30
Croatia/*Croatie*	878	696	685	664	697	553	349	580	477	38	59	39	25	13	24
Cyprus/*Chypre*	44	65	72	36	47	66	11	2	49	5	2	16	4	-	8
Czech Republic/*République Tchèque*	941	1406	1369	629	1064	1264	280	399	420	16	91	141	7	41	30
Denmark/*Danemark*	142	129	94	73	86	72	65	88	86	4	8	9	6	-	2
Estonia/*Estonie*	178	186	204	131	138	164	138	70	82	5	4	5	1	4	-
Finland/*Finlande*	285	313	270	260	244	244	97	191	256	11	27	23	12	15	11
France/*France*	2904	3025	2826	1481	1737	1827	1451	1678	1441	89	105	192	89	70	60
Georgia/*Georgie*	44	60	91	35	47	72	24	17	48	6	7	9	1	1	5
Germany/*Allemagne*	1935	2562	2164	998	1527	1582	461	914	1386	17	16	22	10	10	4
Greece/*Grèce*	480	405	425	354	274	369	171	253	349	72	96	54	26	34	93
Hungary/*Hongrie*	499	589	635	330	397	647	293	337	220	25	12	50	15	15	16
Iceland/*Islande*	17	10	7	10	6	6	5	6	9	-	-	1	1	-	-
Ireland/*Irlande*	76	64	62	29	32	45	31	16	36	2	1	3	2	-	1
Italy/*Italie*	1848	1867	1186	1351	1480	848	1009	1178	839	89	228	146	16	95	39
Latvia/*Lettonie*	312	332	318	133	195	234	152	115	92	10	14	9	7	5	-

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (1/3)
EVOLUTION OF CASES (1/3)

Etat *State*	Requêtes introduites (prov.) *Applications lodged (prov.)*			Requêtes attribuées à un organe décisionnel *Applications allocated to a decision body*			Requêtes déclarées irrecevables ou rayées du rôle *Applications declared inadmissible or struck off*			Requêtes communiquées au Gouvernement *Applications referred to Government*			Requêtes déclarées recevables *Applications declared admissible*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Liechtenstein/*Liechtenstein*	5	5	2	3	5	3	3	2	6	-	-	1	1	1	-
Lithuania/*Lituanie*	485	465	266	355	451	266	199	586	444	21	6	27	5	3	13
Luxemburg/*Luxembourg*	58	40	50	21	12	28	28	3	16	5	2	5	2	1	2
Malta/*Malte*	19	14	11	4	8	13	-	4	12	3	3	6	1	3	3
Moldova/*Moldovie*	357	441	583	238	344	594	105	79	302	64	53	46	2	38	12
Monaco/*Monaco*	-	-	2	-	-	1	-	-	-	-	-	-	-	-	-
Netherlands/*Pays-Bas*	451	553	511	278	350	412	235	339	440	19	58	23	7	11	7
Norway/*Norvège*	74	110	73	51	82	57	62	44	53	3	3	13	1	-	-
Poland/*Pologne*	5359	5796	4744	3658	4321	4571	1702	2344	6466	123	66	190	83	54	37
Portugal/*Portugal*	243	175	287	148	115	221	252	102	117	8	18	19	5	10	7
Romania/*Roumanie*	4282	3988	3820	2165	3225	3110	700	1200	2036	57	65	158	22	22	43
Russia/*Russie*	6062	7855	8781	4738	5835	8088	3206	3704	5262	169	232	341	15	64	110
San Marino/*Saint-Marin*	2	5	2	2	-	4	2	5	2	2	1	-	3	1	-
Serbia and Montenegro/*Serbie-Monténégro*	101	615	629	-	452	660	-	-	384	-	1	5	-	-	-
Slovak Republic/Republique *Slovaque*	539	484	478	349	403	444	277	353	283	8	63	59	28	12	24
Slovenia/*Slovénie*	265	303	347	251	271	347	60	198	131	86	128	43	3	2	1
Spain/*Espagne*	604	690	634	455	423	493	377	204	426	12	8	7	6	3	2
Sweden/*Suède*	436	524	587	257	398	448	303	366	391	13	25	38	5	8	5
Switzerland/*Suisse*	273	311	296	162	203	232	108	170	178	6	15	10	1	4	6
FYRO Macedonia/ERY *Macédoine*	148	148	234	98	115	220	57	51	62	1	11	15	-	-	6
Turkey/*Turquie*	2944	3930	2244	3558	3679	2489	1632	1817	1366	357	740	538	142	172	241
Ukraine/*Ukraine*	2287	2265	2457	1858	1538	1870	1665	1246	1698	158	141	269	6	31	133
United Kingdom/*Royaume-Uni*	1396	1423	1652	685	745	1007	865	721	732	86	25	150	134	20	18
Total	**38810**	**44128**	**41510**	**27189**	**32512**	**35402**	**17272**	**20350**	**27612**	**1714**	**2439**	**2842**	**753**	**830**	**1036**

