

Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project

KHRP

Celebrating 15 Years 1992-2007

(2008) 13 KHRP LR

The Kurdish Human Rights Project

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

AIMS

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

METHODS

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

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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 20 7405 3835
Fax: +44 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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11, Guilford Street,
London WC1N 1DH,
Tel: +44 20 7405 3835
Fax: +44 20 7404 9088
Email: khrp@khrp.org
http://www.khrp.org

Legal Review Editors

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Mark Muller QC

Executive Editor

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Abbreviations

CAT	United Nations Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COE	Council of Europe
Convention (The)	The European Convention for the Protection of Human Rights and Fundamental Freedoms
Court (The)	The European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The European Court of Justice
ECtHR	The European Court of Human Rights
EU	The European Union
HRA	Human Rights Act 1998
ICJ	International Court of Justice
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNCAT	United Nations Convention Against Torture

Relevant Articles of the European Convention on Human Rights

Article 1:	Obligation to respect human rights
Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, non-governmental organisations or groups of individuals (formerly Article 25)
Article 35:	Admissibility criteria
Article 38:	Examination of the case and friendly settlement proceedings
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber

Protocol No. 1 to the Convention

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

Protocol No 2 to the Convention

Article 7:	Right of appeal in criminal matters
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Section 1: Legal Developments and News

KHRP observes acquittal of publisher accused of disseminating separatist propaganda

On 13 February 2008 a KHRP mission observed the trial and acquittal of publisher Mr Ahmet Önal, who stood accused of showing demonstrable support for an 'armed terror organisation', in the 2005 publication of *The Diaspora Kurds* by Hejare Şamil.

During proceedings at Istanbul Heavy Criminal Court (No. 11), Mr Önal's lawyers relied on his right to free expression as enshrined in Article 10 of the European Convention on Human Rights. It was asserted that Mr Önal's rights as a publisher encompassed the right to "receive and impart information and ideas without interference by public authority".

While the trial judge expressed "concern" about the publication during the hearing, in his judgment he concluded that the book consisted of wide-ranging research which contained no intent to propagandise. Mr Önal was acquitted of the charge and awarded 1100 New Turkish Lira in state compensation.

As the head of Peri Publishing, which has released some 270 titles, Mr Önal has already served two prison terms in relation to similar charges. Mr Önal and his supporters strongly felt that the presence of international observers in this instance, in the form of the KHRP mission, encouraged the judge to uphold the defendant's right to freedom of expression.

The prosecution has appealed the Istanbul Heavy Criminal Court decision to the Court of Cassation.

Collective agreement with workers union increases gender awareness among Turkey's labour movement

An important agreement reflecting the increased gender awareness amongst the labour movement and women in Turkey has been signed. The innovative collective agreement between the municipality of Bostaniçi (a south-eastern province of Van) and the Genel-İş trade union for general service workers stipulates that workers who have been violent at home may be dismissed. Initially, offending workers will be sent to a disciplinary board. The board may decide to give the worker's wage to the spouse and if the violence persists the worker may be dismissed. In addition the agreement confirms that workers

who take a second wife will be dismissed. Finally, the agreement stipulates that workers will receive an increase in their wages, one day off for all workers on 1 May, International Labour day, and one day off for all female workers on 8 March, International Women's day.

The Viranşehir municipality in Şanlıurfa agreed a similar contract earlier in 2008. Gülcihan Simsek of the Democratic Society Party confirmed plans to incorporate these types of practices in all the municipalities where the party is in power. Furthermore, Simsek highlighted additional work aimed at solving issues faced by women in the municipality, including, a Women's Solidarity and Washing House, education for women projects and psychological support for women. This work aims to address some of the issues caused by the increased rural migration to the area, in particular, women whose first language is not Turkish who face issues trying to access basic services.

Istanbul fourteenth Heavy Penal Court holds hearings in Hrant Dink murder case

The third and fourth hearings in the case of those suspected of Hrant Dink's murder were held in February 2008, on the 11th and 25th respectively, at the İstanbul 14th Heavy Penal Court. The proceedings were not open to the press because it is claimed that Ogun Samast, the man suspected of carrying out the murder, was under age at the time.

The proceedings were recorded at the request of Dink's family's lawyers, the first time this has happened in Turkey, but their request for access to a CD of the recordings, to assist with their preparations for the next hearing, was denied.

At the third hearing the Court was set to hear evidence from Coşkun İğci, a gendarme informant who had stated in a separate case that he had informed the gendarmerie in Trabzon of the planned attack on Dink four months before it took place. However İğci was not present at the hearing and no reason was given for his absence. Another important witness, Erhan Tuncel, refused to answer any of the questions of the Dink family's lawyers, merely repeating "I did everything they asked me to do"¹

1 Quoted in Reporters Without Borders, 'Third hearing in Dink murder trial increases doubts that it will identify all those involved', 12th February 2008, available online: http://www.rsf.org/article.php3?id_article=25697 (accessed 11th April 2008).

The court has decided not to open a separate investigation into police intelligence officer Muhittin Zenit, who is suspected of having had foreknowledge of the attack.

Joost Lagendijk, member of the European Parliament and head of the EU-Turkey mixed commission, was present at the trial and expressed annoyance at its progress, saying “We notice that those within the police and gendarmerie who were warned about the plan to murder Dink are not in the dock with the other defendants (...) The government’s promises have not materialised. We are at the end of our patience.”²

The fifth hearing in the present case was held on 28 April 2008. The court heard the testimonies of suspects İrfan Özkan and Numan Şişman, and an inciter Yasin Hayal, who expressed his hatred and disgust toward Dink but insisted that he did not know him before the incident.

Dink’s lawyers have requested the presence of more than 10 witnesses to provide testimony in the next hearing, to be held on 7 July 2008. One of Dink’s lawyers, Fethiye Çetin, said the hearing will be open to members of the press since Ogun Samast will no longer be a minor as of 28 June.

Following its observation of the trial’s opening hearing, and the publication of a related report in October 2007, KHRP continues to closely monitor the progress of the Hrant Dink murder case.

Turkey fails to reopen criminal proceedings due to obstacles in law

On 5 December 2007 the Committee of Ministers of the Council of Europe adopted an Interim Resolution (CM/ResDH(2007)150) on the execution of the judgment of the European Court of Human Rights in *Hulki Güneş v Turkey*.

The Committee of Ministers once again strongly urged Turkey to remove the obstacles to the reopening of certain criminal proceedings so as to allow redress for the violations of the right to a fair trial found by the European Court of Human Rights in the case of *Hulki Güneş*.

2 Joost Lagendijk, speaking after the hearing, quoted in Reporters Without Borders, ‘Third hearing in Dink murder trial increases doubts that it will identify all those involved’, 12th February 2008, available online: http://www.rsf.org/article.php?id_article=25697 (accessed 11th April 2008).

In that case, the Court found violations of the applicant's right to a fair trial (Articles 6(1) and 6(3)(d) of the Convention) before the Diyarbakır State Security Court. As a result of the unfair proceedings, he was sentenced to death, which was subsequently commuted to life imprisonment.

The Committee of Ministers noted that, despite the adoption of Article 90 of the Turkish Constitution, the Code of Criminal Procedure still excludes the reopening of the criminal proceedings in this case as in numerous other cases pending before the Committee for supervision of execution, as it only provides reopening of proceedings in respect of Court judgments which became final before 4 February 2003 or those rendered in applications lodged with the Court after 4 February 2003.

This is the third Interim Resolution adopted by the Committee of Ministers since the Court's judgment became final in September 2003. The Committee of Ministers stated that they deeply deplored the fact that no measures have yet been taken by the Turkish authorities to grant the applicant adequate redress for the violations found.

Turkey issues hefty sentence in Avşar murder case

On 20 March 2008, the Diyarbakır Heavy Criminal Court Number 3 sentenced Gültekin Sütçü, a former member of the Turkish security forces, to 30 years imprisonment for his involvement in the killing of Mehmet Şerif Avşar in Diyarbakır, south-east Turkey in 1994.

This decision may be seen as an indication of Turkey's new willingness to hold members of its security forces accountable for their violations of Turkish law. However, there is concern that the Court decided not to remand Sütçü in custody until his sentence is ratified by the High Court of Appeal. Prior to his arrest in October 2006, Sütçü had spent several years in hiding, thus showing himself to be a serious flight risk. Now that he has been sentenced, it is highly likely that he will once again disappear and evade justice.

Mehmet Şerif Avşar was taken into custody by several armed policemen on 22 April 1994 in Diyarbakır and was later found dead. In a KHRP-assisted case (*Avşar v. Turkey* (25657/94, judgement dated 10 July 2001)), the European Court of Human Rights found Turkey responsible for his death, in violation of Article

2 of the European Convention on Human Rights, as well as Article 13 based on its failure to adequately investigate the killing.

Moves made in Turkey to lift strict ban on Muslim headscarf

On 9 February 2008 the Turkish parliament approved two constitutional amendments to ease a ban on students wearing the Muslim headscarf in university campuses. A huge majority voted in favour of the amendments which proposed to insert paragraphs into the constitution confirming the right to higher education and equal treatment by state institutions.

However, since these constitutional changes it has been reported that some universities have denied access to students wearing headscarves. In addition, the main opposition party, The Republican People's Party (CHP), has challenged the amendments at the Constitutional Court on the basis that the reforms are contrary to the principle of secularism.

In addition to this, on 31 March 2008 the Turkish Constitutional Court unanimously agreed to hear a case against the governing Justice and Development Party (AKP). The Chief Prosecutor of the Court of Appeals filed the indictment against the AKP for alleged anti-secular activities. The Prosecutor referred to the AKP's recent constitutional amendments to ease the ban on students wearing the Muslim headscarf as an example of the party's efforts to subvert the secular constitution. If the case is successful it may result in the closure of the party.

Kosovo parliament declares independence from Serbia

On 17 February 2008 Kosovo's parliament declared independence from Serbia.

Kosovo's ethnic Albanian majority celebrated the move whilst there were increasing tensions amongst the ethnic Serbian minority in Northern Kosovo. Kosovo's declaration of independence has been rejected by Serbia and its ally Russia. However, a majority of EU member states and the United States have recognised the new state. In his refusal to recognise Kosovo's independence, the Serbian president has recently encouraged all Serbs in Kosovo to participate in the local Serbian elections on 11 May 2008.

The UN Mission in Kosovo (UNMIK), which has been overseeing the area since Serbian forces were driven out by NATO in 1999, continues to exercise its authority in the area. It was anticipated that UNMIK would handover to EU officials in June, however, this is now in doubt and there is growing speculation that UNMIK will remain in the province. The precise role of the UN in Kosovo is still to be agreed.

The declaration of the independence of Kosovo could set a precedent for other states to declare independence. In particular, Abkhazia and South Ossetia have argued that a precedent has been created. This could influence the argument for an independent Kurdish state.

UN involvement in Kirkuk referendum attracts criticism

An agreement between US President George W. Bush and Turkey's President Abdullah Gül to involve the UN in resolving delays of the Kirkuk referendum has been criticised for undermining the Iraqi constitution.

The Kirkuk referendum, originally scheduled for July 2007, was postponed for another six months, in a decision reached late last December. This followed the recommendation of UN Special Representative for Iraq Staffan de Mistura. Under Article 140 of the Iraqi constitution, a three-stage process of normalisation, a census and a referendum must be completed by the end of 2007. The referendum is currently scheduled for June 2008.

Some people feel that the US and Turkey have bypassed the Iraqi constitution which was approved by the Iraqi people and that if the Iraqi authorities are not involved in the decision the solution will undermine the authority of the sovereign state. It has been alleged by a number of critics that the Iraqi government is using neighbouring countries such as Turkey to undermine the Kurdistan Regional Government.

The President of Kurdistan, Iraq, Massoud Barzani in January warned that any efforts by political parties in Baghdad to oppose the referendum will be resisted. President Barzani said that the Kirkuk provincial government itself should be able to sponsor the referendum, if not held as scheduled this year. Kirkuk Provincial Council member Mohamed Kamal in February expressed support for the UN's involvement.

Iraqi Presidency endorses execution of “Chemical Ali”

On 29 February 2008, Iraq’s Presidential Council endorsed the execution of Saddam Hussein’s cousin Ali Hassan Al-Majid, known as “Chemical Ali”, for his role in the 1980s ‘Anfal’ campaign.

The three-member presidential council did not approve death sentences against the other two defendants, Hussein Rashid Mohammed, an ex-deputy director of operations for the Iraqi armed forces, and former defense minister Sultan Hashim al-Taie, amid Sunni protests that they were only following orders.

Chemical Ali was one of three former Saddam officials sentenced to death in June 2007 after being convicted of genocide, war crimes and crimes against humanity for their part in the 1988 Anfal campaign that killed nearly 200,000 Kurds. An appeals court upheld the verdict in September. The execution has been delayed for months by a legal wrangle over who has the authority to approve the executions.

The approval by the Presidency Council, which comprised Iraq’s President Jalal Talabani and his two vice presidents, Tareq al-Hashemi and Adel Abdul-Mahdi, was the final step clearing the way for Ali Hassan Al-Majid’s execution by hanging. Under Iraqi law the execution was to have taken place within a month of the decision on a date determined by the government.

Al-Majid would be the fifth former regime official hanged for alleged atrocities against Iraqis during Saddam’s nearly three-decade rule.

Armenia declares state of emergency

On 1 March 2008 heavy clashes broke out between police officers and protesters in Armenia which resulted in the death of ten people and about two hundred people being injured.

The events unfolded after the presidential elections on 19 February which resulted in the election of current Prime Minister Serge Sargsyan as president amid allegations of electoral fraud. On 20 February, the former President Levon Ter-Petrosian called on his supporters to begin a peaceful demonstration. Thousands of people took part in peaceful demonstrations and protest marches. On 26 February 2008 an estimated 300,000 people participated in a protest march in

Yerevan. In the early hours of the morning on 1 March 2008 police surrounded demonstrators and attempted to disperse them by using force. The demonstrators gathered spontaneously in a different place and after several hours the number of demonstrators grew to several thousand. This situation continued until late into the evening when police and military attacked demonstrators by opening fire, first shooting into the air and then at demonstrators. A state of emergency was declared by the Government in Yerevan from 1 to 20 March 2008.

In the aftermath of the post-election violence, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg was invited by the Government of Armenia to undertake a special mission following the declaration of State of Emergency. On 12 March 2008 Commissioner Hammarberg visited Yerevan and met with the highest national authorities to monitor the overall human rights situation and the impact of the State of Emergency. In his report which was released on 20 March 2008, the Commissioner recommended that the state of emergency be lifted “in order for the country to return to democratic rule and respect for human rights”. The proposed changes of the law relating to freedom of expression and assembly only are approved when they are consistent with Armenia’s obligations under the European Convention on Human Rights.

The Commissioner also urged that all detainees who have not been charged with any crimes be released and that cases of excessive force by the police be investigated and those responsible held to account. Further, instructions must be issued to the law enforcement structures to implement regulations regarding the rights of arrestees to contact relatives and have access to lawyers. Hammarberg also recommended that the Armenian Government should establish a comprehensive enquiry into the events of 1 March and that the investigation must be independent, impartial, transparent and perceived as credible by the whole nation. Finally, he recommended that the Armenian Government ought to seek a substantial contribution from the international community for this inquiry; therefore a precise and targeted request for such assistance should be made.

The situation remains tense. There are several outstanding KHRP-assisted cases at the ECtHR concerning charges of provoking calls to overthrow the Government and provoking violence arising out of the 2003 presidential elections.

A recent Resolution 1609 (2008)³ adopted by PACE (Parliamentary Assembly Council of Europe) in an urgent hearing about Armenia confirms certain obligations on the state. The resolution requests that the obligations be complied with before the PACE session in June 2008. If the obligations are not met then PACE says Armenia may be deprived of PACE membership.

Council of Europe Committee for the Prevention on Torture publishes report on Turkey

On 6 March 2008 the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published the report on its visit to Turkey in May 2007, together with the response of the Turkish Government. During this visit, the CPT's delegation went to İmralı High-Security Closed Prison and examined the treatment of the establishment's sole inmate, Abdullah Öcalan. The delegation looked into what action had been taken to implement the recommendations made after earlier CPT visits as regards the prisoner's conditions of detention, and reviewed the situation concerning access to İmralı Island for his family members and lawyers. The state of the prisoner's health was also examined.

A psychiatric examination showed a distinct deterioration of the prisoner's mental state resulting from a situation of chronic stress and prolonged social and emotional isolation, coupled with a feeling of abandonment and disappointment.

In the report, the CPT called upon the Turkish authorities to completely review the situation of Abdullah Öcalan, with a view to integrating him into a setting where contacts with other inmates and a wider range of activities are possible. CPT recommended that the Turkish authorities take steps to provide the prisoner with regular psychiatric consultations, guarantee his free movement between the cell and the adjoining room during the day and access to a larger exercise area, ensure regular family visits, enable the prisoner to have a television set and use the phone to speak to his family members.

³ *Assembly debate* on 17 April 2008 (16th Sitting). *Text adopted by the Assembly* on 17 April 2008 (16th Sitting).

KHRP continues to pursue Mr. Öcalan's ongoing complaint before the European Court of Human Rights that his conditions of detention violate Article 3 of the European Convention on Human Rights.

Council of Europe Convention on Action against Trafficking in Human Beings enters into force

On 1 February 2008 the Council of Europe Convention on Action against Trafficking in Human Beings entered into force. According to International Labour Organisation (ILO) figures 2.45 million people are trafficked every year, making an annual profit of US\$ 33 billion. The Convention forms the basis for much needed international co-operation to combat trafficking and sets up the Group of Experts on Action Against Trafficking in Human Beings (GRETA) as a monitoring mechanism. There are three main strands to this Convention: prevention, protection of victims, and prosecution, including a possibility to prosecute those who knowingly use the services of trafficked people. So far 15 member states have ratified it, largely from Eastern Europe, 23 have signed but not yet ratified and nine have not signed. It is also open for signature to states outside the COE area. Of the countries which are in the Kurdish regions, only Armenia has signed the Convention, but has not ratified it.

Council of Europe celebrates 10th anniversary of landmark international treaties for protection of minority rights

The Council of Europe celebrated the 10 year anniversary of the entry into force of the Framework Convention for the Protection of National Minorities, and European Charter for Regional or Minority Languages on 11 March 2008.

Council of Europe Commissioner for Human Rights Thomas Hammarberg said that these treaties constituted two of the strongest pillars of a democratic society in Europe, which should be characterised by 'pluralism, tolerance and broadmindedness.'

The Framework Convention for the Protection of National Minorities 1995 has been said to be the most comprehensive multilateral treaty devoted to the protection of national minorities. It provides such rights as the right to equality before the law (Article 4.1), full and effective equality in economic, social, political and cultural life (Article 4.2), protection against threats or acts of discrimination, hostility or violence (Article 6.2), and the right to freedoms of peaceful assembly, association, expression, and thought, conscience and religion (Article 7). The European Charter for Regional or Minority Languages further provides for the protection and promotion of minority languages, as an element of cultural heritage.

Mr Hammarberg said he believed that European authorities had not always been “well prepared to accept and effectively cope with ... the co-existence of dominant and non-dominant groups or languages”. He noted the situation of the Roma minority, comprising around 10 million people, who have experienced a history of continued discrimination, hostility and persecution.

Mr Hammarberg called on European states to adopt more systematic national measures in accordance with the two treaties, to make local authorities and societies more sensitive to human rights issues. He concluded that while significant and positive steps had been made so far, there was still a “long, challenging journey ahead for all of us”.

Council of Europe Committee of Ministers issues first annual report on the execution of the judgments of the European Court of Human Rights

On 25 March 2008 the Committee of Ministers of the Council of Europe presented its first annual report on its supervision of the execution of the judgments of the European Court of Human Rights. The 274 page report provides an overview of the issues examined and statistical information in the execution of the main cases before the Committee of Ministers in 2007. It lists the final resolutions, the interim resolutions and other relevant public documents.

The report demonstrates, in particular, the breadth of questions examined by the Committee in this area of its work, the number of different actors involved in the execution process, and the important number of reforms adopted to ensure

that legal systems and practices develop in conformity with the standards of the European Convention on Human Rights.

According to the Report, Turkey leads in terms of the number of cases against a single Council of Europe member state awaiting a final resolution at 31 December 2007, their examination having been closed in 2007 or earlier. Turkey was responsible for 20 per cent (156 cases) of such cases. In comparison, France came second with 137 cases (18 per cent) awaiting for a final resolution, and the United Kingdom came third with 94 cases (12 per cent). At the same time, Armenia had only one such case and Azerbaijan had none.

The report provides the details of leading cases and information regarding the execution of the judgments adopted in those cases. It also lists, on a case by case basis, the measures that are necessary to ensure the execution of the judgments, including the changes in domestic law of a particular country. For example, the Committee of Ministers noted Turkey's attempt to ensure the execution of the judgments of the European Court of Human Rights. It also listed some of the measures taken by the Turkish authorities during the recent years to ensure the execution of judgments and prevent repetitive cases:

- a) The abolition of state security courts in 2004, solving the problem of the independence and impartiality of the courts.
- b) The adoption of the new Code of Criminal Procedure (in force from 01/06/2005), which introduced, inter alia, new provisions to guarantee defence rights and additional safeguards with regard to the excessive length of detention on remand and has provided a right to compensation for those arrested without a valid reason.
- c) The enactment of a number of regulations between 1999 and 2006, which will allow a regular update of the police data and prevent unjustified arrests.
- d) The maximum penalty imposed for disobeying military orders was reduced from 21 to 7 days of detention. Further reforms are under way to ensure that military sanctions implying deprivation of liberty are only ordered by a body offering the judicial guarantees required by Article 5 of the ECHR.
- e) The issue of the non-communication of the Principal Public Prosecutor's written observations has also been resolved as the new Code of Criminal Procedure (2005) introduced a requirement to this effect.

- f) Ensuring that in practice, parliamentary immunity is not an obstacle to the carrying out of criminal investigations in cases in which members of parliament or their families are involved as possible witnesses or suspects.

Recent efforts by the Committee to assist the states in the execution of judgments have included the adoption, in February 2008, of a new recommendation to member states on efficient domestic capacity for rapid execution of judgments of the Court, which supplements the five recommendations already adopted since 2000 regarding other aspects of the national implementation of the Convention. The Committee of Ministers has also considered a number of further measures to improve execution and has decided to regularly include an item with this title on its agenda.

Mateo Sorinas, the Secretary General of the Parliamentary Assembly, said that this report would be a valuable tool for the national parliaments and for the Assembly with which to continue working for the effective protection of the rights of European citizens.

European Union proclaims Charter of Fundamental Rights

On Wednesday 12 December 2007, seven years after its drafting began and in conjunction with the signing of the new EU Reform treaty, a new EU Charter of Fundamental Rights was signed by President of the European Parliament, Hans-Gert Pettinger, European Commission President, José Manuel Barroso and Portuguese Prime Minister, José Sócrates, whose country at the time held the EU Presidency. The three men formally proclaimed the Charter to MEPs and spoke about its importance in Europe today.

The speakers stressed that the Charter represented the common values which make the countries of the EU a true community and not simply an economic entity. They stated that the Charter embodies values of solidarity, freedom and equal rights, and fundamental to all of these, the dignity of the individual.

However not all MEPs are in favour of the Charter or the EU Reform Treaty and the proclamation ceremony was interrupted several times by shouts from a minority of MEPs.

The following day the signing of the EU Reform Treaty otherwise known as the Treaty of Lisbon by member states rendered the Charter legally binding on EU institutions and on member states when they implement EU Law. However a protocol annexed to the Lisbon Treaty introduces specific measures for the United Kingdom and Poland establishing exceptions with regard to the jurisdiction of the European Court of Justice and national courts for the protection of the rights recognised by the Charter. The European Parliament has urged them to work towards removing this reservation.

European Parliament censures Iran's human rights abuses

The European Parliament has strongly denounced Iran for its violations of human rights, especially in relation to the increasing number of death sentences and executions being carried out, in a resolution adopted on 31 January 2008.

The resolution, which was adopted by 561 to 52 votes (with 44 abstentions), expressed "deep concern" over the deterioration of human rights in Iran within recent years. The European Parliament said that executions, including those of minors, had increased especially over the last few months. Prior to voting on the resolution, European Parliament member Struan Stevenson claimed that 23 people in Iran were executed within the first two weeks of 2008, and five people had their limbs amputated.

The European Parliament said: "There have been confirmed instances of executions, often carried out in public by hanging or stoning, torture and ill-treatment of prisoners, the systematic and arbitrary use of prolonged solitary confinement, clandestine detention, the application of cruel, inhuman and degrading treatment or punishment, including flogging and amputations, and impunity for human rights violations". It went on to urge Iran to eliminate all forms of torture, noting that the exercise of civil rights and political freedoms has deteriorated since Iranian President Mahmoud Ahmadinejad took office in June 2005.

The European Parliament also noted that Iran had continued with its non-compliance with international obligations to suspend all nuclear enrichment-related and reprocessing activities. It expressed that the Iranian nuclear programme was a "source of serious concern to the EU and the international community".

According to the numbers released by Amnesty International on 15 April 2008, Iran executed at least 317 people in 2007. This was the second highest number of executions per capita in the world after Saudi Arabia.

Council of the European Union sets human rights as short-term priority in its revised Accession Partnership with Turkey

On 18 February 2008 the Council of the European Union revised the principles, priorities and conditions in the Accession Partnership with Turkey. The Accession Partnership acts as a basis for Turkey's political reforms and as a measure against which to gauge its progress towards integration with the EU.

The Partnership was revised on the basis of the 2007 progress report on Turkey's preparations for integration with the EU. Its implementation will continue to be examined through mechanisms established by the Association Agreement and through the Commission's progress reports.

The revised Partnership establishes new short-term priorities (to be implemented within one to two years) relating to democracy and the rule of law, human rights (specifically mentioning the rights and protection of minorities), regional issues and international obligations and economic criteria. Medium term priorities (to be implemented within three to four years) related to economic criteria and the ability to assume the obligations of EU membership.

The European Union Committee of Foreign Affairs has produced a report on Turkey's 2007 progress report drafted by rapporteur Ria Oomen-Ruijten. The report urges that transformation of the Accession Partnership priorities and timelines into reform plans, and insists that the speed of reform must pick up. It welcomes the commitment made by Prime Minister Erdoğan that 2008 is going to be the "year of reforms", but urges that such promises are fulfilled through implementation. Noting both that modernisation and reform are in Turkey's own interest, and that "any further delays will seriously affect to the pace of negotiations".

The report raises concerns about the implications of the AK Party closure case, noting its expectation that the Constitutional Court should respect the principles of the rule of law, European standards and the Venice Commission. Further, it considers that Article 301 as well as other articles should be reformed without delay, that the amendment of Article 301 recently sent to Parliament by the Government is merely a first step towards fundamental reform. Additionally, the government should make further "systematic efforts to ensure that the democratically elected political leadership bears full responsibility for

formulation of domestic, foreign and security policy” and that the armed forces accept this by “fully and unambiguously acknowledging civilian control.”

Regarding the Kurdish situation the report urges the Turkish government to launch “a political initiative favouring a lasting settlement of the Kurdish issue”, to include a “comprehensive master plan to boost the socio-economic and cultural development of the south-east of Turkey.” It recognises the need for real opportunities to learn, and to use Kurdish in broadcasting, public life and public services. It considers the banning of the DTP to be counter-productive and deplores the court cases brought against mayors or elected representatives for their use of Kurdish, and the recent conviction of Leyla Zana. However, the report also calls upon the DTP party to distance itself clearly from the PKK. It calls on the PKK to declare and respect an immediate ceasefire.

The report also stresses that the new constitution should ensure gender equality, also noting the disappointment and concern of certain sections of the population that the lifting of the headscarf ban was not a part of a broader package of reform based on a wide ranging consultation of civil society.

U.S. State Department and European Parliament issue 2007 Annual Reports on Human Rights

Two important reports on global human rights were issued in spring 2008. On 11 March 2008 the United States of America Department of State submitted its annual Country Reports on Human Rights Practices for 2007 (the Reports) to the United States Congress. On 14 April 2008, European Parliament (EP) issued its Annual Report on Human Rights in the World 2007 and the European Union’s policy on the matter.

Both the EP and US reports highlight the challenges met by the countries and note serious regressions as well as significant advances in human rights and democracy. They state, however, that the vast majority of countries struggled somewhere between making incremental progress and suffering setbacks.

Both reports recalled the deteriorating situation in Syria, where human rights groups are refused official status and continue to be harassed by the security services. The reports condemned the arrests of dissidents and people from opposition parties.

The European Parliament and the US Department of State expressed great concern over continuous violation of freedom of speech and assembly in Iran and regretted the closure by the Iranian government of NGOs that encourage civil society participation and raise awareness of human rights violations, including those providing legal and social aid to women victims of violence. The Iranian regime continued its harassment against dissidents, journalists, women's rights activists and those who disagreed with it through arbitrary arrests and detentions, torture, abductions, the use of excessive force, and the widespread denial of fair public trials, detention and abuse of religious and ethnic minorities. The regime continued to support terrorist movements and violent extremists in Syria, Iraq, and Lebanon and called for the destruction of a UN member state.

The reports stressed that respect for freedoms of expression, press, and assembly suffered in many countries of current internal and cross-border conflict (including Georgia, Iraq, Azerbaijan, Armenia, Turkey) and noted that limitations on freedom of expression expanded to the Internet (especially in Turkey). The US report also addressed severe human rights abuses including sectarian, ethnic, and extremist violence and the continuous creation of large numbers of refugees and internally displaced persons in Iraq. The reports also indicated the incidents of discrimination against ethnic minorities (including Kurds), restrictions on the ability to teach and learn in their native languages, and harassment by local authorities (Azerbaijan, Iran, Iraq, Turkey). Kurds who publicly or politically asserted their Kurdish identity or publicly espoused using Kurdish in the public domain often risked censure, harassment, or prosecution (particularly in Turkey).

The Reports address the main human rights issues on a country by country basis, the EP report also indicating the actions taken by the European Parliament (including, for example: the adoption of the resolutions on Christian communities concerning the violent attacks on Catholic priests in Iraq and Turkey; condemnation of executions in general and call on abolition of execution by stoning and on the release of all "prisoners of conscience" in Iraq; expression of concern at the restrictions imposed on citizens for exercising their democratic rights and engaging in peaceful activities in Syria; letters of concern regarding the treatment of journalists, lawyers and human rights defenders in Syria). They also call for a greater cooperation and initiative by developed countries and international organizations to respond rapidly to breaches of human rights by third countries and systematically addressing human rights issues within the framework of the political dialogue at all levels.

The Reports contain detailed and comprehensive information with regard to the above mentioned and many other countries and can be used as a resource for shaping policy, conducting diplomacy, and assist with research and training.

OSCE welcomes pardoning of journalists in Azerbaijan but urges legal reform

On 2 January 2008 the OSCE Representative on Freedom of the Media and the OSCE Office in Baku welcomed Azerbaijani President Ilham Aliyev's pardon of five imprisoned journalists who were released from prison following a Presidential decree that was issued on 28 December 2007.

Ambassador Jose Luis Herrero, Head of the OSCE Office in Baku, expressed his hope that the pardoning of the journalists will help the much needed normalization of the situation of the media in Azerbaijan. He also stressed that OSCE is ready to support the Government of Azerbaijan, media professionals and civil society in preserving, consolidating and reinforcing the freedom of the press.

OSCE representative in Baku Miklos Haraszti noted that three journalists still remain in detention. He urged the Azerbaijani authorities to start the long-due reform required by both the country's OSCE commitments and by Council of Europe standards to "decriminalize journalism" and guarantee the freedom of the media by law.

The Presidential decree of 28 December pardoned a total of 119 prisoners.

OSCE trains Armenian prosecutors on international legal co-operation

The OSCE Office in Yerevan, together with the OSCE Office for Democratic Institutions and Human Rights and the General Prosecutor's Office, have organized seminars on international legal co-operation for Armenian prosecutors. The seminars are part of the ongoing co-operation of the OSCE with the Armenian Prosecutor's Office in recent years and were designed to promote the institution's reform and support its capacity to ensure the functioning of the criminal justice system. Ambassador Sergey Kapinos, Head of the OSCE

Office in Yerevan, described the workshops as timely and relevant, giving the prosecutors an opportunity to look for more effective forms of international co-operation in preventing organized crime, such as trafficking, money laundering and terrorism, and prosecuting perpetrators.

PACE calls on UN and EU to review blacklisting of terrorist suspects which violates human rights

On the 23rd January 2008 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1597 stating that that UN and EU procedures for blacklisting individuals or groups suspected of having links with terrorism were “completely arbitrary” and “a violation of human rights.” PACE called on the UN and EU to review the procedures which lead to people having their assets frozen and being unable to travel. They can be instated on the basis of suspicion alone and without an individual being given a hearing or informed of the decision. PACE argued that this situation undermines the legitimacy of these institutions’ fight against terrorism. The Resolution was passed by 101 votes to three with four abstentions. Two representatives from Romania and one from the UK voted against it and representatives from Switzerland, the Czech Republic, the UK and Poland abstained.

There have also been a number of cases in the ECJ and the Proscribed Organisations Appeal Commission (UK), which have challenged the lawfulness of this procedure. See the cases of, Lord Alton of Liverpool and others In the Matter of People’s Mojahadeen Organisation of Iran v Secretary of State for the Home Department (PC/02/2006), Yassim Abdullah Kadi v Council of the European Union and Commission of the European Communities (C-402/05 P), People’s Mojahedin Organization of Iran v Council of the European Union (T-256/07) and PKK and KONGRA-GEL v Council of Europe (T-229/02 and T-253/04), all of which are summarised in Section 3 of this volume.

PACE selects law professor as Turkey’s judge at the European Court of Human Rights

The Parliamentary Assembly of the Council of Europe announced that Prof. Ayşe Işıl Karakaş from Galatasaray University will represent Turkey at the European Court of Human Rights (ECHR). Karakaş took over the post from Rıza Türmen on 1 May. Commenting on her candidacy, Karakas said, “a judge who will work

at ECtHR should have a good knowledge of both domestic and European law. As I was nominated, I guess they thought I had such qualifications”.

Karakaş said Turkey needs to readjust its domestic law to conform with European Human Rights Law and particularly the areas that are frequently referred to by the European Court of Human Rights. She is the Turkey’s first female judge in the ECtHR.

Human Rights Council’s first session of the Universal Periodic Review calls into doubt high hopes for a sound review process

On 14 March 2008 the UN Human Rights Council concluded its general debate on human rights situations that require the Council’s attention. One of the situations raised was that of Turkey’s Kurdish population. This was raised alongside such situations as the deteriorating situation of human rights in the Middle East, especially in Iraq and the Occupied Palestinian Territories, among others.

Other activities included the extension of the mandates of 13 Special Procedures and the nomination of 10 special Rapporteurs (see below). The eighth session of the Council was scheduled for the 2 to 13 June 2008 in Geneva.

The inauguration of the first session of the Universal Periodic Review (UPR) also took place at the Council’s seventh session. UPR entails the examination of all UN Member States to assess whether they have fulfilled their human rights obligations, at the rate of 48 countries a year. The first report of the working group on UPR, which began its work on individual countries on 7 April 2008, is to be examined during the next session of the Human Rights Council on 2 June.

The first UPR session was concluded on 18 April 2008. The first group of countries scrutinised were Algeria, Argentina, Bahrain, Brazil, Czech Republic, Ecuador, Finland, India, Indonesia, Morocco, the Netherlands, the Philippines, Poland, South Africa, Tunisia and the United Kingdom.

The United Nations Secretary-General confirmed that the system of UPR aims to support and expand the promotion and protection of human rights.

However, despite high hopes for the review process and its effect on the credibility of the Human Rights Council, from the opening of its first session it was subject to criticism that it will prove incapable of tackling substantial human rights abuses. There were reports of NGO participants being denied access, and of Member States wasting review time with lengthy monologues about tangential topics. There have also been complaints

that the review of Bahrain was dominated by praise for the initiation of the process, rather than providing a robust human rights examination. Another criticism is that the UPR serves as a “soft” alternative to General Assembly resolutions on human rights issues. Further concerns have been voiced about the human rights records of UPR troika members and their own interests in the process.

The first session will be followed by two further sessions in 2008, so that forty-eight countries, selected by drawing lots, will have been scrutinized during the year. Under the Review’s work plans, 48 countries are scheduled to be reviewed each year, so that the UN’s complete membership of 192 countries will be reviewed once every four years. The second UPR session was held from 5-19 May 2008. The session considered Gabon, Ghana, Peru, Guatemala, Benin, Republic of Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania and Mali. The third session is scheduled for 1-12 December 2008.

Limits to the mandate of the Special Rapporteur on Freedom of Speech and the appointment of UN Special Procedures mandate holders lead to controversy

During the seventh session of the UN Human Rights Council held in March 2008 a review of the mandate of the Special Rapporteur on the promotion and Protection of the Right to freedom of Opinion and Expression (Special Rapporteur) was conducted.

On 25 March 2005, the Organization of the Islamic Conference (OIC) and the Cuban delegations introduced an amendment (resolution A/HRC/7/L.39) to the mandate of the Special Rapporteur which required that the Special Rapporteur “report on instances where the abuse of the rights of freedom of expression constitutes an act of racial or religious discrimination, taking into account Articles 19(3) and 20 of the International Covenant on Civil and Political Rights and General Comment 15 of the Committee on Elimination of All Forms of Racial Discrimination which stipulates that the prohibition of the discrimination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression”. This amendment was later adopted by the Council in resolution A/HRC/7/L.24.

The proposed amendment goes against the spirit of the mandate, as the role of Special Rapporteur is not to look at abusive expression, but to consider and monitor abusive limits on expression. Such amendment lacks balance, is unnecessary and undermines freedom of expression.

NGO groups have condemned the repeated misuse of the HRC process to push for an agenda that has nothing to do with strengthening human rights and everything to do with protecting autocracies and political point scoring.

The Council also approved the appointment of 14 Special Procedures mandate holders at the seventh session. Concerns were raised prior to the session regarding the lack of transparency and competitiveness in the appointment procedure for Special Mandate holders. These followed the nomination of only one candidate for several of the mandates by the Consultative Group (whose role is to consider the candidacies of persons nominated by the Council Secretariat, and then propose to the Council President a list of candidates that are most qualified to fill the posts).

During the general discussion about the Special Procedures mandate holders, delegations raised fresh concerns about deficiencies in the appointment process. Delegations said clarification was still needed on the status of mandate holders that had reached the end of their three-year terms; these mandate holders should not be renewed automatically.

Concern was also expressed over the appointment of Richard Falk to the mandate on Palestine, in part because of his controversial comparison of Israeli treatment of Palestinians with the crimes against humanity committed by the Nazis. Israel has since declared that it will deny Falk an entry visa to Israel and the Palestinian Territories.

UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment presents report during the 7th session of the Human Rights Council

The UN Human Rights Council held its seventh session in Geneva from 3rd to 28th March 2008. On 10th March Manfred Nowak, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur), presented his report (A/HRC/7/3 and Add.1-6), which was mainly devoted to international norms relating to violence against women. The report explored the influence of these norms on the definition of torture and the extent to which the definition itself could embrace gender-sensitivity, and it discussed the specific obligations upon States which followed from this approach. Mr. Nowak drew the attention of the Council to the central yet debilitating role of stigma associated with victims of sexual violence, and the related challenges that women faced in terms of access to justice, reparations and rehabilitation.

The report notes that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is the only legally binding instrument at

the universal level concerned exclusively with the eradication of torture. The Special Rapporteur has suggested adding the criterion of powerlessness to the Article 1 of the Convention, which lays down a definition consisting of four elements required to meet the threshold of torture (severe pain and suffering, physical or mental; intent; purpose; state involvement). In the view of the Special Rapporteur, the main elements distinguishing cruel, inhuman and degrading treatment are the powerlessness of the victim and the purpose of the act.

The report analyses the ill-treatment of women in the public sphere and states that custodial violence against women very often includes rape and other forms of sexual violence such as threats of rape, touching, “virginity testing”, being stripped naked, invasive body searches, insults and humiliations of a sexual nature. The Special Rapporteur highlighted some of the unique dimensions of this form of torture, stating that when Government officials use rape, the suffering inflicted might go beyond the suffering caused by classic torture, partly because of the intended and often resulting isolation of the survivor. The Report also discusses corporal punishment as a form of torture and recalls that between 2004 and 2007 the Special Rapporteur sent 13 joint communications concerning 21 women sentenced to death by stoning and two sentenced to flogging under Sharia law. The report also highlights the torture and ill-treatment of women in the private sphere. The Special Rapporteur focused on three forms of violence that may constitute torture or cruel, inhuman and degrading treatment: domestic violence, female genital mutilation and human trafficking.

Convention on the Rights of Persons with Disabilities enters into force

On 3 May 2008, the Convention on the Rights of Persons with Disabilities and its Optional Protocol came into force. Ecuador became the required 20th country to ratify it on 3 April 2008. A total of 126 countries have signed the instrument and 71 have signed its Optional Protocol, which will allow individuals and groups to petition for relief.

The new landmark treaty, adopted by the UN General Assembly in December 2006, is aimed to promote and protect the full enjoyment of human rights and fundamental freedoms by all persons with disabilities while promoting respect for their human dignity. It is estimated that there are at least 650 million persons with disabilities worldwide, of whom approximately 80 percent live in less developed countries.

UNAMI presents its latest report on human rights situation in Iraq

On 15 March 2008 the United Nations Assistance Mission for Iraq (UNAMI) presented its latest report on human rights in Iraq.

In its twelfth report, covering the second half of 2007, UNAMI noted that the Government of Iraq continued to face enormous challenges in its efforts to bring sectarian violence and other criminal activity under control against a backdrop of political instability and stalled efforts in revitalizing a national reconciliation process. Violent attacks against the civilian population have decreased significantly in the capital Baghdad as a result of the ongoing “surge” within the Baghdad Security Plan, launched last February. However, the extent to which the decrease in violence was sustainable remained unclear, with the security situation still precarious in many parts of the country. Despite the decrease in the general level of violence in the fourth quarter of 2007, there were numerous incidents involving intimidation, threats, abductions, torture, assassinations and extrajudicial killings.

The report welcomed the expanded capacity of the Iraqi judiciary to process cases as the detainee population continues to grow. Despite this progress, UNAMI voiced concern over continuing prolonged delays in reviewing detainee cases; the lack of timely and adequate access to defense counsel for suspects; the failure to promptly and thoroughly investigate credible allegations of torture and to institute criminal proceedings against officials responsible for abusing detainees; and the procedures followed by the Central Criminal Court of Iraq and other criminal courts, which fail to meet basic fair trial standards.

UNAMI also welcomed Iraq’s decision to ratify the UN Convention against Torture, and noted there has been a greater degree of transparency and access to information pertaining to law enforcement issues on the part of both Iraqi officials and their international advisers.

In the Kurdish Region in Iraq’s north, the report noted that the Kurdistan Regional Government (KRG) continued to work effectively with UNAMI in seeking resolution of a range of human rights concerns and due process issues. The report cited gender-based violence as cause for serious concern in the Kurdistan Region. In spite of the creation by the Kurdistan Regional Government of an Interior Ministry department to tackle violence against women, the report called for scaled up efforts and political will to bring those responsible to justice.

UNHCR visits IDPs in Kurdistan, Iraq

United Nations High Commissioner for Refugees Antonio Guterres met with the Kurdistan Regional Government on a two-day mission to Iraq during his tour of the Middle East in February 2008.

As part of UNHCR's mission to view the conditions of internally displaced persons in the region, Mr Guterres met with KRG President Masoud Barzani and Deputy Prime Minister Omer Fattah, before visiting a camp near Akre which accommodates over 150 displaced families from Mosul.

"It's a pity that in such a rich country with so many opportunities you are condemned to be caught in such tragic circumstances", Mr Guterres said. "I hope things will improve, that peace will return and that you can finally go home".

UNHCR has made plans to liaise with other UN agencies, international organisations and NGOs to provide direct emergency assistance to 15,000 internally displaced families in northern Iraq, and implement wider infrastructure projects to benefit them and support their host communities. The recent cross border operations have increased the number of internally displaced persons as people are forced to flee areas which have been subjected to bombardments by neighbouring states. UNHCR's Iraq Situation Supplementary Appeal 2008 notes that refugees in northern Iraq in particular will require assistance to meet shelter and other basic needs. It states that UNHCR plans to assist with rental subsidy payments, health care, and education, and the care and maintenance of camp refugees.

Chair of the Commission on the Status of Women reiterates that women's rights are human rights

The Committee on the Status of Women had the opportunity to review gender questions in its most recent session, which was held from 25 January to 7 March 2008. Olivier Belle, Chairperson of the Commission on the Status of Women, said that the session was an important opportunity to reiterate that women's rights were human rights. The financing of the empowerment of women and gender equality were at the fore of this year's session of the Commission on the Status of Women. Thirty recommendations were made at the session that could be used on a national, regional and global level to improve financing mechanisms with regards to gender equality and the empowerment of women.