COUR EUROPEENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (2/3) - ARRÊTS (1/2)
EVOLUTION OF CASES (2/3) - JUDGMENTS (1/2)

Etat *State*	Arrêts (Chambre et Grande Chambre) *Judgments (Chamber and Grand Chamber)*			Arrêts (définitif - après renvoi devant la Grande Chambre) *Judgments (final - after referral to Grand Chamber)*			Arrêts (règlement amiable) *Judgments (friendly settlements)*			Arrêts (radiation) *Judgments (striking out)*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Albania/*Albanie*	-	1	1	-	-	-	-	-	-	-	-	-
Andorra/*Andorre*	-	1	-	-	-	-	-	-	-	-	-	-
Armenia/*Arménie*	-	-	-	-	-	-	-	-	-	-	-	-
Austria/*Autriche*	17	14	20	-	-	-	2	1	1	-	1	-
Azerbaijan/*Azerbaïdjan*	-	-	-	-	-	-	-	-	-	-	-	-
Belgium/*Belgique*	7	11	13	-	-	-	1	1	1	-	3	-
Bosnia and Herzegovina/*Bosnie-Hezégovine*	-	-	-	-	-	-	-	-	-	-	-	-
Bulgaria/*Bulgarie*	11	26	22	-	-	1	-	1	-	-	-	-
Croatia/*Croatie*	6	12	25	-	-	-	-	21	1	-	-	-
Cyprus/*Chypre*	2	2	-	-	1	1	-	-	-	-	-	-
Czech Republic/*République Tchèque*	5	27	29	-	-	-	1	1	4	-	-	-
Denmark/*Danemark*	2	1	1	-	1	-	-	1	1	-	-	1
Estonia/*Estonie*	3	1	4	-	-	-	-	-	-	-	-	-
Finland/*Finlande*	3	12	12	-	-	-	2	-	1	-	-	-
France/*France*	83	70	57	-	-	-	7	4	1	-	-	2
Georgia/*Georgie*	-	1	3	-	-	-	-	-	-	-	1	-
Germany/*Allemagne*	9	6	12	2	-	1	1	-	-	-	-	1
Greece/*Grèce*	23	35	102	-	-	-	3	-	1	-	-	1
Hungary/*Hongrie*	13	20	16	-	-	-	2	-	-	1	-	-
Iceland/*Islande*	2	2	-	-	-	-	-	-	-	-	-	-
Ireland/*Irlande*	2	2	3	-	-	-	-	-	-	-	-	-
Italy/*Italie*	107	37	70	1	-	-	29	7	7	4	-	2
Latvia/*Lettonie*	1	3	1	-	-	-	-	-	-	-	-	-

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (2/3) - ARRÊTS (1/2)
EVOLUTION OF CASES (2/3) - JUDGMENTS (1/2)

Etat *State*	Arrêts (Chambre et Grande Chambre) *Judgments (Chamber and Grand Chamber)*			Arrêts (définitif - après renvoi devant la Grande Chambre) *Judgments (final - after referral to Grand Chamber)*			Arrêts (règlement amiable) *Judgments (friendly settlements)*			Arrêts (radiation) *Judgments (striking out)*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Liechtenstein/*Liechtenstein*	-	1	1	-	-	-	-	-	-	-	-	-
Lithuania/*Lituanie*	3	1	4	-	-	-	1	1	-	-	-	1
Luxemburg/*Luxembourg*	4	1	1	-	-	-	-	-	-	-	-	-
Malta/*Malte*	1	1	2	-	-	-	-	-	-	-	-	-
Moldova/*Moldovie*	-	10	13	-	-	-	-	-	-	-	-	1
Monaco/*Monaco*			-			-			-			-
Netherlands/*Pays-Bas*	7	9	8	-	-	-	-	1	-	-	-	2
Norway/*Norvège*	5	-	-	-	-	-	-	-	-	-	-	-
Poland/*Pologne*	43	74	48	-	1	-	22	4	-	2	-	-
Portugal/*Portugal*	16	5	7	-	-	-	1	2	3	-	-	-
Romania/*Roumanie*	25	11	24	-	1	-	-	3	5	3	-	1
Russia/*Russie*	5	15	82	-	-	-	-	-	-	-	-	-
San Marino/*Saint-Marin*	3	2	-	-	-	-	1	-	-	-	-	1
Serbia and Montenegro/*Serbie-Monténégro*	-	-	-		-	-		-	-		-	-
Slovak Republic/Republique *Slovaque*	19	12	28	-	1	-	8	1	-	-	-	-
Slovenia/*Slovénie*	-	-	1	-	-	-	-	-	-	-	-	-
Spain/*Espagne*	9	6	-	-	-	-	-	-	-	-	-	-
Sweden/*Suède*	3	1	4	-	-	-	-	5	2	-	-	1
Switzerland/*Suisse*	1	-	5	-	-	-	-	-	-	-	-	-
FYRO Macedonia/ERY *Macédoine*	-	-	4	-	-	-	-	-	-	-	-	-
Turkey/*Turquie*	76	156	276	1	2	3	44	10	6	1	3	3
Ukraine/*Ukraine*	6	14	119	-	-	-	-	-	-	-	-	1
United Kingdom/*Royaume-Uni*	20	18	14	2	1	1	3	4	3	-	-	-
Total	**542**	**621**	**1032**	**6**	**8**	**7**	**128**	**68**	**37**	**11**	**8**	**18**