Mr. Belle also applauded the Human Rights Council's decision to incorporate the mainstreaming of gender perspectives in its work and mandates.

At this session, the Secretary-General also launched a campaign to deal with violence against women, which was met with a great deal of enthusiasm and support.

Public hearings in the genocide case

On 2 July 1999, Croatia instituted proceedings before the International Court of Justice (ICJ) against Serbia and Montenegro (then known as the Federal Republic of Yugoslavia, FRY) with respect to a dispute concerning alleged violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide committed between 1991 and 1995.

Croatia claims that the direct occupation of its Knin region, eastern and western Slavonia and Dalmatia territories by Serbia Montenegro resulted in ethnic cleansing of Croatian citizens as well as extensive property destruction. Croatia relying on Article IX of the Genocide Convention, to which both States are parties, requested the Court to adjudge and declare that Serbia Montenegro has breached its legal obligations under the Convention. Thus, Serbia and Montenegro has an obligation to pay reparation for damages to its citizens, destruction of property and to the Croatian economy and environment caused as a result of that breach. The International Court of Justice will hold public hearings from 26 to 30 May 2008. The hearings will concern solely preliminary objections to jurisdiction and admissibility raised by Serbia and Montenegro.

Important developments for freedom of expression in Turkey

On 28 April 2008 the Court of Appeals Plenary Committee in Turkey upheld the acquittal of Prof. Dr. Kaboğlu and Prof. Dr. Oran, who were members of the Human Rights Advisory Board of the Prime Ministry (BIHDK). Kaboğlu and Oran were charged under Articles 216 and 301 for a report they wrote on minority and cultural rights. The defendants were on trial for four years until their acquittal finally became definite. The report they wrote proposed the concept of “Türkiyelilik” (being from Turkey) which nationalist circles seen as an unacceptable departure from the established term of Turk. The Supreme Court of Appeals decision sets an important precedent for future cases concerning freedom of expression. The trial of Professors Kaboğlu and Oran was closely covered by KHRP, who produced a report on the trial in 2006 (see Suppressing Academic Debate: The Turkish Penal Code, KHRP, 2006).

A further development for freedom of expression in Turkey took place on 30 April 2008 when the Turkish Parliament agreed to amend the controversial Article 301 of the

Turkish Penal Code. The changes were approved with 250 votes for and 65 against. The Article had criminalised “Denigration of Turkishness, the Republic, the institutions and organs of the State.” It was agreed that “Turkish Nation” would substitute “Turkishness” and “The State of Turkish Republic” would replace “Turkish Republic.” In addition, the justice minister will be required to give their permission to open a case under Article 301 and the maximum sentence will be reduced from three years to two. KHRP, along with other human rights groups, has argued that these amendments are superficial and that a full repeal of Article 301 better serves the principle of freedom of expression.

Section 2: Articles

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

Greg Muttitt*

Investor Rights vs Human Rights: The implications of oil contracts in the Kurdistan Region of Iraq

Abstract

Since September 2007, the Kurdistan Regional Government (KRG) has signed oil development contracts covering nearly half of the land area of the Kurdistan Region. The so-called production sharing contracts give oil companies exclusive rights to extract the oil over a period of up to 32 years. This essay examines the consequences of these contracts for the human rights framework within Iraq and Kurdistan, and for access to water, land and other resources. It goes on to consider the role of KRG oil policy in the broader human rights situation.

INTRODUCTION AND OVERVIEW

“We’re not saying Kurdistan is heaven,” said Herish Muharam, chairman of the KRG’s Board of Investment. “But we’re telling investors that Kurdistan can be that heaven.”¹

It has become a media cliché to run stories of Kurdistan, Iraq as an oasis of stability and democracy, attracting investment into its booming economy. It’s an image the Kurdistan Regional Government (KRG) is keen to cultivate, hiring the California-based public relations firm Russo, Marsh & Rogers to coordinate a major advertising campaign under the slogan “the other Iraq”².

* Greg Muttitt is a Co-Director of PLATFORM, an interdisciplinary, London-based organisation monitoring the human rights, development and environmental impacts of the oil and gas industry. Greg has been studying Iraqi oil policy since 2003, and has examined the economics, law and politics of oil investment contracts in a number of countries, including Azerbaijan, Kazakhstan and Russia, as well as Iraq.

1 New York Times, ‘Pointing to Stability, Kurds in Iraq Lure Investors’, 27 June 2007, <http://www.nytimes.com/2007/06/27/world/middleeast/27kurds.html?ex=1340596800&en=5e36027ca95c2e2d&ei=5088&partner=rssnyt&emc=rss>

2 Michael E. Ross, ‘Iraqi Kurdistan says it’s open for business - Semi-autonomous region woos the West with high-profile ad campaign’, MSNBC, 14 November 2006, <http://www.msnbc.msn.com/id/14689169/>

One of the most controversial sectors in this rush of investment is oil and gas, in which the KRG signed nearly 20 contracts between September and November 2007 to develop the fields, invoking the ire of the federal government. Argument has raged between Erbil and Baghdad over who has the constitutional authority to sign such deals, and over whether they give too much away to foreign companies.

These contracts, as well as a further five signed between 2003 and 2005, are almost all of a controversial type known as production sharing contracts (PSCs).³

The KRG's oil deals are striking for the speed with which they have been signed. In the space of just over two months, nearly half of the land area⁴ of the Kurdistan Region was signed up, under contracts that will endure for up to 32 years.

But investors' heaven may not look so rosy for the people of the region, or indeed of Iraq. The aim of this essay is to examine whether investor interests are being prioritised over human rights.

Under occupation and subject to deepening internal conflict, Iraq suffers from a dire human rights situation. Some estimates put the death toll from the violence of the last five years at more than a million people.⁵

The legal framework for protection of rights remains weak, due to Iraq being only five years on from the dictatorship, and with little progress on human rights legislation during the occupation. The institutions of state have largely been either effectively dismantled, or taken over by political and sectarian interest groups.

However, the oil contracts are set to lock in this weak rights framework for their entire duration. The contracts contain "stabilisation clauses", which require the government to compensate investors for any costs incurred as a result of changes in law, including human rights and environmental law. This threat of economic compensation is likely to discourage future governments from using regulation to protect the rights of its citizens.

3 Also known as production sharing agreements, PSAs

4 See the map of contract areas at <http://www.krg.org/s/?s=11>

5 ORB survey, based on representative sample of 1,499 adults. ORB press release, 'More than 1,000,000 Iraqis murdered', 14 September 2007, http://www.opinion.co.uk/Newsroom_details.aspx?NewsId=78

Just as the contracts will freeze the legal framework in its current form, so too will the economic terms be frozen. Investors are demanding sizeable risk premia, to compensate them for the security, political and legal risks. Oil accounts for around 95 per cent of government revenue in Iraq⁶ (and by extension, the Kurdistan Region), and the perpetuation of profitable contracts reflecting the circumstances of 2007 until 2039 will have a serious impact on government's ability to fulfil human rights.

At a local level too, oil production will have a major impact on rights. Water is a resource in severe shortage in Kurdistan, as in the rest of Iraq – with some areas receiving as little as four hours' supply every three days. Yet, through unbalanced dispute procedures, the needs of oil companies could be prioritised over those of people – with decisions ultimately arbitrated not in the villages, or even in Iraq, but in London.

Land rights are also already severely disrupted in Iraq – due to the legacy of enforced displacement by the Ba'athist regime (such as the Arabisation of Kirkuk), and due to more than four million Iraqis driven from their homes by the conflict. Granting wide rights over land to oil investors is likely to add to these problems, and make their resolution all the more difficult.

Yet oil is not just an exacerbating factor to a bad situation; it plays a role both in conflict and in the broader rights context. Oil played a significant role in allowing decades of dictatorship to thrive in Iraq, through the 'rentier' effect, where economics and politics became excessively centralised due to the dominance of resource revenues. There are fears that the same effect may now be occurring in the Kurdistan Region, due to the way in which oil interests are pursued. Meanwhile, regionalised struggles for control of oil risk extending the internal conflict into a new dimension.

This essay aims to provoke much-needed discussion on the future of oil in Kurdistan and in Iraq.

6 International Monetary Fund, Request for Stand-By Arrangement, December 2005, pp.19,27, <http://www.imf.org/external/pubs/ft/scr/2006/cr0615.pdf>

PART I – LEGAL AND POLITICAL BACKGROUND

Constitution and oil laws

The constitutional basis for oil development in Iraq is both vague and contradictory, and has spawned numerous commentaries on its meaning and implications.

Whereas Article 111 of the 2005 Constitution⁷ states that oil and gas are owned by “all the people of Iraq in all the regions and governorates”, Article 112 only specifies (and even then, ambiguously) how that ownership is manifested in relation to “current fields” (a term that is not explained): “The federal government with the producing governorates and regional governments shall undertake the management of oil and gas extracted from current fields”, and also shall formulate strategic policies. Nothing is said of the management of non-“current” fields.

Unsurprisingly, conflicting interpretations of these Articles quickly emerged. The Kurdish parties pointed to Article 115, which states that all powers not allocated to the federal government are by default allocated to regional governments⁸, and which further gives the regions precedence in case of conflicts relating to those shared powers.⁹

The Kurdish parties have argued that since Article 112 only refers to current fields¹⁰, the Kurdistan Regional Government (KRG) would be responsible for managing non-current fields. Furthermore, even on current fields and strategic policies, the federal government would only have a role as long as it did the

7 In part because the text of the Constitution was repeatedly amended even after parliamentary approval, and right up to the referendum, there are various versions available on the web, many of them with differing numbering of articles. The most accurate, reflecting the final version as approved, appears to be the translation by the UN Assistance Mission for Iraq, available at http://www.usip.org/ruleoflaw/projects/unami_iraq_constitution.pdf (last accessed 21 May 2008)

8 At present, Kurdistan is the only Federal Region within Iraq, although the Law on the Establishment of Federal Regions of October 2006 allowed others to be formed after April 2008.

9 “All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.”

10 And the list of exclusive federal powers in Article 110 does not include oil (although it does include economic, trade and commercial policy – which also makes that article ambiguous in relation to oil)

regions' bidding; if there were any disagreement, the regions would effectively have sole powers in these areas.¹¹

Broadly speaking, there is no doubt that the Constitution is a radically decentralist document – largely because its drafting was dominated and shaped by the three political parties in favour of powerful regions and a weak federal centre (the Supreme Council for the Islamic Revolution in Iraq (SCIRI)¹², the Patriotic Union of Kurdistan (PUK) and the Kurdistan Democratic Party (KDP)).

Iraqis say that the Constitution was produced “in the kitchen” (*matbakh*) – in that it was cooked up behind closed doors by the leaders of those three parties, leaving the official Constitutional Committee just to drink tea in the front room.

Nonetheless, few others have supported as radical an interpretation of the Constitution as the KRG. The federal government rejected their interpretation, arguing that only the federal government is constitutionally able to act on behalf of all of the people of Iraq, and therefore should take the lead in managing the oil sector, in order to satisfy Article 111.¹³

Most Iraqi oil technocrats also took the view that a fully regionalised, and therefore fragmented oil industry, on the lines suggested by the KRG, would be unable to function successfully at a technical level.¹⁴ They added that disputes

11 Q&A with Ashti Hawrami, KRG website, 'Oil and gas rights of regions and governorates', 13 June 2006, <http://www.krg.org/articles/detail.asp?nr=95&lngnr=12&nr=11678&smap> (last accessed 21 May 2008) The KRG recently commissioned a more detailed legal opinion from London-based solicitors Clifford Chance, http://www.krg.org/uploads/documents/James_R_Crawford_Legal_Opinion_English_2008_02_05_h19m39s24.pdf (last accessed 21 May 2008)

12 Renamed the Islamic Supreme Council of Iraq (ISCI) in 2007

13 For a more detailed legal analysis favouring a centralised system, see Memorandum, July 7, 2006, from Joseph C. Bell (Hogan & Hartson LLP) and Professor Cheryl Saunders (University of Melbourne Australia), RE: Iraqi Oil Policy - Constitutional Issues Regarding Federal and Regional Authority, http://www.revenuewatch.org/news/MEMORANDUM_Constitutional_Interpretation.doc (last accessed 21 May 2008)

14 They argued that much oil infrastructure (such as pipelines, refineries and export terminals) is necessarily shared between regions, and so requires central management; that effective economic, geological and industrial management requires central coordination (rather than competition between Regions); and that the Regions simply do not have the technical expertise or capacity to develop their oil industries independently. See eg Kamil Mhaidi et al (12 signatories), Open letter on the Oil and Gas wealth in the Draft Iraqi Constitution, Baghdad 18/10/2005, <http://www.iraqrevenuewatch.org/reading/101805.pdf> (last accessed 21 May 2008) Also Tariq Shafiq, 'Iraq's Petroleum Law: Politicized Management Vis-à-Vis Optimal Resource Management', Middle East Economic Survey, VOL. XLIX, No 18, 30 April 2007, <http://www.mees.com/postedarticles/oped/v50n18-5OD01.htm> (last accessed 21 May 2008)

over oil facilities and infrastructure could further divide the country, and generate new conflicts (this is discussed in Part IV, below).

After a Federal Oil Law was drafted in July 2006, the following six months were spent in disputes about the degree of regional versus central control over the oil industry.

Like most of Iraqi politics, the issue was eventually resolved through what Iraqis call *muhasasa* (horse-trading between leaders of political parties), and by postponing another fight until later.

In February 2007, the Iraqi Cabinet approved a draft oil law,¹⁵ in which regions would negotiate and initially sign contracts, subject to approval by a new Federal Oil and Gas Council (FOGC). Along with four Federal Ministers and the head of the Central Bank, the Council would comprise representatives of the regions (although it is not specified who would appoint them), of important oil companies (not listed) and three experts to be selected. Thus the composition of the FOGC, like every other Iraqi political body established since 2003, is likely to be subject to protracted haggling over identity-based quotas.

Opposition to the Oil Law

But whilst these disputes were taking place “in the kitchen”, news of the content of their menu leaked out, sparking outrage among many Iraqis. Whilst many were unhappy with what they saw as the fracturing of the country through excessive regionalisation, a bigger issue became the role of foreign companies.

Until that point, it had simply been assumed among policymakers that foreign companies would take the main role in developing Iraq’s oil, through long-term contracts; the political negotiators focussed on who among them would have the authority to sign these contracts.

However, most Iraqis would prefer oil production to remain in the Iraqi public sector. This includes those living in the Kurdistan Region: in a survey in summer 2007, 64 per cent of respondents in Kurdistan expressed a preference for oil to

15 Draft of the Oil and Gas Law of The Iraq Republic, 26 February 2007, translated by Raed Jarrar, <http://www.box.net/public/ehdzt13d71> (last accessed 21 May 2008)

be developed and produced by Iraqi state-owned companies, rather than foreign companies.¹⁶

The trade unions have led the opposition to the reversal of Iraq's oil nationalisation. In a statement in December 2006, they said:

We strongly reject the privatization of our oil wealth, as well as production sharing agreements, and there is no room for discussing this matter. This is the demand of the Iraqi street, and the privatization of oil is a red line that may not be crossed.¹⁷

This was echoed in milder terms by more than 60 of Iraq's most senior oil experts, who wrote in a letter in February 2007 that "Long-term contracts with international companies are better avoided now."¹⁸ The technocrats added that with the Constitution still under review, and with the oil articles among those being addressed, it made no sense to proceed with an Oil Law until that process was complete.

This opposition soon spread into the Federal Parliament, making passage of the Law seem unlikely. The USA pressured hard for its passage, making it the top political "benchmark" alongside the "surge" in troop numbers announced in January 2007.¹⁹ Whilst it set several deadlines for the Iraqi government to get the law passed, the most important of these for the Bush administration was the September report to Congress by General Petraeus and Ambassador Crocker,

16 Iraqi Oil Law Poll: June-July 2007, carried out by KA Research, and coordinated and analyzed by Custom Strategic Research. It was based on face-to-face interviews with 2,200 Iraqis in all 18 provinces. Charts available at http://priceofoil.org/wp-content/uploads/2007/08/iraq_oil_chartsJuly_1-4.pdf (last accessed 21 May 2008)

17 Hassan Jouma'a Awaad et al (18 signatories) (2006), 'Statement issued by the Iraqi Labor Union Leadership at a Seminar held from 10 to 14 December 2006, in Amman, Jordan to discuss the draft Iraqi Oil Law', <http://www.carbonweb.org/showitem.asp?article=223&parent=39> (last accessed 21 May 2008)

18 al-Rasheed et al (61 signatories), Open letter to Members of Iraqi Parliament –Iraqi Oil Experts Seminar held in Amman, 17 February 2007. Tariq Shafiq, one of the experts, later commented that "Privatization, however, runs against the grain of the great majority of the oil technocrats and the Iraqi nation. A strong state-owned national oil industry and unified central plan, policy and resource management, with a liberal attitude towards cooperation with the regions and governorates, have become the unchallenged principles of the overwhelming majority of Iraqi oil technocrats." (Tariq Shafiq, 'Iraq Petroleum Law Re-visited', paper presented At Centre for Strategic & International Studies, Washington DC, 12 June, 2007, p.4, http://www.al-ghad.org/wordpress/wp-content/uploads/2007/06/tes_csis_paper_-tariq-shafiq.doc (last accessed 21 May 2008)

19 George W Bush, President's Address to the Nation, 10 January 2007, <http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html> (last accessed 21 May 2008)

in which the administration stood to suffer actual political damage for lack of progress.

Yet all of these efforts were unsuccessful. When the law was not passed before the Petraeus/Crocker report, the KRG decided it did not want to wait any longer. In August, the Kurdistan Parliament passed its own Regional Oil and Gas Law²⁰, and two days before the Petraeus/Crocker report, the KRG started signing its own contracts.

The sovereign right to surrender sovereignty?

If KRG officials have been anxious to establish their sovereignty independent of central government in Baghdad, they have been remarkably keen to surrender it to foreign companies.

In explaining its policy of unilaterally signing contracts, the KRG points out that the Kurdistan Region has been passed over for investment, during decades of dictatorship. Whilst this is true, there is no benefit in terms of revenue for the KRG by having “its” fields developed rather than those elsewhere in Iraq, as either way, the KRG receives the same percentage of the revenues (currently 17 per cent), after federal expenditures have been deducted. Broader economic benefits are also likely to be limited: for example, the oil sector employs notoriously few people for the scale of its investments (and many come in from outside as foreign contractors).

The contracts they have signed are almost all production sharing contracts (PSCs) – a form that is favoured by companies²¹ for the way in which it fixes both fiscal and legal terms, rather than leaving them as sovereign matters to be determined by the government. For this reason, PSCs are only used in developing countries – industrialised countries simply would not accept that degree of encroachment on their ability to determine policy in the public interest.

Thus whereas the British government, for example, has adapted the fiscal framework for North Sea oil production on a number of occasions, and has

20 Oil and Gas Law of the Kurdistan Region – Iraq, Law No. (22) - 2007 (hereafter KRG Regional Oil and Gas Law), http://www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English__2007_09_06_h14m0s42.pdf (last accessed 21 May 2008)

21 See International Tax and Investment Centre, 'Petroleum and Iraq's Future: Fiscal Options and Challenges', fall 2004, <http://www.iticnet.org/publications/Iraq-book.pdf> (last accessed 21 May 2008)

introduced new environmental or safety laws from time to time, future Iraqi or KRG governments would be unable to do so. Effectively, Iraq's legal and economic framework is being frozen in its state in 2007 – a time when the country has recently emerged from dictatorship, is still occupied by foreign troops, is deeply divided and is riven with violence.

None of the KRG contracts has been signed with oil 'majors' such as BP, Shell or ExxonMobil; all have involved relatively tiny independent oil companies.²² Whilst the 'majors' do not want to damage their chances of signing deals with Baghdad for development of the larger oilfields in the south of Iraq, and are cautious of the legal and political risks of signing with the KRG, they know that they can easily buy out the small companies later on if their investment becomes more secure. The small companies have obtained highly profitable contracts to compensate their risks, and would receive huge windfalls were the majors to buy them out.

British and American occupation officials have been central in setting the frame for foreign investment in Iraq's oil, and in pushing production sharing contracts.²³ But on the question of decentralisation, the US administration in particular has been divided²⁴ and has sent contradictory message on the KRG's signing of its own contracts.

However, by spring 2008, it seemed they had settled on the more centralised approach. In a March 2008 meeting with KRG President Masoud Barzani, US

22 Of the 25 companies that have signed, the author of this essay – a keen oil industry watcher – had only previously heard of six.

23 See, for example, PLATFORM, 'The Iraqi oil sector, privatisation and the UK's role', Submission to the Iraq Commission, 14 June 2007, http://www.carbonweb.org/documents/iraq_commission.pdf (last accessed 21 May 2008); and Erik Leaver and Greg Muttitt, 'Slick Connections: U.S. Influence on Iraqi Oil', in *Foreign Policy in Focus*, 17 July 2007, <http://www.fpiif.org/fpiftxt/4399> (last accessed 21 May 2008)

24 The reason for this division lies in conflicting agendas within the US administration, which can broadly be divided into two camps, at least in so far as their agendas relate to oil. On one hand, the more ideological neoconservatives, who sought the spread of US values of democracy and economic liberalism in Iraq and the Middle East, seeing oil as simply the largest of many sectors to be privatised and liberalised. On the other side, the "power pragmatists" saw oil as the strategic interest in the region. The combination of these two strains of thought, together with the attacks of September 11 2001, created the political conditions that led to the war with Iraq. The two groups however differ in their vision for Iraq's oil, the former favouring a rapid and outright privatisation of the sector, open to all players in a free market, and the latter preferring dominance by the American and European oil super-majors through long-term contracts. Hence, differing responses to the KRG's rapid signing of deals with many small independent oil companies.

Vice President Dick Cheney pressed Barzani to help pass the federal oil law.²⁵ Less than a month later KRG Prime Minister Nechirvan Barzani was in talks in Baghdad and announced progress towards agreement on the oil law.²⁶

The solution being discussed – as ever – is to defer the decisions until later, leaving the allocation of contracts to regional or federal bodies to be addressed by the Federal Oil and Gas Council. This may do little to foster reconciliation in Iraq, by locking in future disputes, but would achieve a major US objective of getting an oil law on the statute books.

The next section will assess the terms of the KRG's Model Contract²⁷, which was published in September 2007 as a starting point for negotiations with companies. The KRG has refused to disclose the contracts themselves (a point discussed in Part IV); thus some terms may even have greater implications than those discussed below.

25 Tabassum Zakaria, 'U.S. will complete mission in Iraq – Cheney', Reuters, 18 Mar 2008, <http://www.alertnet.org/thenews/newsdesk/L18823307.htm> (last accessed 21 May 2008). Cheney had previously met in November 2007 with two KRG Deputy Prime Minister and Natural Resources Minister. Following the meeting, the KRG's legal adviser Jonathan Morrow commented, "Far from the US taking it as an opportunity to lean on the Kurds and ask them to withdraw from their position on Iraqi federalism in the oil sector, they're brainstorming with the Kurds on how to break the impasse in Baghdad". (Steven Mufson, 'Cheney and Kurds Meet About Oil', Washington Post, 1 December, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/30/AR2007113002178.html> (last accessed 21 May 2008))

26 Ben Lando, 'KRG PM: 'Progress' on oil law with Baghdad', 21 April, 2008, http://www.upi.com/International_Security/Energy/Briefing/2008/04/21/krg_pm_progress_on_oil_law_with_baghdad/2414/ (last accessed 21 May 2008)

27 KRG Model PSC, published 6 September 2007, http://www.krg.org/uploads/documents/KRG%20Model%20PSC__2007_09_06_h14m3s46.pdf (last accessed 21 May 2008)

PART II – CONSEQUENCES FOR HUMAN RIGHTS FRAMEWORK

Stabilisation clauses – holding back the progressive realisation of human rights

Under international human rights agreements, all states have a duty to enhance their human rights frameworks over time, in order to move towards the full protection and fulfilment²⁸ of human rights.²⁹

There are three ways in which a state might expect to strengthen its human rights laws. Firstly, since no country has a perfect human rights framework, with limited resources, and sometimes political constraints, states need to prioritise certain actions related to human rights, and return to others later.³⁰ Secondly, as new human rights treaties are negotiated in the future, states will need to incorporate them into their domestic laws. And thirdly, states may need to introduce measures to address new and unforeseen circumstances and threats.³¹

However, in common with many other production-sharing contracts (PSCs) elsewhere, those signed by the Kurdistan Regional Government (KRG) contain “stabilisation clauses”, to protect the profitability of the projects from future changes in law or policy.

Under these clauses, if the state (either the Iraqi federal government or the KRG) introduces any new laws, taxes or economic policies that affect a project’s

28 Governments have three obligations in relation to human rights:

- a) To **respect** human rights: to refrain from violating rights;
- b) To **protect** human rights: to prevent violations of rights by third parties;
- c) To **fulfil** human rights: to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights.

29 For example, in the International Covenant on Economic, Social and Cultural Rights: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” (Article 2.1), http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last accessed 21 May 2008)

30 Prioritising actions does not involve prioritising certain rights over others

31 Laws relevant to human rights and investment include those relating to labour, workplace safety, environmental protection, land, non-discrimination and other areas.

profitability, the investor will have the right to adjusted economic terms of the contract, so as to restore “the same overall economic position”.³²

The result is that the state must pay the costs of any such change.

Not only does this compromise the sovereignty of the state³³ – it is likely to have what the UN High Commissioner on Human Rights has called a “chilling effect”,³⁴ discouraging both regional and federal governments from passing new legislation, for which they would have to pay in lost revenues.³⁵

The stabilisation provisions thus create an immediate conflict with the state’s obligation to progressively realise human rights.³⁶

32 “The GOVERNMENT guarantees to the CONTRACTOR, for the entire duration of this Contract, that it will maintain the stability of the legal, fiscal and economic conditions of this Contract, as they result from this Contract and as they result from the laws and regulations in force on the date of signature of this Contract. The CONTRACTOR has entered into this Contract on the basis of the legal, fiscal and economic framework prevailing at the Effective Date. If, at any time after the Effective Date, there is any change in the legal, fiscal and/or economic framework under the Kurdistan Region Law or other Law applicable in or to the Kurdistan Region which detrimentally affects the CONTRACTOR, the CONTRACTOR Entities or any other Person entitled to benefits under this Contract, the terms and conditions of the Contract shall be altered so as to restore the CONTRACTOR, the CONTRACTOR Entities and any other Person entitled to benefits under this Contract to the same overall economic position (taking into account home country taxes) as that which such Person would have been in, had no such change in the legal, fiscal and/or economic framework occurred”. (KRG Model PSC, Article 43.3)

33 The United Nations Commission on International Trade Law notes: ‘All business organizations, in the private and public sectors alike, are subject to changes in law and generally have to deal with the consequences that such changes may have for business [...] General changes in law may be regarded as an ordinary business risk [...]’. (UNCITRAL, ‘Legislative Guide on Privately Financed Infrastructure Projects’, New York, 2001, p.141, <http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf> (last accessed 21 May 2008) In OECD countries, stabilisation clauses are generally based on the principle that compliance with some new laws should be at the cost of the investor; OECD stabilisation clauses generally only relate to laws that are discriminatory toward the investor, and even in project-specific laws the costs and risks may be shared between government and investor. (Andrea Shemberg, ‘Stabilisation Clauses and Human Rights’, research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 11 March 2008, p.29, <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf> (last accessed 21 May 2008; Hereafter cited as Shemberg, ‘Stabilisation Clauses and Human Rights’)

34 UN Commission on Human Rights, ‘Human Rights, Trade and Investment’, report of the High Commissioner for Human Rights, E/CN.4/Sub.2/2003/9, July 2003, p.21 http://ap.ohchr.org/documents/dpage_e.aspx?s=115 (last accessed 21 May 2008)

35 The stabilisation is not however symmetrical: the contracts provide that if future legislative changes benefit the investor, then the investor will be entitled to enjoy that benefit (KRG Model PSC, Article 43.5)

36 The chilling effect may be especially significant in Iraq, where oil accounts for about 95% of government revenue - so that any compensatory adjustment in the economic terms of oil contracts could have a large impact on government budgets.

This conflict is particularly troubling in the case of Iraq, where only five years from the end of dictatorship, and still under occupation, many elements of the human rights framework are weak or non-existent.

The situation has barely moved on since 2003. Very little legislation has passed since then, as a result of political chaos and extensive violence. That which has passed has largely reflected the priorities of the occupation or of sectarian political parties – including laws governing trade and investment, security and the powers of regions and governorates.

Whilst the Kurdistan Region has some human rights legislation beyond that existing in the rest of Iraq,³⁷ introduced since the region gained autonomy in 1992 and preserved under the 2005 Constitution, this is inevitably limited. The Kurdistan parliament did not sit between 1995 and 2000, as a result of the conflict between the PUK and KDP; and throughout the period 1992-2003, the region was under political pressure, and economically under-resourced.

The effect of “stabilisation” therefore will be to freeze Iraq in this situation of weak protections of human rights.

The stabilisation clauses used in the KRG’s model PSC are also unusually wide-ranging, relating to the entirety of the “legal, fiscal and economic framework.”³⁸

Whereas stabilisation clauses often relate to laws and fiscal matters, the inclusion of the “economic framework” is uncommon. It is not clear whether this would include macroeconomic policies of the Iraqi government: if so, this would be a significant intrusion on the government’s ability to manage the economy.

Nor is the meaning of “framework” defined in the contract in relation to legal aspects: it is likely to include international agreements as well as domestic laws and regulations, but might be taken also to include administrative and institutional structures for delivering and enforcing those.

Locking in weak regulation of environment, health and safety

A key tool with which a state should protect human rights in relation to investment is through environmental, health and safety regulation – in particular, to protect

37 Including on workers’ rights and women’s rights

38 KRG Model PSC, Article 43.3

the rights to life and health of oil workers and local communities living near the operations.

As Andrea Shemberg points out in a recent report to the UN Secretary General's Special Representative on Business and Human Rights and the International Finance Corporation³⁹:

The state's ability to pass laws regulating the behaviour of private parties (including investors) is fundamental to human rights protection, because such measures are primary tools by which states implement their international human rights obligations – specifically the duty to protect rights.

However, unlike production sharing contracts (PSCs) in some other countries⁴⁰, the stabilisation clauses in the KRG's model PSC make no exception for environmental or safety laws, and nor does the contract itself provide significant protection.

Such regulations are weak in Iraq, including the Kurdistan Region. A desk study by the United Nations Environment Programme in 2003 characterised Iraq's environmental framework as suffering from⁴¹:

- A) no effective institutional or administrative infrastructure for environmental management or sustainable development;
- B) inadequate legislation;
- C) lack of participation in global and regional environmental agreements and processes.

Some work has taken place on drafting environmental laws at both federal and regional levels; however neither has yet been completed. Thus the environmental legislation at the time of signing the KRG's PSCs had not moved on since 2003, and the contracts' stabilisation clauses will lock in this weak regulatory framework.

39 Shemberg, 'Stabilisation Clauses and Human Rights' p.11

40 For example, Republic of Kazakhstan, Agip/BP/et al. Production Sharing Agreement dated 18 November 1997 in respect of the North Caspian Sea (Kashagan oilfield), Clause 40.2. See also Shemberg, 'Stabilisation Clauses and Human Rights'.

41 UNEP, Desk Study on the Environment in Iraq, 2003, p.49, http://postconflict.unep.ch/publications/Iraq_DS.pdf (last accessed 21 May 2008)

On the positive side, the model PSC does require compliance with “any then applicable Kurdistan Region Law” on protection of the environment (that is, laws in force at the time of carrying the oil operations).⁴² However, in the stabilisation provisions, no exception is made for development of environmental legislation. Reconciling these two provisions, we infer that the investor must comply with any future environmental laws, but that the government must compensate it for the cost of doing so.

This disincentive of compensation is likely to limit the scope of future environmental laws, in either drafting or interpretation, effectively freezing the current inadequate legislation.⁴³

The specific provisions of the contracts on environment and safety confirm the regulatory vacuum.

Whilst the investor must submit an environmental impact assessment to the Regional Government,⁴⁴ there is no provision for its approval, non-approval or amendment by any regulator, nor for public disclosure – all of which are generally accepted practices in other oil-producing countries. Environmental planning thus becomes entirely a matter for the investor, with no reference to any external standard or check and balance.

Meanwhile, the model PSC contract places a duty on the KRG to provide permits, including environmental permits, when requested by the investor.⁴⁵ This legal duty could discourage government from carrying out its functions of environmental regulation, by requiring it to approve applications for works regardless of their environmental consequences.

In relation to workplace safety too, no provision is made in the model contract for monitoring, regulation or enforcement of independent standards. Instead,

42 KRG Model PSC, Article 37.1

43 The model contract (Article 23.9) also requires contributions by investors to an Environment Fund “for the benefit of the natural environment of the Kurdistan Region.” Whilst this will provide for positive investments in environmental improvement, it does not restrict the negative environmental damage of petroleum operations themselves.

44 KRG Model PSC, Article 37.5

45 “Upon the CONTRACTOR’s request, the GOVERNMENT shall provide and/or procure all Permits relating to the Petroleum Operations required by the CONTRACTOR to fulfil its obligations under this Contract” (KRG Model PSC, Articles 2.2); “The GOVERNMENT shall facilitate the performance of the Petroleum Operations by promptly granting to the CONTRACTOR any necessary authorisation, permit, licence or access right” (Article 43.6)

the investor is required to design its own system, with the only external reference point for standards being “prudent international petroleum industry practice”⁴⁶ – essentially a self-referential standard. Since investing oil companies are by definition better judges of what is prudent in the industry, they are effectively entitled to do what they like.

There is no requirement for this safety system to be approved by a regulator, no provision for inspections, and the only reporting requirement is where a serious injury has actually occurred.

The only point at which there is an opportunity for regulatory approval or otherwise, on safety, environment or other issues, is at the stage of application and signing of the contract. The Regional Oil and Gas Law requires environmental, health and safety provisions to be submitted with applications⁴⁷, which the KRG could refuse. However, these provisions were not made public, and are not apparently part of the contract, so not enforceable. The hurry with which the contracts were signed in autumn 2007 suggests that political considerations weighed more heavily than the details of optimum development in any case.

The Regional Oil and Gas Law provides that the Minister may make regulations on environment, health and safety, including reporting requirements⁴⁸ – however, as these were not in force at the time of signing the contracts, nor included in the contracts themselves, any such new regulations will be subject to the stabilisation provisions and thus to potential compensation payments.

The model contract explicitly confirms the regulatory impotence of the government by ruling out the use of punitive damages, and indeed restricting any liability of the investor to wilful misconduct or breach of contract.⁴⁹

46 KRG Model PSC, Article 16.11.

47 KRG Regional Oil and Gas Law, Article 26 Third

48 KRG Regional Oil and Gas Law, Article 53

49 “Notwithstanding the other provisions of this Contract, the CONTRACTOR and the CONTRACTOR Entities shall not be liable to the GOVERNMENT or the Public Company or other government agencies, authorities or bodies, courts or political subdivisions for any damage or loss or claims of any kind resulting from its conduct of the Petroleum Operations unless such damage or loss is the result of wilful misconduct or a material failure to conduct Petroleum Operations in accordance with the terms of this Contract; provided, however, that such liability cannot result in the event of any omissions, errors or mistakes committed in good faith by the CONTRACTOR in the exercise of the powers and authorisations conferred upon the CONTRACTOR by virtue of this Contract, and further provided that in no event shall the CONTRACTOR and the CONTRACTOR Entities be liable for ... any loss, damages, costs, expenses or liabilities caused (directly or indirectly) by any of the following ...: (iv) special or punitive damages; or (v) other indirect damages or losses whether or not similar to the foregoing.” KRG Model PSC, Article 35.2

This would seem to imply that if the investor cut costs excessively on environmental protection or workplace safety – for example, by not installing available technology, by not providing safety equipment, or by not maintaining or inspecting facilities – and if this resulted in a devastating accident, then the investor could claim that the cost-cutting was simply a “mistake”, and the government would be unable to impose a fine or other penalty. Nor could the government terminate the contract. In fact, the only thing the “regulator” could do would be to require a change of practice, and for the government to pay the costs of carrying it out. The bizarre requirement of “wilful misconduct” would appear to hold the investor liable only if it actively and deliberately polluted a water course or injured its workers, for example.

With a minimal baseline of regulations at the time of signing, the investor is effectively given free reign to operate in any way it chooses.

There is ample evidence from around the world that left to their own devices, in spite of claims of progressive policies, oil companies systematically fall short of standards necessary to preserve the safety of their workforce and the environment. As such, the lack of regulatory mechanisms in the law or model contract constitutes a manifest neglect of the government’s obligation to protect the rights of oil industry workers and local communities.

International arbitration – enforcing investor rights

If an investor claims that a change of law or policy affects its profits, the stabilisation clauses in the KRG’s model contract allow it to renegotiate the economic terms with the government, in order to compensate for the lost profits. If adjusted terms cannot be agreed, the investor has the right to take the case to arbitration by a tribunal in London, in the English language, under the rules of the London Court of International Arbitration (LCIA).⁵⁰

The LCIA is an international commercial court, designed to resolve disputes between companies, but also used for investment disputes between companies and states. As such, it will consider only the purely commercial terms of the contract, extracting and isolating it from the body of Iraqi and Kurdistan Regional law. Thus the state becomes not an entity serving the public interest of its citizens, but simply a partner in a commercial arrangement. For these reasons, international investment arbitration tends to defend the interests of the foreign

50 KRG Model PSC, Article 42.1

investor; indeed, it is extremely rare for a host government to take an investment to arbitration.

Susan Leubuscher, one of the first researchers to highlight to civil society the implications of international investment arbitration, identified the problem as follows⁵¹:

International commercial arbitration... assigns the State the role of just another commercial partner, ensures that non-commercial issues will not be aired, and excludes representation and redress for affected populations... It thereby creates a system of private justice which leads to a 'compartmentalisation of the market that the state judicial system is powerless to control' and ensures that each holder of economic power is 'fortified with its own custom-made justice.

The contract is governed by English law, "together with any relevant rules, customs and practices of international law, as well as by principles and practice generally accepted in petroleum producing countries and in the international petroleum industry".⁵²

The governing of the contract under English and international law, and its hearing in arbitration tribunals in London, removes it from considerations of public interest⁵³, which domestic courts would be more likely to weigh.⁵⁴ For

51 Susan Leubuscher, 'The privatisation of law: International investment agreements as acts of pretended legislation', *Transnational Dispute Management*, Vol.3, No.2, April 2006, pp.15-16

52 KRG Model PSC, Article 43.1

53 Arbitration tribunals tend to take the view that a foreign investor – as foreign 'person' – does not participate in or benefit from the public interest, or from the broader actions of the state, so must be protected by international law instead; in other words, the concept of public interest could be used to arbitrate between two nationals of the host state, but not between a national (or the state itself) and a foreigner. Stefan Kröll, 'The Renegotiation and Adaptation of Investment Contracts', *OGEI – Oil, Gas & Energy Law Intelligence*, vol.2, no.1, February 2004, p.36

54 While international arbitration is used in the majority of cases, there are exceptions – including Iraq's model contract of 1995, which specified Iraq as the 'country place of arbitration' (Frank Alexander, 'Production sharing contracts and other host government contracts', *Annual Institutes*, 46, 2000, chapter 20, Rocky Mountain Mineral Law Institute, reproduced in *OGEI – Oil, Gas & Energy Law Intelligence*, 3: 3, October 2005). China's 1982 (revised in 2001) offshore oil regulations (Article 24) specify that in case of disputes, 'mediation and arbitration may be conducted by an arbitration body of the People's Republic of China' (Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, 23 September, revision of Regulations of 30 January 1982, reproduced in *World Petroleum Arrangements – Asia & Australasia*, 2004, Barrows, pp. 203–09). Venezuela's Organic Law of Hydrocarbons (Article 34) states that 'All disputes shall be decided by the competent courts of the Republic, and no foreign claims shall arise for any reason' (enacted 2 November 2002).

example, domestic courts might seek to balance an investor's right to stable terms of its investment contracts with its workers' rights to a safe workplace. The reference in the KRG's model PSC to accepted practice of the international oil industry is likely to weight any arbitration of the contract further in the favour of the investor – a self-referential note akin to that on safety standards.

The LCIA's rulings are binding, and give no right of appeal⁵⁵, except in relation to "errors in computation, clerical or typographical errors or any errors of a similar nature."⁵⁶ Any compensation award, as ruled by the LCIA tribunal, can be enforced through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, allowing the winning party to seize assets of the losing party in any of the more than 140 countries that are parties the Convention.

Furthermore, under LCIA rules⁵⁷, no information is provided on cases, before, during or after the hearing. Thus, although the case may have a major bearing on wide areas of public law, citizens of Iraq and the Kurdistan Region would not even have the right to know that an arbitration is taking place, nor that the government might have had to pay compensation of potentially tens of millions of dollars.⁵⁸

The result is that the rights of the investor are strongly protected, at the expense of the rights of the people of Iraq and the Kurdistan Region.

55 "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority" (LCIA Rules, Article 26.9, http://www.lcia.org/ARB_folder/arb_english_main.htm#article26)

56 LCIA Rules, Article 26.9 This is even more restrictive than the International Centre for Settlement of Investment Disputes (ICSID), a purpose-built investment arbitration body, which also allows no appeal on points of law or interpretation, but does allow appeal on grounds of procedural violations (such as that the tribunal did not observe ICSID's rules).

57 Article 30.1 of the LCIA Rules states that "Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."

58 According to the FAQ section of LCIA's website (http://www.lcia.org/FAQ_folder/faq_main.htm#cia15; last accessed 21 May 2008): "Confidentiality is still generally regarded as one of the primary underpinnings of arbitration. Nobody who is not a proper party to an arbitration, or a legal representative of a party, may obtain information about pending or completed arbitrations from the LCIA. Our response to any such request will be that we cannot comment, irrespective of whether we have any knowledge of the matter about which we are being asked."

PART III – IMPACT ON ACCESS TO LAND, WATER AND SERVICES

Restricting use of land and resources

A further respect in which oil operations under the KRG's PSC contracts may violate rights of local people is through potentially prioritising oil investors' access to land and essential resources, including water.

The model PSC provides that the investor may freely use water, electricity and other natural resources.⁵⁹ The investor also has the right to construct a wide range of earthworks that will affect both the water table and access to other resources, including dams, canals and reservoirs.⁶⁰ Whilst in the case of water, the investor's right is limited by a requirement not to damage or deprive use of irrigation and navigation systems,⁶¹ no process is created for approval or planning of water extraction (for example, by application to a government regulator), or for addressing loss of water supplies.

No restriction is placed on the use of electricity, a resource that is already insufficient to meet people's needs in Iraq.

The BBC recently reported that residents of Sulemanya get running water for four hours every three days and electricity for three-to-four hours a day.⁶² According to Voice of America, Erbil residents get only eight hours of electricity per day.⁶³

59 KRG Model PSC, Article 2.8 (c)

60 "For its Petroleum Operations, the CONTRACTOR shall have the right in the Kurdistan Region to clear land, excavate, drill, bore, construct, erect, place, procure, operate, emit and discharge, manage and maintain ditches, tanks, wells, trenches, access roads, excavations, dams, canals, water mains, plants, reservoirs, basins, storage and disposal facilities, primary distillation units, extraction and processing units, separation units, sulphur plants and any other facilities or installations for the Petroleum Operations ... The CONTRACTOR shall have the right to select the location for these facilities." KRG Model PSC, Article 17.5

61 "The CONTRACTOR shall have the right in the Kurdistan Region to take or use any water necessary for the Petroleum Operations provided it does not damage any existing irrigation or navigation systems and that land, houses or watering points belonging to third parties are not deprived of their use." (KRG Model PSC, Article 17.6) This clause is somewhat ambiguous. The qualifier "their" (rather than "its") implies that it refers to use of irrigation and navigation systems, rather than of water itself. Thus it appears that there is no restriction on depriving houses of drinking water.

62 Kate Clark, 'Corruption in Iraqi Kurdistan', BBC News, 10 January 2008, http://news.bbc.co.uk/1/hi/programmes/crossing_continents/7178820.stm (last accessed 21 May 2008)

63 Brian Padden, 'Iraq's Kurdish region struggles with power shortages', Voice of America, 24 August 2007, <http://www.krg.org/articles/detail.asp?lngnr=12&smap=02010200&rnr=73&anr=19837> (last accessed 21 May 2008)

The contracts also give investors wide rights to land, which in rural areas will have a major impact on livelihoods and on food production.

The investors have a right to use public lands without payment. Private lands may be expropriated by the KRG, at the request of the investor, subject to payment of compensation. There is no specific procedure for assessing, awarding or appealing payments for land expropriation; the only mechanism available is the general process for compensation for third party damages (see below). In the absence of a clear, land-specific procedure for expropriation of and compensation for land *per se*, there is a significant risk that landowners will be unaware of the means of defending their property rights.

The context of displacement within Iraq also worsens the prospect of landowners achieving their rights. Claims arising from seizure of land under the 'Arabisation' policy of the Ba'athist dictatorship are far from settled. The UN High Commission on Refugees estimates that there are at least 4.6 million displaced Iraqis, about half of them within Iraq and half abroad.⁶⁴ There is a danger that displaced people may eventually return to find their land has been granted to private investors in their absence.

Thus in the cases of water, electricity and land, the oil contracts could exacerbate, and make harder to resolve, an already dire human rights situation.

Limited rights of redress

The KRG's Regional Oil and Gas Law requires that "fair and reasonable compensation" be paid in case of damage or loss to the property of third parties.⁶⁵ This is the only mechanism of redress, including in relation to land expropriation.

However, there are a number of weaknesses in this provision. Firstly, it is the KRG's Ministry of Natural Resources that will decide amounts of compensation.⁶⁶ The Ministry is also the body responsible for promoting development of the oil and gas resources, so will inevitably suffer from conflicts of interest, which may

64 UNHCR, Statistics on Displaced Iraqis around the World, September 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssldoc.pdf?tbl=SUBSITES&id=461f7cb92> (last accessed 21 May 2008)

65 KRG Regional Oil and Gas Law, Article 29 Third

66 KRG Regional Oil and Gas Law, Article 29 Third

lead to lower compensation payments than would be decided by an independent body.

Secondly, the provision focuses on cases where oil activity “disturbs the rights of the owner of any Asset”.⁶⁷ Whilst there is also reference to activity that “interferes with any other lawful activities”, the basis for compensation is less clear in this case – raising potential threats to the rights of land users who do not own the land. The restrictions to use are very broad. Third parties, including local residents, will require government permission to gain access to the contract area, on which the government will consult with the investor before granting.⁶⁸ Conversely, there is no requirement to consult other land users or affected people on access rights.

It should be noted that these areas of restricted access are not simply drilling compounds, but cover enormous areas, each of between 300 and 2,400 square kilometres.⁶⁹

For example, a farmer taking his livestock to graze, even on land that has been used in that way for generations, might require oil company approval (which the company could deny), whereas the oil company could drive construction machinery through the land at any time, potentially disturbing the animals through noise or spread of disease, or damaging the land.

Thirdly, the rights of appeal are unbalanced. Whereas the investor is entitled to arbitration in London, under the rules of the LCIA, the locally affected person shall be entitled only to rely on the specialist courts in the region to object to a compensation decision.⁷⁰ This greatly limits the possibility of obtaining justice.

In any case, it will be difficult for any third party to obtain redress, given that the contracts themselves are not disclosed – this means that an affected person will not be able to discover their rights in case of damage, or the obligations of the

67 KRG Regional Oil and Gas Law, Article 29 Second

68 “The GOVERNMENT shall give the CONTRACTOR adequate advance notice of any Access Authorisation in respect of the Contract Area and shall not grant any Access Authorisation in respect of the Contract Area until it has taken into account any submissions made by the CONTRACTOR nor in such a way that there is undue interference with or hindrance of the rights and activities of the CONTRACTOR.” KRG Model PSC, Article 17.9

69 For example, the Sindi/Amedi Block, awarded to Perenco in September 2007, covers 2,358 square kilometres (KRG press release, ‘KRG Natural Resources Ministry announces new Kurdistan Region petroleum contracts’, 2 October 2007)

70 KRG Regional Oil and Gas Law, Article 29 Third

investor. Even were contracts to be released, they are in English language, so not accessible to the majority of affected people.

The economic impacts of the oil contracts

In a heavily oil-dependent economy like Iraq's, the economic terms of oil production will have a major bearing on government's budgetary capacity to fulfil the rights of its citizens – including through the provision of education, health services, justice and security.

However, extensive deals have been signed in a very short space of time: 32-year contracts covering almost half of the Kurdistan Region were signed between September and November 2007.

By offering all at once, the market dynamics will favour the investors, as they will not have to compete for limited acreage. None of the contracts were even tendered; instead all were awarded through direct one-to-one negotiations. In such circumstances, highly profitable terms (and the expense of the state and its people) are inevitable.

If the approach were replicated across Iraq, as the KRG clearly intends, regions and governorates would be the ones forced to compete with each other, to attract investment – resulting in a race to the bottom, where each offers more generous economic terms, weaker regulation and more inducements.

Salman Banaei, writing in the journal of the Association of International Petroleum Negotiators, writes approvingly,⁷¹

Competition among key decision makers may lead to regulatory competition, allowing for contractors to obtain relatively favorable terms.

Furthermore, by signing the contracts before either the constitutional review or the oil law are concluded, and especially while there is dispute over the latter, far greater risk premia will be factored into the economic terms: higher profits to compensate companies for the legal and political uncertainties of whether the contracts will even stand up as valid, given the murky constitutional situation.

71 Salman Banaei, 'The Draft Iraqi Oil and Gas Law Analyzed', *Advisor* (journal of the Association of International Petroleum Negotiators), March 2007, No. 274, pp.10-12, <http://www.aipn.org/documents/advisor/AdvisorMarchfinal.pdf> (last accessed 21 May 2008)

This will result in lower revenues to the KRG, even after the legal and political situation has been clarified, as the terms are fixed by the contracts and their stabilisation clauses.

The major international oil companies are not signing up to the KRG's deals; instead, small companies are taking on those risks, like a form of venture capital, aiming to make great windfalls by later selling their stakes to the majors if the risk pays off. "The Kurds are offering attractive terms to companies that are willing to take a gamble on the legal situation, and some small oil companies are prepared to take the bait" says Rafiq Latta, of Argus Oil and Gas report.⁷²

Like the legal and regulatory situation, the economic terms will be fixed for 32 years in a way that reflects the circumstances of violence, division and occupation in 2007.

The people of Iraq might ask whether this approach will give them a fair return for depletion of their non-renewable natural resources. Unfortunately, that question cannot be answered, as none of the contracts have been published.

PART IV – IMPACTS ON BROADER RIGHTS CONTEXT

The rentier sub-state

Whereas the oil contracts themselves undermine the legal and economic framework of rights protection, oil policy more broadly may be worsening the human rights context, by circumventing the rule of law, and weakening the institutions of state. This has created a climate in which civil and political rights are increasingly violated, and in which conflict has worsened.

There are widespread accusations of corruption and patronage within the Kurdistan Region. For example, there have been allegations that officials require that any business venture must involve contracts with companies associated with

72 James Brandon, 'Oil revenue may provide more economic independence to Iraq's Kurds', Christian Science Monitor, 26 April 2006, <http://www.gasandoil.com/goc/news/ntm62063.htm> (last accessed 21 May 2008)

KRG political leaders, and that public funds have been diverted into the political parties and to their senior members.⁷³

Corruption is a major focus of public protests within the region. Many protesters have been arrested and intimidated, primarily by the KRG's *Asayish* internal security forces, and in some cases, security forces have opened fire on peaceful demonstrations, killing at least two people in 2006.⁷⁴ The UN Assistance Mission to Iraq (UNAMI) also reports widespread torture and abuse of prisoners detained by the *Asayish*, and a failure to bring perpetrators to justice.⁷⁵ In part, this is because the courts are part of the Ministry of Justice, and not independent of the executive branch of government.

Citizens are regularly pressured to join one of the two parties, and there are reports that the parties prevent employment of non-party members, and that courts favour party members.⁷⁶

Most media outlets are controlled by one of the two parties, and follow party lines in their programmes and articles. Independent journalists who have criticised the parties have frequently been arrested and detained. The Committee to Protect Journalists reported a "rising number of physical attacks on the press" and "politicized lawsuits against outspoken newspapers" in 2007.⁷⁷

Many of these problems are common features of 'rentier' states, which rely heavily on natural resource wealth, such that the extractive sector becomes isolated from

73 For example: Kyle Madigan, 'Iraq: Corruption Restricts Development In Iraqi Kurdistan', Radio Free Europe / Radio Liberty, 29 April 2005, <http://www.rferl.org/featuresarticle/2005/4/DA9D366C-C2C2-486F-A4D7-2EEBC0BB507E.html> (last accessed 21 May 2008); Michael Rubin, 'Is Iraqi Kurdistan a Good Ally?', American Enterprise Institute Online, January 7, 2008, http://www.aei.org/publications/filter.all,pubID.27327/pub_detail.asp (last accessed 21 May 2008); Clark, 'Corruption in Iraqi Kurdistan', BBC News, 10 January 2008, http://news.bbc.co.uk/1/hi/programmes/crossing_continents/7178820.stm (last accessed 21 May 2008)

74 US State Department, Country Reports on Human Rights Practices - Iraq, 2006, Released by the Bureau of Democracy, Human Rights, and Labor, 6 March 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm> (last accessed 21 May 2008)

75 UN Assistance Mission for Iraq, Human Rights Report, 1 April - 30 June 2007, pp.30-31, www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf (last accessed 21 May 2008)

76 US State Department, Country Reports on Human Rights Practices - Iraq, 2007, released 11 March 2008, www.state.gov/g/drl/rls/hrrpt/2007/100596.htm (last accessed 21 May 2008)

77 UN Assistance Mission for Iraq, Human Rights Reports: 1 January - 31 March 2007, pp.11-13, www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf; 1 April - 30 June 2007, p.12, www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf (last accessed 21 May 2008) ; 1 July - 31 December 2007, p.19 <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jul%20Dec%202007%20EN.pdf> (last accessed 21 May 2008)

the rest of the economy, and the government becomes distant from the interests of its people. Politics is centralised, as what happens in the rest of the country or the rest of the economy is less significant to the rulers. Government takes place through allocation of resource proceeds, alongside repression of dissenters.

With politics haggled out at the centre between party leaderships and occupation officials, such views are simply not given space to be discussed. At an Iraq-wide level, at least one senior civil servant in the British Foreign Office saw this exclusion as an advantage, commenting to the author of this essay that

We need to be careful about asking Iraqis whether they want foreign companies to develop the oil; the danger is that you'd get a knee-jerk response rejecting the foreign companies, and that wouldn't be in anyone's interests⁷⁸

The result however is a crisis of legitimacy in the policies, and by extension, within the political systems themselves. As noted in Part I, most people in the Kurdistan Region, as in the rest of Iraq, oppose the handing of oil development to foreign companies. But whilst all politics takes place "in the kitchen", civil society is left out on the pavement.

In August 2006, the KRG published a draft of its Regional Oil and Gas Law for consultation. Illustrating clearly the problematic political dynamic behind oil policy, it appears that the consultation was aimed at international oil companies, and not at the people of Kurdistan or Iraq. In his reflections on the comments received, the KRG's Minister for Natural Resources mentioned seven comments from international oil companies, and none from people or civil society groups in Kurdistan.⁷⁹ He also said that *all* respondents supported the draft law – which would be very unlikely in a genuine public consultation. When the KRG's spokesman was asked how many of the respondents were in Kurdistan, the rest of Iraq and abroad, he declined to respond.⁸⁰

78 Meeting at Foreign and Commonwealth Office with PLATFORM and War on Want, 11 January 2007

79 Q&A with Ashti Hawrami. KRG website, 'KRG Natural Resources Minister responds to comments on draft Kurdistan Petroleum Act', 22 August 2006, <http://web.krg.org/articles/detail.asp?nr=95&lngnr=12&nr=13070&smap> (last accessed 21 May 2008)

80 Email from Khaled Salih, 18 April 2008

With no debate on the structures for managing oil development, the role of oil is reduced to that of providing revenues, which in turn are pursued according to the interests seeking to gain control of them. As Kamil Mahdi explains,⁸¹

In essence, many politicians now engaged in backroom bargaining are ultimately embroiled in a resource conflict – rather than a conflict of ideas and visions. What has been lost is even a minimal sense of a common national interest, or for that matter any sense of what are the ‘communal’ interests.

This environment of self-interest lends itself to a rentier-style economy, where patronage dominates politics, and where political self-interest is the guiding factor of official behaviour. This problem is at least as prevalent in Kurdistan as in the rest of Iraq, as evidenced by the rapidity with which oil contracts have been signed, at the expense of human rights and economic development, and against the wishes of most Kurds. Kamil Mahdi adds,

Despotism has indeed left a mark on Iraqi politics, and won't be prevented by creating smaller rentier institutions.

Oil and conflict

The five years since 2003 have seen a bloody competition for control of the institutions of state, for the most part by groups organised around ethnic or sectarian identity. This control has in turn been used to reward a group's supporters, attack opponents and entrench power.⁸²

Sectarianisation at the political level is part and parcel of the sectarianism that now poisons Iraq's streets and drives ethnic cleansing. Not only do all the political parties in Iraq have their militias (with varying but low degrees of respect for human rights), it is along ethnic and sectarian lines that armed groups – and also criminal gangs – seek to advance their interests.

The competition is now intensifying, as the economy too becomes an area of contestation. Oil is thus seen not as an integral part of the state and its economic policy, but simply as a generator of revenue, to be appropriated by sub-national

81 Kamil Mahdi. 'Iraq's Oil Law: Parsing the fine print', in *World Policy Journal*, summer 2007, p.17, www.mitpressjournals.org/doi/pdf/10.1162/wopj.2007.24.2.11 (last accessed 21 May 2008)

82 See, for example, Eric Herring and Glen Rangwala, *Iraq in Fragments: The Occupation and its Legacy*, London: Hurst & Co, 2006, p.97

groups. Regionalised ownership over oil revenues, and over the right to sign contracts, quickly translates into ownership by identity-based political parties.

With this devolved ownership, the battle for oil-rich disputed territories (including Kirkuk and Mosul) is intensifying. There are many documented cases of intimidation and unlawful detention without trial of Arabs and Turkmen by Kurdish security and intelligence forces,⁸³ denial of non-Kurds' voting rights, and enforced migration of Kurds from the KRG region to Kirkuk.⁸⁴ Already those disputed areas have been the site of worsening violence,⁸⁵ and are projected to be a serious flashpoint in the future.

Even once internal boundaries are settled, geology will continue to have other intentions, and the management of shared fields could also become an issue of dispute. It should be remembered that one of the issues that led to Iraq's 1990 invasion of Kuwait was the accusation that Kuwait was over-producing from the portion of Iraq's Rumaila oilfield that stretched across the border, undermining the reservoir's geology on the Iraqi side.

Furthermore, foreign oil installations would be very likely to be attacked in Iraq by resistance groups, especially as fields near the edge of the Kurdistan region (or even beyond it) begin to be developed. Both Iraqi oil facilities, and foreigners, have already (separately) been 'insurgent' targets; the existence of highly profitable contracts that are seen as impinging directly on the state's sovereignty and violating human rights could deepen and strengthen that resistance.

Michael Wareing, appointed by the UK government to head the Basra Economic Development Commission, has commented that oil companies are not so concerned about these threats, as they are quite used to dealing with physically insecure environments. He gave the specific example of the Niger

83 UN Assistance Mission for Iraq, Human Rights Report, 1 November - 31 December 2006, <http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf> (last accessed 21 May 2008)

84 International Crisis Group, 'Iraq and the Kurds: Resolving the Kirkuk crisis', Middle East Report No.64, 19 April 2007, p.4

85 UNAMI July-December 2007

Delta⁸⁶, giving a troubling foretaste of what is likely to come if oil companies enter Iraq: neither the public security forces (armed police and the military) nor the companies' own private security contractors have stopped at defending oil assets from physical attack, but have proactively targeted anyone who is seen as a threat to the companies, including peaceful protests.⁸⁷

Facts on the ground

Rather than attempt to resolve the legal uncertainty about the authority to sign contracts, the KRG's approach has been to establish facts on the ground. The neglect of the rule of law risks intensifying internal conflicts within Iraq.

Since September 2007, the KRG has signed at least 18 contracts for exploration and development of oil and gas fields, without even consulting the federal government, whilst Baghdad's objections to the constitutionality of the move were met by the KRG with an instruction to "shut up".⁸⁸

The first draft of the KRG's regional oil law in 2006 gave the KRG the right to sign contracts not only in the territory it controls – the three governorates of

86 "If you look at many other economies in the world, particularly the oil-rich economies, many of these places are quite challenging countries in which to do business. Frankly, if you can successfully operate in the Niger Delta, that is a very different benchmark from imagining that Basra needs to be like London or Paris. My sense is that many of the oil companies are very eager to come in now, and actually what they're waiting for is the hydrocarbon law to be passed and various projects to be signed off. That is what is causing them to pause, rather than the security position." (David Smith, 'Oil giants are poised to move into Basra', *The Observer*, 24 February 2008, <http://www.guardian.co.uk/world/2008/feb/24/iraq.oil>, last accessed 21 May 2008)

87 In the Niger Delta, oil companies have devastated the local environment, including fishing and farming grounds, and poisoned the air with constant gas flares just metres from villages. Peaceful protests by local communities have repeatedly been met with violence by Nigerian forces, often called in for assistance by the oil companies. During the early 1990s, thousands of the Ogoni people were killed, following their high-profile campaign against Shell. An infamous leaked memo from an army commander talked of plans to carry out "wasting operations" to allow Shell operations to recommence. The oil companies have also been implicated in supplying weapons, transport and other equipment to the armed forces, who used them against protesters. As government and oil companies have failed to improve the situation in the Delta, protests have shifted from unarmed to armed, and now there is a murky borderline between political and criminal armed groups, as the Delta has descended into anarchic violence. See, for example, Human Rights Watch, 'The Price of Oil - Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities', January 1999, <http://www.hrw.org/reports/1999/nigeria/> (last accessed 21 May 2008); Ike Okonta and Orono Douglas, *Where Vultures Feast - Shell, Human Rights and Oil in the Niger Delta*, Sierra Club, 2001; Andrew Rowell, James Marriott and Lorne Stockman, *The Next Gulf - London, Washington and Oil Conflict in Nigeria*, Constable & Robinson, 2005.

88 "For people who are shouting that this is illegal, our advice to them is, 'Shut up.'" (Jim Landers, 'Hunt Oil deal could help shape Kurds' future', *The Dallas Morning News*, 24 October 2007, <http://www.dallasnews.com/sharedcontent/dws/news/world/stories/102107dnintkurdoil.3850ac1.html> (last accessed 21 May 2008)

Sulemánya, Erbil and Dohuk – but also within “disputed territories” outside them, including Kirkuk and parts of Nineveh governorate (Mosul). Although following criticism, this provision was removed from the final version of the regional law passed in 2007, in practice it is still being pursued nonetheless.

The first contract signed after passage of the Regional Law was with the Texan independent Hunt Oil, for an area in Nineveh governorate, outside the Kurdistan Regional Government’s jurisdiction.⁸⁹

The KRG also granted a contract to develop the Khurmala Dome structure (part of the Kirkuk oilfield) in November 2007. Not only is Khurmala Dome outside the KRG’s territory, it is also under almost any definition a “current field”, producing 35,000 barrels per day, according to the US Energy Information Administration.⁹⁰ The federal Oil Ministry had already tried to develop Khurmala Dome, signing an EPC (Engineering, Procurement and Construction) contract with a Turkish company in 2004. According to officials, they were prevented from working on the field by Kurdish *Peshmerga* forces.⁹¹

The KRG’s Natural Resources Minister reportedly justified the move by saying

There is no hard line drawn somewhere that says this is KRG controlled territory and these are disputed territories, it is all grey areas. We provide the security; administratively we run the towns and villages in that area. It is and has always been under control of KRG, under our security⁹²

The approach of proceeding regardless of the law has already undermined trust between political parties within the federal parliament, and is likely to inflame tensions on the ground. More broadly, operating outside clear legal authority undermines the rule of law in the longer term, and weakens opportunities for using it to defend rights.

89 Middle East Economic Survey, 15 October 2007, ‘KRG-Baghdad Oil Licensing Standoff Shifts Up A Gear Over Geography Of Hunt Oil PSC’, <http://www.al-ghad.org/wordpress/wp-content/uploads/2007/10/071011-interview-with-issam-chalabi-on-kr-g-hunt-oil-mees.pdf> (last accessed 21 May 2008); Landers, ‘Hunt Oil deal could help shape Kurds’ future’, *The Dallas Morning News*, 24 October 2007

90 US Department of Energy, Energy Information Administration, Country Analysis Brief – Iraq, June 2006

91 ‘The New Anatolian’, Kurds challenge Kirkuk oil rights, 30 November 2007, www.thenewanatolian.com/tna-29855.html (last accessed 21 May 2008); Ben Lando, ‘Kirkuk project battle heats up’, UPI, 28 November 2007, www.upi.com/International_Security/Energy/Analysis/2007/11/28/analysis_kirkuk_project_battle_heats_up/7804 (last accessed 21 May 2008)

92 Ben Lando, ‘Kirkuk project battle heats up’, UPI, 28 November 2007

Lack of transparency

The KRG's Minister for Natural Resources has said "The principles of transparency and accountability will be rock solid."⁹³

However, whilst these principles have been referred to from time to time, they have not been applied in practice – in potential violation of the KRG's own Regional Oil and Gas Law. The Law does provide for details of contracts to be made available to the public, along with summary details of other key data, such as development plans.⁹⁴ In principle, this appears to be a progressive position.⁹⁵ However, no such details have been made available.⁹⁶

When asked about the Minister's commitment to transparency, a KRG official replied⁹⁷:

I think that the point about transparency in the article related to transparency of officials and procedures, rather than providing full public access for what are essentially confidential commercial contracts – I am not sure of any company in any region that would wish to have such access granted.

In fact, she was wrong, as various countries do now release their contracts – including Azerbaijan, Timor Leste and Ghana. The International Monetary Fund recommends full publication of contracts as best practice on transparency, and dismisses the confidentiality arguments by noting that since in practice contract terms tend to be widely known within the industry soon after signing,

93 Revenue Management and KRG Draft Petroleum Act, KURDISTAN REGIONAL GOVERNMENT - Office of the KRG Minister for Natural Resources, 22 October 2006, <http://www.krg.org/articles/detail.asp?smmap=02010100&lgnr=12&asnr=&anr=18699&rn=223> (last accessed 21 May 2008)

94 KRG Regional Oil and Gas Law, Article 52 First

95 Just as best practice is now that it is necessary to publish contracts, to allow verification of amounts of payments, the publication also of details of development plans would be the logical next step, as they contain economic data vital to modelling project cash flows.

96 Unless "details" is interpreted in an extremely narrow way. When asked for the details specified in the law, the KRG's official spokesman said in an email that "the KRG has published information required by law on our official website". (Email from Khaled Salih, 3 April 2008) All that is given on the website are announcements of the signing of contracts, together with some vague economic principles.

97 Email from Mia Early (Head of Investment Promotion, Kurdistan Development Corporation), 14 June 2006

there is no commercial advantage lost by publication of contracts.⁹⁸ The US Treasury Department also calls for “ex ante presumption of disclosure of such documents as Host Government Agreements, Concession Agreements, and bidding documents”.⁹⁹

The history of the last eighteen months has shown that these considerations of best practice have not influenced KRG policy, and that the principles of transparency have been far from rock solid.

In an apparent reversal in March 2007, the Minister announced that contracts already signed by the KRG would indeed be published.¹⁰⁰ He was responding to extensive criticism that the terms of those contracts were too generous to the companies. However, more than a year on, still no contracts have been published.

In October 2007, the Minister was asked by a journalist how much had been paid in signing bonuses to the KRG. He refused to answer, declaring the amounts “confidential”.¹⁰¹ As one-off cash payments, such bonuses are usually disclosed; that they are not in the KRG case raises significant fears of abuse.

All the problems examined in this essay are likely to be exacerbated by the fact that the contracts have not been disclosed. Not knowing the legal basis of investment, affected people will find it difficult to assess their rights and how to defend them. Lack of accountability is the central factor in creating the rentier economy. And the widespread suspicions that the KRG has ‘sold off’ the natural resources on extremely generous terms will only deepen resentments, and the potential for conflict.

Some may suspect that if the contracts are not economically favourable for Iraq or Kurdistan, they may have been motivated by benefits for the officials that negotiated them, or their parties and networks. The accusations of corruption were noted above.

98 IMF, ‘Guide to Resource Revenue Transparency, 2007’, p.14, <http://www.imf.org/external/pubs/ft/grrrt/eng/060705.htm> (last accessed 21 May 2008)

99 U.S. Department of Treasury, ‘Statement Concerning the Extractive Industries Review’, JS-1841, August 2, 2004, <http://www.treasury.gov/press/releases/js1841.htm> (last accessed 21 May 2008)

100 Dow Jones, ‘Iraq Kurdish Government To Publish Details Of 5 Oil Deals Soon Min’, 3/22/2007

101 UPI, ‘Reliance Iraq oil signing bonus \$15M’, 7 November 2007, http://www.upi.com/International_Security/Energy/Briefing/2007/11/07/reliance_iraq_oil_signing_bonus_15m/8330/ (last accessed 21 May 2008)

That the contracts were directly negotiated rather than tendered is not reassuring. Tendering public contracts and selecting the bidder offering the best economic terms is standard practice around the world, as it provides a degree of transparency, makes it harder for contractors to be selected on the basis of illegitimate personal benefits, and ensures the best outcome for the public purse.

Even more worrying is an unusual provision in the model contract that “A Public Company may assign part or all of its Government Interest to a third party or parties (not being a Public Company)”.¹⁰² This is wide open to abuse, as officials could transfer oil rights to private companies in which they had an interest.¹⁰³

Not only should citizens of Iraq, and of the Kurdistan Region, expect to see the contracts that have been signed, it would seem to be in the KRG’s interests to release them, in order to refute suspicions of impropriety, and indeed of undermining the country’s interests for political ends.

PART V – CONCLUSION

Oil accounts for about 95 per cent of government revenue in Iraq, and indeed in the Kurdistan Region. If Iraq or the KRG are to make any claim to democracy, civil society should clearly have an input into decisions on such a vital natural resource. In reality however, people have been disenfranchised on these questions of the future of the economy.

The rapidity of contract signing reflects the political self-interest that has driven oil policy, at the expense of national or even regional legitimacy. The result is to create a rentier sub-state at the regional level, in which government remains divorced from systems of accountability, and human rights are violated for political ends. Furthermore, this approach undermines the rule of law, and is inflaming tensions, especially in relation to disputed areas, and exacerbating Iraq’s internal conflict.

Meanwhile, the contracts themselves stand to freeze Iraq and Kurdistan for 32 years within the legal and economic situation that existed in 2007, at a time of occupation, conflict and political divisions. From a virtual absence of

102 KRG Model PSC, Article 4.5

103 Article 55 of the KRG Regional Oil and Gas Law bars public officers (and their spouses and children) from holding shares in companies with interests in oil and gas fields. The fear is that such interests may be acquired indirectly, covertly or through other allies, friends and relatives. Indeed, there seems to be little other possible motivation for including such a clause in the contract.

environmental, safety or other relevant human rights laws, the contracts prevent any new regulation being introduced throughout their duration, unless the state pays for it.

Far from realising the KRG's self-portrayal as a modern and democratic beacon, "the other Iraq", they emasculate regulatory structures to an extent that would be unthinkable in almost every other country, actively preventing government from meeting its obligations to protect and fulfil human rights.

This may be heaven for investors, but for people living in the region, it is more likely to resemble the other place.

Yet, for all the generous terms offered to foreign investors, the legal position remains unclear, and there is no sign of either the KRG or the federal government backing down from its interpretation of the Constitution.

This leaves open the possibility that the KRG's contracts may be struck down, or at least be indefensible in arbitration tribunals. Given the worrying consequences of the contracts for human rights, that may be an outcome many Iraqis, including Kurds, would hope for.

Anat Scolnicov*

Women and Religious Freedom: A Legal Solution to a Human Rights Conflict? **

Abstract

The right to equality and the right to individual religious freedom of women stand in conflict with community religious freedom. The determination that group religious freedom cannot override women's individual rights should be upheld, but attention must be given to the complex problems this determination creates: once a State acknowledges a right to religious freedom of communities and relegates legal powers to them, it is in practice more difficult for the State to implement rights of equality for women. A clear, albeit far-reaching, consequence of recognising the individual rights of women to equality and to freedom of religion and belief over any communal right of religious freedom is that religious institutions should not be able to curtail these rights of women even in their internal organisation. Finally, the compatibility of institutional participation of religion in the law-making process that determines the rights of women, both at the national and international level, with religious freedom is questioned.

1. INTRODUCTION

The protection of women's freedom of religion and belief is a paradigm test case of the conflict between religious freedom as a community right and the rights of individuals in that community. A core problem in the application of religious freedom is the inherent conflict between religious freedom, if it is given a group dimension, and women's right to equality and individual religious freedom. No international human rights instrument has, to date, comprehensively addressed or solved this difficult problem. While women's equality may be affected by claims of religious freedom in various contexts such as the workplace, this article will use examples mostly from the area of personal law, specifically marriage and divorce. The conflict in this area is not accidental. The doctrines of many religions have sought to regulate family life, deciding on the role of men and women within the

* Fellow in law, Lucy Cavendish College, University of Cambridge, United Kingdom.

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family as one of the bases of the social structure that the religious doctrine sets up. Important inequalities in this area emanate from religion.

In this article I explain first why both the right to equality and the right to individual religious freedom of women should be seen as standing in conflict with community religious freedom (section 2.1). Then I examine the existing relative international legal protection of rights in this conflict. I show that there exists a legal determination that posits women's individual rights above claims of group religious freedom (section 2.2). It will then be argued, that the determination that group religious freedom cannot override women's individual rights should be upheld, but attention must be given to the complex problems this determination creates: once a State acknowledges a right to religious freedom of communities and relegates legal powers to them, it is in practice more difficult for the State to implement rights of equality for women (section 3). A clear, albeit far-reaching, consequence of recognising the individual rights of women to equality and to freedom of religion and belief over any communal right of religious freedom is that religious institutions should not be able to curtail these rights of women even in their internal organisation (section 4). Finally, the compatibility of institutional participation of religion in the law-making process that determines the rights of women, both at the national and international level, with religious freedom is questioned (section 5).

2. THE PROBLEM AND EXISTING INTERNATIONAL LAW

2.1. THE CONFLICT BETWEEN GROUP RELIGIOUS FREEDOM AND THE RELIGIOUS FREEDOM OF WOMEN

It is not only women's right to equality which stands in conflict with a community right of religious freedom, but also women's individual right of religious freedom. Human rights instruments, following a liberal approach, speak of a right to 'manifest' and 'practice' religion or belief. For women, however, one of the most important aspects of freedom of religion may be the right to manifest their religious belief by being an equal member of a religious community or organisation. Equality in the religious community is a religious freedom concern for women who choose to become, or remain, members of religious

communities.¹ While the effect on equality of women by religions to which they belong has not traditionally been seen as a religious freedom concern, it is an important one from women's point of view.² The ability of women to belong to a faith of their choice, or, more often, a faith into which they were born and comprises their social and cultural connections, without being discriminated against, is vital to realising their religious freedom. Application of feminist analysis to international law may be helpful in justifying this interpretation.³ In the same way that MacKinnon argued that legal – and indeed human rights – concepts should be defined and addressed in ways that matter to women,⁴ the scope of rights protected within the idiom of 'religious freedom' may thus have to be redefined.

The liberal approach to religious freedom, which mandates that everyone be allowed to choose their religion, but does not intervene in the 'private' realm of religions themselves, must be rejected in this context. What happens within and by religious communities should be of concern to international and national law.⁵ Religious freedom is not about 'all or nothing' – either you choose to take part in a religion and must accept its inequalities, or you must cease to belong to that religion. For women, realising religious freedom is often about realising their freedom within religion.⁶ The argument of voluntary choice, which resonates of

1 On the impact of different religions on women's human rights, see Howland, C., *Religious fundamentalism and the human rights of women*, St. Martin's Press, New York, 1999; Rahman, A., 'Religious rights versus Women's rights in India: A test case for international human rights law', *Columbia Journal of Transnational Law*, Vol. 28, 1990, p. 473; and An-Na'im, A., 'The rights of women and international law in the Muslim context', *Whittier Law Review*, Vol. 9, 1987, p. 491.

2 For a claim that international human rights law based on a liberal conception of freedom largely excludes women, see Wright, S., 'Economic rights, social justice and the state: a feminist reappraisal', in: Dallmeyer, D., *Reconceiving reality: Women and international law*, American Society of International Law, Washington DC, 1993, at p. 129.

3 For a discussion of the applicability of feminist theories to international law, see Charlesworth, H. and Chinkin, C., *The boundaries of international law: A feminist analysis*, Manchester University Press, Manchester, 2000; and Charlesworth, H., Chinkin, C. and Wright, S., 'Feminist approaches to international law', *American Journal of International Law*, Vol. 85, 1991, p. 613.

4 MacKinnon, C., *Feminism unmodified: Discourses on life and the law*, Harvard University Press, Cambridge, 1987.

5 On how States can be accountable in international law for non-State infringements of women's rights, see Cook, R., 'Accountability in international law for violation of women's rights by non-state actors', in: Dallmeyer, *op.cit.* (note 2), p. 93; and Romany, C., 'State responsibility goes private: A feminist critique of the public/private distinction in international human rights law', in: Cook, R. (ed.), *Human rights of women: National and international perspectives*, University of Pennsylvania Press, Philadelphia, 1994, at p. 85.

6 Feminists, among others, pointed out that the liberal conception of freedom was framed in negative terms, as absence of constraint, rather than in positive terms, as the opportunity for self-realization. Frazer, E. and Lacey, N., *The politics of community: A feminist critique of the liberal-communitarian debate*, Harvester-Wheatsheaf, Hemel Hempstead, 1993, p. 60.

the liberal tradition, 'you are free to leave the religion, therefore your liberty is not restrained', is flawed. This is particularly so for women who often cannot leave, or do not want to leave their religious community. This is so not only for economic reasons, as the economic disparity between men and women makes it difficult for women to leave, but unequal treatment and social status of women and girls in many cultures and religions, including in education and assigned gender roles, mean that they are effectively less able than men to exercise independence and exit their groups of origin.⁷ Moreover, these women often have little influence over the rules of the community they live in.

2.2. GUARANTEES OF RELIGIOUS FREEDOM OF WOMEN IN INTERNATIONAL DOCUMENTS

International covenants that guarantee freedom of religion and belief do not refer to specific rights of religion and belief of women. Nor does the 1981 UN Declaration on Religion and Belief.⁸ It is particularly surprising that this Declaration, proclaimed only two years after the adoption of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),⁹ has no mention of these concerns. Of course, most rights guaranteed in international documents are guaranteed to everyone, with no explicit mention of their applicability to women. But regarding religious freedom, because of the reasons highlighted above, there are particular causes for concern that, without specific mention, it would be interpreted in a way that would result in protection of the freedom of religion and belief of men but not of women.

CEDAW itself does not have any express provision dealing with discrimination against women on religious grounds, but it has several pertinent articles dealing with the elimination of practices based on the inferiority of either of the sexes,¹⁰ right to vote and hold public office,¹¹ access to health care including family planning,¹² equality before the law,¹³ and prohibition on discrimination

7 See Muller Okin, S., 'Is multiculturalism bad for women?', in: Cohen, J., Howard, M. and Nussbaum, M.C. (eds), *Is multiculturalism bad for women?*, Princeton University Press, Princeton, 1999; Shachar, A., *Multicultural jurisdictions: Cultural differences and women's rights*, Cambridge University Press, Cambridge, 2001; and Muller Okin, S., "Mistresses of their own destiny": Group rights, gender and realistic rights of exit, *Ethics*, Vol. 112, 2002, at p. 205.

8 UNGA Res. 36/55, adopted 25 November 1981.

9 Adopted 12 December 1979, 1249 *United Nations Treaty Series*, 13.

10 Article 5.

11 Article 7.

12 Article 12.

13 Article 15.

in marriage.¹⁴ The compliance of States with all these articles may be affected by religious law, practice or tradition. Even a newer international document, the Beijing Declaration and Platform for Action, Fourth World Conference on Women,¹⁵ does not refer to any effect of religion on women or even to women's rights in marriage.

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,¹⁶ as well as newer proposed international documents, signal some shift towards adoption of group protection of religious communities. Such a shift in perception of religious freedom in international law, although it has not yet matured into a recognition of religious group rights, could potentially jeopardise the human rights of women, both their right to equality and their right to individual freedom of conscience and religion, for instance by the recognition of a right to a communal legal system without sufficient protection against discriminatory laws. These documents should be interpreted so as to include a right not to be discriminated against on the basis of sex by religious laws, practices, customs or institutions. No binding international instrument currently guarantees any such protection.

An important step was taken in General Comment No. 28 to the International Covenant on Civil and Political Rights (ICCPR),¹⁷ adopted by the Human Rights Committee in 2000 as an updated General Comment on Article 3 (equality between men and women). It addresses the human rights concerns of equality between the sexes, including those raised by the right to freedom of religion. The General Comment states that 'Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion.' An important premise of the General Comment is gleaned from paragraph 5 which asks that '[s]tate parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of

14 Article 16.

15 Adopted 15 September 1995, UN Doc. A/CONF.177/20 and A/CONF.177/20/Add. 1,

16 UNGA Res. 36/55, adopted 25 November 1981.

17 UN Doc. CCPR/C/21/Rev.1/Add.10.

women's right to equality before the law and to equal enjoyment of all Covenant rights'.¹⁸

The General Comment also addresses directly the conflict between women's equal rights under the Convention and rights of minority members (including those of religious minorities) under Article 27 of the ICCPR. It determines that rights under Article 27 do not permit infringement of women's equality in enjoyment of rights.¹⁹

This approach can be supported by reference to Article 2 (non-discrimination) and Article 26 of the ICCPR (protection against discrimination in any field regulated and protected by public authorities).²⁰

There exists a strong case for concluding that the prohibition of gender discrimination must be regarded as a norm of customary international law,²¹ at least if the discrimination is systematic and State endorsed. Prohibition of

18 The relation between CEDAW and the ICCPR should also be a matter for concern. Coherence should be sought in the interpretation of UN human rights conventions. Such concerns would lead to question Saudi Arabia's ratification of CEDAW in October 2000 subject to a reservation that '[i]n case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention'. The reservation seems to go directly against General Comment 28 to the ICCPR to which Saudi Arabia is not a party. But General Comment 28 would reinforce the interpretation that the reservation is contrary to the object and purpose of CEDAW itself.

19 Paragraph 32 of the General Comment states that '[t]he rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. States should report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant (Comment No. 24/1977, *Lovelace vs Canada*, Views adopted July 1981) and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women.'

20 Also relevant is the International Covenant on Social, Economic and Cultural Rights (ICESCR), Article 3, which guarantees equal enjoyment of economic, social and cultural rights.

21 The Restatement (Third) of the Foreign Relations of the United States, para. 702, comment, 1987 states that freedom from gender discrimination as State policy, in many matters, may already be a principle of international law (702 comment (l)). However, this is only if discrimination is a matter of State policy, not if these are acts of individuals which are not condoned by the State. See also Chinkin, C., 'Reservations and objections to the convention on the elimination of all forms of discrimination against women', in: Gardner, J.P. (ed.), *Human right as general norms and a state's right to opt out - reservations and objections to human rights conventions*, British Institute of International and Comparative Law, London, 1997, p. 64, at p. 83, who refers to the Opinion of Judge Ammoun in the International Court of Justice decision *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, ICJ Reports 4, 1970*, for the argument that the right to equality, codified in the Universal Declaration of Human Rights (UDHR), is a pre-existing customary norm.

similar discrimination on the basis of religion may also be customary law.²² So, both these norms would obligate States, even if they had not ratified the relevant conventions or had entered reservations to the conventions on these issues. There is, however, no determination of the outcome, if these rights conflict, that is if one person's right to non-discrimination on the basis of gender is claimed to conflict with a right of a group to non-discrimination on the basis of religion (if such a right is recognised).

Prohibitions of discrimination on grounds of race are routinely recognised as *jus cogens*. Gender grounds of discrimination are less often argued to be norms of international law from which no derogation is permitted.²³ Neither is there evidence that discrimination on grounds of religion has attained such status.²⁴

2.3. RESERVATIONS TO CONVENTION PROVISIONS AFFECTING NON-DISCRIMINATION IN ENJOYMENT OF THE RIGHT TO RELIGIOUS FREEDOM

The Human Rights Committee (HRC) has defined what are valid reservations to the ICCPR, in General Comment No. 24.²⁵ The Committee noted that human rights treaties differ from treaties that are mere exchange of obligations between States, in which they can reserve application of rules of general international law. Covenant provisions in human rights treaties that represent customary international law may not be subject to reservations. The Committee lists among these provisions, which represent customary law, the freedom of thought, conscience and religion. In General Comment No. 31²⁶ it clarifies that also Article 2 (non-discrimination) cannot be subject to reservation.²⁷ Thus, reservations to the ICCPR (on religious, or any other, grounds) cannot operate to deny these obligations. For the same reason the corresponding non-discrimination

22 The Restatement (Third) of the Foreign Relations of the United States, *supra* note 19 states that there exists a strong case that systematic discrimination on grounds of religion is a violation of customary law (702 comment (j)). See also Sullivan, D.J., 'Gender, equality and religious freedom: Toward a framework for conflict resolution', *New York University Journal of International Law & Policy*, Vol. 24, 1992, p. 795, at p. 798.

23 Charlesworth, H. and Chinkin, C., 'The gender of *jus cogens*', *Human Rights Quarterly*, Vol. 15, 1993, p. 63, at p. 70.

24 The Restatement (Third) of the Foreign Relations of the United States, *supra* note 19 does not list either religious discrimination or gender discrimination as *jus cogens* (comment (n)), although noting that international law in this area is developing and may already be more comprehensive than noted.

25 UN Doc. CCPR/C/21/Rev.1/Add.6, 1994.

26 UN Doc. CCPR/C/21/Rev.1/Add.13, 2004.

27 See also General Comment No. 18, on non-discrimination, 1989.

obligations in CEDAW (Articles 2, 7, 15 and 16), at least to the extent that they protect the same rights as the ICCPR, should not be subject to reservations.

There is also a different basis for arguing that non-discrimination in enjoyment of rights on the basis of sex is not subject to reservations to CEDAW or the ICCPR, namely that they are incompatible with the object and purpose of the covenant,²⁸ as learned, respectively, from Article 2(a) CEDAW²⁹ and from General Comment No. 28 to the ICCPR.

CEDAW General Comment to Article 16(2) notes with alarm the number of State parties that have entered reservations to Articles 2 and 16 based, *inter alia*, on cultural and religious beliefs and urges them to withdraw these reservations.³⁰ This in itself is a telling sign of the impact of religion on recognized human rights of women and should warrant further attention.

So, there is no clear hierarchy in international law between freedom of religion and equality on the basis of sex. The interpretation offered by the HRC in General Comment No. 28,³¹ that freedom of religion cannot justify the limitation of equality between men and women, should serve as a starting point, but as will be seen, this raises a multiplicity of problems.

3. APPLICATION OF DISCRIMINATORY RELIGIOUS LAW THROUGH RELEGATION TO THE RELIGIOUS COMMUNITIES

States give legal status to religious law by relegation of State authority to religious communities, usually in the area of family law. This legal structure directly pits the rights of religious communities against the rights of individuals, with specific implications for the rights of women in those instances in which the religious law is discriminatory to women. The clear direction of General Comment No. 28 is that a principle of religious freedom cannot override women's individual rights; however States find it particularly difficult, for political reasons, to intervene to reverse such discrimination, especially in the law of minority communities, as will be seen. It seems easier for States to assuage political group aspirations by

28 CEDAW, Article 28. See also the Vienna Convention on the Law of Treaties, 1155 *United Nations Treaty Series* 331, Article 19(c); and the ICJ decision in the Reservations to the Genocide Convention, *ICJ Reports*, 1951, 15.

29 A claim raised in the objections to the reservations based on religion of some State parties, entered by the Netherlands, Norway, Spain, Sweden and the United Kingdom.

30 CEDAW General Comment No.21, adopted 4 February 1994, UN Doc. A/47/38.

31 UN Doc. CCPR/C/21/Rev.1/Add.10, 2000.

conceding to religious groups jurisdiction over the family, often compromising the rights of women, rather than risking a political confrontation and power struggle between sub-groups in the State. In this case State practice regrettably does not support the General Comment of the Human Rights Committee, which remains *de lege ferenda*.

3.1. RELIGIOUS TRIBUNALS AND THE RIGHT OF WOMEN TO EQUALITY BEFORE THE LAW

The claim has been made that in international law the right to manifest religion or belief includes the right to observe and apply religious law in a community, including the right to establish and maintain religious tribunals.³² As will be seen, this is cause for concern, as it potentially harms individual rights, and often among these the rights of women.