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (3/3) - ARRÊTS (2/2)
EVOLUTION OF CASES (3/3) - JUDGMENTS (2/2)

Etat *State*	Arrêts (satisfaction équitable) *Judgments (just satisfaction)*			Arrêts (exceptions préliminaires) *Judgments (preliminary objections)*			Arrêts (interprétation) *Judgments (interpretation)*			Arrêts (révision) *Judgments (revision)*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Albania/*Albanie*	-	-	-	-	-	-	-	-	-	-	-	-
Andorra/*Andorre*	-	-	-	-	-	-	-	-	-	-	-	-
Armenia/*Arménie*	-	-	-	-	-	-	-	-	-	-	-	-
Austria/*Autriche*	-	1	-	-	-	-	-	-	-	-	-	1
Azerbaijan/*Azerbaïdjan*	-	-	-	-	-	-	-	-	-	-	-	-
Belgium/*Belgique*	-	-	-	-	-	-	-	-	-	-	-	-
Bosnia and Herzegovina/*Bosnie-Hezégovine*	-	-	-	-	-	-	-	-	-	-	-	-
Bulgaria/*Bulgarie*	-	-	-	-	-	-	-	-	-	-	-	-
Croatia/*Croatie*	-	-	-	-	-	-	-	-	-	-	-	-
Cyprus/*Chypre*	1	-	-	-	-	-	-	-	-	-	-	-
Czech Republic/*République Tchèque*	-	-	-	-	-	-	-	-	-	-	-	-
Denmark/*Danemark*	-	-	-	-	-	-	-	-	-	-	-	-
Estonia/*Estonie*	-	-	-	-	-	-	-	-	-	-	-	-
Finland/*Finlande*	-	-	-	-	-	-	-	-	-	-	-	-
France/*France*	2	-	-	-	-	-	-	-	-	2	1	-
Georgia/*Georgie*	-	-	-	-	-	-	-	-	-	-	-	-
Germany/*Allemagne*	-	-	1	-	-	-	-	-	-	-	-	1
Greece/*Grèce*	2	4	1	-	-	-	-	-	-	-	1	-
Hungary/*Hongrie*	-	-	-	-	-	-	-	-	-	-	-	-
Iceland/*Islande*	-	-	-	-	-	-	-	-	-	-	-	-
Ireland/*Irlande*	-	-	-	-	-	-	-	-	-	-	-	-
Italy/*Italie*	2	3	-	-	-	-	-	-	-	5	-	-
Latvia/*Lettonie*	-	-	-	-	-	-	-	-	-	-	-	-

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

EVOLUTION DES AFFAIRES (3/3) - ARRÊTS (2/2)
EVOLUTION OF CASES (3/3) - JUDGMENTS (2/2)