If such a community right is recognised, the question which follows is whether international human rights obligations apply to legal proceedings of religious courts, and specifically, in the context of this article, whether the right of women to equality before the law applies in those courts. Article 15 CEDAW guarantees women equality before the law in civil matters. It has been questioned³³ whether the Article also applies to religious courts or to religious law administered by secular courts. While it would be advisable if future human rights documents would refer specifically to equality before religious courts, I think it is clear that if the religious court or law is authorised by the State, Article 15 applies, because, as far as international law is concerned, it *is* the State law.

Personal law can be relegated, by law, to the religious communities in different ways. For example, in India, a secular State, the personal law is the law of the

32 Capotorti, F., *Study of the rights of persons belonging to ethnic, religious and linguistic minorities*, United Nations, New York, 1979, implies that religious marriages should be recognised. He mentions that some States recognise entire systems of personal status, but he does not raise problem of gender discrimination. Capotorti claims that preservation of customs and legal traditions forms part of protection of minorities, although notes that 'some argue' that these must be subject to the State's moral and social policy. See also Sullivan, loc.cit. (note 20), p. 805, footnote 29; and Meron, T. Meron, *Human rights lawmaking in the United Nations: A critique of instruments and process*, Clarendon Press, Oxford, 1986, pp. 155-156.

33 Sullivan, D.J., 'Advancing the freedom of religion or belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', *American Journal of International Law*, Vol. 82, 1988, p. 487 at p. 516.

individual's religious community,³⁴ and it is applied in the secular courts. In Bangladesh, a Muslim State,³⁵ personal law is the religious law of the individual's religious community. As in India, it is applied in the secular court system, in the family courts.³⁶ In Israel,³⁷ personal law is mostly that of the individual's religious community.³⁸ Religious tribunals have exclusive jurisdiction in certain instances and concurrent jurisdiction with secular courts in other instances.³⁹ Appellate religious courts, are subject to limited judicial review by the (secular) Supreme Court of Israel. In Sri Lanka,⁴⁰ family law is communal, religious or customary,⁴¹ but there is a separate jurisdiction only for the Muslim minority religious courts, which operate according to Muslim law,⁴² and in which sit religious judges, *Quazis*. Their judgements can be ultimately appealed to the (secular) Supreme Court of Sri Lanka. In these instances, the substantive law is the religious law, but the religious courts are subject to the general court system.

The CEDAW Committee saw an inherent conflict between religious law and jurisdiction on one hand and the equality provisions of CEDAW on the other hand. For instance, on Israel it noted that

34 In India a complicated set of laws governs personal law of different religious denominations. A codification of the various personal laws began during colonial rule, and continued after independence. For instance, the Hindu Marriage Act, 1955 codifies Hindu Law; the Constitution sanctioned the Shari'at Act, 1937, as the prevailing Muslim Personal law (26 January 1950), with few reforming Acts such as the Dissolution of Muslim Marriages Act, 1939 giving the wife a right to dissolution of the marriage in certain cases. Christians are governed by Indian Divorce Act 1869 and Indian Christian Marriage Act 1872; Parsees are governed by the Parsee Marriage and Divorce Act, 1956.

35 According to Article 2A added in the 1988 amendment to the Constitution.

36 The Family Courts Act 1985.

37 Defined as a 'Jewish and democratic State' in two of its Basic Laws: Freedom of Vocation and Human Freedom and Dignity.

38 The Palestine Order in Council 1922-1947 (which remains in force from the pre-independence period) states in Section 47 that some matters of personal law are subject to religious law, whether civil or religious courts have jurisdiction. These matters are defined in Section 51, mainly matters of marriage, divorce and alimony and maintenance.

39 In Israel, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, Article 1, grants exclusive jurisdiction to Rabbinical (religious) Courts in matters of marriage and divorce of Jews. In other matters, such as spousal alimony, the Rabbinical court has concurrent jurisdiction with the civil courts (Article 4). The Druze Courts Law, 1962 Article 4 grants exclusive jurisdiction to Druze religious courts in marriage and divorce of Druze. The Shari'a Courts have exclusive jurisdiction over personal status matters: marriage and divorce, child custody and support, paternity, alimony and maintenance of Muslims (The Palestine Order in Council 1922-1947, The Procedure of the Muslim Courts Act, item 7).

40 A State which, in Article 9 of the Constitution, accords Buddhism a foremost place.

41 See Jayasuriya, D.C., *Law and social problems in modern Sri Lanka*, Sterling Publishers, New Delhi, 1982, pp. 37-53.

42 According to the Muslim Marriage and Divorce Act 1951.

in order to guarantee the same rights in marriage and family relations in Israel and to comply fully with the Convention, the Government should complete the secularization of the relevant legislation, place it under the jurisdiction of the civil courts and withdraw its reservations to the Convention.⁴³

One of the dangers of adopting a principle of relegation, is that the State may choose not to rely directly on religion as a reason to diverge from the international human rights norm, but on the relegation of State authority to the religious community. This can be seen in the reservations to CEDAW that emanate from religious reasons. These are of two types. The first are reservations that rely directly and explicitly on religious grounds. These are the reservations submitted by religious Islamic States or Muslim majority States (Bangladesh, Egypt, Iraq, Jordan, Libya, Tunisia, Saudi Arabia, Syria), subjecting some or all State obligations under the Convention to Shari'a law.⁴⁴ The second are the reservations entered by India and Israel. These rely, for their justification, on a domestic legal principle of autonomy of religious communities in the sphere of family law.

3.2. COMPETING RELIGIOUS AND SECULAR SOURCES OF LEGAL AUTHORITY AND PROTECTION OF THE RIGHTS OF WOMEN

In these last mentioned legal systems, in which religious and secular legal systems operate side by side, the religious legal systems develop as a competing legal system with that of the State. The secular State views itself as the ultimate source of law, from which both the secular and the religious legal systems draw their authority. However, religious legal systems do not view the State as their source of authority, but see themselves as deriving their authority from a divine source. This competition has direct implications for the ability of the State to uphold its international obligations to safeguard human rights of women. This is evident, for example, in India and in Israel.

43 Concluding Observations of the CEDAW Committee, Israel, adopted 12 August 1997, UN Doc. A/52/38/Rev.1, Part II, paras 132-183. Israel expressed its Reservation to Article 7(b) concerning appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel.

44 At the 1987 General Assembly Third Committee discussion on reservations to CEDAW, Iraq and Egypt both justified their reservations on the sovereign right of States to choose their political, economic and social system without the interference of others. Egypt, UN Doc. A/C.3/42/SR.26, para. 9; and Iraq, UN Doc. A/C.3/42/SR.29, para. 29. See Lijnzaad, L., *Reservations to UN Human Rights Treaties – Ratify and ruin?*, Nijhoff, Dordrecht, 1995, p. 333.

The demand in international law that States guarantee equality raises a question of the relationship between religious and secular law within the domestic system. Even in States where constitutional protection from discriminatory laws exists, religious law may be excluded from its ambit. In India, an early post-independence case⁴⁵ suggests the Bombay High Court viewed religious law as falling outside the ambit of 'laws in force',⁴⁶ which would be void⁴⁷ if they are inconsistent with the constitutionally protected fundamental rights.⁴⁸

However, in 1995 in *Sarla Mugdal*⁴⁹ the Supreme Court of India ruled that personal laws operate by force of secular legislation, not religious authority. This determination was not made in order to test their constitutionality, but as a prerequisite to the Court's determination that they can be superseded by a Uniform Civil Code.⁵⁰ But, if religious personal law operates by force of secular law, this should open the way to argue that it also must be subject to constitutional review.

At the core of domestic conflicts between religious and secular legal systems, is a conflict of perception about the source and authority of law. The secular system views the formal source of religious law recognised by the State as State law. The religious system views its formal source as religion. Each of these two viewpoints, has implications as to which higher legal norms religious law has to conform to, including domestic human rights legal provisions, and international human rights norms.⁵¹ Among these are provisions of equality of women.

Just such a conflict arose in Israel. A decision of the Supreme Court, based on the application of the Equal Rights of Women Law (1951) to religious courts,

45 *State of Bombay vs Nasaru Appa Mali*, AIR 1952, Bom 84; ILR 1951, Bombay 77.

46 For a dictum to the same effect by the Indian Supreme Court, see *Krishna Singh vs Mathura Ahir*, AIR 1980 SC 707.

47 Under Article 13(1) of the Constitution.

48 Included in Part III of the Constitution.

49 *Sarla Mugdal vs Union of India*, AIR 1995 SC 1531; 1995 SCC, (3) 635.

50 The Court urged the government to conform to Article 44 of the Constitution, which states that the State shall endeavour to secure a uniform civil code throughout the territory of India, and legislate the Uniform Civil Code. Indeed, the CEDAW Committee has criticised India's policy of non-intervention in religious personal law and thought. India should solve the problem of relegation of religious law to religious communities, resulting in measures discriminatory to women, by enacting a Uniform Civil Code, which different ethnic and religious groups may adopt (CEDAW, UN Doc. A/55/38, 2000, part I, p. 7 at paras 60 and 61). This has not been done.

51 Compare Elon, who argues that in Israel, although Jewish law in matters of marriage, divorce and child support has been incorporated by blanket reference, its formal source in Israeli law must be considered the secular legislature which incorporated it and not a religious source. Elon, M., *Jewish law: History, sources, principles*, The Jewish Publication Society, Philadelphia, 1994, p. 1757.

directed the religious courts to follow the principle of community property which does not exist in Jewish law.⁵² The rabbinical courts did not accept this ruling, and it has brought a head-on collision between the religious courts and the Supreme Court. The religious courts viewed their own legitimacy as deriving purely from religious law, and saw themselves as unable to deviate from it. Thus, the judgement of the Supreme Court of Israel was not followed by the Great (appellate) Rabbinical Court.⁵³ Even in the *Bavli* Case itself, the local Rabbinical Court ignored the direction of the Supreme Court.⁵⁴ The only effective solution which would guarantee protection of gender equality as recognised by the Supreme Court would be the abolition at least of non-consensual jurisdiction of religious courts in matters of family law.

3.3. RELIGIOUS AUTONOMY AND WOMEN MEMBERS OF MINORITY GROUPS

The relegation of personal law to religious communities is often particularly detrimental to minority women. States may find it especially difficult to intervene with anti-discriminatory legislative reforms in the law of minority religions. As will be seen, this is so in States with various different combinations of minority and majority religions. A delicate political balance between majority and minority will mean that the minority will be 'left alone' even when the State attempts to implement its obligations of equality in international law.

A legal system based on autonomy of religious communities might be even more reluctant to intervene in minority religious personal law that infringes women's rights than some outright religious States. In India, polygamy is prohibited for those religions in which a subsequent marriage for someone already married is void, but not when such a marriage is valid according to the applicable religious

52 HCJ 1000/92, *Bavli vs Great Rabbinical Court*, 48 (2) PD 221. A principle of equal ownership of property during marriage and at its dissolution is included in General Comment No. 21, paras 30-33, interpreting CEDAW Article 16(1)(h). This principle is unrecognised not only in religious legal systems. Although existing in most European systems and US states, it is also not recognised in UK law. It was considered and rejected by the Law Commission in 1978 (see Law Com No. 86 (Third Report on Family Property)). The Matrimonial and Family Proceeding Act 1984 did not change from the existing legal regime of separation of assets.

53 As can be seen in HCJ 2222/99, *Gabbai vs Great Rabbinical Court*, 54 (5) PD 401.

54 Case (Tel Aviv Local Rabbinical Court) 884/99, *Bavli vs Bavli*. In HCJ 9734/03 (published as *Anonimous vs Great Rabbinical Court*, PD 59 (2) 295). the Supreme Court tried, again, to limit the extent of the Rabbinical Courts' enlargement of the use of religious law over secular law, by deciding that submission of the parties to religious courts' jurisdiction does not mean they implicitly agreed to the application of religious law. See Scolnicov, A., Religious law, religious Courts and human rights within Israeli constitutional structure', *International Journal of Constitutional Law*, Vol. 4, 2006, pp. 732-740.

personal law, *i.e.* for Muslims.⁵⁵ As the Supreme Court of India in *Sarla Mugdal*⁵⁶ pointed out, even Muslim States (Syria, Tunisia, Morocco, Pakistan, Iran and Islamic republics of the former Soviet Union) have banned or restricted polygamy, while India, a secular republic with personal laws of religious communities, has not.

Constitutional equality provisions can be used to protect women in minority communities, but not without difficulty. In the landmark *Shah Bano Case*,⁵⁷ the Indian Supreme Court ordered post-divorce maintenance payments under the (secular) Code of Criminal Procedure, generally unrecognised under Muslim Law beyond a period of three months, while also suggesting an interpretation of Muslim law allowing for the maintenance order.⁵⁸ Political uproar from the Muslim community caused the Indian Parliament to reverse the law in the Muslim Women (Protection of Rights on Divorce) Act 1986. It thus denied Muslim women the option of exercising their rights under the provisions of secular legislation. Thus, the Court's attempt to intervene in religious law proved politically unacceptable and was reversed by the political system. The Indian Supreme Court was finally called upon to determine the constitutionality of the Muslim Women (Protection of Rights on Divorce) Act.⁵⁹ It decided that unless interpreted in a way that would benefit divorced Muslim women as much as the general law (the Criminal Procedure Code) benefited women of other religions, the Act would be contrary to constitutional guarantees of equal protection of the law and equality on the basis of religion.⁶⁰ Therefore it interpreted the Act

55 Section 494 of the Penal Code, as interpreted in *Sarla Mugdal vs Union of India*, 1995 SC 1531; 1995 SCC (3) 635.

56 *Sarla Mugdal vs Union of India*, AIR 1995 SC 1531; 1995 SCC (3) 635 .

57 *M.A.Khan vs Shah Bano Begum*, 1985 SCC 556 .

58 Ruling that in case the woman is unable to maintain herself after the period of *iddat*, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

59 In Writ Petition (civil) 868 /1986, *Latifi vs Union of India*, decided 28 September 2001). See <http://judis.nic.in> .

60 Articles 14 and 15 of the Constitution. It could be argued that not only would Muslim women have been treated unequally on the basis of religion, had the maintenance provisions not applied to them, as the Indian court ruled, but on the basis of sex as well. In a society in which married women generally do not work outside their home and do not earn money, some form of financial compensation upon divorce is necessary to redress at least somewhat the inequality created between the former husband and wife. Absence of any post-divorce financial payment to the wife, in disregard of her contribution to the marriage, would fall far below the standard set by Article 16(1)(h) CEDAW as interpreted in para. 32 of CEDAW General Comment No. 21, which demands that in distributing property upon dissolution of marriage, financial and non-financial contributions of the spouses should be accorded the same weight.

expansively, so as to allow for maintenance payments to Muslim women.⁶¹ The clash between two sources of law is clear. The State judicial system saw the religious law as part of State law, thus open to interpretation by judges. The religious authorities viewed interpretation of religious law as a matter of doctrine reserved for religious authorities. The clash is particularly strong when the religion is one of a minority community.

Bangladesh, a predominantly Muslim State, found it easier to intervene in Muslim personal law and harder to intervene in discriminatory Hindu personal law of the minority. Personal law issues such as marriage, child custody and property are governed by religious laws. Some provisions discriminatory to women still exist,⁶² as was highlighted by CEDAW in concluding observations on Bangladesh's State report.⁶³ Some provisions of Muslim Personal Law had been modified, but, claimed the State representative, it would not be easy to modify Hindu Personal Law because of the complex religious issues involved.⁶⁴ This is a mirror image of the situation in India, a predominantly Hindu State, where it has proved easier for the State to modify by legislation Hindu personal law than the personal law of the Muslim minority (as seen for instance in the *Shah Bano* Case). Indeed, Engineer comments that

[t]he secular forces in that country [Bangladesh] have been demanding further changes in the Muslim personal law. It is, however, interesting

61 See further examples of the difference between reform of Hindu personal law and the personal law of minority religions, which Parashar attributes to political calculation, in: Parashar, A., *Women and family law reform in India: Uniform civil code and gender equality*, Sage Publications, New Delhi, 1992, Chapter Four.

62 For Muslims, mainly the Muslim Family Law Ordinance, 1961. It permits polygamy under certain conditions, but it is a restricted option. It recognises unilateral divorce (*taleq*) where it is revocable, and permits limited grounds for divorce by the wife. The Government of Bangladesh is considering a draft Uniform Family Code which offers further reforms to the Muslim Family Ordinance, for instances providing women with broad grounds for divorce. Hindu personal law allows polygamy by the husband (which is outlawed in India for Muslims). Hindu personal law does not recognise a woman's right of inheritance. See *Human rights in Bangladesh – A study of standards and practices*, Bangladesh Institute of Law and International Affairs, Dhaka, 2001, p. 72.

63 Concluding Observations of the CEDAW Committee: Bangladesh, adopted 1 February 1993, UN Doc. A/48/38, paras 248-326.

64 The legal situation as described by Lailufar Yasmin ('Law and Order Situation and Gender-based Violence: Bangladeshi Perspective', Regional Centre for Strategic Studies, Policy Studies, Vol. 16, 2000, Chapter 4, at: www.rcss.org (last accessed 1 November 2007)), is that Hindu women are still governed by the ancient Shastric law. Laws of the colonial period too remain, as they were not revised after independence, specifically, the Hindu Widows Remarriage Act 1856, Hindu Women's Right to Property Act of 1937 and the Hindu women's Right to Separate Residence and Maintenance Act of 1946. Hindu women in Bangladesh do not have a right to divorce but can have a right to live separately. Hindu law does not make marriage registrations compulsory. Hindu women's inheritance of property is very restricted.

to note that like the Muslim minority in India the Hindu minority in Bangladesh resists any change in its personal law. Thus, Hindu women in Bangladesh are still governed by age-old traditions and laws.⁶⁵

The case of Bangladesh (a Muslim majority/Hindu minority State), just as the case of India (a Hindu majority/Muslim minority State), shows that women in minority religions face a particular barrier from State intervention to protect their rights, no matter which is the State religion and which is the minority religion. The State plays a delicate political balance, it tries particularly to avoid conflict with minority groups which may see any intervention in the *status quo* of religious law as government encroachment. Thus, women's rights fall victim to a political balancing act.

A further example of the reluctance of States to intervene in the religious personal law of minority communities, is seen in Sri Lanka.⁶⁶ A dual standard exists in the provision of minimum age of marriage.⁶⁷ In Sri Lanka the minimum age has been set to 18, except for Muslims, because of Muslim personal law, which does not provide a minimum age of marriage.⁶⁸ Likewise, polygamy is permitted, in certain circumstances, for Muslims.⁶⁹ Thus, a State which prohibits polygamy⁷⁰ and underage marriages in its general laws, allows a minority religious community to operate a different law on these matters. So, women in a minority community are particularly adversely impacted on by relegation of personal law to a religious community.

The difficulty of the State in according equal rights to women once jurisdiction is granted to religious communities, proves in Israel, as well, to be particularly great regarding minority communities. The Family Court Law, 1995, was amended in 2001, by the addition of Article 3(b1), which grants concurrent jurisdiction in

65 Engineer, A., 'Bangladesh showing the way', *The Hindu*, 14 May 2001].

66 Sri Lanka has a Buddhist majority, while there are also Hindu and Christian minorities. The problem discussed only exists regarding Muslim personal law.

67 CEDAW prohibits the betrothal and marriage of a 'child' (in Article 16(2)), but does not specify what age is considered a child. The UN Recommendation on Consent to Marriage, Minimum age for Marriage and Registration of Marriage (GA Res. 34/180, 18 December 1979) refers to 'no less than fifteen' and makes an exception only where a 'competent authority' has decided it is in the interests of intended spouses (compare: the minimum age, 18, in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 6(b)).

68 See Concluding Observations of the CEDAW Committee: Sri Lanka, 7 May 2002, UN Doc. A/57/38, Part I, paras 256-302. In fact, the Muslim Marriage and Divorce Act 1951 has a minimum marriage age of 12.

69 Under the Muslim Marriage and Divorce Act, 1951.

70 See Jayasuriya, *op.cit.* (note 39).

matters of family law (except marriage and divorce) of Muslims and Christians to (civil) family courts. Until this amendment, all such matters were exclusively under the jurisdiction of religious courts. Among these are proceedings for spousal support. Jewish women have had the option since 1953 to initiate proceedings for spousal support in either religious or civil court.⁷¹ The award of spousal support is consistently higher in family courts than in all religious courts, and religious courts do not follow a principle of community property.⁷² Thus the outcome is less likely to be equitable to women in a religious court.⁷³ The women of minority religions were harmed by lack of political will to interfere in the religious autonomy of minority religious communities.⁷⁴ Even after the passage of the legislation, it remains to be seen whether women of minority religions will have the same accessibility to civil courts as those of the majority religion.⁷⁵ It also remains to be seen how the civil courts will interpret the religious law of minority religions, and whether they will be able, as outsiders to the religious community, to interpret it in a way compatible with women's equality.

The State may try to rectify human rights violations by religious law through directly applicable secular legislation. This too raises distinct problems if it is perceived as interference in the autonomy of minority religions. In Israel, secular legislation was sometimes, but not always, perceived this way by the Muslim minority legal system. The Muslim *Qadis* have ignored the secular prohibition of underage marriage as grounds for divorce.⁷⁶ In other cases they accepted and

71 Rabbinical Courts Judgment Law (Marriage and Divorce), 1953, Article 4.

72 HCJ 9734/03, *Anonymous. vs Great Rabbinical Court*, decided 21 October 2004.

73 In societies in which, in marriages, wives still provide more of the home work and husbands more of the paid employment, some redress of inequality between spouses upon divorce is achieved by ordering of support payments (or other financial compensation). So, realistic amounts of support payments may be considered a measure to redress inequality of women.

74 In other instances the Israeli legislation intervened, affecting Muslim minority religious law: Unilateral repudiation of marriage against the wishes of the wife is an offence according to Article 181 of the Penal Law (1977). Polygamy is prohibited (for members of all religions) by Article 176 of the Penal Law (1977). Shougry-Badarne claims, however, that the law is ineffectively enforced despite a high incidence of polygamous marriages among the Beduin Muslim community; Shougry-Badarne, B., *International law, personal status and the oppression of women: The case of Muslim women in Israel*, unpublished LLM thesis, American University, Washington DC, 2001 (on file with the author).

75 Layish notes, that even when Muslim women have a choice of secular jurisdiction more favourable to them, such as in matters of inheritance, they prefer litigation in the Shari'a Court due to social and religious pressures; Layish, A., "The status of the Muslim women in the Sharia Courts in Israel", in: Raday, F., Shalev, C. and Liban-Kooby, M. (eds), *Women's status in Israeli law and society*, Shoken, Tel Aviv, 1995, p. 364 (in Hebrew).

76 The Age of Marriage Act (1950), Article 3.

even welcomed secular legislation, such as the introduction of legal principle of 'the best interest of the child'.⁷⁷

Thus, in these four examples drawn from India, Bangladesh, Sri Lanka and Israel, relegation of personal law to religious communities has meant greater difficulty for the State law to rectify discrimination in personal law of minority women than of women of the majority religion.⁷⁸

These intractable problems would also point against recognition of a group right of religious freedom which includes exclusive, and possibly even concurrent, jurisdiction over personal law.

4. DISCRIMINATION AGAINST WOMEN IN INTERNAL RELIGIOUS AFFAIRS BY RELIGIOUS INSTITUTIONS

The most far-reaching but logical conclusion of the adoption of a principle of superiority of gender equality over communal religious freedom, such as that adopted in General Comment No. 28, is that this principle will have to be employed even in doctrinal areas of religions, including the appointment of clergy.

4.1. CLERGY WHO HOLD PUBLIC OFFICE

The right of religious organisations to run their internal organisation is perhaps the right that is most justifiably reserved to the community, with which international law will find it hardest to interfere. However, even under existing international law, barring women from serving as clergy who hold public office should be impermissible.

Where religious clergy are given public office by the State, or they are appointed by the State to hold office in which they exercise legal powers within religious communities, discrimination against women in their appointments should be considered a discriminatory act by the State itself. As such, it may run afoul of provisions of both CEDAW, which guarantees the right to hold public office on

77 Layish, *loc.cit.* (note 74).

78 See discussion of the implications of religious minority marriages in secular states (United States, United Kingdom and South Africa) in Scolnicov, A., 'Multi-religious Societies and State Legal Systems: Religious Marriages, the State and Implications for Human Rights', in: Wilhelmsson, T. (ed.), *Private Law and the Cultures of Europe, Kluwer Law International*, forthcoming 2007 Chapter 21, p. 385.

equal terms,⁷⁹ and the ICCPR, which guarantees equality in access to public service.⁸⁰ All ICCPR rights are guaranteed by Article 3 to men and women on an equal basis. Although General Comment No. 28 does not refer specifically to the appointment of clergy or religious judges, its unambiguous language interpreting Article 3 leaves no room for exception, and means that even religious doctrine as to appointment of clergy cannot serve as justification for a breach of gender equality in appointments to public office.

An example of such appointments, in Israel, is the appointment by the State of two State Rabbis and City Rabbis.⁸¹ In Israel, jurisdiction in matters of family law is given to State-appointed religious judges.⁸² Women cannot fill the posts of either State-appointed Rabbis or religious judges.⁸³ The CEDAW committee has criticised Israel over the fact that women cannot become religious judges.⁸⁴

This implies that the CEDAW committee holds the view that international human rights treaty obligations of States should be implemented in the appointment of religious judges even if this intervenes in religious doctrine. Alternatively, the State could abolish altogether the legal capacities of religious judges.

It is not clear if the same would apply to clergy appointed or funded by the State who do not hold a judicial role. It is more questionable if theirs can be considered a 'public office'. Judicial office is public office, as its holder executes a core function of the State. A clergyman who only performs religious service does not execute any such State function. However, if the clergy is appointed to office by the State, holds office in a State-Church, or is paid as a civil servant, there is a strong argument to see the position such a clergy holds as a public office as well.

79 Article 7(b).

80 Article 25(c).

81 Pursuant to the Chief Rabbinate Law (1980) and the Jewish Religious Services Law (combined version) (1971).

82 See Shari'a Courts (Verification of Appointments) Law (1965); Druze Courts Law (1962); Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (1953) regarding, respectively, Muslim, Druze and Jewish Courts.

83 Israeli law exempts these posts from the general provision of equality in appointment to public posts (Equal Rights of Women Law (1953), Article 7(c)).

84 CEDAW Concluding Observations on Israel's State Report: Israel, UN Doc. A/52/38/Rev.1, part II, 1997, 87. Israel has, in fact, submitted a reservation to Article 7(b) precisely on this point.

4.2. CLERGY WHO DO NOT HOLD PUBLIC OFFICE

Even concerning the appointment of clergy who are not holders of public office, the State may have an obligation to prohibit gender discrimination. Under CEDAW, the parties are obliged to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁸⁵ This is a fairly weakly worded – although unique – provision of an obligation on the State to attempt to effect change. Nevertheless, it means that the State must endeavour to eradicate culturally determined gender roles even in private religious organisations.

The argument for imposing a legal obligation of non-discrimination on private religious organisations becomes stronger the clearer the involvement of the State with the religious organisation. If the religion is legally or financially established or supported by the State there will be a stronger reason for demanding that the State reverse the discriminatory practice. But there is a basis for arguing that the States must promote non-discrimination even in religious organizations in which it is not involved.

4.3 DISCRIMINATION IN APPOINTMENT TO RELIGIOUS OFFICE AS A CONCERN FOR INTERNATIONAL LAW

There is further indication that discrimination against women within religions, even in areas which are at the core of religious doctrine, is an issue in which international law can legitimately intervene. The former UN Special Rapporteur, Elizabeth Odio Benito, suggested in her study to the Sub-commission on Prevention of Discrimination and Protection of Minorities⁸⁶ that studies be undertaken about discrimination against women within Churches and within religions, including discrimination in ceremonies and worship, in becoming ministers of religion and in having a part in the hierarchal organisations of religions. She calls for immediate attention to this issue by the UN and recommends that the Sub-Commission undertake this study. Her suggestion implicitly includes a determination that discrimination against women by religions is within the ambit of international human rights law. No further action has been taken on this by the UN.

85 Article 5(a).

86 Odio Benito, E., *Elimination of all forms of intolerance and discrimination based on religion or belief*, UN, New York, 1989, p. 54.

Application of constitutional non-discrimination principles to religious organisations is also absent in most States. A State constitution which takes an important step in this direction is that of South Africa. In South Africa the non-discrimination provision of the Constitution⁸⁷ has application for private actors, which would include religious bodies. Legislation which must be enacted in order to prohibit such discrimination by religious organization would certainly be controversial, raising objections such as those voiced by Van der Vyver, that a scenario in which ‘the Roman Catholic Church might be constrained to justify its internal ruling before a secular tribunal smells of totalitarianism of the worst kind’.⁸⁸

The European Court of Human Rights has dealt with this issue only indirectly. It ruled that where a State-Church decided to ordain women clergy, a clergyman who did not approve could not claim his right to freedom of religion was infringed.⁸⁹ The question whether State-Churches were obligated to ordain women clergy did not arise.⁹⁰

Sometimes, it is precisely the establishment, the granting of legal status by the State, which exempts the institutions of the religious community from general law of non-discrimination on the basis of sex. In the UK, the Church of Scotland was granted jurisdiction over ‘matters spiritual’ in the Church of Scotland Act (1921).⁹¹ In *Percy*,⁹² an associate minister was demoted from her position by the Church following allegations of misconduct. She filed claim under the Sex Discrimination Act (1975), claiming that she was treated differently from male ministers. The Scottish Court of Session accepted the claim of the Church that the Employment Tribunal had no jurisdiction to entertain any complaint by the appellant of sex discrimination, since it was a question concerning an

87 Section 9(4): ‘No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.’ (The grounds in subsection (3) include gender).

88 Van der Vyver, J., ‘Constitutional perspectives on Church-State relations in South Africa’, *Brigham Young University Law Review*, 1999, p. 635, at p. 668.

89 *Williamson vs UK*, Application No. 27008/95, . See also *Karlsson vs Sweden*, Application No. 12356/86; and *Knudsen vs Norway*, Application No. 11045/84 .

90 For the position of the Catholic Church see the Congregation for the Doctrine of the Faith, Declaration Inter Insigniores on the question of the Admission of Women to the Ministerial Priesthood (15 October 1976): AAS 69 (1977), 98-116, which denies the possibility of the ordination of women, a position repeated in the *Ordinatio Sacerdotalis* (22 May 1994) of John Paul II (see the Vatican website www.vatican.va).

91 Sections 1 and 3.

92 *Percy vs Employment Appeal Tribunal Order and Judgment*, ScotCS 65, 2001.

office in the Church⁹³ and was accordingly a 'matter spiritual'. It followed that the Church had the right, 'subject to no civil authority', to adjudicate finally on the matter and the Employment Tribunal had no jurisdiction. The autonomy of the religious community to govern its institutions was given by the Scottish Court *a priori* precedence over the general law of non-discrimination in employment. This is precisely the type of preference of community over women's equality which General Comment No. 28 directs against. The House of Lords reversed the decision, deciding that a contract of employment was not a spiritual matter.⁹⁴

The constitutional structure of religion in the State has direct implications for the relationship between individual and group rights. These may have particular implications for women, as exemplified in this case.

4.4. DISCRIMINATION AGAINST WOMEN BY RELIGIONS AND TAX-EXEMPT STATUS

State endorsement of discriminatory religious organisations occurs even where religious institutions are not directly funded by the State, but are indirectly subsidised by receiving tax-exempt status. It can be argued, that even such an indirect endorsement is impermissible: if these religious institutions discriminate against women, their tax-exempt status as charitable institutions should be removed,⁹⁵ for a similar reasoning to that used to deny tax-exempt status from private educational institutions which discriminate on the basis of race in the US.⁹⁶

It could, however, be argued, that there is a dividing line between impermissible direct State funding of discriminatory religious institutions, and permissible indirect funding via tax exemptions. Such an interpretation would recognise as legitimate a 'sphere of private support', arguing that since people are allowed to adhere to discriminatory religions, they should be allowed to donate to them.

Nevertheless, these last considerations justify a right of everyone to donate to a religion of their choice, but not a right to do so under tax-exempt conditions.

93 In terms of Article IV of the Declaratory Articles contained in the Schedule to the Church of Scotland Act (1921).

94 *Percy vs Church of Scotland Board of National Mission*, UKHL 73, 2005.

95 Cook, *loc.cit.* (note 5), p. 107.

96 *Bob Jones University vs US*, 461 US 574, 1983.

5. SECULAR LEGISLATION BASED ON RELIGIOUS MOTIVES

The multiplicity of conflicts between women's equality and religious doctrines is not coincidental. They stem from the all-encompassing nature of religions as normative systems that organise private, as well as public, aspects of life. Since these systems were formulated historically in patriarchal societies, they often reflect those values. Thus, it must be asked, not only whether in particular cases reliance on religion infringes the rights of women, but whether, in principle, reliance on religious reasons for legislation should be seen as infringing religious freedom, among others, of women.

Secular legislation that infringes recognized human rights of women is, in many cases, based on religious motivation. Often there will be reasons based on social or cultural norms that have their grounding in religion, even if religion is no longer seen as their justification. Laws which have particular significance for the rights of women, such as those regarding rights of marriage, reproduction, abortion or contraception, will often be based on such social norms. International human rights law has, so far, not addressed this problem.

An important question is, whether such legislation can be said to infringe illegitimately the religious freedom of men and women who do not subscribe to those religious beliefs. In other words, the question raised is whether religious freedom is breached by the fact that secular legislation is based on religious motives, apart from any infringement of other rights which the law or policy might cause. While this question is relevant to both men and women whom such legislation affects, this article addresses specifically laws which affect women. The reason for raising this issue in regard to women's freedom of religion is that there may be different considerations regarding women. Even in democratic States, where women participate equally in the democratic process, their effective political power is often less than that of men, for various reasons (such as lack of influence and less than proportional representation within political parties), and so the product of the legislative process may not proportionately reflect their beliefs.⁹⁷ Also, even if both women and men choose, by majority vote, to institute law based on specific religious teaching, the law will reflect the underlying discriminatory attitude to women often embedded in religious norms.

97 See: CEDAW General Comment 23 'Women in political and public life', adopted 1997, UN Doc. A/52/38; and Cook, R. and Dickens, B., 'Human rights dynamics of abortion law reform', *Human Rights Quarterly*, 2003, p. 1, at p. 44.

5.1. RELIGIOUS REASONS FOR STATE LEGISLATION

The problem whether religious reasons for legislation are legitimate, especially where these are concerned with the private lives of men and women, is theoretically difficult, constitutionally fundamental, and politically loaded. Nowhere is this more so than in the case of regulation of abortion.

Because it is not yet clear whether there is a right of abortion in international law, it is important to examine the process by which domestic and international law and policy on this issue is made. Currently, a right over reproduction is not explicitly included in any of the main human rights instruments. CEDAW guarantees equal access to health care, including 'family planning',⁹⁸ a term deliberately left vague. General Comment No. 24⁹⁹ interprets that

it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

Access to contraception and abortion might be considered as included in Article 2 in conjunction with Article 1 CEDAW (prohibition of discrimination), although this would entail a complex argument that lack of access to abortion constitutes 'distinction, exclusion or restriction made on the basis of sex,' because lack of means of ensuring reproductive choice have vastly unequal consequences for men and women, thus perpetuating existing gender inequalities.¹⁰⁰

Only the Protocol to the African Charter on Human and People's' Rights on the Rights of Women in Africa includes a specific obligation of State parties to protect reproductive rights of women, including authorising abortion in cases of rape and when continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus or is the result of incest.¹⁰¹ This is not a full right to abortion based on a perception of women's' bodily autonomy, but rather a truncated right, based on what are perceived by society as fruit of crimes committed and danger to health.

98 Article 12(a).

99 UN Doc. A/54/38/Rev. 1, adopted 1999, chapter 1.

100 See Cook, R., 'Women's rights: A bibliography', *New York University Journal of International Law and Politics*, Vol. 24, 1992, p. 857, at p. 680.

101 Article 14(2)(c).

The International Conference on Population and Development ('The Cairo Conference')¹⁰² did not recognise a right to abortion. This was directly due to religious involvement in the discussions. The Vatican was one of the most active participants in the Cairo Conference, objecting to all references to human rights of abortion and contraception.¹⁰³ The Beijing Declaration and Platform for Action¹⁰⁴ suggests States not take punitive steps against women who have undergone abortions, but nowhere suggest that it is a right of women. The follow-up report¹⁰⁵ also does not suggest such a right.

While the question of abortion is usually argued as one of substantive rights, the process of the determination of these rights should also be considered. If a State or international policy is deemed in breach of religious freedom because of institutional religious involvement in its formulation, this adds a different reason to argue that prohibitions on abortions are in breach of human rights.

In the context of the debate on the constitutionality of prohibition of abortions in US law, Laurence Tribe has argued that whenever the views of organised religion play a dominant role in formulating an entire government policy, as is the case with abortion, it is an improper involvement of religion in the political process, violating the Establishment clause of the First Amendment.¹⁰⁶ Later, however, in a move which is testament to the difficulty of this question, he shifted his stand, acknowledging that, in fact, religion could not be disentangled from the public debate on the issue.¹⁰⁷

The controversial influence of religion on the legislative process can be seen in the constitutional reform concerning abortion in Ireland.¹⁰⁸ In the referenda on the issue, religious arguments played a pivotal role in supporting one side

102 Paragraph 8.25, Program of Action of the International Conference on Population and Development, 13 September 1994, UN Doc. A/CONF. 171/13.

103 See Eriksson, M.K., *Reproductive freedom in the context of international human rights and humanitarian law*, Nijhoff, The Hague, 2000, p. 187.

104 Fourth World Conference on Women, 15 September 1995, UN Doc. A/CONF.177/20 and A/CONF.177/20/Add.1, Chapter IV, para. 107 (k).

105 Report of the ad hoc committee of the whole of the twenty-third special session of the General Assembly, UN Doc. A/S-23/10/Rev.1, 2000.

106 Tribe, L., 'Forward: Toward a model of roles in Due Process of life and law', *Harvard Law Review*, Vol. 87, 1973, p. 1-, at pp. 18-25.

107 Tribe, L., *American constitutional Law*, 2nd ed., Foundation Press, Minola, 1988, pp. 1349-1350.

108 For discussion, see Dooley, D. 'Gendered citizenship in the Irish Constitution', in: Murphey, T. and Twomey, P. (eds), *Ireland's evolving constitution, 1927-1997*, Hart, Oxford, 1998, p. 121.

of the debate.¹⁰⁹ This influence of the Church on law and policy was criticised by the CEDAW committee. The Committee noted,¹¹⁰ that although Ireland is a secular State, the influence of the Church is strongly felt not only in attitudes and stereotypes but also in official State policy.¹¹¹ In particular, it noted, women's right to health, including reproductive health, is compromised by this influence. While criticising church involvement in legislation in a specific case, it seems that the Committee viewed the involvement of the Church in formulating State policy in a secular state as an institutional problem of human rights.¹¹²

However, religious involvement in referenda, as in Ireland, raises separate considerations. The use of religious arguments in a referendum is perhaps the most justifiable of all uses of religious arguments in policy-making. The strongest argument against use of religious reasons exists when these are used by public servants. These arguments are weaker against religious reasons for voting by

109 Previously the Eighth Amendment of the Constitution Act (1983) acknowledged 'the right to life of the unborn, with due regard to the equal right to life of the mother'. The Thirteenth Amendment (1992) provided that 'Article 40.3.3 [the right to life of the unborn] would not limit freedom to travel between Ireland and another state', and the Fourteenth Amendment (1992) provided that 'Article 40.3.3 [the right to life of the unborn] would not limit freedom to obtain or make available information relating to services lawfully available in another state'. The latest, 2002, constitutional referendum on abortion sought to amend Article 40 to limit the cases in which a woman could legally obtain an abortion, so that medically necessitated permitted abortions would exclude danger to the women's life from suicidal intent. The amendment was rejected. See further the referendum committee website: www.refcom.ie. Although the Fifth Amendment (1972) removed from the Constitution the special position of the Catholic Church, Church involvement in constitutional debates remained influential. On the religious institutional religious involvement backing the failed 2002 amendment, see Parkin, C., 'Ireland decides, the Pope supports Ahern on Abortion', *The People (Ireland)*, 3 March 2002.

110 CEDAW Concluding Observations on the second and third periodic reports of Ireland 1999, UN Doc. A/54/38/Rev.1, para. 180.

111 On Church involvement in lawmaking in Ireland, see also Whyte, G., 'Some reflections on the role of religion in the constitutional order', in: Murphy and Twomey (eds), *op.cit.* (note 107), p. 51.

112 No substantial determination as to the existence of a right of abortion has been made under the European Convention. *Open Door and Dublin Well Women vs Ireland*, Application No. 14234/88, raised the issue indirectly. It dealt with an injunction banning dissemination of information in Ireland on abortion clinics outside Ireland. The European Court of Human Rights decided the case on the issue of freedom of expression and made no determination as to whether a right of access to abortion is included within Convention rights. In *Tokarczyk vs Poland*, Application No. 14235/88, the Court decided that the conviction of the applicant for arranging abortions did not infringe his rights under Article 10. The question whether women had a right of access to abortions again remained unanswered. In *H vs Norway*, Application No. 17004/90, the European Commission of Human Rights, asked to rule on a potential father's right in connection with an abortion, left broad discretion to the State on this issue, avoiding again a clear statement on the existence and permissible limitations of a woman's right. In *Tysic vs Poland*, Application No. 5410/03, the Court decided that where the law permitted abortion to save the life or health of the pregnant woman, as it did in Poland, an uncertain procedure which caused severe anxiety to the women was in breach of Article 8 of the Convention. Again, no determination was made as to whether recognition of a right to abortion in these circumstances was required.

individual citizens, such as voters in a referendum. It is practically impossible to disallow the reliance of individual voters on religious reasons for their voting. Not only that, but the right of free speech includes the right of the voters to hear and consider any religious message before voting, as well as the right of the religious speakers to impart such a message. Thus, while institutional religious involvement in deciding the rights of women is problematic, it may not be easy to justify its prohibition.

There is, however, a strong, although not conclusive, case for claiming that women do have a right of access to abortion under international law. If so, regardless of the legitimacy of using religious reasons for the decision to vote for or against abortions, a law which prohibits abortions could be attacked on substantive human rights grounds.

The argument that the right to freedom of religion and belief includes a right that the State will not legislate secular laws based on religious norms was raised, but not examined, in a case of the European Court of Human Rights. In *Johnston*¹¹³ the European Court concluded that Article 12 of the European Convention (the right to marry) does not include a right to divorce, nor does Protocol 7 to the Convention, and that neither is such a right included in Article 8 (protection of family life).¹¹⁴ Johnston claimed as well that lack of a divorce provision breached his rights under Article 9, as the inability to live with his new partner as married man and wife was against his conscience. The Court summarily dismissed this claim, saying Johnston's freedom to have and manifest his convictions was not in issue. The law in Ireland has changed since the ruling.¹¹⁵ Malta is now the

113 *Johnston vs Ireland*, Application No. 9697/82.

114 Neither does the ICCPR, which does mandate, however, in Article 23, paragraph 4, that States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

115 The Irish Referendum on Divorce on 24 November 1995 had been carried. Consequent to the constitutional amendment, the Family Law (Divorce) Act (1996) came into force on 27 February 1997. The Irish Constitution, Article 41(3) as amended the 1995, states that: (1) The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack. (2) A court (...) may grant a dissolution of marriage where (...) (i) (...) the spouses have lived apart from one another for (...) at least four years during the five years, (ii) there is no reasonable prospect of a reconciliation (...) (iii) such provision as the Court considers proper (...) will be made for the spouses, any children of either or both of them and any other person prescribed by law, and (iv) any further conditions prescribed by law are complied with. (3) No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction (...) [=of Ireland] shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

only State under the jurisdiction of the European Court which has no divorce provision and to which this case is directly applicable.¹¹⁶

However, the Court's analysis of religious freedom is still relevant. It viewed freedom of conscience as limited to the right to manifest convictions. The European Court interpreted narrowly the concept of religious freedom. It did not raise the question whether the State, by mandating a system of marriage and divorce which conforms to one religious creed, impinges on the freedom of religion and conscience of those who do not subscribe to that belief.

Lack of divorce provisions impinges upon the liberties of both men and women, but its effect on women and men is different. In a social structure in which most marital unions are dominated by men, through unequal financial power and traditional gender roles, lack of divorce provisions constitutes a breach of equality for women, as well as a breach of freedom of conscience for both men and women.

When a State shapes the lives of men and women, constricting them through laws based on religious doctrine, a question of religious freedom is raised. This is true, of course, not just regarding lack of divorce, but regarding any other legal arrangement which is based on religious doctrine.

A contrary argument can be made, that, in keeping with liberal conceptions, channeling religious motives into the political system through democratic participation is not only legitimate, but also has a positive public value. However, women have historically been, and mostly still are, excluded from the formulation of religious doctrine. So, the legitimation of religious motives for legislation discriminates against women in the legislative process, apart from any discrimination which may be manifested in the resulting legislation.

5.2. RELIGIOUS REASONS FOR INTERNATIONAL NORMS

A comparable situation to the use of religious reasons in legislation, arises when religious reasons underpin a State's international obligations, or when religious reasons or religious institutional involvement influence the formulation of international documents. Because religions typically espouse a comprehensive

¹¹⁶ After legislation of a divorce law in Chile in March 2004, the Phillipines are the only other State with no divorce provisions. The Catholic Church was influential in all three States in opposition to divorce legislation. See 'Chilean divorce law passed', CBC-Canada Radio, 11 March 2004, www.cbc.ca.

value system of gender differentiation, their involvement will entail a systematic influence on the development of international law in regard to the rights of women. The Catholic Church is in a legally unique position to influence such developments,¹¹⁷ because of its centralised structure and its status in international law.¹¹⁸ Other religions may also exert influence through States.

An example of how religious obligations might influence the creation of international law is seen in the opposition by some of the delegates of proposals for the inclusion in the Universal Declaration of Human Rights of equal rights of men and women to contract or dissolve a marriage. These were delegates of States bound by laws based on Concordats with the Church, which created obligations in respect of religious marriage and divorce. These would not permit them to accept the proposed text.¹¹⁹ The right was finally mentioned in Article 16, which states that men and women are 'entitled to equal rights as to marriage, during marriage and at its dissolution'.¹²⁰ The reliance on the Concordats in the negotiations, however, suggests that pre-existing international law treaties, which had already absorbed much of religious tenets (in this case – of Catholic doctrine) had already shaped the constitutional structure of the rights of men and women in States.

An example of institutional religious involvement in the formulation of international documents relating to the rights of women occurred when the Vatican was one of the most active participants in the Cairo Conference,

117 For the position of the Catholic Church on many issues pertinent to the rights of women, see the Report on the Holy See submitted by Abdelfattah Amor, Special Rapporteur on Freedom of Religion and Belief, UN Doc. E/CN.4/2000/65, 15 February 2000.

118 The Holy See is a permanent subject of general international law. It concludes international treaties on the basis of full equality on behalf of the State of the City of the Vatican or on its own behalf. (Kunz, J.L., 'The status of the Holy See in international law, *American Journal of International Law*, Vol. 46, 1952, p. 39). The Vatican, through the Holy See on its behalf, carries out activities, which in international law are traditionally assigned to States. Besides Concordats, the Vatican is signatory to other international treaties, it has diplomatic relations with States, and has a UN permanent observer status; Bettwy, S.W., 'US – Vatican recognition: Background and issues', *Catholic Lawyer*, Vol. 29, 1984, p. 225, at p. 236.

119 See UN Doc. AC.2/SR.6/, p. 4 (M. Amado of Panama), quoted in: Morsink, J., *The Universal Declaration of Human Rights: Origins, drafting and intent*, University of Pennsylvania Press, Philadelphia, 1999, p. 122. Subsequent Concordats loosened State obligations in this area considerably: for instance the 1984 Concordat with Italy (see Certoma, D.L., *The Italian legal system*, Butterworths, London, 1985, p. 123) and the 1979 Concordat with Spain (see Martinez-Torron, J., 'Freedom of religion in the case law of the Spanish Constitutional Court', *Brigham Young University Law Review*, 2001, p. 711, at pp. 728-729).

120 Likewise, the ICCPR states in Article 23(4) that 'States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'.

objecting to all references to human rights of abortion and contraception.¹²¹ The Holy See stated in a reservation to the final document of the Cairo Conference that it understood that the document does not affirm a new international right to abortion.¹²² The Vatican also participated in the 1995 UN Beijing Conference on Women,¹²³ but lobbied China to ban reformist Catholic groups, who support women's equality, from participating in it.¹²⁴

The influence of religious bodies on formulation of international law affecting women's freedom of conscience and religion is evident also in the Rome Statute for the International Criminal Court.¹²⁵ The statute includes several gender-specific offences. Important in its implication of religious attitudes is the offense of forced pregnancy, in Article 7(2)(f):

'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

The wording was controversial, as the inclusion of the limitation that the woman was 'forcibly made pregnant' means that confinement of a woman who is pregnant by consensual sex will not be a crime under the statute. The limitation was included at the behest of the Vatican.¹²⁶

Thus, institutional religious involvement in formulating international human rights documents (or documents which affect human rights) is problematic. The strongest argument against this involvement is in the case of direct involvement

121 See Eriksson, *op.cit.* (note 102), at p. 187.

122 UN Doc. A/CONF.171/13, 18 October 1994, p. 147. The Holy See is party to some UN human rights treaties: CERD (the International Convention on all forms of Racial Discrimination, adopted 7 March 1996, 660 *United Nations Treaty Series* 195), CRC (the Convention on the Rights of the Child, adopted 20 November 1989, 1577 *United Nations Treaty Series* 3) and CAT (the Convention against Torture, 1465 *United Nations Treaty Series* 85), but not CEDAW, ICCPR or the ICSECR.

123 See further Howland, C.W., 'The challenge of religious fundamentalism to the liberty and equality rights of women: An analysis under the UN Charter', *Columbia Journal of Transnational Law*, Vol. 35, 1997, p. 271, at p. 296.

124 See Preston, J., 'UN summit on women bars groups: China, Vatican block opponents admission', *Washington Post*, p. A36, 17 March 1995.

125 Adopted 17 July 1998, UN Doc. A/CONF.183/9.

126 See Cedant, B.C., 'Gender-specific provisions in the International Criminal Court', in: Lattanzi, F. and Schabas, W.A. (eds), *Essays on the Rome Statute of the International Criminal Court*, Ripa Fagnano Alto, Naples, 1999.

of religious organisations. A somewhat weaker argument exists where States rely on religious arguments. After all, it may be argued that

every party to the drafting process brings with it some pre-conceived ideological notion, and a religious approach is no less legitimate than any other. However, the nature of institutional religious involvement is different where the rights of women are at issue, as religions have not just a pre-set conception on particular issues but a comprehensive and often non-negotiable set of conception about gender roles.

5.3. RELIGIOUS DETERMINATIONS AND INDIVIDUAL CONSCIENCE – NO CLEAR DIVIDING LINE

In theory, it is possible to argue that a communal religious determination should never prevail over individual choice. However, it is not always easy to decide where an aggregate of individual rights ends and a communal policy mandating one religious belief begins. Rights of religious freedom are pitted against each other when doctors, nurses or hospitals refuse to perform abortions. The health service professional does not wish to perform an act against his or her religious beliefs, but the woman seeking abortion is being denied this medical service for religious reasons, which do not form any part of her belief. This becomes a critical problem where most doctors or hospitals in her area refuse to perform this procedure. The CEDAW committee viewed this as an infringement of women's reproductive rights, stating that if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.¹²⁷ The CEDAW committee thus expressed its concern at the refusal, by some hospitals in Croatia, to provide abortions on the basis of conscientious objection of doctors.¹²⁸

An individual doctor relies on individual religious freedom in refusing to perform the abortion, a right typically recognised.¹²⁹ A central policy of the State based on the same reasons, even if democratically decided, would be an imposition of group values over individual rights. A confluence of doctors or hospital administrations all manifesting their religious beliefs to abstain from

127 CEDAW General Comment No. 24, para. 11.

128 CEDAW Concluding Observations on Croatia, UN Doc. A/53/38/Rev.1, 1998, part I, p. 10, at para. 109. See also: CEDAW Concluding Observations on Italy, UN Doc. A/52/38/Rev.1, 1997, part II, p. 106, at para. 353.

129 Compare section 38(1) of the UK Human Fertilisation and Embryology Act (1990) exempting any person objecting to the activities covered by the Act from any duty to participate in them.

performing abortions falls somewhere between the two. Thus, some cases cannot be categorised neatly as either a clash of rights, or an imposition of a religious belief of a group on an individual. Here, there cannot be a principled determination but rather each case must be decided on an *ad hoc* basis.

6. CONCLUSION

Religious freedom should be viewed as an individual right, which a derivative right of the community cannot overcome. So, a claim of community religious freedom cannot override the individual freedom of religion or belief of women within religious communities. The same reasoning would lead to the conclusion that no right of community religious freedom can override the right of non-discrimination between the sexes. These conclusions match those of the UN Human Rights Committee in General Comment No. 28. However, this article has raised some of the complexities that this determination creates: States delegate jurisdiction in matters of personal law to religious communities, and so their ability to intervene and uphold principles of equality is weakened, particularly within minority communities. Thus, women who are members of minorities are harmed twice.

Two further questions will have to be addressed under a principle which views gender equality above communal religious freedom: that of the legitimacy of institutional religious participation in the lawmaking process at the national and international level, and that of the discrimination against women in the internal practice of religious organisations. All of these are serious concerns for the protection of women's human rights, which must be accorded legal solutions.

Catriona Vine, Serpil Taşkan and Amy Pepper*

The Experience of Internally Displaced Women in Urban Areas of Western Turkey.

Abstract

This article considers the experiences of internally displaced women in urban areas of western Turkey as violations of their Constitutional rights and of their international human rights. The article explores changes in family and community structures, social exclusion, violence and honour as examples of the consequences of displacement and attempts to illuminate the ways in which women's experiences may constitute violations of their rights under domestic and international law while showing how instruments in the international arena may provide some form of redress when an adequate remedy is not available within Turkey.

Introduction

According to the United Nations Guiding Principles on Internal Displacement (Guiding Principles), “internally displaced persons” (IDPs) include any person or group of persons who involuntarily left their home or habitual settlements, without crossing an internationally recognized State border, especially as a result of or in order to protect themselves from the consequences of armed conflict.¹ There are an estimated 25 million IDPs worldwide² with at least 1.4 million in Turkey alone. In the 1980s and 1990s, an armed struggle between the Kurdistan Workers’ Party (PKK) and the Turkish Armed Forces resulted in significant levels of internal displacement in Turkey. Throughout this period, state security forces forcibly evacuated approximately 3500 rural communities in the Kurdish regions. Between three and four million villagers were displaced from their homes in officially sanctioned village evacuations.

* Catriona Vine is the KHRP Legal Director. Serpil Taşkan has recently completed an international fellowship at KHRP. Amy Pepper is a former research intern at KHRP and is currently a caseworker with Elizabeth Finn Care.

1 Francis M. Deng, Principles on Internal Displacement, Introduction, para 3, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), noted in Comm. Hum. Rts. Res. 1998/50.

2 Francis M. Deng, *In the Vacuum of Sovereignty: the International Challenge of Internal Displacement*, Forced Migration Review, 17 May 2003 at 56.

Displacement and its consequences continue to have a detrimental impact upon IDP women in Turkey, who are almost exclusively Kurdish. Although many of the problems suffered by IDPs are common to both men and women, there are specific manifestations of displacement that disproportionately affect women. However, the specific experiences of women are often neglected in discussions relating to internal displacement, despite the fact that approximately 80 per cent of displaced persons throughout the world are women and children.³ In view of that trend, we will examine the experience of female IDPs in the western cities of Turkey. The article will discuss mechanisms in domestic and international law that are relevant to violations suffered by female IDPs in an urban context, considering some of the social, economic and psychological impacts of their displacement as violations of their citizenship rights and their human rights under international law.

Internal Displacement in Turkey

The Kurds are the native inhabitants of the region of Kurdistan, an area which covers parts of the modern day states of Turkey, Iraq, Iran and Syria. The majority of the Kurdish population is in Turkey where their numbers run from 15 to 20 million, or about 23 per cent of the population.⁴ Since the early 1900s, the Kurds in each of these states have been subject to discrimination along ethnic lines. For example, throughout the 20th century, the Kurds in Turkey have been subject to official policies and legislation directed towards the total suppression of Kurdish identity. The phenomenon of internal displacement is just one example of the means utilized by those in power to deprive the Kurdish population of their legitimate rights.

Although policies involving the forced migration of the Kurds have featured in Turkey since the 1920s, the main trigger for the displacement of the 1980s and 1990s was the armed struggle between the Kurdistan Workers' Party (PKK), and the Turkish Armed Forces, which became a major feature of the situation in Turkey in 1984. The Turkish authorities' desire to cut off the support given to the PKK and to change the demographics of the predominantly Kurdish areas of south-east and east Turkey, led them to impose a policy of internal displacement

3 Malinda Schmiechen 'Student Panel on Children and Health Law: Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps' (2003) 22 Saint Louis University Public Law Review, 473.

4 Commission of the European Communities, *Regular Report on Turkey's Progress Towards Accession* (2004) European Commission p 39 <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf> (last accessed 3 September 2007). ('2004 Regular Report')

upon the Kurdish people living in those regions. This situation continued for at least fifteen years with the evacuation of approximately 3,500, mainly rural, villages. Between three and four million people were displaced from their homes during this period. As a result, approximately half of the Kurds in Turkey now live outside the Southeast⁵ and it is estimated that there are approximately one million Kurds still living in the west of Turkey as a result of internal displacement.

Following a military coup in 1980 a three year period of martial law was imposed. All political parties, trade unions and civil society associations were dissolved. The enactment of a new Constitution in 1982 reaffirmed the Turkish state's policy towards the Kurdish population, excluding them from the protection of the Constitution. The 1982 Constitution allowed the State to take direct control of the areas in the south in which the PKK were based, and led the way to the establishment of a civil administration and the appointment of a Regional Governor.⁶ On 19 July 1987 the notorious State of Emergency Law, commonly known by its Turkish acronym as 'OHAL'⁷ was invoked and a state of emergency declared in relation to the majority of the Kurdish provinces, including Elazığ, Bingöl, Diyarbakır, Hakkari, Bitlis, Mardin, Siirt, Tunceli, Van, Şırnak and Batman.⁸ The exercise of state of emergency powers by the Regional Governor, along with emergency orders conferring power to local governors, enjoyed immunity from constitutional review. This situation contributed substantially to the breakdown of the rule of law under OHAL.

The second half of the 1980s and in the 1990s saw a worsening of the situation for the civilian Kurdish population in many respects. The Kurds had very few rights and were subjected to massive oppression, resulting in widespread poverty. With the State's notion of nationalism becoming increasingly narrow, they saw all peaceful and legal avenues of political struggle closed off to them. Deviating from a republican understanding of nationality based on universality and humanity, the State turned towards an ethnic and culturally-based nationalism,

5 Bill Frelick *The Wall of Denial: Internal Displacement in Turkey* (Washington D.C.: US Committee for Refugees) 1999 p 3.

6 Decree No. 285 (Decree having the Force of Law on the Establishment of the State of Emergency Regional Governance) 10 July 1987; amended by Decree Nos. 424, 425 and 435.

7 Law No 2935, 25 October 1983; Regulation No. 19204, 27 October 1983.

8 Council of Europe *List of the Declarations Made by Turkey Complete Chronology as of 3/9/2007* <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=TUR&NT=&MA=3&CV=0&NA=&CN=999&VL=1&CM=5&CL=ENG>> (last accessed 3 September 2007).

which can be defined as Turkishness, excluding all other ethnic, cultural and linguistic identities.⁹

Officially sanctioned village evacuations were accompanied by violent state security operations against Kurdish villages that were considered unsupportive of the government agenda, thereby generating further displacement. In the process of evacuation, Kurds were subjected to a range of forms of maltreatment, including torture and sexual assault. In some cases, food embargoes were imposed, forcing villagers out of their homes.¹⁰ Security forces then destroyed the foundations of the community by burning houses, farmland and forests, slaughtering livestock and denying villagers the opportunity to collect their personal possessions.¹¹ Even where inhabitants were not formally evacuated, they were often compelled to resettle elsewhere as a result of the destruction of their physical and social communities with no resources to rebuild.

The village evacuations and violence in the Southeast did not begin to truly decline until 1999 with the arrest of Abdullah Öcalan and the subsequent PKK ceasefire. The state of emergency officially ended in 2002, at which point Turkey embarked on a programme of reforms designed to align Turkish law with European standards in terms of democracy and human rights. However, displacement and its impacts continue along with many other abuses of Kurdish rights.

Overview of Legal Context

Under normal circumstances, the national laws of a country protect those within its territory. One of the overarching principles of international law, the principle of territorial sovereignty, provides that a State possesses full control over its own affairs within its territorial limits, subject to very limited exceptions. In keeping with this principle, IDPs are to be governed and protected primarily by the domestic laws of their home country. This general principle represents a significant challenge for IDP women, as the state may not be willing to legislate for their protection or be able to implement existing laws. Further, the State is ultimately responsible for its citizens and where it has been in part responsible

9 Ergun Özbudun, "Milli Mücadele ve Cumhuriyet'in Resmi Belgelerinde Yurttaşlık ve Kimlik Sorunu" in *Cumhuriyet, Demokrasi ve Kimlik* edited by Nuri Bilgin, 1997, İstanbul: Bağlam, pp 63-71.

10 Human Rights Foundation of Turkey *Monthly Report* August 2001 p 5.

11 Göç-Der *Recommendations on the Kurdish Problem and Internal Displacement to the Turkish Government, Kongra-Gel (PKK) and the EU* (8 December 2004).

for the circumstances leading to instances of displacement the State is often reticent to admit this. As a consequence, IDP women are likely to find it difficult to rely on domestic laws to obtain adequate protection from, and an adequate remedy for, the consequences of their displacement.

Although the OHAL legislation authorized the Regional State of Emergency Governor to officially evacuate villages and systematically resettle the population, this power was never utilized when the State of Emergency was invoked in 1987.¹² As a result, official records of displacement are scant and the reliability of those that do exist is doubtful. The extent of internal displacement has been a continual source of contention and the lack of reliable statistics has historically facilitated the Turkish Government's denial of the existence of IDPs. As a result, IDP women have not only been stripped of their constitutional rights to liberty and security of the person¹³ and the protection of fundamental rights and freedoms,¹⁴ they have also been denied adequate recognition and support during the process of displacement. In addition, women continue to be ignored in the development of planning processes to deal with displacement and its consequences and their specific needs often go unmentioned.

Although Turkey has been bound by the ECHR since 1989, in August 1990 it filed declarations with the Council of Europe pursuant to Article 15 of the ECHR, which provides for limited derogations in times of emergency. The declarations related to the rights to liberty and security of person; a fair hearing; respect for private and family life; an effective remedy; and freedoms of expression and of association (Articles 5, 6, 8, 10, 11, and 13). In its declarations, Turkey stated that threats to its national security in south-east Anatolia amounted to a threat to the life of the nation within the meaning of Article 15 of the ECHR.¹⁵

Since that time there has been a perceptible shift in the Turkish Government's approach, although there is much evidence to suggest that this shift exists on paper to a far greater extent than it does in reality. For example, according to a 1998 Parliamentary Commission investigating forced migration during the state of emergency, the evacuation of villages was unlawful and may be understood

12 Ibid, 19.

13 *Constitution of The Republic of Turkey*, Art 19.

14 *Constitution of The Republic of Turkey*, Art 40.

15 Council of Europe *List of the Declarations Made by Turkey Complete Chronology as of 3/9/2007* <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=TUR&NT=&MA=3&CV=0&NA=&CN=999&VL=1&CM=5&CL=ENG>> (last accessed 3 September 2007).

as a violation of numerous rights enshrined in the Turkish Constitution.¹⁶ This recognition of the unlawfulness of village evacuations in the 1980s and 1990s was a positive sign. However, ten years later there has been little progress in terms of substantive improvements to the everyday lives of IDPs in Turkey or providing adequate redress for the wrongs recognised by the Parliamentary Commission. Further, the disadvantage suffered by women in Turkish society has a significant impact upon the way in which women's constitutional rights were and continue to be violated. For example, female IDPs have very limited access to the mechanisms of justice and their access to essential services is restricted. In addition, the Turkish Government has failed to provide support through literacy and language training and other programmes to make the transition from internal displacement to some form of settlement possible. There is little recognition of gender-specific violations of constitutional rights in the Turkish government's policies dealing with IDPs to date. Women are also severely under-represented in the political arena, leaving the representation of women's issues to a small number of women and a large number of male politicians who operate within traditional patriarchal social structures. International law and policy are therefore of particular significance.

Despite the many practical similarities between the situation of women as refugees or asylum seekers and those who are internally displaced, the legal protection available to IDP women pursuant to international legal mechanisms is significantly less than that available to refugees and asylum seekers, which is itself extremely restricted. The range of international mechanisms that IDPs can benefit from is limited to those international and regional treaties signed and ratified by the country in which they are displaced. However, as there are no binding international instruments dealing with internal displacement, IDP women have historically had little choice but to rely on more general international treaties dealing with human rights and discrimination. In the past decade, these instruments have been supplemented by one significant non-binding instrument. In 1994 the UN Commission on Human Rights gave Dr Francis Deng the mandate to develop a set of principles, addressing the specific needs of IDPs by identifying rights and guarantees relevant to their protection before, during and after such displacement.¹⁷ Although the Guiding Principles

16 *T.B.M.M. Tutanak Dergisi*, "Doğu ve Güneydoğu Anadolu'da Boşaltılan Yerleşim Birimleri Nedeniyle Göç Eden Yurttaşlarımızın Sorunlarının Araştırılarak Alınması Gereken Tedbirlerin Tespit Edilmesi Amacıyla Kurulan Meclis Araştırma Komisyonu Raporu", 53 (Dönem 20) (2 June 1998).

17 Dr Francis Deng *UN Guiding Principles on Internal Displacement* Hum. Rts. Res. 1998/50, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Introduction.

on Internal Displacement are not legally binding, they echo principles which can be found in legally binding covenants and conventions and they are now widely accepted as representing the benchmark for both states and non-state actors in dealing with internal displacement.

The Guiding Principles address each stage of the phenomenon of displacement, as well as the responsibilities of states and others in relation to IDPs. These principles are consistent with international human rights and humanitarian law and will therefore form the focus of the following discussion as a useful summary of the major principles in international human rights law. The Guiding Principles are divided into three sections. Section I outlines the general principles according to which the Guiding Principles are to be applied. Section II focuses upon protection from (or prevention of) internal displacement. Section III outlines principles relating to protection during displacement and is therefore of most relevance to the situation of women in urban areas of western Turkey, who have already been displaced. Section IV relates to humanitarian assistance and Section V relates to return, resettlement and reintegration.

While we will focus on principles that are relevant to the post-displacement scenario existing in Turkey, it is important to note that the Guiding Principles also address the responsibilities of all parties in relation to protection from displacement, requiring preventive measures and appropriate planning should internal displacement be *the only feasible option*. Although new instances of internal displacement are now relatively rare in Turkey, there were occasional reports of village evacuations in 2007¹⁸ and ‘development’ projects continue to pose a threat for thousands of Kurdish people who will be displaced if the projects go ahead. The South-eastern Anatolia Project (often referred to as GAP, its Turkish acronym) is a case in point. GAP involves, among other projects, the construction of twenty-two dams along the Tigris and Euphrates rivers. If GAP continues to completion, the scale of resulting destruction and displacement will be enormous. The Ilisu Dam alone is expected to affect between 55,000 and 78,000 people who are mainly Kurds. Of these, it is anticipated that at least 11,000 people will lose all of their land.¹⁹

18 ‘Returning Villagers Sent Back,’ *Tolga Korkut* 20 August 2007 <<http://www.bianet.org/english/kategori/english/101219/returning-villagers-sent-back>> (last accessed 13 April 2008).

19 ‘Arbitrary Expropriation Begins at Contested Ilisu Dam Site: Joint press release of WEED, Berne Declaration, Eca-Watch Australia, KHRP, FERN, Amis de la Terre and BankTrack *World Economy, Ecology & Development Online* 24 October 2007 <http://www.weed-online.org/themen/766854.html> (last accessed 13 April 2008) and KHRP FFM Report (internal) October 2008

Although the final Export Credit guarantees have not been signed, the Turkish government has begun expropriating lands, completely ignoring the conditions set out by the Export Credit Agencies financing the project. In October 2007, fact finding missions undertaken by The Berne Declaration and the Kurdish Human Rights Project found that the expropriation process has commenced in Ilisu and Karabayır villages without project implementation structures and grievance mechanisms being put in place.²⁰ The missions also found that those affected were not informed of their rights under the conditions set out by the ECAs and that the expropriations did not conform to these conditions. The sole proposed resettlement site is uninhabitable, as there is no water supply, no fertile land and it is situated on a steep and rocky hill. Further, the compensation offered amounts to about half the price usually paid for land and houses in the area. All of the families interviewed stated that they only accepted the compensation offered because the only resettlement site was unsuitable. These factors led the missions to question the purpose of the ECA conditions, which include making plans for income restoration and resettlement, if the only practicable option for those being displaced is to accept the meagre cash compensation.

The way in which the Ilisu Dam project has been managed and the recent arbitrary expropriations illustrate that the Turkish government continues to ignore the principle of minimization of displacement set out in section II of the Guiding Principles. There has also been a continuing failure to meet the required standard of protection for the people, environment and sites of archaeological significance required by foreign Export Credit Agencies. The offer of an uninhabitable resettlement site also indicates that the Turkish government has failed to ensure that to the greatest practicable extent, IDPs are provided with proper accommodation, satisfactory conditions of nutrition, health and hygiene; and that members of the same family are not separated.²¹ A suitable water supply and fertile land are crucial to the agrarian lifestyle of the Kurds. Therefore, without significant transitional programmes, a site without farming land or water does not represent the provision of adequate nutrition, health and hygiene.

As international law is constantly developing, the international treaties that are reflected in the Guiding Principles continue to be useful in their own right. It is therefore relevant to briefly examine relevant provisions contained in CEDAW

20 The Berne Declaration Report of *Ilisu Fact Finding Mission: Expropriation and Compensation in Ilisu Village and Karabayır* (The Berne Declaration: Switzerland) 2007 p 2-3.

21 Dr Francis Deng *UN Guiding Principles on Internal Displacement* Hum. Rts. Res. 1998/50, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 7(2).

and the Geneva Conventions. In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms will be explored in some detail.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979. It sets out a definition of discrimination and establishes an agenda for action to end such discrimination. CEDAW specifically protects women's equal enjoyment of human rights and fundamental freedoms in the political, economic, social, cultural, civil and any other field. By becoming a party to CEDAW, Turkey has committed to the implementation of measures to end discrimination against women by incorporating the principle of equality of men and women in the legal system, abolishing all discriminatory laws and adopting laws that prohibit discrimination against women. While the principle of equality is dealt with in detail within the Guiding Principles, CEDAW retains an important role as a result of the positive obligations to make changes to the legal system. CEDAW is also important, in principle, as its Optional Protocol provides a mechanism for making individual complaints to the Committee on the Elimination of Discrimination against Women about states party to CEDAW. As Turkey has ratified the Optional Protocol to CEDAW, this mechanism is of particular relevance for IDP women who continue to experience both systemic and direct discrimination.

The Geneva Conventions of 1949 regulate the conduct of armed conflict that occurs within the territory of a state. Common Article 3, which is part of all four of the Geneva Conventions, applies to 'armed conflict not of an international character' that occurs within the territory of a party to the Convention such as Turkey.²² In general terms, Common Article 3 requires that all people who are not taking an active part in hostilities are treated humanely. This brings the Turkish government's treatment of IDP women during the armed struggle within the scope of a binding international legal instrument. Although Turkey is clearly bound by Common Article 3, it disputes the application of that provision to the situation in south-east Turkey.

An instrument of increasing importance for IDP women in Turkey is the European Convention for the Protection of Human Rights and Fundamental

22 *Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949) 75 U.N.T.S. 31; *Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (1949) 75 U.N.T.S. 85; *Convention (No. III) Relative to the Treatment of Prisoners of War* (1949) U.N.T.S. 135; and *Convention (No. IV) relative to the Protection of Civilian Persons in Time of War* (1949) 75 U.N.T.S. 287.

Freedoms (ECHR). The ECHR was established by the Council of Europe in 1950, as a means of implementing provisions of the Universal Declaration of Human Rights and achieving greater unity and understanding between the Council members.²³ Turkey ratified the ECHR in 1954. The right for individual applications from Turkish citizens to the European Commission of Human Rights was recognised in 1987 and the compulsory jurisdiction of the ECtHR was recognised in 1989.²⁴ However, as mentioned previously, by May 1990 Turkey had filed declarations of its intention to derogate from a range of rights in response to 'threats to its national security in south-east Anatolia.' These derogations were progressively withdrawn over the next decade with the final withdrawal occurring in 2002.²⁵ The ECHR is relatively broad in scope and therefore the particular provisions that will be relevant for any individual woman will depend upon her individual circumstances. However, three provisions can be identified as being most likely to apply to the experiences of IDP women in urban areas of western Turkey. Articles three, eight and fourteen relate to the prohibition of torture; the right to respect for family and private life; and the right to an effective remedy respectively.

Despite the derogations referred to above, many cases have been taken to the European Court of Human Rights (ECtHR) by or on behalf of Kurds from Turkey. These proceedings have generally centred on whether the evidence before the Court was sufficient to prove that violations had occurred, rather than whether the alleged acts, if proven, constituted a violation of the relevant right. The Applicants generally alleged that the security forces had destroyed villagers' homes, personal belongings, livestock and crops, forcibly evicting them from their homes. Allegations have also been made in some cases that the security forces tortured or killed the applicants' relatives or were responsible for their disappearance. Despite the Turkish Government's regular assertions that these violations were the fault of the PKK, the Court has increasingly found Turkey responsible. On these occasions the Court has ordered Turkey to pay the

23 European Convention for the Protection of Human Rights and Fundamental Freedoms, Opened for signature 4 November 1950, 213 U.N.T.S. 222, Entered into force 3 September 1953 <<http://www.echr.coe.int/echr/>> (last accessed 4 September 2007). ('ECHR').

24 Protocol No. 11 to the ECHR, which came into force on 1 November 1998, mainstreamed the existing twinned Strasbourg mechanisms (European Court of Human Rights and the European Commission on Human Rights) with a single body, the European Court of Human Rights.

25 Council of Europe List of the Declarations Made by Turkey Complete Chronology as of 3/9/2007 <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=TUR&NT=&MA=3&CV=0&NA=&CN=999&VL=1&CM=5&CL=ENG>> (last accessed 19 April 2008).

applicants pecuniary and non-pecuniary damages, which reflect both the damage to their property and their significant trauma and psychological suffering.

Article 3 of the ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The ECtHR has found Turkey to have violated Article 3 of the ECHR in a number of cases and it is perhaps telling that the first time the ECtHR found that a European State had violated the prohibition on torture was in the case of *Aksoy v Turkey*.²⁶ The ECHR prohibits torture in absolute terms and no derogation is permissible under Article 15. For a finding of torture to be delivered, there must be a factual finding of deliberate inhuman treatment causing very serious and cruel suffering.²⁷ Where that finding cannot be made, the court may decide that the case is one of inhuman or degrading treatment, as opposed to torture.

The relevant standard of proof for finding a violation of Article 3 is proof beyond reasonable doubt. The ECtHR has stated that such proof may 'follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'²⁸ Where an individual has been taken into custody in good health but is found to be injured in some way at the time of release, the State carries the burden of providing an explanation for how those injuries were caused and producing evidence to establish reasonable doubt as to the veracity of the allegations of torture, especially where these are supported by medical reports. However, it appears that the only presumptions the ECtHR is willing to accept are those raised by medical evidence or by the pre-determination of an existing and sustained practice or pattern of ill-treatment. This trend has led some commentators to suggest that the ECtHR is perhaps over-reliant on medical reports, given that many forms of torture such as hosing, sleep and food deprivation and other forms of psychological torture leave no evidence on the body that could be corroborated by medical examination.²⁹ This introduces difficulties for women who suffer torture of a sexual nature, as there are complicated issues of honour surrounding any decision to seek medical attention. Further, as much of the violence experienced by IDP women in Turkey is perpetrated by family members, there may be no opportunity to obtain medical reports or other official corroborating evidence for fear of further violence.

26 KHRP Case, ECtHR, Appl. No. 21987/93, *Aksoy v Turkey*, judgment of 18 December 1996.

27 KHRP Case, ECtHR, Appl. No. 21987/93, *Aksoy v Turkey*, judgment of 26 November 1996, para 63.

28 See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 161

29 Kerim Yildiz and Frederick Piggott *An Ongoing Practice: Torture in Turkey* (London: KHRP) 2007 p 103.

Article 8 of the ECHR is also of particular relevance for women in Turkey, given that their lives are often restricted to the home and family life. Article 8 provides that everyone has the right to respect for their private and family life, their home and their correspondence. Unlike the prohibition of torture, the right to private and family life is subject to a number of exceptions. Interferences with private or family life by a public authority are permitted where necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The State has clear negative obligations to avoid arbitrary interferences with the right to respect for private and family. However, it may also owe positive obligations where necessary to achieve *effective* respect for these rights.³⁰ The ECtHR has considered that it is appropriate for the State to have a margin of appreciation in having regard to the fair balance between the interests of the individual and the community as a whole.³¹ Further, in striking the required balance, the aims referred to in the second paragraph of Article 8 may be of relevance.³² The applicability of this provision will therefore depend largely upon the facts and circumstances of the individual case.

One of the most relevant provisions under the ECHR is the obligation to provide an effective remedy pursuant to Article 13. This requires a ‘thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure,’ under Article 13 of the ECHR, and under Articles 2 and 3 ECHR where an allegation exists of a killing, disappearance or the use of torture.³³ The Court has found a series of violations of Article 13 in particular because of the ineffectiveness of the criminal law system in respect of actions of the security forces in south-east Turkey in the 1990s, including in relation to IDPs.

However, although restitution and compensation are established remedies under international law, the ECtHR has never, in the case of the Kurds of south-east Turkey, ordered the Applicants’ property to be returned to them or that the Government provide the means for applicants to return to their villages and reconstruct their lives there. When comparing this trend to other cases not

30 ECtHR, Appl No 10699/05, *Paulik v. Slovakia*, judgment of 10 October 2006, p 9.

31 See ECtHR, Appl No 74826/01, *Shofman v. Russia*, judgment of 24 November 2005.

32 See ECtHR, Appl No 9310/81, *Powell and Rayner v the United Kingdom*, judgment of 21 February 1990.

33 KHRP Case, ECtHR, Appl. No. 21987/93, *Aksoy v Turkey*, judgment of 26 November 1996.

involving Turkey it is apparent that the Court has indeed ordered the return of property to the Applicants, or failing that, the payment of compensation.³⁴

In the case of *Akdivar*, the Court held that the state should ‘make reparations for [the consequences of its breach] in such a way as to restore as far as possible the situation existing before the breach’, also known as the principle of *restitutio in integrum*.³⁵ However, the Court stated that if *restitutio in integrum* is practically impossible the respondent states are free to choose the means whereby they will comply with the judgment under the supervision of the Committee of Ministers, and the Court will not make consequential orders or declaratory statements in this regard.³⁶ It is likely that the Court’s decision in *Akdivar* was largely due to the security situation in the Southeast, ordering the payment of compensation instead of requiring Turkey to allow the Applicants to return to an area plagued by violent conflict. However, the Court made statements to the effect that if there was a change in circumstances, with less conflict in the Southeast, the Government should develop positive policies to allow for the return of IDPs to their villages and homes.³⁷ Since the lifting of the state of emergency in the region in 2002, applicants before the ECtHR were hopeful that they might be afforded the opportunity to return to their villages and start rebuilding their lives. However, as will be discussed later, that has not proved to be the case.³⁸

A further problem for applicants who are awarded a remedy is the lack of any body that has the power to ensure Turkey implements the ECtHR’s orders. The Council of Europe’s Committee of Ministers is responsible for ensuring that remedies are implemented. However, the Committee of Ministers has not been successful in ensuring the Applicants’ remedy or persuading the Turkish Government to implement an effective general return policy. Turkey often fails to implement adverse ECtHR judgments when they are given. In its 2002 Regular Report the EU pointed out that ‘Turkey’s failure to execute judgments of

34 ECtHR, Appl. No. 14556/89, *Papamichalopoulos v. Greece*, judgment 31 October 1995. See also Appl. No. 28342/95, *Brumărescu v. Romania*, judgment 23 January 2001.

35 KHRP Case, ECtHR, Appl. No. No 21893/93, *Akdivar and Others v Turkey*, judgment of 1 April 1998, para 47.

36 KHRP Case, ECtHR, Appl. No. No 21893/93, *Akdivar and Others v Turkey*, judgment of 1 April 1998, para 47.

37 Mark Muller ‘Strategy and Discussion Meeting on the Situation of Internally Displaced Persons and the Law on Compensation for Damage Arising from Terror and Combating Terror (Law 5233)’ (speech delivered at conference between KHRP, BHRC and DBA conference, Diyarbakır, Turkey, 11 June 2005).

38 See below ‘The Compensation Law’.

the ECtHR remains a serious problem.³⁹ It cited 90 cases in which Turkey failed to ensure just satisfaction of the Court's orders, and a further 18 freedom of expression cases in which the state failed to rectify the consequences of domestic criminal convictions which violated the ECHR.⁴⁰ Subsequent reports have stated that Turkey has made increased efforts since 2002 to comply with ECtHR decisions, yet while the Commission believes these efforts may assist in combating systematic violations of international law, further action will be necessary in order to eradicate the systematic infringements of the civil and political rights of the populace.⁴¹ Such continual violence may be taken to indicate an underlying vacuum of established rights. Recent progress reports attest to this, stating that despite recent reforms Turkey still accounts for over 14 per cent of cases pending before the Committee of Ministers for execution control.⁴²

Article 14 of the ECHR is also likely to be of use to IDP women in urban areas of western Turkey. Article 14 prohibits discrimination, providing that the enjoyment of the rights and freedoms set out in the ECHR 'shall be secured without discrimination on any ground.' Therefore, women who are not accorded equal treatment to men in equivalent circumstances will have an additional basis for claiming redress in accordance with the ECHR. This is particularly relevant to IDP women in Turkey, as pervasive gender discrimination and discrimination on the bases of ethnicity, language and political belief represent significant obstacles for women in their everyday lives and in their interactions with the justice system. In practical terms, applications to the ECtHR relating to IDP women are likely to consist of an allegation of a substantive violation, such as an allegation of torture; in combination with claims based on Article 13 (right to an effective remedy) and/or Article 14 (prohibiting discrimination).

While there are clearly a number of different legal avenues that might be pursued by IDP women in western Turkey, in reality their access to the mechanisms of justice is severely limited. In the domestic sphere Kurdish women who approach the authorities for protection or enforcement of their rights are likely

39 Commission of the European Communities Regular Report on Turkey's Progress Towards Accession (2002) European Commission p 26 <[http://www.europarl.europa.eu/meetdocs/committees/afet/20021021/sec\(02\)1412_EN.pdf](http://www.europarl.europa.eu/meetdocs/committees/afet/20021021/sec(02)1412_EN.pdf)> (last accessed 4 September 2007). (2002 Regular Report).

40 Commission of the European Communities 2002 Regular Report p 26.

41 Commission of the European Communities 2004 Regular Report pp 16-17.

42 Commission of the European Communities Regular Report on Turkey's Progress Towards Accession (2006) European Commission p 11 <http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/tr_sec_1390_en.pdf> (last accessed 4 September 2007). ('2006 Regular Report').

to experience further difficulties in addition to the injustices they are seeking to rectify. While this article does not consider Turkish affirmative action policy in any detail, it is clear that the State often fails to meet its obligations under CEDAW to take all appropriate measures to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Although reforms are being developed in connection with Turkey's plan to become a member of the EU, there has been very little practical change for women. Not only has there been minimal direct attention given to women's issues in the reform process, the reforms that have been developed often fail to translate into practical changes. While international law may represent hope in the sense that equality is more deeply enshrined in international legal mechanisms, there are many practical obstacles preventing Kurdish women from taking full advantage of the opportunities for redress available in the international arena. Regardless of international or domestic laws, many women in urban areas of western Turkey continue to live an existence ruled by customary and religious practices that clearly violate their rights on paper. The following discussion attempts to illuminate that reality of disempowerment while illustrating how domestic and international laws may be applicable.

The Experiences of Internally Displaced Women in Western Turkey

The Turkish Government has historically failed to investigate the nature and extent of internal displacement within its borders, making it difficult to properly assess the impact of displacement on particular categories of IDPs, such as women or city slum-dwellers. Therefore, much of the data and commentary about female IDPs is anecdotal or based on inferences taken from more general sources. However, there has been a shift in the past five years, with greater attention being paid to IDPs in the domestic and international spheres. For example, in the international arena, the European Court of Human Rights found in the cases of *Akdivar and others v Turkey*⁴³ and *Menteş and others v Turkey*⁴⁴ that Turkish security forces were guilty of village destruction and forcing villagers to flee. Official recognition of the fact of internal displacement in Turkey has enabled further investigation to an extent, particularly by civil society organisations. Nevertheless, it remains necessary to make inferences from the experiences of

43 KHRP Case, ECtHR, Appl. No. No 21893/93, *Akdivar and Others v Turkey*, judgment of 16 September 1996.

44 KHRP Case, ECtHR, Appl. No. 23186/94, *Menteş and Others v. Turkey*, judgment of 28 November 1997.

IDPs more generally and women in Turkey as a whole where specific data is not available.

The relative safety of the western cities to which many IDP women were displaced was not sufficient to overcome the difficulties facing them. Rather, migration to these cities represents another stage of displacement during which additional problems arise from the urban environment. In the urban context the situation of IDPs is complicated as a result of changes in family and community structures, domestic and state violence, and bias against women, which is compounded for IDP women as a result of their ethnicity and their educational and economic standing in Turkish society. IDPs suffer disproportionately high levels of psychological problems as a result of the reality and threat of violence, combined with the severe social dislocation associated with displacement.⁴⁵ They are at an economic disadvantage and lack the social support networks necessary to survive in times of crisis. These problems create a complex situation in which many cumulative difficulties have an impact at an individual, family and community level. As one lawyer from the Human Rights Association in Batman said: "The pressures on all of us are unbearable...but our women and girls suffer in specific ways and we need to hear their voices and respond to their cries for help."⁴⁶

Changes in Family and Community Structures

The traditional economy of Kurdish villages in Turkey is based on agriculture and animal husbandry. Close communal living arrangements based on kinship ties and traditional cultural practices such as those relating to births, marriages and deaths are crucial to everyday patterns of life. However, these features are often absent from the urban context. One of the most fundamental problems impacting upon the existence of IDP women in Turkey is the alteration of traditional family and community structures that reflect and sustain Kurdish culture. This alteration is both an ongoing consequence of the conflict in the Southeast and a necessity in order to survive in the vastly different environs of cities in western Turkey.

In dealing with the geographical shift after displacement, many families attempted to recreate their village structures in the cities, building cheap houses on the city fringes in an attempt to reproduce the communal living arrangements to which they were accustomed. However, the organisation of society in a way

45 Mark Muller and Sharon Linzey *The Internally Displaced Kurds of Turkey: Ongoing Issues of Responsibility, Redress and Resettlement* (Kurdish Human Rights Project: London) 2007, p 97.

46 KHRP interview with 'DTP' (Democratic Society Party) Hakkari, 25 January 2007.

that reflected familiar village life is restricted, given that there are estimated to be millions of Kurdish girls without fathers, widows and wives of the 'disappeared' and significant numbers of older women who are both widowed and have lost the sons and grandsons who would have supported them in their old age. These losses naturally have impacts upon women in the form of bereavement, grief and trauma at an individual level. The absence of men and boys has also resulted in a shift in the household balance with many Kurdish women becoming single heads of households. The existence of female-led households represents an obstacle to the transition of Kurdish community structures to the urban context, as concepts of female leadership are absent from the patriarchal structure predominant in many Kurdish communities. Therefore, such households are likely to be excluded from the pseudo-village arrangements in the cities, as their existence is not conducive to the urban approximation of the traditional community structure. Single women are at a particular disadvantage, as they continue to be disempowered in accordance with traditional social structures while becoming solely responsible for the survival of their families in the city. While social exclusion is a key feature of the lives of most IDPs, the exclusion experienced by households led by a single female is distinctive in that it combines the general exclusion of IDPs and women in Turkey with exclusion from Kurdish social networks as a result of all-pervasive gender discrimination. While hard data relating to the psychological impacts of this burden has not been gathered to date, the likely practicalities of life for female heads of households in Turkey are clear: violence, inequality in employment and a lack of regard for the position of IDP women has left many in a state of destitution that impacts upon economic, psychological, social and political aspects of their lives.