Etat *State*	Arrêts (satisfaction équitable) *Judgments (just satisfaction)*			Arrêts (exceptions préliminaires) *Judgments (preliminary objections)*			Arrêts (interprétation) *Judgments (interpretation)*			Arrêts (révision) *Judgments (revision)*		
	2003	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***	***2003***	***2004***	***2005***
Liechtenstein/*Liechtenstein*	-	-	-	-	-	-	-	-	-	-	-	-
Lithuania/*Lituanie*	-	-	-	-	-	-	-	-	-	-	-	-
Luxemburg/*Luxembourg*	-	-	-	-	-	-	-	-	-	-	-	-
Malta/*Malte*	-	-	-	-	-	-	-	-	-	-	-	-
Moldova/*Moldovie*	-	-	-	-	-	-	-	-	-	-	-	-
Monaco/*Monaco*			-			-			-			-
Netherlands/*Pays-Bas*	-	-	-	-	-	-	-	-	-	-	-	-
Norway/*Norvège*	-	-	-	-	-	-	-	-	-	-	-	-
Poland/*Pologne*	-	-	1	-	-	-	-	-	-	-	-	-
Portugal/*Portugal*	-	-	-	-	-	-	-	-	-	-	-	-
Romania/*Roumanie*	-	3	3	-	-	-	-	-	-	-	1	-
Russia/*Russie*	-	-	-	-	-	-	-	-	-	-	-	-
San Marino/*Saint-Marin*	-	-	-	-	-	-	-	-	-	-	-	-
Serbia and Montenegro/*Serbie-Monténégro*	-	-	-		-	-		-	-		-	-
Slovak Republic/Republique *Slovaque*	-	-	1	-	-	-	-	-	-	-	-	-
Slovenia/*Slovénie*	-	-	-	-	-	-	-	-	-	-	-	-
Spain/*Espagne*	-	-	-	-	-	-	-	-	-	-	-	-
Sweden/*Suède*	-	-	-	-	-	-	-	-	-	-	-	-
Switzerland/*Suisse*	-	-	-	-	-	-	-	-	-	-	-	-
FYRO Macedonia/ERY *Macédoine*	-	-	-	-	-	-	-	-	-	-	-	-
Turkey/*Turquie*	-	-	1	1	-	1	-	-	-	-	-	-
Ukraine/*Ukraine*	1	-	-	-	-	-	-	-	-	-	-	-
United Kingdom/*Royaume-Uni*	-	-	-	-	-	-	-	-	-	-	-	-
Total	**8**	**11**	8	**1**	**-**	1	**-**	**-**	**-**	**7**	**3**	2

Appendix 2

European Court of Human Rights – Composition of the Court as at May 2006

Last update: 11/05/2006

Composition of the Sections

Section I	**Section II**	**Section III**	**Section IV**	**Section V**
Mr C.L. Rozakis **President**	Mr J.-P. Costa **President**	Mr B.M. Zupančič **President**	Sir Nicolas Bratza **President**	Mr P. Lorenzen **President**
Mr L. Loucaides **Vice-President**	Mr A.B. Baka **Vice-President**	Mr J. Hedigan **Vice-President**	Mr J. Casadevall **Vice-President**	Mrs S. Botoucharova **Vice-President**
Mrs F. Tulkens	Mr I. Cabral Barreto	Mr L. Caflisch	Mr G. Bonello	Mr L. Wildhaber
Mrs N. Vajić	Mr R. Türmen	Mr C. Birsan	Mr M. Pellonpää	Mr K. Jungwiert
Mr A. Kovler	Mr M. Ugrekhelidze	Mr V. Zagrebelsky	Mr K. Traja	Mr V. Butkevych
Mrs E. Steiner	Mrs A. Mularoni	Mrs A. Gyulumyan	Mr S. Pavlovschi	Mrs M. Tsatsa-Nikolovska
Mr K. Hajiyev	Mrs E. Fura-Sandström	Mr E. Myjer	Mr L. Garlicki	Mr R. Maruste
Mr D. Spielmann	Mrs D. Jočienė	Mr D. Björgvinsson	Mrs L. Mijović	Mr J. Borrego Borrego
Mr S. E. Jebens	Mr D. Popović	Mrs I. Ziemele	Mr J. Šikuta	Mrs R. Jaeger

Section Registrars

S. Nielsen S. Dollé V. Berger L. Early C. Westerdiek

Deputy Section Registrars

S. Quesada S. Naismith M. Villiger F. Elens-Passos

Appendix 3

964th meeting – 10 May 2006

Item 4.4

Steering Committee for Human Rights (CDDH) – Activity report – Reform of the European Convention on Human Rights – Declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" – Rules 9 and 15

(CM/Del/Dec(2006)963/4.1b, CM(2006)39 Addendum)

Decisions

The Deputies

1. adopted the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements as they appear at Appendix 4 to the present volume of Decisions and agreed to reflect this decision in the report "Ensuring the continued effectiveness of the European Convention on Human Rights – The implementation of the reform measures adopted by the Committee of Ministers at its 114th Session (12 May 2004)" and in the draft Declaration on "Sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels";

2. decided, bearing in mind their wish that these Rules be applicable with immediate effect to the extent that they do not depend on the entry into force of Protocol No. 14 to the European Convention on Human Rights, that these Rules shall take effect as from the date of their adoption, as necessary by applying them *mutatis mutandis* to the existing provisions of the Convention, with the exception of Rules 10 and 11.

(Item 4.4)

Appendix 4

Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

(Adopted by the Committee of Ministers on 10 May 2006
at the 964th meeting of the Ministers' Deputies)

I. General Provisions

Rule 1

1. The exercise of the powers of the Committee of Ministers under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4, of the European Convention on Human Rights, is governed by the present Rules.

2. Unless otherwise provided in the present Rules, the general rules of procedure of the meetings of the Committee of Ministers and of the Ministers' Deputies shall apply when exercising these powers.

Rule 2

1. The Committee of Ministers' supervision of the execution of judgments and of the terms of friendly settlements shall in principle take place at special human rights meetings, the agenda of which is public.

2. If the chairmanship of the Committee of Ministers is held by the representative of a High Contracting Party which is a party to a case under examination, that representative shall relinquish the chairmanship during any discussion of that case.

Rule 3

When a judgment or a decision is transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, or Article 39, paragraph 4, of the Convention, the case shall be inscribed on the agenda of the Committee without delay.

Rule 4

1. The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem.

2. The priority given to cases under the first paragraph of this Rule shall not be to the detriment of the priority to be given to other important cases, notably cases where the violation established has caused grave consequences for the injured party.

Rule 5

The Committee of Ministers shall adopt an annual report on its activities under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4, of the Convention, which shall be made public and transmitted to the Court and to the Secretary General, the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe.

II. Supervision of the execution of judgments

Rule 6

Information to the Committee of Ministers on the execution of the judgment

1. When, in a judgment transmitted to the Committee of Ministers in accordance with Article 46, paragraph 2, of the Convention, the Court has decided that there has been a violation of the Convention or its protocols and/or has awarded just satisfaction to the injured party under Article 41 of the Convention, the Committee shall invite the High Contracting Party concerned to inform it of the measures which the High Contracting Party has taken or intends to take in consequence of the judgment, having regard to its obligation to abide by it under Article 46, paragraph 1, of the Convention.

2. When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:

a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

b. if required, and taking into account the discretion of the High Contracting Party

concerned to choose the means necessary to comply with the judgment, whether:

> i. individual measures[1] have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;
>
> ii. general measures[2] have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

Rule 7
Control intervals

1. Until the High Contracting Party concerned has provided information on the payment of the just satisfaction awarded by the Court or concerning possible individual measures, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, unless the Committee decides otherwise.

2. If the High Contracting Party concerned informs the Committee of Ministers that it is not yet in a position to inform the Committee that the general measures necessary to ensure compliance with the judgment have been taken, the case shall be placed again on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise; the same rule shall apply when this period expires and for each subsequent period.

Rule 8
Access to information

1. The provisions of this Rule are without prejudice to the confidential nature of the Committee of Ministers' deliberations in accordance with Article 21 of the Statute of the Council of Europe.

2. The following information shall be accessible to the public unless the Committee decides otherwise in order to protect legitimate public or private interests:

a. information and documents relating thereto provided by a High Contracting Party to the Committee of Ministers pursuant to Article 46, paragraph 2, of the Convention;

b. information and documents relating thereto provided to the Committee of Ministers, in accordance with the present Rules, by the injured party, by non-governmental organisations or by national institutions for the promotion and protection of human

rights.

3. In reaching its decision under paragraph 2 of this Rule, the Committee shall take, *inter alia*, into account:

a. reasoned requests for confidentiality made, at the time the information is submitted, by the High Contracting Party, by the injured party, by non-governmental organisations or by national institutions for the promotion and protection of human rights submitting the information;

b. reasoned requests for confidentiality made by any other High Contracting Party concerned by the information without delay, or at the latest in time for the Committee's first examination of the information concerned;

c. the interest of an injured party or a third party not to have their identity, or anything allowing their identification, disclosed.

4. After each meeting of the Committee of Ministers, the annotated agenda presented for the Committee's supervision of execution shall also be accessible to the public and shall be published, together with the decisions taken, unless the Committee decides otherwise. As far as possible, other documents presented to the Committee which are accessible to the public shall be published, unless the Committee decides otherwise.

5. In all cases, where an injured party has been granted anonymity in accordance with Rule 47, paragraph 3 of the Rules of Court; his/her anonymity shall be preserved during the execution process unless he/she expressly requests that anonymity be waived.