The Compensation Law

The way in which changes in family and community structures contribute to the disempowerment of female IDPs is illustrated by the operation of Law 5233 (the Compensation Law) which was passed by the Turkish Parliament on 17 July 2004. The Compensation law purports to provide full compensation for material losses inflicted by armed opposition groups and security forces combating these groups in the context of displacement occurring between 19 July 1987 and 27 July 2004. This process of compensation is managed by provincial Compensation Commissions which assess losses and damage to property and livestock, deaths, physical injury and loss of income resulting from the inability of the owner to access their property in the designated timeframe. The Compensation Commissions make offers of compensation to applicants in the first instance. Although the Compensation Law could, with some modifications, represent an

adequate remedy, arbitrary reductions in the amount of compensation being awarded, discrimination, unrealistic evidentiary requirements and a number of procedural obstacles mean that many Kurds have experienced great difficulty in obtaining fair compensation.⁴⁷ The situation is so dire that the Compensation law is often perceived as nothing more than an obstacle between IDPs and justice in the international arena. The ECtHR may also provide an avenue of redress for violations of the right to an adequate remedy before a national authority pursuant to Article 13 of the ECHR as the Compensation law is often construed as yet another ineffective domestic law that slows the course of IDPs taking cases to the ECtHR. However, the international arena has become significantly less attractive since 2006, when the ECtHR found that the Compensation law constituted an adequate remedy for one applicant, as he was free to return to his village.⁴⁸ As a result, many applications to the ECtHR are being declared inadmissible and referred back to compensation commissions Turkey, despite the ECtHR's recognition of continuing corruption and inadequacies in the commissions' methods.

In addition, the Compensation law is open to a range of criticisms in relation to its specific treatment of women. One particular difficulty for women is the requirement that individuals who experienced relevant losses must apply to the compensation commission in the province where the damage was done or the loss incurred.⁴⁹ The fact of displacement to western cities remote from the villages in the Southeast where most of the damage was done therefore operates as a *de facto* exclusion for many women who are barely able to survive, let alone travel to other parts of Turkey to enforce their legal right to compensation. This difficulty is exacerbated for female heads of households, who are solely responsible for the care of children and earning an income in the urban context. The practicalities of leaving children in order to apply for compensation, in addition to the expense of travelling represent significant obstacles to their obtaining justice.

Women are also likely to be excluded as a result of the prohibition of compensation for damages suffered by convicted offenders and those convicted of assisting and harbouring terrorists.⁵⁰ Women who have been labelled as PKK sympathisers through minor actions such as providing food or medicine to their male relatives

47 Mark Muller and Sharon Linzey *The Internally Displaced Kurds of Turkey: Ongoing Issues of Responsibility, Redress and Resettlement* (London: KHRP) 2007, 61-86.

48 Inadmissibility decision in KHRP case, ECtHR, *İçyer v Turkey* Appl No. 18888/02, judgment of 12 January 2006.

49 Law 5442, Article 6.

50 Law 5233, Article 2, para 2.

are particularly disadvantaged by this provision. The exclusion of convicted offenders from the benefit of the Compensation law is arguably contrary to Article 10 of Turkey's Constitution, which requires equality before the law. Further, the exclusion of this group of IDPs effectively violates the rule against double jeopardy by punishing them twice for the conduct that resulted in their conviction under the Anti-Terror law. The objective of the Compensation Law is to compensate displaced people for damages due to displacement. This exclusion operates to give or deny a remedy (albeit inadequate) depending on which side of the conflict an individual was on. Such cases may constitute a violation of the right to an adequate remedy without discrimination in accordance with articles 13 and 14 of the ECHR.

Some women have faced a complete exclusion from compensation on the basis of their gender, being told to return to compensation commissions with a male relative. In addition to exemplifying blatant gender discrimination and having no legal basis, this type of response ignores the fact that many women have no living male adult relatives. Such exclusion may amount to a further infringement of their right to equality before the law in violation of Article 10 of the Turkish Constitution. Women who have experienced material losses may therefore have to choose between 'cutting their losses' in a continuing struggle against poverty and discrimination in Turkey or somehow gathering the funds and support necessary to take their case to the international arena.

Exclusion on these and other bases is an aspect of the Compensation Law that warrants further attention. With further statistical and evidentiary support, exclusion from the Compensation Law may form a sufficient basis for a claim of denial of an effective remedy in contravention of Article 13 of the ECHR. Article 13 is often used in conjunction with other provisions such as Article 3 and Article 8 combining the claim of a substantive violation (such as torture) with a claim that the State failed to properly investigate or provide an adequate remedy. This avenue of legal challenge may also be strengthened by the ECtHR's frequent findings that many of the Turkish courts' decisions pursuant to the Anti-Terror Law were the result of unfair court procedures, in violation of the right to a fair trial enshrined in Article 6 of the ECHR.

It is well-documented that IDPs and women in particular have experienced grave detriment to their psychological and social wellbeing in the course of displacement. A 1998 medical study found that 66 per cent of the subject group of internally displaced Kurds were suffering from post-traumatic stress

disorder and 29.3 per cent were suffering from severe depression.⁵¹ A 2002 study found that 9.5 per cent of the subjects suffered from mental illness which arose during or after displacement.⁵² However, the Compensation law only provides compensation for pecuniary losses as opposed to those that are not easily translated into monetary terms. The basis for this exclusion appears to be the Turkish Government's belief that IDPs have not suffered trauma. One MP, who is also a member of the Human Rights Commission in Turkey, demonstrated a crucial lack of awareness or perhaps wilful ignorance of the fate of the majority of IDPs stating that they did not have far to travel or many belongings and assuring KHRP interviewers that 'everyone has a contact in the city they can call on.'⁵³ This attitude clearly ignores the complex problems facing many IDPs and particularly women as a result of their displacement.

The ECtHR has awarded both pecuniary and non-pecuniary damages as compensation for IDPs whose homes were destroyed in recognition of the suffering and distress of applicants. For example, in *Hasan İlhan v Turkey* €14,500 the Applicant was awarded in respect of non-pecuniary losses in addition to €33,500 for pecuniary losses.⁵⁴ Similarly, in *Çelik and İmret v. Turkey* the ECtHR awarded Çelik €10,000 and İmret €5,000 for non-pecuniary damages plus costs and expenses.⁵⁵ The fact that the ECtHR has made awards for non-pecuniary losses in such cases suggests that it may be possible to bring applications to the ECtHR for a claim of inadequate remedy in violation of Article 13 of the ECHR on the basis that the Compensation Law does not provide for awards of non-pecuniary damages.

The Compensation Law is just one example of the way in which internally displaced women are disempowered by legislation and policy, both official and unofficial, as a result of changes in the family and community structures within which they exist. While Kurdish men have suffered grave violations of their rights at the hands of the Turkish authorities, they are, to a certain extent, involved in political processes and have certain basic advantages such as full legal personality and a generally higher standard of education than their female counterparts. Although

51 Dr Aytekin Sır et al "A Preliminary Study on PTSD after Forced Migration" Turkish Journal of Psychiatry (1998) pp 173-180.

52 Mehmet Barut, Göç-Der, (Sociological Analysis of the Migration Concept: Migration Movements in Turkey and Their Consequences) (2002) Mersin University, see Table 243.

53 KHRP Interview with Cavit Torun, AKP MP and member of the Human Rights Commission, 6 July 2006.

54 KHRP Case, ECtHR, *Hasan İlhan v. Turkey*, Appl. No. 22494/93, judgment of 9 November 2004.

55 ECtHR, *Çelik and İmret v. Turkey*, Appl. No. 44093/98, judgment of 26 October 2004.

the Compensation Law purports to provide full compensation for displacement between 1987 and 2004, it is clear that for women in urban areas of western Turkey the Compensation Law offers little hope. Rather, the Compensation Law entrenches the gender discrimination that pervades Turkish society and fails to consider the specific needs of female IDPs.

CEDAW

As discussed above, one of the major difficulties IDP women face is entrenched gender discrimination in the laws and policies of their country of origin. Article 2 of CEDAW, which Turkey has ratified, affirms that the States Parties agree to pursue ‘by all appropriate means and without delay, a policy of eliminating discrimination against women.’⁵⁶ Although that provision does not amount to a prescriptive obligation, it certainly requires Turkey to direct its attention towards the elimination of gender discrimination in its policies, laws and conduct. That is made clear by Article 2(d) whereby Turkey agrees to “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.”

The situation of IDP women in general and instances of gender-based discrimination in the operation of the Compensation Commissions and in relation to proof of property ownership demonstrate the failure of the Turkish Government to meet its international obligations in this regard. The different treatment of women in Turkey as compared with men and specifically IDP women also constitutes a failure by the Turkish Government to accord to women equality with men before the law as required by Article 15(1). Equality in relation to the administration of property is specifically required by Article 15(2), reinforcing the gravity of the Turkish Government’s failures in that respect with regard to IDP women. The Turkish Government has not only failed to develop policies directed towards the elimination of discrimination and the achievement of substantial equality, it continues to directly discriminate against IDP women in the administration of its existing laws and policies.

Turkey has also ratified the Optional Protocol to CEDAW,⁵⁷ which provides for the Committee on the Elimination of Discrimination Against Women to receive and consider communications from individuals and groups regarding States

⁵⁶ *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) 1249 U.N.T.S. 513.

⁵⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999).

Parties. Article 4 of the Optional Protocol outlines the admissibility criteria for communications to the Committee. One difficulty that IDP women face in utilizing this mechanism is the requirement that all available domestic remedies must have been exhausted before the communication is considered. However, it may be argued that the reference to “available” domestic remedies in Article 4 facilitates communications being made where individuals or groups are not accorded equality before the law, rendering the pursuit of domestic remedies futile. That argument could certainly be made in relation to IDP women who have been refused compensation by domestic compensation commissions on the basis of their gender or told to return with a male relative. Although the Guiding Principles broadly reflect the content of CEDAW, the possibility of making a communication to the Committee on the Elimination of Discrimination against Women remains as an additional avenue for achieving justice for IDP women in Turkey. That is particularly the case for women in urban areas of western Turkey, who are more likely to have access to expertise and assistance in making such a communication.

Social Exclusion

Another important factor shaping the experience of Kurdish IDP women in urban centres is exclusion. This is strongly related to the changes in the social structure on which gender roles depended, as well as all-pervasive gender discrimination. Women’s responsibility for the children and household management and their contribution to all social, economic, and political processes within their villages has not translated to the urban context. These changes in their social roles, coupled with a lack of formal education and their inability to communicate in Turkish often prevent IDP women from adapting to city life, leading them to perceive their existence as a “prison-like life” in the city.⁵⁸ Linguistic disadvantage also causes IDP women difficulties in accessing essential services such as health and social aid programs.⁵⁹ For the older generation of Kurdish women who are not employed, cannot speak Turkish and cannot return to their homelands, the urban context represents absolute isolation. However, for many of the younger generation, the urban environment is the only home they have ever known and the prospect of returning to villages which have suffered from lack of re-

58 Yüксеker, Deniz, “*Internal Displacement and Social Exclusion: Problems Encountered by Internally Displaced Persons in the Provinces of Istanbul and Diyarbakir*”, in *Coming to Terms with Forced Migration: Post-displacement Restitution of Citizenship Rights in Turkey*, (Istanbul, Tesev Pub) August 2007, p 258.

59 Demirler Derya, “*Gender Dimension of the Internal Displacement Problem in Turkey*” (paper presented at EPPS and IAFFE AEA/ASSA Conference, Chicago, 5-7 January 2007).

development following their destruction is not a welcome one. This causes significant tension between those who wish to return and those who do not.

In traditional Kurdish communities, all daily activities revolve around agriculture, animal husbandry, upkeep of the household, and preparations for weddings and other celebrations. Since the household is the main site of productive activities, Kurdish women play a crucial role in providing for their family's livelihood.⁶⁰ Women in Kurdish families are responsible for key aspects of the family's survival, including making dairy products, stocking food for the winter, managing supplies and caring for children. The economic, social and cultural contributions that Kurdish women provided were vital for the continuation of the social order in the villages. Bringing up children in accordance with social and cultural traditions and teaching them their domestic roles was also important for supporting their future economic welfare.

This economic structure deteriorated significantly as a result of the armed struggle between the PKK and the Turkish Armed Forces. However, the displacement of the Kurdish population into urban centres has had a particularly detrimental effect with traditional economic relations almost completely disappearing. High unemployment rates among Kurdish men after displacement have resulted in an immediate decrease in the overall welfare of IDP families as a result of increased living expenses in western cities. This places an extra burden upon women in managing household resources and attempting to contribute some form of income. Economic exclusion is a familiar phenomenon for Kurdish women, as the Kurdish regions have historically been the most deprived areas in the country. However, even in the relative wealthy environs of western cities, Kurdish women have not experienced an improvement in their economic situation.

The prospect of women contributing to the household income is complicated by the prevalence of illiteracy in the Turkish language among Kurdish women, which is reportedly as high as 35 per cent in the Southeast.⁶¹ Further, studies have shown that Kurdish girls are less likely to be enrolled in schools compared to girls from other regions of Turkey. For example, Women for Women's Human Rights found in its study of east and south-east Turkey and an area of Istanbul mainly populated by people from those regions that 62.2 per cent of girls in the

60 Kurdish Family and Households <<http://family.jrank.org/pages/1025/Kurdish-Families-Kurdish-Family-Households.html>>, last accessed 2 November 2007.

61 Ertürk, Y. 'Report of the Special Rapporteur on violence against women, its causes and consequences', OHCHR A/HRC/4/34/Add.2. <http://ap.ohchr.org/documents/dpage_e.aspx?c=189&su=187.7> (last accessed 8 February 2007).

sample had never been to school or were not permitted to finish their primary education.⁶² As a result of this economic and educational deprivation, IDP women in western Turkey have experienced not only a horizontal, geographical, but also a vertical and downward displacement in terms of their living standards.⁶³ Further, illiteracy and lack of competency in the Turkish language mean that women and girls are often unaware of their legal rights, leaving them with no alternative to forced marriage and motherhood.

IDPs in urban areas face significant difficulties in obtaining housing and employment.⁶⁴ Further, women who have access to employment in Turkey are often paid less than their male counterparts. When discrimination on the bases of gender, ethnicity and educational opportunity are combined, as is the case for IDP women in Turkey, the impact of economic disadvantage is compounded. Both female and male IDPs often find that the urban context renders them in an economically and socially inactive position. This, in turn, exacerbates the psychological impacts of their displacement.

The Guiding Principles

Section I of the Guiding Principles outlines the fundamental principles underlying their development and application. The most basic of those principles is that the Turkish Government has the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction.⁶⁵ Therefore, the Turkish Government's historical denial of the plight of IDPs within its borders and its lack of political will in dealing with that plight may be considered to be contrary to the Guiding Principles. Further, the Guiding Principles are to be applied without discrimination of any kind, including discrimination on the basis of sex or ethnicity.⁶⁶ This is particularly relevant to IDP women in western

62 Kurdish Human Rights Project, Study: *The Increase in Kurdish Women Committing Suicide*, (European Parliament: Brussels) 2007, p 26.

63 Yüksekseker, Deniz, "Severed From their Homelands and Livelihoods; The Internal Displacement of Kurds as a Process of Social Exclusion," in *Poverty and Social Exclusion in Slum Areas of Large Cities in Turkey: report prepared for the European Commission*, 2006, p 49. <http://ec.europa.eu/employment_social/social_inclusion/docs/2006/study_turkey_en.pdf> last accessed 8 November 2007.

64 Yüksekseker, Deniz, "Diyarbakır'da Yerinden edilme Sorunu: Geri Dönüş, Kentsel Sorunlar ve Tazminat Yasası Uygulamaları" in *Zorunlu Göç ile Yüzleşmek: Türkiye'de Zorunlu Göç Sonrası Vatandaşlığın İnşası* (İstanbul: Tesev) 2006.

65 Dr Francis Deng *UN Guiding Principles on Internal Displacement* Hum. Rts. Res. 1998/50, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 3(1).

66 Dr Francis Deng *UN Guiding Principles on Internal Displacement* Hum. Rts. Res. 1998/50, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 4(1).

Turkey, as the Guiding Principles require the achievement of substantial equality between men and women. Therefore, systemic gender-based discrimination must be properly addressed in dealing with displacement in order for the Government to comply with the Guiding Principles. The ECHR also provides that the rights and freedoms it contains are to be secured without discrimination, providing an additional line of attack for women seeking to enforce their rights in the international arena.

In addition, Principle 3(2) of the Guiding Principles addresses several of the specific circumstances and situations facing IDP women. It provides that, as expectant mothers, mothers with young children and female heads of households, the special needs of IDP women in urban areas of western Turkey must be taken into account. Therefore, the particular experiences of female IDPs such as social exclusion and violence and the burdens faced by female heads of households must be considered throughout all phases of internal displacement. Providing substantively equal access to mechanisms of justice for women within the domestic legal system is one obvious area for improvement to the Turkish Government's approach. However, full attention to the needs of IDP women, such as those in urban areas of western Turkey, requires a far broader and more radical change of paradigm. Providing access to justice is a start, but what is really required is action to remove the almost constant need to revert to the justice system for the enforcement of human rights.

The Turkish Government has clearly failed to meet the standard established by Principle 18(1) of the Guiding Principles, which provides that all IDPs have the right to an adequate standard of living. This requires, at a minimum, that the competent authorities provide IDPs with and ensure safe access to essential food and potable water, basic shelter and housing, clothing and essential medical services and sanitation and that women must be able to fully participate in the planning and distribution of these basic supplies. If these principles were adhered to in the development of the Turkish Government's policies, many of the factors contributing to women's social, psychological and economic difficulties would be accorded a significant amount of attention. Transitional literacy programmes and assistance for women to find work in urban areas might be expected if the Turkish Government was truly focused on ensuring an adequate standard of living. Similarly, anti-discrimination training for law enforcement agencies would be required to ensure that women have 'safe access' to shelter and housing, particularly in situations where past or continuing violence is a factor.

One of the most significant failures on the part of the Turkish Government in meeting its obligation to provide IDPs with a decent standard of living is its failure to implement a proper resettlement plan prior to or during displacement. As a result, IDPs were left to rely upon their own connections and resources in order to find shelter, food, water and essential medical services in an alien environment. This has led to further exclusion for women, contrary to Principle 18(3), which states that special efforts should be made to ensure the full participation of women in the planning and distribution of basic supplies. As there was very little proactive planning for resettlement on the part of the Turkish Government, there has been little scope for women to become involved in any such planning. However, the Turkish Government has failed to pay proper attention to women's needs across the board. For example, Principle 19(3) provides that special attention should be given to the health needs of women, including access to female health care providers and services, such as reproductive health care and appropriate counselling for victims of sexual and other abuse. However, the reluctance of the Turkish Government to permit the use of the Kurdish language means that even if such services were provided, many Kurdish women would be unable to access them given the extremely high levels of illiteracy and the fact that many Kurdish women do not speak Turkish.

It is clear that the exclusion experienced by internally displaced women in urban areas of western Turkey is a systemic and continuing phenomenon. Women are generally excluded from any positive measures to improve the plight of IDPs and their specific needs are almost entirely neglected. Without a significant shift of paradigm on the part of the Turkish Government, this situation is unlikely to change. The way in which internally displaced women's experiences of violence are manifest is a further specific example of the disadvantage faced by this group.

Gender-Based Violence

Violence perpetrated by the state and domestic violence represent significant threats to the lives and wellbeing of IDP women in urban areas of western Turkey. Domestic violence increases during conflict and IDP women who have been forced to flee their homes are considered to be at greater risk of becoming victims of violence perpetrated by state security forces and civilians.⁶⁷ Although it is generally agreed that state violence has decreased in recent years, fear of

67 Amnesty International, 'Turkey: Women confronting family violence', June 2, 2004, p. 8.

violence by State officials, particularly the police, continues to shape the lives of many people in the Kurdish regions⁶⁸ and beyond.

While reliable information does not exist in relation to IDP women in western Turkey, it is reasonable to infer that fear of the authorities continues in the post-displacement context. As a result, IDP women are likely to have little confidence in the police, which leaves them without support or protection from violation of their rights and bodies. The lack of confidence that Kurdish women have in authorities such as the police is exacerbated by the lack of gender awareness training for these authorities and the resulting entrenchment of gender discrimination within a strongly patriarchal society. Female IDPs are also marginalised by their position within their families and communities and the fact that state violence towards men is often perceived to be of greater significance than women's concerns. As a result, violations of women's rights tend to be cast as a low priority among IDPs as well as in mainstream political processes.

Similarly, violations of the constitutional right of IDP women to liberty and security of the person have received relatively little attention.⁶⁹ Many IDP women have experienced or witnessed sexual and psychological torture, killings and rape as well as the deprivation of liberty as a result of the conflict between the Turkish Armed Forces and the PKK. The nature of internal displacement in combination with these experiences and a range of other factors have apparently left IDP women susceptible to a broad range of psychological problems. Further, it has been suggested that women and girls in the IDP population of Turkey are especially prone to depression leading to actual and attempted suicide.⁷⁰ However, IDP women in particular are left entirely without support in dealing with these traumatic experiences, as a result of social exclusion and their inability to access basic social and medical services, as outlined above.

The failure of the Turkish Government to provide support for IDP women to deal with the consequences of violations of their right to liberty and security of the person is a grave problem, which has received some attention in recent times. According to a recent international recommendation by the European Parliament, there is a need for at least one shelter or refuge space for women

68 KHRP interview with Mazlum-Der, Van Branch, 23 January 2007.

69 *The Constitution of the Republic of Turkey*, Article 19.

70 Kurdish Human Rights Project, Study: *The Increase in Kurdish Women Committing Suicide*, (European Parliament: Brussels) 2007, p 43.

and children per 10,000 females.⁷¹ In July 2006 there were just eight shelters for the entire population of 70 million people in Turkey. The shelters that do exist are severely under-funded and many regions do not have a shelter at all. In January 2007 there were reports of a circular sent to governors by the Minister of Internal Affairs, Abdulkadir Aksu, stating that shelters should be set up as soon as possible in towns that do not have them and that women who turn to the law enforcement authorities should be dealt with by female officers with the victim's psychological wellbeing taking precedence.⁷² In reality many towns still do not have any form of women's shelter and those that exist are restricted in terms of the length of time a woman can be accommodated and the fact that girls under 18 and child victims of abuse cannot be accommodated at all. The State's failure to provide any form of redress for women who experience violations of their right to liberty and security of the person may also amount to a violation of the constitutional right to protection of fundamental rights and freedoms, including prompt access to the competent authorities.⁷³

The ECHR may prove particularly useful for internally displaced women who experience violence and are unable to obtain redress in Turkey. In such situations, Article 3 (prohibition of torture or inhuman or degrading treatment) and Article 13 (right to an effective remedy) are likely to be relevant. There may also be an argument for utilising Article 14 by establishing that other persons in analogous circumstances enjoy preferential treatment in accessing the domestic justice system and that this distinction is discriminatory. A difference in treatment is discriminatory according to the ECtHR when it has no reasonable and objective justification, considered in terms of the principles that normally apply in democratic societies. Such justification must be both legitimate and proportionate.⁷⁴ Therefore, internally displaced women could argue that men and especially Turkish men receive preferential treatment as victims of violence in Turkey in that the justice system reflects the patriarchal structure of Turkish society more generally, thereby marginalising women and perpetuating the dominance of men.

71 'Report on women's role in social, economic and political life in Turkey' from the Committee on Gender Rights and Equality, submitted to the European Parliament on 11 January 2007, Emine Bozkurt; <<http://www.eminebozkurt.pvda.nl>> (last accessed 24 May 2007).

72 Anatolia News Agency, 11 January 2007.

73 *The Constitution of the Republic of Turkey*, Article 40.

74 ECtHR, Ünal Tekeli v Turkey, Appl No 29865/96, judgment of 16 November 2004.

Women in Turkey are widely perceived as second-class citizens⁷⁵ and their lives are shaped by religious and customary practices without regard for the legal rights available on paper.⁷⁶ For example, perpetrators of domestic violence are rarely investigated or charged by the police and women are not protected against aggressive relatives.⁷⁷ Further, women often decide not to report domestic violence to the police, not only for fear of further abuse, but because of their belief in the concept of honour and the potential impact a report of violence may have on their families and on the Kurdish population more generally.⁷⁸ The difficulty in escaping domestic violence is compounded for those women who do not speak Turkish. For example, one female victim of domestic violence in Istanbul who managed to seek protection from the police was told to ‘go home and come back when you have learnt Turkish’⁷⁹ as she only spoke Kurdish.

As is the case for individual complaints to the Committee on the Elimination of Discrimination Against Women, women seeking to apply to the ECtHR must first exhaust all available domestic remedies. While there is a strong case for asserting that most domestic remedies are not ‘available’ to women, efforts must be made to engage with the domestic justice system before seeking a remedy from the ECtHR. Although such actions may bring about further harm, internally displaced women have no choice but to approach the Turkish authorities, even where they have little hope of obtaining any assistance.

Section III of the Guiding Principles is also particularly relevant for internally displaced women who are victims of violence, as it deals with situations where displacement has already occurred. This section outlines a broad range of fundamental human rights and measures directed towards their protection in the particular circumstances facing IDPs. For example, Principle 11(1) provides that “every human being has the right to dignity and physical, mental and moral integrity.” Further, IDPs are to be protected against rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence and any form

75 KHRP interview with AKP, Justice and Development Party, Van, 23 January 2007. KHRP interview with the Governor of Van, 23 January 2007; Interview with İHD, Hakkari, 25 January 2007.

76 Women for Women’s Human Rights – New Ways: Women’s Human Rights Training Program, 1995-2003, Evaluation Report, Associate Professor Nüket Kardam.

77 ‘Turkey’s Accession to the EU: Democracy, Human Rights and the Kurds’ KHRP, 2006, p.32.

78 *KHRP European Parliament Project: The Increase in Kurdish Women Committing Suicide: Final report* (European Parliament: Brussels) 2007, p 9.

79 KHRP interview with Gökkuşuğu Women Association, İstanbul, 16 January 2007.

of indecent assault.⁸⁰ In addition, Principle 19(2) requires that “appropriate counselling for victims of sexual and other abuses” is provided. Therefore, the Turkish Government is not only required to protect IDP women from violations of their human rights, they are also required to take the lead in addressing the consequences of such violations.

According to a recent survey, women’s experiences of sexual violence or threatened violence and threats to their lives are the main causes of psychological problems such as depression, insomnia, intensive anxiety, and hopelessness.⁸¹ IDP women in the urban context are likely to develop behaviours based on a lack of confidence, hopelessness, anger, suspicion and introversion.⁸² One survey found that ninety per cent of internally displaced women reported that psychological problems, such as stress and headache, have increased after migration to İstanbul.⁸³ For many IDP women life has become a vicious cycle of victimization, disempowerment, hopelessness and further victimisation. On that basis, the implementation of measures to meet the needs of IDP women should be a priority.

Another significant resource available to internally displaced women in international law is the growing body of international humanitarian law that regulates armed conflict within a state’s borders, such as Common Article 3 of the Geneva Conventions. Turkey is a party to the Geneva Conventions and is bound by common Article 3. Although the Turkish Government disputes the application of Article 3 to the situation in south-east Turkey, it is arguable that the hostilities between Turkey and the PKK amount to an armed conflict for the purpose of the Geneva Conventions.⁸⁴ Common Article 3 forbids violence to life and person; and outrages upon personal dignity if perpetrated against civilians and those taking no part in the hostilities. Therefore, IDP women who experience physical or sexual violence at the hands of Government forces can assert their

80 Dr Francis Deng *UN Guiding Principles on Internal Displacement* Hum. Rts. Res. 1998/50, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), Principle 11(2).

81 International Free Women’s Foundation (IFWF), *Psychological Consequences of Trauma Experiences on the Development of Migrated Kurdish Women in the European Union*, (Rotterdam: IFWF Publications) 2007, p 35.

82 Tesev, Türkiye’de Ülke İçinde Yerinden Edilme Sorunu: Tespitler ve Çözüm Önerileri, (İstanbul, Tesev) 2006, p 14, <http://www.tesev.org.tr/etkinlik/TESEV_UYE_Grubu_Raporu.pdf> last accessed 8 November 2007.

83 Aker, Tamer, “Zorunlu İç Göç: Ruhsal ve Toplumsal Sonuçları,” *Anadolu Psikiyatri Dergisi*, 2002, 3:97-103. <<http://lokman.cu.edu.tr/psikiyatri/derindex/apd/fulltext/2002/97.pdf>> last accessed 24 October 2007.

84 Dr Susan C. Breau “The situation in south-east Turkey: is it an armed conflict for the purpose of international humanitarian law?” *Legal Review* 12 (KHRP: London) 2007 p 115.

legal rights under Common Article 3. Further, since the International Criminal Tribunal for Rwanda decision in *Prosecutor v Jean-Paul Akayesu*⁸⁵ a non-military perpetrator can be convicted of sexual assault as a violation of Common Article 3 even when physical contact does not occur.⁸⁶ However, it remains unclear whether the *Akayesu* decision would prohibit violence against IDP women by another displaced person.⁸⁷

CONCLUSION

Internally displaced women are exposed to a significant level of disadvantage as a result of their displacement, which is exacerbated by continuing discrimination against women in Turkey more generally. IDP women experience a broad range of violations of their constitutional rights which are neglected by the Turkish Government. In that context, international mechanisms are of particular relevance for internally displaced women in urban areas of western Turkey, having sustained violations of their rights pursuant to the Turkish Constitution in circumstances that also arguably amount to breaches of Turkey's international obligations. Internal displacement and its consequences have had specific detrimental impacts upon IDP women in urban areas of western Turkey, where psychological, social and economic factors combine to secure their marginalization and disadvantage. The Turkish Government is responsible, both under the Turkish Constitution and at international law, for addressing this situation and must do so as a matter of urgency. Unfortunately, there appears to have been little real change in the Turkish Government's approach to displacement since those IDPs now living in western Turkey were displaced. Recent developments in relation to the Ilisu Dam clearly demonstrate the Turkish Government's blatant disregard for the human rights and fundamental freedoms of Kurds in Turkey. The lack of a satisfactory resettlement plan for those being displaced from villages affected by the Ilisu Dam project suggest that rather than minimising displacement and paying proper attention to its consequences where displacement is *the only feasible option*, the Turkish Government is repeating its past mistakes.

85 ICTR-96-4-T, 2 September 1998.

86 Malinda Schmiechen 'Student Panel on Children and Health Law: Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps' (2003) 22 Saint Louis University Public Law Review, p 511.

87 Ibid, p 511.

Kerim Yildiz and Josée Filion*

European Convention on Human Rights: Extraterritorial Acts in Iraq

Abstract

The issue of extraterritorial application of human rights treaties is particularly relevant to the present increase in state activities undertaken or producing effects across borders. The human rights obligations in international and regional instruments have been traditionally been considered as having a territorial scope. States parties have a duty to guarantee the rights recognised in the treaties to all individuals within their territories. In its decision on Banković, the European Court of Human Rights limited the trend toward a progressive expansion of the protection granted by human rights treaties, affirming that the extraterritorial reach of the European Convention was limited to the European legal space. After Banković, the European Court provided a more articulated interpretation of the issue of extraterritorial acts. In examining the case law, this article deals with the nature and extent to which a State party of the European Convention is accountable for human rights violations perpetrated by its armed forces during military operations conducted in the territory of a non-contracting state. The importance of this debate to civilians cannot be underestimated.

Introduction

In the latter half of 2007 and early 2008, more than 30 civilian-inhabited villages in Kurdistan, northern Iraq (Kurdistan, Iraq) were destroyed by the Turkish cross-border military air raids, rendering over 600 families homeless and unable to return to their villages. The air strikes, which reached 95km into Iraqi territory, destroyed and damaged schools, mosques, houses, tents, farmland and herds. A Kurdish Human Rights Project fact finding mission to the area revealed that the attack killed one woman, caused another to lose her leg and left several other civilians injured. The impact of military operations also extends to other, less immediately visible issues, such as the trauma caused to civilians, particularly children, and the destruction of traditional ways of life through the temporary or permanent displacement of village dwellers.

* Kerim Yildiz is KHRP's Executive Director and Josée Filion is a Legal Intern at KHRP. A modified version of this article was first published in *Socialist Lawyer* 49 (April 2008), 12-15.

With the Turkish Parliament authorising the military to fight the PKK in neighbouring Iraq, the Turkish Government has maintained that the attacks were within its right to self-defence, and were restricted to isolated PKK bases.¹ A statement by the Recep Tayyip Erdoğan, Turkish Prime Minister, declaring the raids a 'success' and stating that his government is 'determined to use all political and military means, both inside and outside Turkey, against the PKK',² confirms that the Turkish Government does not regard the deaths and injuries to civilians and damage to livelihood, farmland and property as contrary to its obligations under international law and human rights norms.

In *Issa and Others v. Turkey*³, the European Court of Human Rights considered the crucial question of when does the European Convention on Human Rights (ECHR or Convention) apply to human rights abuses committed outside the territory of a state party? This article deals with the nature and extent to which the ECHR is applicable to human rights violations perpetrated by armed forces of contracting states during military operations in the territory of a non-contracting state.

In April 1995, seven Kurdish shepherds were brutally killed by Turkish forces conducting a major cross-border operation against the PKK (Kurdistan Workers' Party) in Kurdistan, Iraq using artillery, F16 fighters and helicopters. After having been detained by the Turkish soldiers, their mutilated corpses were found tortured, with bullet wounds, and missing ears, tongues and genitals.

On the morning of 2 April 1995, the shepherds and four of their relatives were taking their flocks to the hills near the Azadi village in Sarsang province, close to the Turkish border. They encountered Turkish soldiers who immediately abused and assaulted them, hitting them with their rifle butts, kicking them and slapping them on the face. The following day, the Turkish army withdrew from the area. Their bodies were found in an area close to where the seven shepherds had last been seen.

According to the Turkish Government, their records did not show the presence of any Turkish soldiers in the hills surrounding the Azadi village, which is ten

1 On 17 October 2007, Turkish Prime Minister Recep Tayyip Erdoğan's government asked parliament to authorise a military incursion into Kurdistan, Iraq. By a vote of 507 to 19, the parliament authorised the Prime Minister to order strategic strikes or large-scale invasions of Kurdistan, Iraq for a one-year period.

2 BBC, "US Denies Backing Turkey PKK Raid", 17 December 2007.

3 KHRP case, ECtHR, Appl. No. 31821/96, judgment of 16 November 1994.

kilometres south of area where the Government alleged the operations took place.

The controversial issues of principle, law and fact in the *Issa* shepherds' case, and of the others discussed here, help to demonstrate why the interpretation and the practical application of the Convention's extraterritorial reach outside the Council of Europe is too important to ignore its implications.

The *Issa and Others v. Turkey* hearing

Following the events, Kerim Yildiz of the KHRP travelled to the Azadi village to interview the widows of six of the shepherds and mother of one and assist them in their complaints to the ECtHR for the illegal detention, torture and execution of their relatives.

It was undisputed between the applicants and the Turkish Government that the Turkish armed forces carried out military operations in Kurdistan, Iraq over a six-week period between 19 March and 16 April 1995. However, the fate of the applicants' complaints depended on their ability to establish that, at the relevant time, the armed forces operated in the hills nearby the Azadi village where the killings took place.⁴ In other words, was the area effectively controlled by the Turkish armed forces, and consequently, within the "jurisdiction" of Turkey for the purposes of Article 1 of the ECHR? The Government claimed that the perpetrators did not belong to the Turkish armed forces as 'the records of the armed forces do not show the presence of any Turkish soldiers in the area indicated by the applicants'.⁵

In response, the applicants argued that the victims were within the jurisdiction of the Turkish Government at the material time.⁶ This submission was based on the proposition that Turkey's ground operations in Kurdistan, Iraq were sufficient to constitute "effective overall control" of the area where the atrocities to the shepherds occurred. During the military operations, the Turkish Government deployed in excess of 35,000 ground troops, backed by tanks, helicopters and F-16 fighter aircraft; given this degree of control enjoyed by the Turkish armed forces of the area, the Turkish Government had *de facto* authority over this part of Kurdistan, Iraq. Further, the decision-making process that led to the military

4 *Issa and Others v. Turkey*, § 76.

5 *Issa and Others v. Turkey*, § 25.

6 *Issa and Others v. Turkey*, § 63.

operations in Kurdistan, Iraq took place in Turkey lent further weight to the submission that Turkey exercised jurisdiction at the relevant time. The shepherds were brought within the jurisdiction of Turkey by virtue of falling within the protected persons category defined in Article 4 of the Fourth Geneva Convention of 1949, which clearly reinforced the submission that the requirements for the applicability of Article 1 of the Convention were satisfied in this case.⁷

While affirming that the concept of “jurisdiction” within the meaning of ECHR signatories’ obligation to respect human rights is not necessarily restricted to those parties’ national territories or to the Council of Europe, the Court ruled in favour of the Government. It stated that it was ‘not satisfied that the applicants’ relatives were within the “jurisdiction” of the respondent State for the purposes of Article 1 of the Convention⁸ on the basis that they had not established ‘beyond reasonable doubt’⁹ that ‘Turkish armed forces conducted operations in the area [...] where [...] the victims were at that time.’¹⁰ The Court did however expressly declare that the Convention can be applied in Iraq – clearly outside the European legal space – to acts performed by agents of a state party if an effective overall control had been established.¹¹

The judgment indicates that Article 1 cannot be interpreted so as to allow a state party to perpetrate ECHR violations on the territory of any state, which it could not perpetrate on its own territory.¹² It has profound implications for the level of protection to be afforded to civilians who find themselves caught up in pre-planned military incursions by contracting states into the territory of a non-contracting state. A case in point is the controversial military incursions by Turkey in Iraq in 2007 and 2008.

The law

The importance of the legal formulation and evidential standard for the applicability of the “extraterritorial jurisdiction” cannot be underestimated if it is to afford this protection to civilians.

7 *Issa and Others v. Turkey*, § 64.

8 *Issa and Others v. Turkey*, § 82.

9 *Issa and Others v. Turkey*, § 76.

10 *Issa and Others v. Turkey*, § 81.

11 *Issa and Others v. Turkey*, § 74.

12 KHRP, “*Issa and Others v. Turkey* Commentary”, 7 *KHRP Legal Review* (2005), at 155-156.

Under Article 1 of the ECHR, states parties must answer for violations of the rights and freedoms committed against all persons ‘within their jurisdiction’. From the point of view of public international law, the jurisdictional competence of a state is primarily a territorial concept and refers to the state’s borders.¹³

However, the ECHR jurisprudence limits this presumption by expanding the reach of states’ obligations under the Convention by way of interpretation. It is generally accepted that the ECHR has an extraterritorial scope.¹⁴ The extent of the scope, however, is not without controversy. One such established basis for extraterritorial scope concerns states’ responsibility in respect of an area outside their national territories over which they exercise “effective overall control”. An important controversy lies in whether the victims of extraterritorial human rights violations located in non-contracting state territory can make use of the ECHR. The approach of the Court to applications brought against signatory states in respect of such extraterritorial actions is a developing jurisprudence.

In *Loizidou v. Turkey (preliminary objections)*, the Court held that Turkey was responsible for the actions of its armed forces in Northern Cyprus. It noted that the concept of jurisdiction is not restricted to the national territory of the Parties, but could also arise when a state exercises effective control of an area outside its national territory.¹⁵ While it did not define “effective overall control”, it considered several factors as the basis for its decision, including the number of personnel stationed throughout the territory, the presence of Turkish patrol and checkpoints on main lines of communication, and the existence of Turkish naval command and air forces.¹⁶

Banković and Others v. Belgium and 16 Other Nato States, concerned alleged breaches of the Convention by signatory states in respect of a NATO bombing campaign in former Yugoslavia, a non-Party to the ECHR. The Grand Chamber held the case to be inadmissible since the states did not exercise effective control

13 Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998), 287, 301 and 312-314.

14 See ECtHR sequence of authorities on the matter: *Loizidou v. Turkey (preliminary objections)*, Appl. No. 15318/89, judgment of 23 March 1995, § 62; *Loizidou v. Turkey (merits)*, Appl. No. 15318/89, judgment of 18 December 1996, § 52; *Cyprus v. Turkey*, Appl. No. 25781/94, judgment of 10 May 2001, § 76; *Banković and Others v. Belgium and 16 other Contracting States*, Appl. No. 52207/99, judgment of 12 December 2001, §§ 54 and 70; *Ilaşcu and Others v. Moldova and Russia*, Appl. No. 48787/99, judgment of 8 July 2004; *Öcalan v. Turkey*, Appl. No. 46221/99, judgment of 12 March 2003.

15 *Loizidou v. Turkey (preliminary objections)*, § 52.

16 *Loizidou v. Turkey (preliminary objections)*, § 56.

over former Yugoslavia. It went on to suggest that any extraterritorial liability of states under the Convention was limited to the territories of the Council of Europe. On this view, the Grand Chamber stressed that the Convention operates in an ‘essentially regional context and notably in the legal space of the Contracting States,’ which excluded former Yugoslavia.¹⁷ The decision was received with a high degree of criticism. If correct, the limited application of the ECHR to the European legal space would mean that a particular state action taken in the territory of another state would take place in a ‘legal black hole,’ encouraging and perpetuating impunity.¹⁸ This has been exploited by the United Kingdom in relation to the application of the ECHR to its military activities in Iraq, such as the case of *Al-Skeini and Others v. Secretary of State for Defence*, in which the House of Lords interpreted “effective control” in light of *Banković*.

The Court in *Issa* resolved any uncertainties surrounding the strictly regional character of the Convention by providing a more articulated interpretation of the issue of extraterritorial acts. The Court accepted that the Convention could have applied to Iraq – a territory clearly outside the European legal space – had Turkey been in effective control of Iraqi territory, which on the facts it had not been.

This apparent conflict between the two cases can easily be reconciled. The Court’s use of the words ‘essentially’ and ‘notably’ in *Banković* qualify the Court’s remarks that the Convention operates in a regional context and allows for the possibility of a wider extraterritorial jurisdiction.¹⁹ The “legal space” comments were *obiter dictum* as they only came after the Court found the case inadmissible and held that the air strikes were not sufficient to satisfy the effective control criterion.²⁰ Also, the Court considered the effective control test without mentioning former Yugoslavia’s status as a non-state party. The Court in *Issa* interpreted the “legal space” doctrine to say that the territory under Turkey’s control would have fallen within the jurisdiction of Turkey, and not the jurisdiction of Iraq, which is not a contracting state. This is a clear attempt by the Court to resolve any uncertainties surrounding the “legal space”, by stating that it is not a bar to jurisdiction over

17 *Banković and Others v. Belgium and 16 other Contracting States*, § 80.

18 Michael Gondek, “Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalisation?”, *Netherlands International Law Review* (2005), 348-387, at 353.

19 KHRP, “*R (Al-Skeini and Others) v. Secretary of State for Defence Commentary*”, 12 KHRP Legal Review (2007), at 292.

20 KHRP, “*R (Al-Skeini and Others) v. Secretary of State for Defence Commentary*”, 12 KHRP Legal Review (2007), at 292.

non-contracting states' territories;²¹ when the territorial locus at issue does not fall within the overall territory of the Council of Europe, this does not preclude the Convention from applying.

If this was not the case, there would be a severe limitation as far as the Convention is concerned, since some of the key sites of extraterritorial action by contracting states – most notably the United Kingdom military presence in Iraq and Afghanistan, and Turkey's military operations within Iraqi borders against the PKK – would fall outside of the “legal space” of the Convention. Under such an interpretation of extraterritorial jurisdiction, Iraqi citizens would have no remedy for human rights grievances under the ECHR.

The *Issa* judgment, in parting with the law established by *Banković* and *Loizidou* and bringing the doctrine of effective control to territories otherwise outside the “legal space” of the Convention, aligns the ECtHR's case-law with the jurisprudence of the Inter-American Commission on Human Rights and the UN Human Rights Committee. Both bodies recognise the extraterritorial applicability of their respective human rights treaties on the basis of the principle of “effective control” over the territory of both a state party and non-state party. The approach of these institutions, however, is less restrictive than the one taken by the ECtHR.²² It does not emphasise the exceptional nature of extraterritorial applicability, thus, does not place an additional burden on victims to rebut the presumption of territoriality. It further, seems to be more in line with the reality of the field and has allowed these human rights institutions to address challenging situations, such as the Guantánamo detentions in the case of the Inter-American Commission.²³

Obviously, apart from the ECHR, there are other rules of international law that may be applicable to extraterritorial state activities, such as international humanitarian law applicable in the event of an armed conflict, or customary international law of human rights. However, the unique nature of the ECHR is the fact that it includes an implementation mechanism by means of which victims can hold a state accountable for violations that it commits – or can they?

21 KHRP, “R (*Al-Skeini and Others*) v. Secretary of State for Defence Commentary”, 12 KHRP Legal Review (2007), at 293.

22 Michael Gondek, “Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalisation?”, *Netherlands International Law Review* (2005), 348-387, at 353.

23 Michael Gondek, “Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalisation?”, *Netherlands International Law Review* (2005), 348-387, at 354.

The protection of individuals and the debate over extraterritorial acts in a non-contracting state's territory

The importance to victims of extraterritorial human rights violations of the practical application of “extraterritorial jurisdiction” cannot be underestimated. Indeed, the ECtHR was conscious of the vulnerability of these otherwise unprotected victims when it recognised that a state cannot insulate itself from the Convention scrutiny by operating beyond its borders.²⁴

As the case law stands in *Issa*, this protection is however undermined by the Court's failure to provide sufficient guidance in two respects, namely the disproportionate and excessive standard of proof borne by applicants, and the limited scope of a fact-finding assessment and rulings.