Rule 9
Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.

2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.

3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It

shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.

Rule 10
Referral to the Court for interpretation of a judgment

1. When, in accordance with Article 46, paragraph 3, of the Convention, the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

2. A referral decision may be taken at any time during the Committee of Ministers' supervision of the execution of the judgments.

3. A referral decision shall take the form of an interim resolution. It shall be reasoned and reflect the different views within the Committee of Ministers, in particular that of the High Contracting Party concerned.

4. If need be, the Committee of Ministers shall be represented before the Court by its Chair, unless the Committee decides upon another form of representation. This decision shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

Rule 11
Infringement Proceedings

1. When, in accordance with Article 46, paragraph 4, of the Convention, the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.

2. Infringement proceedings should be brought only in exceptional circumstances. They shall not be initiated unless formal notice of the Committee's intention to bring such proceedings has been given to the High Contracting Party concerned. Such formal notice shall be given ultimately six months before the lodging of proceedings, unless

the Committee decides otherwise, and shall take the form of an interim resolution. This resolution shall be adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee.

3. The referral decision of the matter to the Court shall take the form of an interim resolution. It shall be reasoned and concisely reflect the views of the High Contracting Party concerned.

4. The Committee of Ministers shall be represented before the Court by its Chair unless the Committee decides upon another form of representation. This decision shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

III. Supervision of the Execution of the Terms of Friendly Settlements

Rule 12
Information to the Committee of Ministers on the execution of the terms of the friendly settlement

1. When a decision is transmitted to the Committee of Ministers in accordance with Article 39, paragraph 4, of the Convention, the Committee shall invite the High Contracting Party concerned to inform it on the execution of the terms of the friendly settlement.

2. The Committee of Ministers shall examine whether the terms of the friendly settlement, as set out in the Court's decision, have been executed.

Rule 13
Control intervals

Until the High Contracting Party concerned has provided information on the execution of the terms of the friendly settlement as set out in the decision of the Court, the case shall be placed on the agenda of each human rights meeting of the Committee of Ministers, or, where appropriate,[3] on the agenda of a meeting of the Committee of Ministers taking place no more than six months later, unless the Committee decides otherwise.

Rule 14
Access to information

1. The provisions of this Rule are without prejudice to the confidential nature of the

Committee of Ministers' deliberations in accordance with Article 21 of the Statute of the Council of Europe.

2. The following information shall be accessible to the public unless the Committee decides otherwise in order to protect legitimate public or private interests:

a. information and documents relating thereto provided by a High Contracting Party to the Committee of Ministers pursuant to Article 39, paragraph 4, of the Convention;

b. information and documents relating thereto provided to the Committee of Ministers in accordance with the present Rules by the applicant, by non-governmental organisations or by national institutions for the promotion and protection of human rights.

3. In reaching its decision under paragraph 2 of this Rule, the Committee shall take, *inter alia*, into account:

a. reasoned requests for confidentiality made, at the time the information is submitted, by the High Contracting Party, by the applicant, by non-governmental organisations or by national institutions for the promotion and protection of human rights submitting the information;

b. reasoned requests for confidentiality made by any other High Contracting Party concerned by the information without delay, or at the latest in time for the Committee's first examination of the information concerned;

c. the interest of an applicant or a third party not to have their identity, or anything allowing their identification, disclosed.

4. After each meeting of the Committee of Ministers, the annotated agenda presented for the Committee's supervision of execution shall also be accessible to the public and shall be published, together with the decisions taken, unless the Committee decides otherwise. As far as possible, other documents presented to the Committee which are accessible to the public shall be published, unless the Committee decides otherwise.

5. In all cases, where an applicant has been granted anonymity in accordance with Rule 47, paragraph 3 of the Rules of Court; his/her anonymity shall be preserved during the execution process unless he/she expressly requests that anonymity be waived.

Rule 15
Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the applicant with regard to the execution of the terms of friendly settlements.

2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of the terms of friendly settlements.

3. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers. It shall do so in respect of any communication received in reference to paragraph 2 of this Rule, together with any observations of the delegation(s) concerned provided that the latter are transmitted to the Secretariat within five working days of having been notified of such communication.

IV. Resolutions

Rule 16
Interim resolutions

In the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution.

Rule 17
Final resolution

After having established that the High Contracting Party concerned has taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been executed, the Committee of Ministers shall adopt a resolution concluding that its functions under Article 46, paragraph 2, or Article 39 paragraph 4, of the Convention have been exercised.

***Note 1** For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings (see on this latter point Recommendation Rec(2000)2 of*

the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies).