While *Issa* extends the potential areas covered by the Convention in significant ways, the Court simultaneously set the highest evidentiary standard and in essence curtailed the expansion of the applicability of the Convention. In particular, the Court has made it difficult to successfully establish when a state exercises jurisdiction through its effective overall control while acting abroad. In order to prevail, an applicant must establish ‘beyond a reasonable doubt’ that a state exercised effective overall control over an area. Though this ‘beyond a reasonable doubt’ standard is not identical to its namesake in domestic jurisdictions, the Court defined the heightened standard of proof as one that ‘may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.’ This very high standard of proof poses difficulties for applicants – as it did for the applicants in *Issa* – who are often not able to marshal the amount of evidence necessary to meet the burden – particularly in covert operations where much of the available evidence is in the state's control. Further, it comes close to imposing upon applicants the duty to prove beyond a reasonable doubt, the merits of their case as a condition precedent to establishing jurisdiction.

The Court claimed that the applicants in *Issa* failed to prove that Turkish troops conducted operations in the areas where the killings took place because they did not produce evidence to rebut the Government's assertion that there was no record

24 *Issa and Others v. Turkey*, § 71, citing *M. v. Denmark*, Appl. No. 17392/90, judgment of 14 October 1992; *Illich Sanchez Ramirez v. France*, Appl. No. 28780/95, judgment of 24 June 1996; *Coard et al. v. The United States*, the Inter-American Commission on Human Rights, Report No. 109/99, Case No. 10.951; decision of 29 September 1999; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, Nos. 52/1979 and 56/1979.

of troops being in the area at the time.²⁵ The assertion remained unchallenged. The Court instead required detailed descriptions and independent testimony from the applicants, which went beyond what was considered in previous cases. In this context, the test and burden imposed on applicants has the potential of rendering their protection illusory, unless defenceless civilians, who come under attack, have the presence of mind to collect forensic material, note the names of military commanders and their regiments and complete meticulous records concerning the lodging of their complaints.

Issa also raises questions concerning the nature of the Court's fact-finding jurisdiction. Given the fundamental factual differences between the parties, particularly as to whether the perpetrators were members of the Turkish armed forces, the failure of the authorities to carry out any form of effective investigation into the allegations, and accordingly no findings of fact by any domestic courts, the Court should have acceded to the applicants' request for a fact-finding hearing as the former Commission had done in *Cyprus v. Turkey*.²⁶ That the entire application turned on a factual assessment of whether Turkish troops were engaged in operations in Azadi village at the material time, the Court should have conducted intensive factual examinations particularly into the Government's untested claim that Azadi village was some 10 kilometres short of the operation zone.

The positive implications of the *Issa* judgment can however easily be imagined. Simply by perusing the recent newspaper articles and press statements made by Turkish officials with regard to their fight against 'outlawed PKK terrorists', one can develop a potential factual basis for Turkey's effective overall control over areas in Iraq. If such facts are proven, as well as evidence provided by the victims of the human rights violations, that would mean that the victims would have a remedy before the ECtHR. However, if Turkey wins the battle over the applicability of the ECHR to extraterritorial acts in the non-contracting state of Iraq, as the U.K. has done before the House of Lords in *Al-Skeini*, this lacuna in human rights protection will only serve to perpetuate a culture of impunity amongst armed forces operating abroad, to the detriment of defenceless civilians.²⁷

25 *Issa and Others v. Turkey*, §§ 76-79.

26 § 107.

27 *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26.

Section 3: Case Summaries and Commentaries

A. ECHR Case News: Admissibility Decisions, Communicated Cases and Advisory Opinion

Advisory Opinion: On certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the ECtHR

The European Court of Human Rights (Grand Chamber): Advisory Opinion dated 12 February 2008

Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights - Article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - Resolution - Articles 21 and 22 of the Convention - Assembly Resolution 1366 (2004) and 1426 (2005).

Facts

The request for an opinion arose out of the correspondence between the Maltese authorities and the Parliamentary Assembly concerning the composition of the Maltese list of candidates for the post of Judge at the European Court of Human Rights. The submitted list of candidates did not include at least one candidate belonging to the sex which is under-represented (female) in the Court and therefore did not fulfil the criterion laid down in paragraph 3.ii of Assembly Resolution 1366 (2004), as modified by Resolution 1426 (2005).

Complaints

The Maltese Government requested that the Committee of Ministers, in virtue of Article 47 of the Convention, request an advisory opinion from the European Court of Human Rights on the following issues:

- (1) can a list of candidates for the post of judgement at the ECtHR, which satisfies the criteria listed in Article 21 of the Convention, be refused solely on the basis of gender-related issues?
- (2) are Resolution 1366 (2004) and Resolution 1426 (2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?

The Maltese Government claimed that they have submitted a list which is in conformity with the European Convention on Human Rights and that the list

can only be refused if it does not conform with the criteria listed in Article 21 of the Convention and not on gender-related issues which are not mentioned or covered by the Convention. Consequently, it was claimed by the Maltese Government that the refusal of the list was based on gender-related issues which raised a matter of interpretation of Article 21 and 22 of the Convention. Therefore, the argued the matter should be sent to the ECtHR for an advisory opinion under Article 47 of the Convention, as to whether the refusal of the list of candidates is in accordance with the Convention.

Held

In giving an advisory opinion the Court unanimously decided that it has jurisdiction to answer the first question and that it is not necessary for it to answer the second. The Court delivered the opinion that the first question should be answered by reference to the observations outlined.

The Court's Advisory Jurisdiction

The Court observes that its jurisdiction under Article 47 of the Convention is confined to “legal questions concerning the interpretation of the Convention and the protocols thereto”. The Court decided to maintain the adjective “legal” in order to rule out any jurisdiction on the Court’s part regarding matters of policy.

The intention in giving the Court advisory jurisdiction is to confer on it “a general jurisdiction to interpret the Convention, which would therefore include matters arising out of the application of the Convention but not resulting from ‘contentious proceedings’”. The examples cited at the time to illustrate the type of questions which might fall within this general jurisdiction related mainly to procedural points concerning, among other subjects, the election of judges and the procedure followed by the Committee of Ministers in monitoring the execution of judgments.

The first question asked is whether “a list of candidates for the post of judge at the European Court of Human Rights, which satisfies the criteria listed in Article 21 of the Convention, [can] be refused solely on the basis of gender-related issues”. The list by the Parliamentary Assembly amounts for the latter, legally speaking, to its refusing to elect a candidate from the list in accordance with Article 22 of the Convention. Accordingly inviting the Contracting Party concerned to submit another, different list to it. The fact that, in practice, “refusal” of a list on the basis of gender-related considerations occurs before compliance with the criteria laid down by Article 21 § 1 has been checked by means, in particular,

of the personal interviews, does nothing to alter this assessment. The question therefore concerns the rights and obligations of the Parliamentary Assembly in the procedure for electing judges, as derived from Article 22 in particular and from the Convention system in general. Accordingly, whatever its implications, it is of a legal character and as such falls within the scope of the Court's jurisdictions under Article 47 § 1 of the Convention. Consequently, the Court has jurisdiction to answer the first question.

The Court considers it appropriate to give a ruling on this question in the interests of the proper functioning of the Convention system, as there is a need to ensure that the situation which gave rise to the request for an opinion does not cause a blockage in the system.

In answering the second question the Court considers that the question concerns the effects of the two Parliamentary Assembly resolutions in question and has doubts as to whether it relates solely to "the interpretation of the Convention and the protocols thereto" within the meaning of Article 47 § 1. Thus, it is not necessary for the Court to answer it in view of the answer set out to the first question.

Merits

The election of judges is governed by Articles 21 §1 and 22 of the Convention which are mandatory and binding on all Contracting Parties in the same manner when it comes to selecting the candidates to be placed on the lists for submission to the Parliamentary Assembly. Contracting Parties take into account additional criteria or considerations for instance, a balance between the sexes or between different branches of the legal profession on a particular list or within the Court. However, Contracting Parties are obliged to fulfil all the conditions laid down in Article 21 § 1, which relate exclusively to candidates' moral qualities and professional qualifications.

The powers devolved to the Parliamentary Assembly by Article 22 entail both obligations and prerogatives. The Assembly is required to elect judges on the basis laid down by Article 22. However, the Assembly has a certain latitude in the absence of more detailed indications in that Article, when it comes to establishing the procedure for the election of judges. The task of electing judges to the Court necessarily entails the ability to assess the candidates, reflected in the ability to choose one candidate from the three nominated.

The Assembly may take account of additional criteria which it considers relevant for the purposes of choosing between candidates and may incorporate those criteria in its resolutions and recommendations. Neither Article 22 nor the Convention system sets out explicit limits on the criteria which can be employed by the Assembly. Hence, it is the Assembly's custom to consider candidates also "with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance".

The first question asked by the Committee of Ministers was whether the Court must also determine whether the Assembly may reject a list on the ground that a condition not explicitly laid down in Article 21 § 1 has not been met. In this instance the condition whereby, in accordance with Parliamentary Assembly Resolutions 1366 (2004) and 1426 (2005), each list should include at least one candidate of the sex under-represented in the Court.

In that connection the Court notes that the inclusion of a member of the under-represented sex is not the only criterion applied by the Assembly which is not explicitly laid down in Article 21 § 1. The same is true of the criterion that candidates should have "sufficient knowledge of at least one of the two official languages". This can be legitimately considered to flow implicitly from Article 21 § 1 and justified on the basis that it is necessary for candidates to have knowledge of at least one of the official languages in order to make a useful contribution to the Court's work.

However, in the Court's view what distinguishes the criterion relating to a candidate's sex from the criteria referred to in the preceding paragraph is the lack of an implicit link with the general criteria concerning judges' qualifications laid down in Article 21 § 1. The question therefore arises whether it can ignore the less constitute grounds for rejection of a list by the Assembly.

The criterion in question derives from a gender-equality policy reflecting the importance of equality between sexes. There is far-reaching consensus as to the need to promote gender balance within the State and in the national and international public service. It should be observed that although the Committee of Ministers "fully shares the Assembly's determination to secure a proper balance of the sexes in the composition of the Court and agrees therefore that lists of candidates should as a general rule contain at least one candidate of each sex". However, the Committee of Ministers chose not to act upon the Assembly's proposals to amend Article 22 of the Convention to ensure that the list contained at least one candidate of each sex.

In the Court's view the Contracting Parties have, admittedly, accepted the principle of nominating candidates of the sex under-represented at the Court, but not without provision being made for derogations from the rule. The obligation is therefore one of means, not of outcome.

Although the aim to ensure a certain mix in the composition of the lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates to satisfy all the requirements of Article 21 § 1.

In light of the foregoing, the Court considered that the first question asked by the Committee of Ministers, couched as it is in general terms, does not lend itself to a straightforward "yes" or "no" answer. In any event it is clear that, in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidates, the Assembly may not reject the list in question on the sole ground that no such candidate features on it. Accordingly, exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible.

Prohibition of torture or inhuman & degrading treatment

Alaattin Arat v Turkey

(10309/03)

European Court of Human Rights: Communicated 8 January 2008

Torture and ill-treatment – independence and impartiality of the trial court – fair trial – Articles 3 and 6.

Facts

The applicant, Mr Alaattin Arat, is a Turkish national who was born in 1961 and lives in Diyarbakır. He is the owner of a grocery shop in Diyarbakır which he runs with his brother. On 15 February 2001, before the applicant opened the

shutters of his shop, a number of police officers arrived and started smashing the shutters and windows of the shop with sledgehammers. When the applicant and his brother attempted to stop the police officers they were beaten up, arrested and subsequently placed in police custody. A medical report drawn up at the Diyarbakır branch of the Forensic Medicine Institute on the day of the arrest indicated bruises and a traumatic oedema on the applicant's body.

According to the report of arrest, the police officers had gone to the applicant's shop upon receiving information that the applicant had refused to open his shop as a protest to mark the second anniversary of the arrest of Abdullah Öcalan, the leader of the Kurdistan Workers' Party (PKK). When the officers had arrived at the shop, the applicant had sworn at them and had told them that the State could not interfere with his business. The police officers had then used force to subdue the applicant before arresting him.

On 18 February 2001, while he was still being detained in police custody, the applicant was questioned. In the verbatim records of the questioning, the applicant was recorded as having stated that he sympathised with the policies of the PKK. On 13 February 2001 he had found a leaflet on the floor outside the shop, which had been prepared and distributed by the PKK, inviting the local businesses not to open their shops on 15 February. Following this invitation, he had intended not to open his shop until 1.30 p.m.

On 19 February 2001 the applicant was examined for a second time at the Diyarbakır branch of the Forensic Medicine Institute. The medical report referred to the injuries indicated on 15 February and described another bruise, measuring 10 square centimetres, on the applicant's left foot.

On 21 February 2001 the applicant was charged with the offence of aiding and abetting an illegal organisation.

The trial at the Diyarbakır State Security Court commenced on 26 April 2001. During the trial the applicant denied having made any protest on 15 February 2001 and maintained that he had been late in opening his shop. He also maintained that the police officers had beaten him up and arrested him. The trial court also heard evidence from a number of prosecution and defence witnesses.

On 28 June 2001 the applicant was released on bail.

On 28 February 2002 the applicant was found guilty as charged and sentenced to three years and nine months' imprisonment.

In his written observations submitted to the Court of Cassation, the prosecutor asked for the conviction to be quashed as the applicant's guilt had not been proven beyond reasonable doubt.

On 11 November 2002 the Court of Cassation upheld the applicant's conviction.

Complaints

The applicant alleged that the treatment to which he was subjected by the police officers had been in violation of Article 3 of the Convention. The applicant referred to the medical reports of 15 and 19 February 2001 and complained that he had been beaten up by the police officers who had arrested him.

Invoking Article 6 of the Convention, the applicant complained that the trial court had not been independent and impartial and that it had taken sides with the police. The trial court had favored the testimonies given by the prosecution witnesses but had failed to adequately examine the testimonies of the defence witnesses. The applicant also complained that the written observations submitted to the Court of Cassation by the prosecutor had not been forwarded to him.

Held

With regard to the complaints under Article 6(1) of the Convention concerning the impartiality and independence of tribunal, the Court noted that: Diyarbakır State Security Court consisted of three civilian judges;

The applicant and his lawyer were given adequate opportunities to present their oral and written defence submissions;

When they challenged the testimony of the prosecution witnesses and argued that they were contradictory, the trial court questioned those witnesses again to eliminate any inconsistencies.

The trial court also heard evidence from the witnesses proposed by the applicant.

Accordingly, the Court held that the State Security Court did not act in an arbitrary fashion when conducting the trial therefore this limb of the applicant's complaint under Article 6(1) was rejected as manifestly ill-founded.

In conclusion, the Court adjourned the examination of the applicant's complaints concerning the ill-treatment to which he was allegedly subjected and his right to a fair hearing in respect of the non-communication of the public prosecutor's observations and declared the remainder of the application inadmissible.

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

Right to liberty and security

Tosun v Turkey

(33104/04)

European Court of Human Rights: Communicated 15 January 2008

Prolonged detention – ill-treatment – refusal to release pending trial – reliance on evidence obtained under torture – failure of the state to guarantee Convention rights – prohibition of discrimination - Articles 1, 3, 5, 6 and 14 of the Convention.

Facts

The applicant, Mr. Mustafa Tosun, is a Turkish national of Kurdish origin who was born in 1974 and lives in İstanbul.

On 10 November 1995 the applicant was arrested on suspicion of attempting to undermine the constitutional order and placed in custody at the anti-terrorist branch of the İstanbul Police Headquarters, where he was subjected to ill-treatment.

On 20 November 1995 the applicant was examined by a doctor at the Forensic Medicine Institute, who observed a number of injuries on the applicant's body and recorded them in a report.

On 21 November 1995 he was brought before the prosecutor and subsequently before the duty judge at the İstanbul State Security Court, who remanded him in custody pending the introduction of criminal proceedings against him. The applicant was charged with the above-mentioned offence on 4 December 1995.

On 6 December 2000 eight police officers were convicted by the İstanbul Court of Assize and sentenced to various terms of imprisonment for having ill-treated the applicant and a number of other detainees in police custody. Their prison sentences were suspended.

On 24 December 2002 the Istanbul State Security Court found the applicant guilty and sentenced him to life imprisonment. In convicting the applicant the court took into account the statement taken from the applicant in police custody where he was ill-treated. The applicant appealed.

On 8 December 2003 the Court of Cassation quashed the judgment. Criminal proceedings against the applicant recommenced before the İstanbul State Security Court. During a hearing held on 13 May 2004 the court refused the applicant's request for release. An objection lodged by the applicant to the decision to refuse his request for release was rejected on 28 May 2004.

Following the abolition of the State Security Courts, the İstanbul Court of Assize took over the case. On 18 May 2006 the applicant was released on bail from prison where he had been detained since 21 November 1995. The retrial is still pending before the İstanbul Court of Assize.

Complaints

The applicant alleged the violation of Articles 1, 3, 5 and 6 of the Convention regarding his prolonged detention, ill-treatment, refusal of bail pending trial, reliance of the State Security Court on evidence obtained under torture and the failure of the state to guarantee his rights under the Convention. He further complained that his above-mentioned Convention rights had been infringed on account of his Kurdish origin, Alevi beliefs and political opinions.

Held

The Court did not consider it necessary to examine the complaint under Article 1 separately, reiterating that Article 1 contains an entirely general obligation and that it should not be seen as a provision which can be the subject of a separate violation, even if invoked at the same time and in conjunction with other Articles.

The Court observed that the applicant was indeed ill-treated in police custody and that a number of police officers responsible for the ill-treatment were found guilty of this. The Court noted that the suspended sentences imposed on the police officers had not remedied the applicant's victim status. However, the

judgment convicting the police officers became final in 2000, whereas the present application was lodged on 22 July 2004. This aspect of the case was therefore rejected for failure to observe the six-month rule.

With regards to the applicant's argument that the trial court's reliance on the evidence obtained from him under ill-treatment infringed his right to a fair trial, the Court observed that the criminal proceedings against the applicant were still pending and this complaint was therefore premature. Consequently, this part of the application was rejected for non-exhaustion of domestic remedies.

The Court unanimously decided to adjourn the examination of the applicant's complaints concerning his right to bail pending trial and his right to a fair hearing within a reasonable time and declared the remainder of the application inadmissible.

Communicated under Articles 5(3) and 14 of the Convention.

Right to a fair trial

Nusret Amutkan v Turkey

(5138/04)

European Court of Human Rights: Communicated 4 January 2008

Ill-treatment – arbitrary detention – fair trial – Articles 3, 5(3), 6(1) and 6(3)(c).

Facts

The applicant, Mr. Nusret Amutkan, is a Turkish national who was born in 1970 and is in prison in Gaziantep.

The applicant joined the Kurdistan Workers' Party (PKK) in 1995 and was arrested during a military operation carried out by the Turkish armed forces on 27 April 1998. The applicant claims that he has never taken part in any armed activity and that there was no clash between the PKK members and the armed forces at the time of his arrest. According to a military report, however, the applicant and a number of other PKK members were arrested following a clash in a valley near Diyarbakır.

On the day of his arrest the applicant was examined by a doctor who observed no signs of injury on his body. The applicant was detained at a gendarme station where he was questioned and his detailed statement was recorded verbatim. In the statement the applicant was quoted as having said that he had joined the PKK on 13 February 1995 and that he had carried out a number of armed activities since that date. However, the applicant claims that he is illiterate and therefore he did not know what was written in the statement, which was not read out to him. He was forced to make his thumbprint on the statement to authenticate it. The applicant also alleged that during his detention at the gendarme station he was subjected to ill-treatment amounting to torture.

On 6 May 1998 the applicant was brought before a prosecutor and then before a judge who ordered his detention in prison, pending criminal proceedings against him. The applicant claims that, although the judge ordered his detention in prison, he was in fact taken back to the gendarme station and was not transferred to the prison until 8 May 1998. When questioned at the gendarme station and then by the prosecutor and the judge, the applicant was not represented by a lawyer.

On 15 June 1998 the applicant was charged with the involvement in activities for the purpose of bringing about the secession of part of the national territory.

The trial of the applicant and his seven co-defendants began on 20 August 1998 before the Diyarbakır State Security Court. In the course of the trial the applicant informed the Court that he had joined the PKK in 1995 and had received military training. He had taken part in only one armed attack during which he and a number of other PKK members had carried out an armed raid in a village and kidnapped four village guards. At the time of his arrest he had been armed but had not opened fire; he had surrendered to the soldiers. He also informed the trial court that he had been forced to put his thumbprint on the statement taken from him at the gendarme station.

On 28 November 2002 the trial court found the applicant guilty as charged and sentenced him to death. The death penalty was later commuted to a life sentence. The trial court found it established, on the basis of, *inter alia*, the statements taken from the applicant after his arrest and the testimony given by him during the trial, that he had carried out a number of illegal activities and had been involved in the killing and kidnapping of a number of village guards.

The applicant's appeal against his conviction was rejected by the Court of Cassation on 16 September 2003.

Complaints

The applicant alleged that while he was detained at the gendarme station he had been subjected to ill-treatment amounting to torture within the meaning of Article 3 of the Convention.

Relying on Article 5 of the Convention, the applicant complained that he had been detained at the gendarme station for 2 more days after the judge ordered his detention in a prison.

Further, relying on Article 7, the applicant complained that he had not had a fair hearing because the trial court had convicted him on the basis of the statement he had made at the gendarme station in the absence of a lawyer and which he had not read as he was illiterate.

Finally, the applicant complained under Article 18 of the Convention that the trial had continued for a period in excess of five years, during which time his rights had not been protected.

Held

With regard to allegations of ill-treatment under Article 3 of the Convention, the Court observed that the applicant failed to bring this to the attention of the national authorities. This complaint was therefore rejected for non exhaustion of domestic remedies. The applicant's complaints under Article 5 were rejected for failing to observe the six-month rule laid down in Article 35 § 1 of the Convention.

The Court deemed it appropriate to examine the applicants complaints under Article 7 from the standpoint of Article 6(1) and 6(3)(c) of the Convention, and considered it necessary, in accordance with Rule 54(2)(b) of the Rules of Court, to give notice of it to the respondent Government.

The Court considered that the complaints raised by the applicant under Article 18 of the Convention were wholly unsubstantiated and did not disclose any appearance of a violation of this provision. Therefore this part of the application was rejected as being manifestly ill-founded.

In conclusion, the Court decided to adjourn the examination of the applicant's complaint concerning his right to defend himself through legal assistance and declared the remainder of the application inadmissible.

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

Mehmet Koç v Turkey
(36686/07)

European Court of Human Rights: Partial admissibility decision 28 February 2008

Right to a fair trial – Articles 6(1) and 6(3) of the Convention.

Facts

The applicant is a Turkish national who was born in 1979 and lives in Diyarbakır.

On 27 April 1999 the applicant was arrested on suspicion of involvement in the activities of the Kurdistan Workers' Party (PKK). He was later transferred to the Anti-Terrorist Branch of the Diyarbakır Security Headquarters, where he was questioned by the police for six days and gave information about his involvement with the PKK and in the bombing of a police vehicle.

On 7 May 1999 the applicant confirmed his previous statements when he was brought before the public prosecutor and the judge at the Dicle Magistrate's Court, who remanded the applicant in custody.

On 24 May 1999 criminal proceedings were introduced against the applicant along with twenty-one other persons, accusing him of activities carried out for the purpose of bringing about the secession of part of the national territory.

On 13 December 2002 Diyarbakır State Security Court sentenced the applicant to life imprisonment.

On 7 October 2003 the Court of Cassation, noting the entry into force of the Law on Reintegration into Society (Law No. 4959) that provided under certain conditions for amnesties and reduced sentences for members of terrorist organisations, quashed the previous decision and remitted the case to the first-instance court to be reviewed in the light of new Law. The State Security Courts

were abolished in 2004 following a constitutional amendment and the applicant's case was transferred to the Diyarbakır Assize Court.

On 19 April 2007 the Diyarbakır Assize Court sentenced the applicant to life imprisonment. It held that the applicant's situation did not meet the requirements of Law No. 4959 and that his sentence could therefore not be reduced.

The applicant appealed against this decision. The proceedings were pending before the Court of Cassation when the application was lodged.

Complaints

The applicant complained under Article 6(1) of the Convention, that the criminal proceedings brought against him had not been concluded within a reasonable time and that neither the Diyarbakır State Security Court nor the Diyarbakır Assize Court which tried him had been independent and impartial tribunals. He maintained in particular that the rejection by the Diyarbakır Assize Court of his request to benefit from the Law No. 4959 had been arbitrary.

The applicant alleged that he had not been informed of the nature and cause of the accusations against him, which deprived him of adequate time and facilities to prepare his defence and that he had been denied the assistance of a lawyer while in police custody in violation Article 6(3)(a), (b) and (c) of the Convention.

Held

The Court observed that the applicant's allegation under Article 6(3)(c) that sometime between his remand in custody and the first trial hearing (between 7 May and 8 July 1999) he had been unlawfully transferred to the Anti-Terrorist Branch of the Diyarbakır Security Headquarters, where he had been questioned by police officers for six days concerns "unlawful detention" for the purposes of Article 5(1) of the Convention. However, as the applicant did not file any complaints under domestic law against his allegedly unlawful detention and the situation ceased more than six months before the introduction of application, this part of the application must be rejected in accordance with Article 35(1) and (4) of the Convention.

With regards to the applicant's other complaints under Article 6 of the Convention, the Court noted that the criminal proceedings against the applicant are still pending before the Court of Cassation. These complaints are therefore premature. Consequently, this part of the application was rejected under Article 35(1) and (4) of the Convention for non-exhaustion of domestic remedies.

The Court unanimously decided to adjourn the examination of the applicant's

complaint concerning the length of criminal proceedings brought against him and declared the remainder of the application inadmissible.

B. Substantive ECHR Cases

Right to life

Enzile Özdemir v Turkey

(54169/00)

European Court of Human Rights Chamber: Judgment dated 8 January 2008

Life – Inhuman Treatment or Punishment – Liberty of Person – Security of Person, Discrimination, Articles 2, 3, 5, 6, 13, 14 and 41.

Facts

The applicant is a Turkish national who lives in the village of Bağıvar, Diyarbakır and she is married to Mehmet Özdemir who is of Kurdish origin and a member of HADEP (People's Democracy Party).

The case concerned Ms Özdemir's allegations that her husband was abducted and killed by Turkish security forces and that the authorities failed to carry out adequate and effective investigations.

In 1995 the Diyarbakır State Security Court tried and acquitted Mehmet Özdemir of the charges of aiding and abetting an illegal armed organisation, namely the Kurdistan Workers' Party (PKK).

On 5 August 1997 Mehmet Özdemir was arrested and taken into police custody where he remained until he was released pending trial on 9 August 1997.

The applicant alleged that, twenty days before her husband disappeared, their home had been raided by security forces. She maintained that, after this event, her husband had left home to stay with his relatives in Diyarbakır for fifteen days. However, she later learned that during this time her husband had once again been arrested, interrogated and subsequently released.

The applicant stated that her husband had told her that he had been instructed by a police officer to report his whereabouts every day. In order to comply with this

request the applicant alleged that her husband had phoned the number given to him twice but no one had responded.

On 26 December 1997 Mehmet Özdemir was in a coffee house with his friends at a park near the Şehitlik vegetable market. According to eye-witnesses, Mr Özdemir was approached by armed men in civilian clothes and then forcibly taken in a taxi.

On 29 December 1997 Ms Özdemir lodged a petition requesting information as to her husband's whereabouts to the Public Prosecutor at Diyarbakır State Security Court. The petition was officially stamped "taken into custody by Security Directorate" on the same day. However, the applicant was later informed that it had been stamped by mistake and her husband was not in custody.

Ms Özdemir lodged a number of other complaints to the Diyarbakır authorities, namely the Public Prosecutor's Disappearance Bureau and the Security Directorate, as well as to the Human Rights Commission of The Turkish National Assembly. In each complaint she repeated the date, place and manner her husband had been abducted. She maintained that she could not name eye-witnesses to the abduction, as they were afraid to testify.

On 7 January 1998 Ms Özdemir lodged a petition with the disappearance bureau of the Diyarbakır public prosecutor's office. An investigation by the Diyarbakır public prosecutor into the disappearance of Mehmet Özdemir commenced. The prosecutor requested information from the Diyarbakır Security Directorate to ascertain whether Mehmet Özdemir was taken into custody as alleged by the applicant. Ms Özdemir and her sister-in-law were interviewed and the security forces were regularly requested to provide updated information as to developments in the case. The Security forces repeatedly denied that Mehmet Özdemir was in custody. On 19 December 2003 the Diyarbakır public prosecutor decided not to open criminal proceedings regarding Mehmet Özdemir's abduction. The official enquiry into his disappearance was left open until the end of 2007. Ms Özdemir has had no news of her husband for more than ten years and she presumes that he must be dead.

Complaints

Related to Articles 2, 5 and 13 the applicant alleged that her husband had been abducted and killed by Turkish security forces and that the authorities had failed to carry out an adequate and effective investigation into those allegations.

Also relying on Article 3 she further alleged that her husband had probably been subjected to torture and ill-treatment whilst in detention. In addition, the applicant complained about the physical and mental stress she had suffered due to the uncertainty of not knowing her husband's whereabouts. She also complained about the authorities' indifference to her persistent efforts to request information. The failure to carry out an effective investigation constituted a breach of her rights and those of her husband under Article 3 of the Convention which provides that "no one shall be subject to torture and inhuman or degrading treatment or punishment". Article 3 in conjunction with Article 1 requires the state to carry out effective investigations into alleged allegations of torture or ill-treatment in order to identify and punish those responsible where possible. The absence of an effective investigation into the applicant's complaints renders the prohibition under Article 3 ineffective in practice and gives the state virtual impunity.

The applicant stated under the Article 6 that her husband's unlawful detention and subsequent disappearance had deprived him of his rights to defence, his rights to see his family and counsel, his right to know of the charges brought against him and his right to be brought before a court within a reasonable time.

In breach of Article 14, in conjunction with Articles 2, 3, 5, 6 and 13, she alleged that her husband had been subject to discrimination on account of his Kurdish ethnic origin and political opinion.

Lastly, the applicant claimed EUR 134,520 for the alleged loss of earning of her husband. She further claimed EUR 47,565 for living costs including electricity, water and heating bills as well as the education cost for eight children and the average amount spent on food. In support of her claims, the applicant submitted one electricity bill, one water bill and one telephone bill under the name of Celal Özdemir.

Held

Article 2

The Court found Turkey responsible for the disappearance and the presumed death of the applicant's husband in violation of the Article 2. The Court noted the circumstances surrounding Mr Özdemir's disappearance, particularly the criminal proceeding against him, and recalled that it had previously found that the disappearance in south-east Turkey in the mid-1990s of a person suspected by the authorities of involvement with the PKK could be considered life-threatening. Indeed, Ms Özdemir claims concerning the way in which her husband had been

abducted were credible and similar to other such disappearances reported at that time.

The Court held that there had been a violation of the Article 2 of the Convention in respect of the failure to conduct an effective investigation into the circumstances in which the applicant's husband disappeared.

Article 3

The Court noted that there was no evidence, namely eye-witness testimony or Mr Mehmet Özdemir's physical remains, to establish exactly how he had died and was therefore unable to find beyond all reasonable doubt that he had been subjected to ill-treatment.

For this reason, the Court held that there was no violation of the Article 3 of the Convention in respect of the applicant's husband's alleged ill-treatment in detention.

However, concerning Ms Enzile Özdemir the Court found that the applicant had suffered for ten years and continued to suffer distress and anguish as a result of the disappearance of her husband and of her inability, despite her persistent efforts, to find out what had happened to him. She had never received any plausible explanation of or simply having been informed that an investigation had been ongoing. The manner in which her complaints had been dealt with by the authorities had to be considered to constitute inhuman treatment, in violation of Article 3.

In making this decision the Court considered the "existence of special factors" to determine if the applicant was also a victim. The Court considered if the applicants suffering had a "dimension and character" which was "distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim." The Court discussed relevant factors to take into account, for example, the proximity of the family tie. The Court highlighted the importance of the authorities' reactions and attitudes to an alleged disappearance when deciding if the applicant had suffered a violation of Article 3.

Articles 5 and 6

The Court held that there has been a violation of Article 5 of the Convention in respect of the Applicant's husband. The Court decided to examine the complaints under Article 6 from the standpoint of Article 5 alone.

The Court highlighted the safeguards provided by Article 5 and the states responsibility to account for individuals under their control. In particular, the effective measures states are required to undertake to safeguard against the risk of disappearance and the requirement to conduct prompt and effective investigations into alleged disappearances of people whilst in custody.

The Court stated that the lack of official documentation of the detention of Mehmet Özdemir was a serious failing. The Court found that there was no official trace of Ms Özdemir's husband's detention apart from the stamped petition of 29 December 1997. Furthermore, the Court's findings in relation to Article 2 left no doubt that the authorities had failed to take prompt and effective measures to safeguard Mr Özdemir against the risk of disappearance. The Court held that Mehmet Özdemir was held in unacknowledged detention therefore he was not protected by the safeguards contained in Article 5.

Article 13

The Court declared that it was not necessary to examine separately the applicant's complaint under Article 13. This decision was based on the grounds of the confirmed violation of Article 2 regarding the procedural aspect and the submissions of the parties.

Article 14

Under the Article 14 the Court found that there was no evidence in the case file to substantiate the applicant's allegation that her husband had been a deliberate target of a forced disappearance on account of his ethnic origin or his political opinions. There had therefore been no violation of the Article 14.

Article 41

The Court observes that the applicant failed to submit an itemised claim detailing the loss of income stemming from the disappearance of her husband. However the undisputed fact remains that Mehmet Özdemir had been providing his family with a living. Having regard to the family situation of Mehmet Özdemir the Court found it established that there was a direct causal link between the Authorities' responsibility for Mehmet Özdemir abduction and subsequent disappearance and the loss to his family of the financial support provided by him.

Consequently according to the Article 41 the Court awarded the applicant EUR 40,000 in respect of pecuniary damage, EUR 23,500 in respect of non-pecuniary damage and EUR 2,176 for costs and expenses.

Osmanoğlu v Turkey

(48804/99)

European Court of Human Rights Chamber: Judgment dated 24 January 2008

Life – Inhuman Treatment or Punishment – Security of Person – Liberty of Person – Discrimination – Articles 2, 3, 5, 8, 13 and 14.

Facts

This is a KHRP assisted case. The case concerned, in particular, the applicant's allegation that his son was taken into police custody and that he consequently disappeared. The applicant is a Turkish national of Kurdish origin and he owns a wholesale grocery store. At the time of the events, the store was run by his son Atilla Osmanoğlu. The applicant moved with his family to Diyarbakır in 1992 because his son had been threatened by a police officer.

In 1994 the applicant was detained in police custody for 28 days but was subsequently acquitted of all charges against him. On 25 March 1996 the applicant stated that he arrived in the grocery store and saw his son being escorted into a car by two armed men carrying walkie-talkies. The two men claimed to be police officers and said that they were taking the applicant's son to the police headquarters.

On 26 March 1996 the applicant applied to the Governor's Office and to the Chief Prosecutor's Office at the State Security Court enquiring as to his son's whereabouts. Between 29 March and 16 May 1996 he made five more applications. On 4 April 1996 the prosecutor informed the applicant that his son's detention was not recorded in any custody records. On 20 May 1996 the applicant was interviewed at Diyarbakır police murder desk. He gave a description of the two men and he stated that he and neighbouring shop owners would be able to identify the men if required.

On 4 July 2006 the newspaper *Özgür Gündem* published a confession of Abdulkadir Aygan, a former agent of the JITEM (Anti-terror Intelligence Branch of the Gendarmerie), describing the abduction and killing of the applicant's son. Mr Aygan stated that Atilla Osmanoğlu had been kidnapped by the JITEM and that his head had been smashed with a hammer so that it would not be possible to identify his body.

The body of Atilla Osmanoglu had been found in a disused oil tanker near the town of Silopi on 30 March 1996. The Government denied any involvement of the Turkish security forces in the abduction and killing of the applicant's son. It submitted that no investigation was carried out because there was no evidence to indicate that he had been the victim of an unlawful act, such as kidnapping and that there were no custody records to prove the applicant's son had been detained.

Complaints

With regard to Articles 2, 5, and 13, the applicant alleged that his son was abducted by the Turkish security forces and that the authorities failed to carry out an adequate investigation. Relying on Article 3, the applicant alleged that his own treatment at the hands of the State following his son's disappearance amounted to inhuman and degrading treatment. He further relied on Article 8, complaining about the prolonged distress and anguish caused by his son's disappearance and lack of an effective investigation. The applicant further claimed that his son's disappearance, his presumed death and the failure of the authorities to carry out an effective investigation had been due to his Kurdish origin, in breach of the Article 14,

Held

Article 2

The Court was unable to establish, on the basis of the evidence in the file, that the abduction and killing of Atilla Osmanoglu had been carried out by agents of the Turkish state.

However the Court held that the government had failed in the positive obligation, also contained in Article 2, to protect the life of Atilla Osmanoglu. The Court observed that, on a number of occasions, it had reached the conclusion that the disappearance of a person in south-east Turkey at the relevant time could be regarded as life-threatening. The lack of any suggestion that the applicant's son might have been involved in PKK-related activities did not make his disappearance any less life-threatening. Indeed, the applicant and his son had had a history of harassment by the police and the way in which the applicant's son had been abducted had been similar to other such disappearances reported at that time. The authorities had been informed on 26 March 1996 that the applicant's son had been abducted and, from that date, had been under an obligation to take immediate steps to protect his right to life which had been at real and immediate risk. Nevertheless, no investigation was opened into the disappearance of Atilla Osmanoglu. The Court found that the mere checking of

custody records was not sufficient to protect the right to life. Therefore the Court concluded that the authorities had failed to take reasonable measures to prevent a real and immediate risk to the life of Atilla Osmanoglu, in violation of the substantive limb of Article 2.

The Court further held that this complete failure to carry out an investigation was also in violation Article 2 under its procedural limb, which entails an obligation to effectively investigate disappearances and to apply sanctions to those found responsible.

Article 3

The Court also found that the applicant had suffered and continued to suffer, distress and anguish as a result of the disappearance of his son and his inability to find out what had happened to him. The manner in which his complaints had been made with the authorities had to be considered to constitute inhuman treatment in violation of the Article 3.

Article 5

The Court reiterated that it had been unable to make a finding as to who might have been responsible for the disappearance of the applicant's son. There was therefore no factual basis to substantiate the applicant's allegation that his son had been detained by the Turkish Authorities. Consequently, the Court found that there had been no violation of the Article 5. Given the findings under Article 2 concerning the lack of an investigation the Court did not consider it necessary to examine separately whether there had been the same failure under the Article 5.

Article 14

Regarding Article 14 in conjunction with Article 2 and 5 the Court stressed that the applicant's allegation that his son had been abducted by Turkish security forces had not been established. Also there was no factual basis to substantiate that his disappearance and presumed death had been due to his Kurdish origin. Concerning the further allegation that the underlying reason for the failure to investigate the abduction of his son had been his ethnic origin, the Court pointed out that the complete lack of an investigation meant that there was no evidence with which to examine whether the authorities had been responsible for discriminatory treatment in respect of the applicant. There had been therefore no violation of Article 14 taken in conjunction with the Article 2 and 5.

Article 8

Having regards to its findings under Articles 2 and 3 (above), the Court did not find it necessary to determine whether there has been a breach of Article 8 of the Convention.

Article 13

The Court did not find it necessary to consider the violation of Article 13, as the facts in the context of this Article reflect those examined when finding a violation under the procedural head of Article 2 of the Convention.

Article 41

Regarding the pecuniary damage the Court awarded the applicant EUR 60,000 and EUR 20,000 in respect of non-pecuniary damage, to be held by him for the partner and heirs of his son. The Court further awarded the applicant, by six votes to one, EUR 10,000 in respect of non-pecuniary damage and 15,000 for costs and expenses under Article 41.

Commentary

This case is an example of the Court's unwillingness to find a violation of Article 14 in respect of Kurdish people in Turkey, a tendency which is notably distinct from its jurisprudence with regard to Roma people. It has shown a much greater willingness to find violations of Article 14 against people of Roma origin, even in cases where there had been no investigation (see the commentaries to *Petropoulou-Tsakiris v Greece*, (44803/04) and *Stoica v Romania*, (42722/02) above). In this case the Court held that it lacked the evidence to find that there had been discrimination, because the absence of any investigation into Atilla Osmanoglu's disappearance meant that there was nothing on which to base such a finding. It could be questioned though why the Court was willing to find that the authorities should have investigated the disappearance, but not that they should have investigated the possibility that Atilla Osmanoglu and the applicant had suffered discrimination due to their Kurdish origin.

In the context of the Kurdish region of Turkey: its political situation and the large number of human rights abuses against Kurds which the Court has found to have occurred there, it would seem reasonable to suspect that discrimination could play a part in these abuses. Thus the Court could have held that the Turkish state had an obligation to examine this possibility as part of an investigation into a human rights abuse in this area.

Prohibition of torture or inhuman & degrading treatment

Ayaz v Turkey

(44132/98)

European Court of Human Rights Chamber Judgment: dated 8 January 2008

Police brutality – Lack of effective domestic remedy – Articles 3 and 13.

Facts

This is a KHRP assisted case. The applicant, Ercan Ayaz, is a Turkish national who was born in 1965 and lives in Berlin. At the material time he was a member of the working party on Kurdistan set up by the Free University of Berlin students' association.

In 1993 the association asked a committee of nine people, including the applicant, to start liaising with a university in Iraq. On 3 August 1993, during a stopover at Atatürk Airport in İstanbul, the applicant and other members of the group were arrested by the border police and taken into custody.

The applicant alleged that he had been ill-treated prior to his release the following day. He said that police officers had blindfolded him, pulled his hair and beaten him while questioning him about his identity and his background. He also claimed that he had been sexually assaulted and detained in a cell constituting a health hazard.

On 6 August 1993 the applicant was examined by a doctor attached to the Human Rights Foundation in Istanbul, who noted that he had superficial scratches on the left leg and a 2 cm by 2 cm bruise on the anterior superior iliac spine and was suffering pain in the abdominal region.

Later that day, on the Foundation's advice, the applicant lodged a criminal complaint with the public prosecutor in Bakırköy (a district of İstanbul) against the police officers in whose custody he had been held. The public prosecutor referred him to the Bakırköy Institute of Forensic Medicine, which noted the presence of scratches and subjective pain on the left side of the sacrum, a 2 cm bruise in the femoral region and subjective pain in the left hypochondrium, the teeth and the head. Following investigations, the provincial administrative council found that the applicant had acted in accordance with the aims of the illegal organisation the Kurdistan Workers' Party (PKK) to tarnish the image of the Turkish police and made an order discontinuing the proceedings, which was

upheld by the Supreme Administrative Court in May 1997. The council also noted that two days had elapsed between the applicant's release and his examination by the Institute of Forensic Medicine.

Alongside those proceedings, a disciplinary inquiry was initiated in respect of the police officers in question. A committee of five police inspectors found that the applicant had inflicted the injuries himself on being released before applying to the public prosecutor. On the basis of those findings, the İstanbul Provincial Disciplinary Board held in July 1995 that no sanctions should be imposed since there was no concrete evidence to substantiate the applicant's accusations.

Complaints

Relying on Articles 3 and 13, the applicant complained that he had been ill-treated while in police custody and that he had no effective remedy in respect of his grievances.

Held

Article 3

The Court noted the consistency between the medical reports issued on 6 August 1993 by the Human Rights Foundation and the Institute of Forensic Medicine. It accordingly considered that it was for the Turkish Government to provide evidence to disprove the applicant's allegations, and was not persuaded by the explanations given on that account.

Furthermore, in view of the duty of police officers to account for the treatment of individuals under their control, the Turkish authorities could not shelter behind explanations such as the existence of numerous cases where detainees manipulated by the PKK had caused themselves injury in order to undermine the police. The argument that the applicant had been "in shock" as a result of the incidents for the two days following his release was therefore more plausible than the suggestion that he had gone so far as to mutilate himself in the name of the PKK, there being no evidence in the file to show that any judicial measures had been taken against him on account of such a suspicion.

The Court concluded that the evidence before it was sufficient to lend credibility to the allegation that the applicant had been the victim of police brutality for which Turkey bore responsibility, amounting to inhuman and degrading treatment in breach of Article 3.

Article 13

The Court held that no separate examination of the complaint under Article 13 was required.

Saadi v Italy

(37201/06)

European Court of Human Rights: Judgment dated 28 February 2008

Deportation – Trial in absentia – Articles 3, 6, 8 and Article 1 of Protocol No. 7, application of Rule 39 (interim measures).