Note 2 For instance, legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned.

Note 3 In particular where the terms of the friendly settlement include undertakings which, by their nature, cannot be fulfilled within a short time span, such as the adoption of new legislation.

Appendix 5

UN HUMAN RIGHTS COUNCIL MEMBERSHIP
AS AT JUNE 2006

The Council is composed of 47 members (with year of term's end)

African States: Algeria (2007), Cameroon (2009), Djibouti (2009), Gabon (2008),Ghana (2008), Mali (2008), Mauritius (2009), Morocco (2007), Nigeria (2009), Senegal (2009), South Africa (2007), Tunisia (2007) and Zambia (2008)

Asian States: Bahrain (2007), Bangladesh (2009), China (2009), India (2007),Indonesia (2007), Japan (2008), Jordan (2009), Malaysia (2009), Pakistan (2008),Philippines (2007), Republic of Korea (2008), Saudi Arabia (2009) and Sri Lanka (2008)

Eastern European States: Azerbaijan (2009), Czech Republic (2007),Poland (2007), Romania (2008), Russian Federation (2009) and Ukraine (2008)

Latin American & Caribbean States: Argentina (2007), Brazil (2008) , Cuba (2009), Ecuador (2007), Guatemala (2008), Mexico (2009), Peru (2008) and Uruguay (2009)

Western European & Other States: Canada (2009), Finland (2007), France (2008), Germany (2009), Netherlands (2007), Switzerland (2009) and United Kingdom(2008)

The first election of the members of the newly established Human Rights Council (HRC) was held by the General Assembly on 9 May 2006. Term of office will begin on 19 June 2006.

Member States announced their candidacies in writing and were elected *directly* and *individually* by a majority of the Members of the General Assembly. They shall not be eligible for immediate re-election after two consecutive terms.

Publications List

Other materials available from the Kurdish Human Rights Project include:

- A Fearful Land: Fact-Finding Mission to Southeast Turkey (1996)
- A Delegation to Investigate the Alleged Used of Napalm or Other Chemical Weapons in Southeast Turkey (1993)
- Advocacy and the Rule of Law in Turkey (1995)
- After the War: Fact-Finding Mission to Iraqi Kurdistan (2003)
- *Akduvar v. Turkey* - The Story of Kurdish Villagers Seeking Justice in Europe (1996)
- Aksoy v. Turkey & Aydin v. Turkey: Case reports on the practice of torture in Turkey - volume I (1997)
- Aksoy v. Turkey & Aydin v. Turkey: Case reports on the practice of torture in Turkey - volume II. (1997)
- Azerbaijan and Armenia – An Update on Ethnic Minorities and Human Rights by Deborah Russo and Kerim Yildiz (2000)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts - Turkey Section Final Report of Fourth Fact-Finding Mission (2004)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts - Turkey Section Final Report of Fifth Fact-Finding Mission (2006)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts – Georgia Section Final Report of Fact Finding Mission (2006)
- Cases Against Turkey Declared Inadmissible by the European Commission of Human Rights Volume 1 (1998).
- Censorship and the Rule of Law: Violations of Press and Attacks on *Özgür Gündem* (1994)
- Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora (2004)
- Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora - English, Sorani, Kurmanci, Arabic, Turkish, French (Second Edition) (2004)
- Cultural and Language Rights of Kurds: A Study of the Treatment of Minorities under National Law in Turkey, Iraq Iran and Syria (1997)
- Damning Indictment: How the Yusufeli Dam Violates International Standards and People's Rights (2002)

- Denial of a Language: Kurdish Language Rights in Turkey – Fact-Finding Mission Report (2002)
- Development in Syria – A Gender and Minority Perspective (2005)
- Disappearances: A Report on Disappearances in Turkey (1996)
- Dissenting Voices: Freedom of Expression and Association in Turkey – Fact-Finding Mission Report (2005)
- Downstream Impacts of Turkish Dam Construction in Syria and Iraq: Joint Report of Fact-Finding Mission to Syria and Iraq (2002)
- Due Process: State Security Courts and Emergency Powers in Southeast Turkey – Trial Observation Report (1997)
- Effective Criminal Accountability? Extra-Judicial Killings on Trial – Trial Observation Report (2006)
- Enforcing the Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora (2005)
- *Ergi v Turkey, Aytekin v Turkey*: Human Rights and Armed Conflict in Turkey – A Case Report (1999)
- *Ertak v Turkey, Timurtaş v Turkey*: State Responsibility in 'Disappearances' - A Case Report (2001)
- Fact-Finding Mission to Iran (2003)
- Final Resolution of the International Conference on Northwest Kurdistan (Southeast Turkey) (1994)
- Freedom of Association: Law and Practice in Turkey (1998)
- Freedom of Expression and Association in Turkey (2005)
- Freedom of Expression at Risk: Writers on Trial in Turkey - Trial Observation Report (2005)
- Freedom of the Press in Turkey: *The Case of Özgür Gündem* (1993)
- Freedom of Thought, Conscience, Religion and Expression Handbook (1998)
- *Gundem v Turkey, Selcuk and Asker*: A Case Report (1998)
- Human Rights Violations against Kurdish People - Report to the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities 46th Session (1994)
- Human Rights Violations against Kurdish People in Turkey - Report to the Budapest Review Conference, of the Conference on Security and Co-operation in Europe (1994)
- Human Rights Violations against Kurds in Turkey, presentation in Warsaw (1995)
- Human Rights Violations Against Kurds in Turkey: Report Presented to the Organisation

for Security and Cooperation in Europe (OSCE) (2005)

- Human Rights and Minority Rights of the Turkish Kurds (1996)
- "If the River were a Pen…" - The Ilisu Dam, the World Commission on Dams and Export Credit Reform (2001)
- Internally Displaced Persons: The Kurds in Turkey (2002)
- Internally Displaced Persons: the Kurds in Turkey (2003)
- International Conference on Turkey , the Kurds and the EU: European Parliament, Brussels, 2004 – Conference Papers (published 2005)
- International Fact-Finding Mission Report: Baku-Tblisi-Ceyhan Pipeline–Turkey section (2003)
- In the Wake of the Lifting of State of Emergency Rule: Report of a Fact-Finding Mission to Southeast Turkey (2003)
- Intimidation in Turkey (1999)
- *Kaya v Turkey, Kiliç v Turkey*: Failure to Protect Victims at Risk - A Case Report (2001)
- Kaya v Turkey, Kurt v Turkey: Case Reports (1999)
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume 1, April 1995.
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume 2, June 1995.
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume, 3, Jan. 1996.
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume 4, June 1996.
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume 5, June 1997.
- KHRP Cases Declared Admissible by the European Commission of Human Rights, Volume 6, June 1998.
- Kurds in the Former Soviet Union: A Preliminary Report (1996)
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- Lawyers in Fear - Law in Jeopardy – Fact-Finding Mission to South-east Turkey (1993)
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- Media, Elections and Freedom of Expression: A Summary Report of International Conference, Turkey (1999)
- *Mentes and Others v. Turkey*: Report of a KHRP Case on Village Destruction in Turkey

(1998)

- National Security and Freedom of Expression in Turkey – Briefing to the Conference on National Security and Freedom of Expression, Article 19 and the University of Witwatersand, Johannesburg (1995)
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- *Sadak & Others v. Turkey*: The Right to Free Elections—A Case Report (2002)
- *Salman v Turkey and Ilhan v Turkey*: Torture and Extra-Judicial Killing - A Case Report (2001)
- Second International Fact-Finding Mission - Baku-Tbilisi-Ceyhan Pipeline – Turkey Section (2003)
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- State Violence Against Women in Turkey and Attacks on Human Rights Defenders of Victims of Sexual Violence in Custody – KHRP Trial Observation Report (2001)
- Submission to the Committee Against Torture on Turkey (1996)

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- The Law: Freedom of Expression and Human Rights Advocacy in Turkey - February 1995 (1995)
- The Lifting of State of Emergency Rule: A Democratic Future for the Kurds? (2002)
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- The Safe Haven in Northern Iraq: An Examination of Issues of International Law and Responsibility relating to Iraqi Kurdistan (1995)
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- Update on Human Rights Violations Against Kurds in Turkey (1996)
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- Written Presentation to the OSCE Implementation Meeting on Human Dimension Issues (1997)
- Written Submission to the Organisation for Security and Cooperation in Europe (OSCE), Human Rights Violations against the Kurds in Turkey, Vienna (1996)
- *Yasa v Turkey and Tekin v Turkey*: Torture, Extra-Judicial Killing and Freedom of Expression Turkey: Case Reports (1999)
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Jonathan Sugden, *Director Human Rights Watch UK*

"In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better."

Can Dundar, *Journalist in Turkey*

Kurdish Human Rights Project
11, Guilford Street, London WC1N 1DH, England
Tel: +44 (0)20 7405 3835 Fax: +44 (0)20 7404 9088
E-mail: khrp@khrp.org Website: www.khrp.org
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