Facts

The applicant, Nassim Saadi is a Tunisian national who was born in 1974 and lives in Milan (Italy). He is the father of an eight-year-old child and his wife is an Italian national. The application concerns the possible deportation of the applicant to Tunisia, where he claims to have been sentenced in 2005, in his absence, to 20 years of imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism. In December 2001 the applicant was issued with an Italian residence permit valid until October 2002, for family reasons. In October 2002 Mr Saadi, who was suspected, among other things, of international terrorism, was arrested and placed in pre-trial detention. He was accused of conspiracy to commit acts of violence in States other than Italy with the intention of arousing widespread terror, of falsifying documents and receiving stolen goods.

On 9 May 2005 Milan Assize Court reclassified the offence of international terrorism, amending it to criminal conspiracy. It found Mr Saadi guilty of the offence and of forgery and receiving and sentenced him to four years and six months imprisonment. It acquitted the applicant of aiding and abetting clandestine immigration. Both the prosecution and the applicant appealed. On the date of the adoption of the Grand Chamber's judgement the proceedings were pending in the Italian Courts.

On 11 May 2005 a military Court in Tunis sentenced the applicant in his absence to 20 years of imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism.

Mr Saadi was released on 4 August 2006. On 8 August 2006, however, the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of the Law of 27 July 2005 on “urgent measures to combat international terrorism”. The Minister observed that “it was apparent from the documents in the file that the applicant had played an “active role” in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. The applicant was therefore placed in the Milan temporary holding centre pending his deportation.

Mr Saadi made a request for political asylum which was rejected on 14 September 2006. On the same day he lodged an application with the European Court of Human Rights and requested, under Rule 39 of the Rules of the Court for interim measures to suspend or annul the decision to deport him. On 5 October 2006 the Court asked the Italian Government to stay the applicant’s expulsion until further notice.

The maximum time allowed for the applicant’s detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However on 6 of October 2006 a new deportation order had been issued against him to France with the result that he was immediately taken back to the Milan temporary holding centre. The applicant applied for a residence permit and requested refugee status, without success.

On 3 November the applicant was released, as fresh information made it clear that it would not be possible to deport him to France.

On 29 of May 2007 the Italian Embassy in Tunis asked the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia as well as diplomatic assurances that, if the applicant were to be deported to Tunisia, he would not to be subjected to treatment contrary to Article 3 of the Convention, that he would have the right to have the proceedings reopened and that he would receive a fair trial. In reply the Tunisian Minister of Foreign Affairs twice sent a *note verbale* to the Italian Embassy in July 2007 stating that “he accepted the transfer to Tunisia of Tunisians imprisoned abroad once their identity had been confirmed” that Tunisian legislation guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions”.

The UK intervened as a third party in this case, submitting that in cases of alien terror suspects the risk to them of being ill-treated when deported must be

balanced against the risk that they pose to the community of the contracting state. The UK submitted that it was wrong to interpret the Article 3 prohibitions as absolute in relation to acts which could be carried out in a third country following deportation by a contracting party to the Convention.

Complaints

The applicant alleged that his deportation to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment contrary to the Article 3 of the Convention.

The applicant complained that his Article 6 rights had been violated as a result of the criminal proceedings in Tunisia where he had been convicted in his absence by a military Court.

Under Article 8 he alleged that his deportation to Tunisia would deprive his partner and his son of his presence and financial support. Lastly, relying on Article 1 of the Protocol No 7 he complained that his expulsion was neither necessary to protect the public order or on reasons of national security.

Held

Article 3

The Court observed that the danger of terrorism could not be underestimated and noted that states were facing considerable difficulties in protecting their communities from terrorist violence. However, the Court stated that the absolute nature of Article 3 was indisputable.

Contrary to the argument of the United Kingdom and the Italian Government, the Court considered that it was not possible to weigh the risk that a person might be subjected to ill-treatment against the danger he posed to the community if not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he may be suffer harm if deported.

As regards the arguments that such a risk had to be established by solid evidence where an individual was a threat to national security, the Court observed that such an approach was not compatible with the absolute nature of Article 3. It amounted to asserting that in the absence of evidence meeting a higher standard, protection of national security justified accepting more readily a risk of ill-treatment for the individual. The Court reaffirmed that for a forcible expulsion to be a breach of the Convention it was necessary for substantial grounds to

have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country.

The Court referred to reports by Amnesty International and Human Rights Watch which described a disturbing situation in Tunisia and which were corroborated by a report from the US State Department. These reports mentioned numerous and regular cases of Torture inflicted on persons accused under the 2003 Prevention of Terrorism Act. The practices reported included hanging from the ceiling, threat of rape, administration of electric shocks, immersion of the head in the water, beatings and cigarette burns. It was reported that allegations of torture and ill-treatment were not investigated by the competent Tunisian authorities, that they refused to follow up complaints and that they regularly used confessions obtained under duress to secure convictions. The Court did not doubt the reliability of those reports and noted that the Italian Government had not adduced any evidence capable of rebutting such assertions.

The Court noted that in Italy Mr Saadi had been accused of international terrorism and that his conviction in Tunisia had been confirmed by Amnesty International in a statement in June 2007. The applicant therefore belonged to the group at risk of ill-treatment. The Court considered that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if he were to be deported in Tunisia.

The Court further noted that the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government in May 2007. Referring to the *notes verbales* from the Tunisian Ministry of Foreign Affairs, the Court emphasised that the existence of domestic laws and accession to treaties were not sufficient to ensure adequate protection against the risk of ill-treatment where, as in the applicant's case, reliable sources had reported practices manifestly contrary to the principles of the Convention. Furthermore, even if the Tunisian authorities had given the diplomatic assurances that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of treatment.

Consequently, the Court found that the decision to deport Mr Saadi to Tunisia would breach Article 3 if it were enforced.

Article 6, Article 8 and Article 1 of Protocol No. 7

Recalling its finding concerning Article 3 and having no reason to doubt that the

Italian Government would comply with its Grand Chamber judgment, the Court considered that it was not necessary to decide the question whether, in the event of expulsion to Tunisia, there would also be violations of Article 6, Article 8 and Article 1 of the Protocol No. 7. Judge Zupančič expressed a concurring opinion, as did Judge Myjer, joined by Judge Zagrebelsky.

Concurring opinion of Judge Zupančič

Judge Zupančič agreed with the opinion of the majority, but added that the suggestion that expulsion cases require a low level of proof simply because the person is notorious for his dangerousness is intellectually dishonest. He further noted that it is thus extremely important to read paragraph 139 of the judgment¹ as a categorical imperative protecting the rights of the individual. The only way out of this logical necessity would be to maintain that such individuals do not deserve human rights (the third party intervener is unconsciously implying just that to a lesser degree) because they are less human.

Judge Zupančič indicated that in emergency assessment cases, such as the present one, the judicial assessment does not have to do with a past historical event. He stated that legal process as a conflict resolution context, together with all its evidentiary apparatus, is always retrospective, therefore one cannot prove a future event to any degree of probability because the law of evidence is a logical rather than a prophetic exercise.

Concurring opinion of Judge Myjer, joined by Judge Zagrebelsky

Judges Myjer and Zagrebelsky agreed with the majority finding of violation of Article 3 and the reasoning behind it. However, they made some remarks regarding paragraph 137 of the judgment which states: “the Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.” Judges Myjer and Zagrebelsky noted that the Court by emphasising the absolute nature of Article 3 seems to afford more protection to the non-national applicant who has been found guilty of terrorist related crimes than to the protection of the community as a whole from terrorist violence, which might be difficult to understand to those reading the decision.

1 Paragraph 139 addresses the concepts of the risk posed to an individual and the dangerousness of that individual to the community, and states that these two concepts are independent and cannot be balanced against each other. It is asserted that there is either a risk to the individual or there is not; it does not depend on the danger that that individual may pose.

Commentary

This judgment is a major reassertion of the importance of the rule of law. It comes at a time when deportation to states known to practice torture and ill-treatment is occurring with troubling frequency in the name of the ‘war on terror.’

The court reaffirmed the longstanding rule that no circumstances, including the threat of terrorism or national security concerns, can justify exposing an individual to the real risk of such serious human rights abuses.

In its intervention, the United Kingdom government argued that the right of a person to be protected from such treatment abroad should be balanced against the risk he posed to the deporting state, despite the fact that the ECtHR had rejected this argument in the 1996 case of *Chahal v United Kingdom* (22414/93). In *Chahal*, the ECtHR held that the Convention prohibited expulsion to countries where there is risk of torture and ill-treatment in all circumstances. This conclusion has been consistently reaffirmed by the court in its subsequent judgments.

The UK government’s intervention in *Saadi* also replicates its intervention - together with the governments of Lithuania, Portugal, and Slovakia - in another case still pending before the court: the case of *Ramzy v The Netherlands* (25424/05), which involves deportation to Algeria. These attempts to undermine fundamental human rights with assertions that national security and public safety are under threat are often based on information that governments seek to keep secret even from the individual affected.

In this judgement the Court did recognise the threat posed by terrorism to modern communities and the difficulties faced by states in protecting their populations. However it asserted that this could in no way compromise the absolute nature of Article 3.

In addressing the issue of “diplomatic assurances”, the ECtHR left open whether assurances might “in their practical application” provide a sufficient guarantee against the risk of ill-treatment. In practice, once such a risk is established, the court has never found assurances capable of displacing it. A growing number of international actors - including the UN High Commissioner for Human Rights, the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, and the Council of Europe Commissioner for Human Rights - hold that diplomatic assurances against torture and ill-treatment are inherently unreliable and practically unenforceable, and thus do not provide an effective safeguard against torture and ill-treatment.

Taştan v Turkey

(63748/00)

European Court of Human Rights: Judgment dated 4 March 2008

Mandatory military service – Articles 3 and 13.

Facts

The applicant, Hamdi Taştan, is a Turkish national who was born in 1929 and lives in Şanlıurfa (Turkey). He was registered in the civil status register in 1986 as a single person with no children.

The case concerned the fact that the applicant was forced to do military service aged 71.

Mr. Taştan stated that he had been a shepherd since his childhood and that he worked for local villagers in exchange for clothes, food and a roof over his head in winter. He maintained that his wife died in childbirth and that he stopped working to look after their son. As a result, the villagers – annoyed that he wasn't working for them anymore – denounced him as a deserter. He also claimed to be illiterate and to speak only Kurdish.

On 15 February 2000 the applicant was called up to do military service and taken by gendarmes to the military recruitment office of Şanlıurfa. He was certified medically fit to perform military service and transferred to Erzincan (Turkey), where he underwent military training for recruits for one month. He was forced to take part in the same activities and physical exercises as 20-year-old recruits.

Mr. Taştan alleged that he was subjected to degrading treatment during his training, such as being offered cigarettes by his hierarchical superiors in exchange for posing with them for a photo, and had been the target of various jokes. As he had no teeth, he had had problems eating at army barracks. He had also suffered from heart and lung problems on account of temperatures dropping to as low as minus 30oC. Lastly, he alleged that he had had no means of communicating with his son throughout the entire period of his military service.

After his military training the applicant was transferred to the 10th infantry brigade in Erciş (Van), where his state of health deteriorated. He was examined by a doctor on two occasions and then admitted to Van Military Hospital, before being transferred to Diyarbakır Military Hospital (Turkey). On 26 April 2000 he

finally obtained a certificate exempting him from military service on grounds of heart failure and old age.

The Turkish Government maintained that, in accordance with the practice followed in similar cases, the applicant's personal records relating to his military service had been destroyed.

Complaints

Relying on Articles 3 and 13, Mr Taştan complained that he had been forced to perform military service despite his age, alleging in particular that he had been subjected to both physical and mental ill-treatment. Under Article 8, he also complained that he had been deprived of all contact with his son during his military service and that he had been distressed by the thought of his son being left alone. The applicant also alleged violations of Articles 4 and 5.

Held

The Court held that the application should be examined under Article 3 taken together with Article 13. It noted, among other things, that the applicant had not provided any proof of the existence of his child and held that it was not necessary to rule separately on the applicant's other complaints.

Article 3 taken in conjunction with Article 13

The Court reiterated that it was incumbent on the State to provide a plausible explanation for the cause of any harm to the physical or mental integrity of persons placed under the control of the authorities.

In the applicant's case the Court considered that that requirement had not been satisfied. Noting that the applicant's military service records had been destroyed by the authorities, it observed that, apart from the applicant's statements, it had little evidence in its possession regarding the applicant's military service or how the applicant, who spoke only Kurdish, had been able to communicate his complaints to the doctors and his hierarchical superiors.

It was established (and not disputed) however, that Mr. Taştan, when aged 71, had performed part of his military service between 15 March and 26 April 2000, including his month's training.

The Court also pointed out that the applicant, who had not been suffering from any particular illness when he was called up to do military service, was taken

into hospital after one month's forced participation in military training designed for 20-year old conscripts.

It went on to observe that the Turkish Government had not referred to any particular measure taken with a view to alleviating, in the applicant's specific case, the difficulties inherent in military service or to adapting compulsory service to his case. Nor had they specified whether there had been any public interest in forcing him to perform his military service at such an advanced age. The Government had confined themselves to emphasising the applicant's share of responsibility in the matter by failing to register himself in the civil status register until 1986.

The Court found that calling the applicant up to do military service and keeping him there, making him take part in training reserved for much younger recruits then himself, had been a particularly distressing experience and had affected his dignity. It had caused him suffering in excess of that which would be involved for any man in being obliged to perform military service and had, in itself, amounted to degrading treatment within the meaning of Article 3.

Accordingly, there had been a violation of Article 3 taken in conjunction with Article 13.

Right to liberty & security

Saadi v United Kingdom

(13229/03)

European Court of Human Rights: Judgment dated 29 January 2008

Unlawful detention, not informed of reason for detention – Articles 5(1), and 5(2).

Facts

The applicant, Shayan Baram Saadi, is a Kurd from Iraq, born in 1976, who now lives and works as a doctor in London.

He fled the Kurdish autonomous region of Iraq in December 2000 because he had facilitated the escape of three members of the Iraqi Workers' Communist Party whom he was treating in hospital after they were injured in an attack. He

arrived at Heathrow Airport on 30 December 2000 and immediately claimed asylum.

As there was initially no room at Oakington Reception Centre (“Oakington”) the applicant was, for three nights, granted temporary admission to stay in a hotel and report again to the airport each morning. On the third morning, 2 January 2001, when he reported to the airport, he was detained and transferred to Oakington. On being detained he was given a standard form “Reasons for Detention and Bail Rights” which set out a list of reasons for detention with boxes to be ticked by the immigration officer. The reasons listed did not include the fast-tracking of asylum applications.

The applicant was detained from 2 January for seven days. During this time he was represented by a lawyer from the Refugee Legal Centre. The lawyer was only able to discover the reason for the applicant’s detention, that he fulfilled the “Oakington criteria,” after he had already been held for 76 hours. He then requested the applicant’s release on the grounds that his detention was unlawful. When this was refused the applicant applied for judicial review, claiming that his detention was contrary to domestic law and to the Convention Articles 5(1) and 5(2).

The applicant’s claim for asylum was initially refused on 8 January 2001 and he was released from Oakington on 9 January pending his appeal hearing. On 14 January 2001 his appeal was allowed and he was granted asylum.

In the judicial review proceedings on 7 September 2001 the High Court held that the Secretary of State had the power to detain under the Immigration Act, but that detention solely for the purpose of administrative efficiency was in violation of the Convention. The Court also held that the applicant had not been given adequate reasons for his detention.

On 19 October 2001 the Court of Appeal unanimously overturned this judgement on the grounds that escalating numbers of asylum claims made it necessary for the interests of asylum seekers to make the processing system as efficient as possible and secondly that subparagraph f) of Article 5(1) preserves the sovereign power of states to decide the terms under which they allow aliens to enter their territory.

The applicant appealed against this decision but the House of Lords were unanimous in dismissing this appeal. They based this on three arguments.

Firstly that it was a “long established principle of international law” as well as the basis for Article 5(1)(f) of the Convention that it is a sovereign right of states to regulate the entry of aliens into their territory and that any other obligations do not override that. Secondly they argued that under ECHR Article 5(1)(f) detention is legitimate in order to “prevent unauthorised entry” into the country and that an asylum seeker’s entry into the country is unauthorised until it has been specifically authorised. Therefore the detention of asylum seekers is legitimate until their claims have been processed and they are authorised to be in the country. Finally the Lords argued that detention was not a disproportionate response to the requirements of efficiency in the asylum process, given the reasonable conditions and brief time period of detention.

A European Court of Human Rights Judgement of 11 July 2006 held that there had been no violation of Article 5(1) but that there had been a violation of Article 5(2) The Applicant requested that the case be referred to the Grand Chamber and on 11 December 2006 the panel of the Grand Chamber accepted this request.

Complaints

The Applicant complained that his detention had not been in accordance with any of the legitimate reasons for detention mentioned in the subparagraphs of Article 5(1) and was therefore unlawful. He also complained under Article 5(2) that he had not been informed promptly of the reason for his detention since he had not learned the true reason until 76 hours after his arrest.

Held

Article 5(1)

It was undisputed that the applicant had been deprived of his liberty but the Court considered the question of whether this had been justified under subparagraph (f) as the respondent government claimed. This was the first case where the Court had been asked to interpret the meaning of the first limb of Article 5(1)(f): “lawful ... detention of a person to prevent his effecting an unauthorised entry into the country.”

The Court held, in common with the domestic courts and the 11 July 2006 Chamber Judgement, that the right to detain individuals attempting to enter a country is inherent in the sovereign right of states to control aliens’ entry into their territory. It therefore interpreted the first limb of Article 5(1)(f) to mean that it was permitted to detain an individual while an application for asylum is being processed on the grounds that an asylum seeker is unauthorised until they have been authorised by having their claim approved. In finding this, the Court

rejected the arguments of the applicant and of the intervening organisations (the United Nations High Commissioner for Refugees (UNHCR), Liberty, the European Council on Refugees and Exiles (ECRE) and the Advice on Individual Rights in Europe (AIRE) Centre) that if asylum seekers surrender themselves to the immigration authorities they are thereby seeking to effect an “authorised entry” into the country and can thus not lawfully be detained. The Court held that this would be too narrow an interpretation of the Article and would place too great a restriction on the sovereign right of the state to control the entry of aliens onto its territory.

However the Court also held, based on its own well established case law, that for the detention of any individual to be lawful it must also satisfy the condition of being prescribed by law, and to do so, as well as conforming with domestic law, it must not be arbitrary. The Court noted that the definition of arbitrariness varies according to the type of detention involved. The Court had previously established the interpretation of arbitrariness in relation to the second limb of Article 5(1)(f) (when a person is detained “with a view to deportation”), and it now held that the same interpretation should apply to the first limb on the grounds that it would be artificial to apply different criteria to detention at the point of entry into a country than detention preceding departure from a country. Thus it held that in the detention of aliens there was no requirement that detention should be reasonably considered necessary, but that to conform with the principle of proportionality it must not be of an undue length. The length of detention in the instance that an asylum seeker is detained while his or her claim is processed should not be longer than the time reasonably required to complete that process.

The Court then examined whether the applicant’s detention had been arbitrary, and, applying four criteria to test this, held that it had not. Firstly the Court noted that the domestic courts had not found, and the applicant had not claimed, that his detention had no basis in national law. Secondly the Court held that the UK had acted in good faith in detaining the applicant and that the purpose of detention was closely linked to the legitimate purpose of preventing unauthorised entry. The Court accepted the findings of the Court of Appeal and House of Lords in this regard that the purpose of the Oakington detention centre was to effect a fast-tracked processing of asylum applications whereby it was necessary to schedule up to 150 interviews per day and that even a slight delay could disrupt the entire process and also that this process was intended to be and generally was to the benefit of asylum seekers.

Thirdly the Court noted that the conditions of detention were specifically adapted to the holding of asylum seekers and that various facilities were available, including legal assistance, also that the applicant had not specifically complained about the conditions in which he was detained. The Court held that the applicant's detention was not arbitrary on the basis of its material conditions.

Finally the Court held that the length of detention was no longer than would reasonably be considered necessary for the processing of an asylum claim and that it was therefore not arbitrary according to this criterion.

The Court therefore held that there had been no violation of Article 5(1)(f), given the administrative difficulties facing the UK at the time with the high numbers of asylum applications. In these circumstances it was permissible to detain the applicant for seven days in suitable conditions since this allowed his asylum claim, and those of others, to be processed as efficiently as possible.

Article 5(2)

The Grand Chamber agreed with the Chamber that the applicant had not been informed of the real reason for his detention until 76 hours after his arrest and that this was not compatible with the provision that reasons should be given "promptly". The Court therefore held that there had been a violation of Article 5(2) of the Convention.

The Court held that the finding of the violation provided sufficient just satisfaction and it awarded the applicant EUR 3,000 in legal costs.

Commentary

It seems that the Court is being pragmatic in this judgement in taking note of the UK's administrative difficulties with the large number of asylum seekers arriving at that time. However this is also the first interpretation which the Court has issued on the meaning of the first limb of subparagraph (f) of Article 5(1), or the lawfulness of detaining an asylum seeker on entry into a country. Thus it sets a precedent for future Court judgements and consequently for domestic court judgements and state practice. It is interesting that the Court comes down so firmly on the side of state sovereignty, interpreting the rights of the state to control the entry of aliens as fundamental and the right to liberty of an individual claiming asylum as secondary to that. It is true that the judgement maintains the need to protect individuals from arbitrariness in the length and conditions of detention but nevertheless it holds that there is no need for the detention to be strictly considered necessary. The implication of this is that an individual seeking asylum is less protected by the Convention from the actions of the state than

an individual who is established in a country. This is troubling considering that individuals are perhaps at their most vulnerable and in need of protection when they are seeking asylum and also that in many countries of the Council of Europe this is one area where significant human rights issues exist.

This lack of protection has at least some basis in the Court's finding that an asylum seeker is unauthorised until they have been specifically authorised to be in the country. It can be inferred from this that an individual arriving in a country to seek asylum is acting unlawfully, when in fact their right to do so is protected in the European Convention on Human Rights and also the 1951 Geneva Refugee Convention.

Overall the judgement seems to place asylum seekers in a slightly ambiguous position legally which could have serious consequences for their treatment in state parties to the Convention.

Right to a fair trial

Galstyan v Armenia

(26986/03)

European Court of Human Rights: Judgment dated 15 November 2007

Unlawful detention – right of appeal – unfair trial – right to time to prepare defence – right to legal assistance – freedom of expression – freedom of association – right to appeal conviction - Articles 5(1), 5(4), 6(1), 6(3) (b and c), 10, 11 and Article 2 of Protocol No. 7.

Facts

The applicant was born in 1958 and lives in Yerevan.

In the presidential election of February to March 2003 the applicant worked as an authorized election assistant for the main opposition candidate and was a member of a district election commission. After the election he participated in several protest rallies organised by the opposition. Early in April of that year he was ordered by the deputy head of the Central District Police Station of Yerevan not to take part in any more demonstrations.

On the 17 April 2003 a political demonstration of around 30,000 people took place on Mashtots Avenue during which criticism of the government and presidential election was voiced. Traffic was suspended in advance by traffic police. The demonstration was largely made up of women, but many men watched and encouraged them from the side of the road, and the applicant was among these.

The applicant left the area at 1730 hours to return home but was stopped by police roughly 100 to 150 m from the site and taken to the Central District Police Station, where a record was drawn up stating that he had been “arrested at around 1730 hours on the Mashtots Avenue for obstructing traffic and behaving in an anti-social way at a demonstration”.

The applicant was questioned and made a written statement. He alleged that his first statement was torn up and he was made to write another one which omitted the assertion that he had not committed any offences during the demonstration. He also signed a record of an administrative offence under Article 172 of the Armenian Code of Administrative Offences (CAO), defined as “minor hooliganism,” and statements that he was aware of his rights and did not wish to have a lawyer.

The applicant alleged that he had initially requested a lawyer, but that the police officers had argued that he did not require one for such a minor offence and that insisting on one would cause him further problems by unduly delaying the proceedings. He alleged that because of his request for a lawyer he was kept in the police station for the following five and a half hours until he was finally persuaded to sign the statement refusing one. He stated that he was taken to Judge M to be tried at 2300 hours.

The government alleged in contradiction to this that the applicant had made no objection to signing the record of the offence, also that the police officers had explained the applicant’s procedural rights including his right to a lawyer, and had advised him to avail himself of one, but that he had refused this and failed to initiate any actions aimed at his own defence. It further stated that the applicant had only been kept in the police station for two hours before being taken to the judge at 1930 hours.

The hearing was held on the same day, although its exact time was disputed by the applicant and the state party, and following this the judge found the applicant guilty of “obstruct[ing] traffic, violat[ing] public order by making a loud noise, and incit[ing] other participants of the demonstration to do the same” and

sentenced him under Article 172 of the CAO to three days in administrative detention.

The Government produced a record of the hearing, which states that it was held in public and that the judge explained the applicant's rights to him but that he did not wish to lodge any challenges, or to have a lawyer. According to this record the applicant admitted to obstructing traffic and making a noise but stated that this was because he was part of a demonstration in which everybody was doing the same. The time of the hearing was not recorded.

The applicant alleged that this record was a forgery, that there had been no clerk and the hearing had not been recorded. He stated that the hearing lasted only five minutes and was held in Judge M's office with only the judge, himself and the accompanying police officer present. Further he stated that before the judge he again requested a lawyer and attempted to explain the circumstances of his case, but that the judge ignored this.

On 28 April 2003 the NGO "February 22nd" on behalf of the applicant, complained to the General Prosecutor seeking to institute criminal proceedings against the police officers and Judge M. The NGO received a letter dated 27 May 2003 from the District Prosecutor, responding that the judge's decision had been well-founded and there were no grounds for appeal.

Complaints

The applicant complained, under Article 5 of the Convention, that he had been unlawfully detained; arguing that he had been detained for "minor hooliganism" under Article 172 of the CAO and that Article 5(1) of the Convention does not envisage an administrative offence as a legitimate ground for detention. Further under Article 5(4) that he had not been able to contest the lawfulness of his detention.

He complained under Article 6 that he had not been given a fair trial because, breaching article 6(1), the judge was not independent, the judge had ignored all of his arguments and the trial had not been public, and breaching Article 6(3) (b and c), he had had insufficient time to prepare his defense and he had been tricked into refusing a lawyer.

The applicant submitted that his trial and detention breached his rights under Articles 10 and 11 of the Convention to freedom of expression and freedom

of assembly because the sanction against him was directed against his political activities and attendance at demonstrations.

Finally, the applicant complained under Article 2 of Protocol No. 7 that he had not been able to contest the decision to detain him.

Held

Article 5

The Court held that the applicant's complaints of unlawful detention and inability to contest this, under Article 5(1) and 5(4) were manifestly ill-founded. This was on the basis that Article 5(1), without regard to the legality of the offence of which a person is convicted, permits detention following the "conviction of a competent court." The Court pointed to the fact that the applicant had been found guilty of an offence in Armenian law by Judge M. of the Kentron and Nork-Marash District Court of Yerevan, which had territorial jurisdiction to examine this offence. It therefore held that the applicant was detained following a conviction by a competent court.

Regarding Article 5(4) the Court noted that the recourse it provides to have the legality of detention examined in a court relates to a situation where a person is detained by an administrative body. The Court asserted that such recourse was not applicable when a decision to detain a person was made by a court. Thus the fact that the applicant had no right of appeal to the court's decision was not held to be unlawful under Article 5(4)

Article 6(1)

The Court held that the applicant's complaint that the judge was not independent was unsubstantiated and was manifestly ill-founded due to the fact that Armenia has in place Constitutional guarantees to ensure the independence of judges.

The Court considered the merits of the remainder of the applicant's claims under Article 6(1). Firstly it held that there was not enough evidence to prove the allegation that the official record of the hearing was forged and therefore it relied on this record in deciding on the merits of the other complaints.

Regarding the applicant's complaint that he was not listened to, the Court asserted that it was not its role to decide what kinds of evidence should have been admissible in domestic courts, nor whether the applicant was guilty. It held that the proceedings as a whole and the gathering of evidence were fair in that the applicant had the chance to test the quality of the evidence in adversarial

proceedings. That he did not request to question the witnesses was his own omission.

The Court held that the tribunal was impartial. It noted the accounts in the Human Rights Watch (HRW) and Parliamentary Committee of the Council of Europe (PACE) briefing papers (excerpts of which are included in the judgement) of the political sensitivity of the period, but did not see this as sufficient evidence on its own to substantiate the applicant's claim that this particular judge was personally biased. Likewise, there was no evidence that the trial was not public. The applicant's submissions that it was held at 2300 hours and in the judge's office were unsubstantiated and the applicant provided no further evidence that it was not public. Therefore the Court held that the hearing was public and thus provided an additional guarantee of impartiality.

The Court therefore decided that there had been no violation of article 6(1) as far as it related to the right to a fair and public hearing by an impartial tribunal.

Article 6(3)(b) and (c)

The Court held that the applicant had not been given sufficient time to prepare his defence, noting firstly that he was given no right to ask for adjournment and secondly that although the amount of time he was given was unclear it could not have been more than a few hours. The Court considered this insufficient especially because it was not clear when he was given the record of the crime of which he was accused, and because during these few hours he would also have had to undergo certain administrative procedures. Therefore the Court decided that there had been a violation of Article 6(3)(b) taken in conjunction with Article 6(1).

The Court held that there had been no violation of the right to have a lawyer since it asserted that this is a right which can be waived by a defendant and was satisfied that in this case this right had been waived voluntarily and unequivocally. The Court noted the content of the briefing papers by HRW and PACE which described extensive denials of the right to legal counsel, but considered that this was not sufficient evidence to prove that this had happened in this specific case.

Article 10

The Court held that it was not necessary to consider the complaint under Article 10 separately from that under Article 11, but that Article 11 was to be considered in the light of Article 10.

Article 11

The Court held that the applicant was convicted for participating in a lawful demonstration and that this was an interference with his right to freedom of peaceful assembly. Although the Court decided that this interference was prescribed by Armenian public order legislation and it had the legitimate aim of preventing disorder, it held that based on the fundamental nature of the right to freedom of assembly and its importance as a foundation of democratic society it was for the Court to decide whether this interference was compatible with the Convention. The Court reiterated that this right is so important that a person cannot be sanctioned for participating in a lawful demonstration, provided that they do not commit any unlawful act during the demonstration.

The Court noted that the penalty (3 days in detention) was particularly severe for the crimes of “obstructing traffic” and “making a loud noise.” Furthermore, the Court noted that, according to the police report, the road in question (Mashtots Avenue) was at that time packed with people and that the traffic had already been suspended by the traffic police in advance of the demonstration. It concluded that the applicant’s “obstruction of traffic” amounted to his presence at a demonstration where the traffic had already been suspended. The Court had no evidence that the “loud noise” made by the applicant involved any obscenity or incitement to violence and stated that a large public demonstration will necessarily generate noise.

Because of this, the Court concluded that the applicant was arrested and punished simply for participating in the demonstration and not for committing any illegal act during it. Thus the Court held that the interference with the applicant’s right to freedom of assembly was not “necessary in a democratic society,” and therefore that there had been a violation of Article 11 of the Convention.

Article 2 of Protocol No. 7

The Court held that there had been a violation of Article 2 of Protocol 7 as the applicant had not had an effective right of appeal. It cited Article 286 of the CAO which states that the judge’s sentence is “final and not subject to appeal” and Article 294 which provides that a penalty “can be quashed or modified by the judge himself upon a protest of the prosecutor and, whether or not such a protest is lodged, by the chairman of the superior court.” The CAO also sets not time limit for review. The Court noted that this does not provide for a regular appeal procedure, but an extraordinary remedy. It stated that, under Article 2 of Protocol 7 any restrictions on the right of appeal must pursue a legitimate aim and not undermine the right itself. It held that the review procedure established by the

CAO did not provide a “clear and accessible right of appeal” and, augmented by the fact that it was not consistently applied in practice, it was not compatible with Article 2 of Protocol No. 7.

The Court awarded the applicant EUR 3,000 for non-pecuniary damages.

Dissenting Opinion

Judge Fura–Sandstrom and Judge Zupancic issued a partly dissenting opinion finding that there had also been a violation of Article 6(3)(c) of the Convention. They argued that the circumstances leading up to the applicant’s waiver of his right to legal counsel were unclear and were central to the dispute. Further they asserted that although the applicant refused a lawyer in writing, this does not necessarily mean that his refusal did not result from some form of pressure or deception by the police officers.

The judges drew attention, in support of their argument, to the briefing papers of HRW and PACE, to the consistency of the applicant’s account, and to the Court’s finding that the applicant had not been afforded sufficient time to prepare his defence. The judges argue that because of this he would not have had enough time to decide on the need for a lawyer.

They concluded that, while there was not sufficient evidence to prove that the applicant had been pressured or tricked into refusing a lawyer, nevertheless the evidence did lead them to seriously doubt that the waiver was truly voluntary and made in full awareness of its consequences. Therefore they held that the waiver was not valid under the Convention.

Commentary

In this case the Court has placed the burden of proof on the applicant relating to his allegations of the forgery of an official document, the events that occurred while he was in police custody, the nature of the court hearing and the time that it took place. These are instances where the state would have had much greater, even exclusive, access to the available information. It would seem an impossible task for the applicant to provide information, which would substantiate these claims to the standard required by the Court. In other cases where the allegations have been more serious, such as injury, death or disappearance in custody and where, as in this case, the facts have been disputed and the government has exclusive access to the relevant information, the Court has laid the burden of proof on the government. In such cases, weight is added to an applicant’s allegations by the undisputable facts of death, injury or disappearance. The Court stated in the case

of *Tanis and others v Turkey* (65899/01) “where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as where persons are under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation” (Paragraph 160 (d)).

In cases such as this one though, where events in custody are disputed but have not resulted in such extreme abuses, it seems that the Court is limited in its ability to find whether there has been a violation. This would seem to offer States a certain amount of impunity in terms of the kind of systematic intimidation which is described in the HRW report and of which this applicant’s treatment appears to have been an example.

Freedom of expression

Yurdatapan v Turkey

(70335/01)

European Court of Human Rights: Judgment dated 8 January 2008

Tribunal’s lack of independence and impartiality – Criminal conviction and sentence in violation of freedom of expression – Articles 6 and 10.

Facts

This is a KHRP assisted case. The applicant, Mehmet Şanar Yurdatapan, is a Turkish national who was born in 1941 and lives in İstanbul. The applicant’s legal representation included members of the Kurdish Human Rights Project (KHRP).

On 23 July 1999, the applicant distributed a leaflet entitled “Freedom of Thought - No. 38” in front of the Istanbul State Security Building. The leaflet reproduced a previous leaflet entitled “Freedom of Thought – No. 9” which contained statements made by Osman Murat Ülke, a Turkish conscientious objector. Ülke was convicted in 1997 for breaching Article 155 of Turkey’s Criminal Code, by holding a press conference at the Izmir War Resisters’ Association.

The applicant filed a complaint against himself with the Public Prosecutor of the İstanbul State Security Court. He maintained that he should be prosecuted for republishing a leaflet banned by the General Staff Military Court. At a military

court hearing held on 23 November 1999, the applicant submitted that the trialing of a civilian by a military court breached Article 6 (right to a fair trial). He argued that the court could not provide him with a fair trial by an independent court, and the prosecution would be against Turkey's Constitution of Military Courts Act. The applicant further submitted that an offence for seeking to dissuade persons from serving in the military (Article 155 Criminal Code) was in violation of Article 10 (right to freedom of expression). He maintained that he should be tried by an ordinary criminal court, as the republication of banned materials was an independent felony (Article 162 Criminal Code).

The applicant's submissions were rejected as unsubstantiated by the military court. The court found that the applicant's fundamental rights and freedoms may be restricted by law, in conformity with the law and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health. Furthermore, the court found that the applicant's exercise of freedom of expression, pursuant to Article 10, may be subjected to formalities, conditions, restrictions or penalties as described by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety.

The applicant was convicted and sentenced to a fine and two months imprisonment, for seeking to dissuade persons from serving in the military. The Military Court of Cassation refused his application for leave to appeal on 16 May 2000.

Complaints

Relying on Article 6 (right to a fair trial), the applicant complained that the court which tried him could not be regarded as an independent and impartial tribunal, and that, as a civilian, he should not have been tried in a military court.

Relying on Article 10 (right to freedom of expression), the applicant complained that his criminal conviction and sentence for publishing and distributing a leaflet, which contained statements from a conscientious objector, had infringed his right to freedom of expression.

Held

Article 6

The Court noted the case of *Ergin v Turkey* (no. 6) (47533/99, 4 May 2006).

It referred to the judgment in *Ergin* (no. 6), where the Court held that it was understandable that a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before military judges. The applicant could legitimately fear that the military court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about the court's independence and impartiality could be regarded as objectively justified.

The Court concluded that it could not distinguish *Ergin* (no. 6) from the particular circumstances of the applicant's case. It therefore concluded that the applicant had been denied the right to a fair trial, in breach of Article 6.

Article 10

The Court cited the KHRP-assisted case of *Düzgören v Turkey* (56827/00, 9 November 2006), which had examined the contents of the leaflet reproduced by the applicant. The Court adhered to prior findings that the words used in the leaflet did not encourage violence, armed resistance or insurrection, and did not constitute hate speech.

Moreover, the Court distinguished the present case from *Arrowsmith v the United Kingdom* (7050/75). The facts in *Arrowsmith* involved the distribution of a leaflet at an occupied military camp, which sought to precipitate immediate desertion.

Furthermore, the Court considered that the applicant's sentence of two months imprisonment was a "harsh penalty". It applied the principles held in *Koç and Tambaş v Turkey* (50934/99), finding that the interference was "disproportionate to the aims pursued", and the reasons provided for justification could not be considered "necessary in a democratic society". In conclusion, the Court held that the applicant's conviction and sentence amounted to a violation of his right to freedom of expression in breach of Article 10.

The Court awarded the applicant EUR 2,000 for non-pecuniary damages and EUR 1,500 in legal costs.

Commentary

The Court's findings are the most recent in a series of cases relating to conscientious objectors in Turkey. The applicant in *Düzgören v Turkey*, a Turkish national and journalist, was fined and imprisoned for two months for distributing leaflets outside Ankara State Security Court.

The treatment of Yurdatapan and Düzgören are manifestations of an ongoing gap in domestic Turkish legislation regarding objection to military service. Turkey's Criminal Code has been revised subsequent to the material time in both cases. At present, the Criminal Code provides that anyone who "instigates, recommends or spreads propaganda which results in discouraging people from performing military service" shall be imprisoned, with greater penalties for such acts committed through publications and the media (Article 318). The predecessor to this provision was Article 155 under the unrevised Criminal Code.

Turkey and Armenia are the only two member states of the Council of Europe that do not recognize the right to conscientious objection. Article 9 of the Convention provides that everyone has the right to freedom of thought, conscience and religion, including the freedom to change their religion or belief, and to manifest their religion or belief, in worship, teaching, practice and observance.

The rights of conscientious objectors in Turkey and freedom of expression for their supporters continue to be violated. KHRP strongly recommends that provision be made in Turkish law to allow for conscientious objection on religious or personal grounds. The Court's judgment is considered a welcome step in underlining the urgent need for reform on this matter.

Albayrak v Turkey
(38406/97)

European Court of Human Rights: Judgment dated 31 January 2008

Disciplinary sanction – Discrimination on account of Kurdish ethnicity – Articles 10 and 14.

Facts

The applicant, Mr Mehmet Emin Albayrak, is a Turkish national who was born in 1967 and lives in İstanbul. The applicant was employed as a judge in Tufanbeyli district, Adana at the material time.

On 14 August 1995, a formal complaint was lodged with the judicial inspection board of Turkey's Ministry of Justice, in relation to the applicant's behaviour. A disciplinary investigation into the allegations was conducted by a judicial inspector.

On 1 March 1996, the judicial inspection board notified the applicant of five charges against him. The first charge related to the applicant having undermined the honour and dignity of the judiciary, as well as respect for his own position as a judge. The other charges were in relation to reports of conflicting behaviour directed towards work colleagues, and the failure to respect the dress code of a judge and his working hours. The report by the judicial inspector concluded that there was no evidence to justify further investigation into the first charge, but that the other charges were supported by the evidence collected.

The entire case file was transferred to the Supreme Council of Judges and Public Prosecutors, for consideration of the disciplinary measures available under domestic law. In relation to the first charge, it was submitted that the applicant allegedly introduced himself at social events as being of “Kurdish origin”, and behaved in a manner which displayed sympathy for the PKK. He was also accused of reading a PKK legal publication (prior to its subsequent ban), and watching a satellite television channel controlled by the PKK.

At trial, the applicant admitted that he had, on private occasions, stated he was of Kurdish origin. He also admitted to reading a PKK publication but denied watching a television channel controlled by the PKK. The applicant submitted that he had the right to be informed of incidents reported by the media, and the accusations were otherwise false, inaccurate, incomplete or misinterpreted. On 11 July 1996 the Supreme Council, having relied on the file evidence, concluded that the allegations were well-founded. It held that the applicant should be disciplinarily sanctioned by transfer to another jurisdiction.

A request to the Supreme Council to rectify its decision was unanimously dismissed, and the Appeals Board rejected the application for appeal. The applicant was transferred to Şenpazar district in Kastamonu under the sanction.

Complaints

Relying on Article 10, the applicant complained that the imposition of a disciplinary sanction by transfer to another jurisdiction, for reading a daily newspaper and watching a television channel, had infringed his right to freedom of expression.

Relying on Article 14, the applicant complained that the imposition of a disciplinary sanction by transfer to another jurisdiction was discriminatory, on account of the applicant’s Kurdish ethnicity.

Held

Article 10

The Court noted the parties did not dispute that the disciplinary sanction interfered with the applicant's right to freedom of expression, although it was submitted that the basis for the interference was that it was prescribed by law and pursued a legitimate aim.

The Court cited the case of *Vogt v Germany*, which recognised that civil servants as individuals were entitled to protection under Article 10. It was for the Court to determine whether a fair balance had been struck between the individual's right to freedom of expression, and ensuring the State's legitimate interest in the civil service performing its functions properly.

The Court found there was no evidence of any incident suggesting that the applicant's conduct would have a bearing on his performance as a judge, or that he had overtly associated himself with the PPK, or behaved in a manner which would lead to questioning of his capacity to remain impartial. The Court assumed that considerable weight had been placed on the allegation that the applicant following PKK-associated media. It stated that "care should be taken to dissociate the personal views of a person from received information that others wish or may be willing to impart to him or her" (*Halis v Turkey* (30007/96)).

In conclusion, the Court was not satisfied that sufficient reasons were shown for the disciplinary sanction to be "necessary in a democratic society". It was therefore unnecessary to consider whether it was proportionate to the aim pursued. The Court held that the sanction amounted to a violation of the applicant's right to freedom of expression in breach of Article 10.

Article 14

The Court found that there was no evidence to support the applicant's complaint of discrimination on the basis of his ethnic origin. It held that the sanction did not amount to a violation of the prohibition of discrimination in breach of Article 14.

Piroğlu and Karakaya v Turkey

(36370/02 and 37581/02)

European Court of Human Rights: Judgment dated 18th March 2008

Violation of Article 6(1) – unfairness of criminal proceedings against the applicants

concerning their refusal to annul memberships of their Human Rights Association;

Violation of Article 11 – interference with freedom of expression not prescribed by law in respect of Mrs Karakaya;

Violation of Article 10 in respect of Mrs Karakaya on account of her conviction for having been involved in a press declaration to protest against the deployment of American troops in Afghanistan.

Facts

The applicants are two Turkish nationals, Mr Ecevit Piroğlu and Mrs Mihriban Karakaya. The applicants were born in 1974 and 1962 respectively, and live in İzmir. They were members of the executive board of the İzmir Branch of the Human Rights Association at the time of lodging their applications to the Court. There were two different sets of criminal proceedings brought against the applicants. However, the first applicant's case concerned only the first set of proceedings, regarding the Association members with prior convictions.

The case concerns both the applicants' right to a fair and public hearing, and the second applicant's right to freedom of expression and freedom of association. The applications were joined on 2 May 2006 and declared partly admissible by the Court.

Proceedings regarding the Association members with prior convictions (concerning both applicants)

On 10 July 2001 the Human Rights Association were requested by the İzmir Governor to annul the membership of thirteen persons, including the second applicant, on account of their alleged involvement in illegal activities. The Association did not comply with the request relying on the provisions of the Associations Act (Law No. 2908). Criminal proceedings were subsequently brought against the applicants for their failure to comply with the İzmir Governor's request.

On 26 December 2001 the İzmir Magistrates' Court convicted the applicants without holding a hearing.

On 6 February 2002 the İzmir Criminal Court dismissed the objection lodged by the applicants, again without a hearing. The applicants paid the fines due.

On 14 April 2003 the Court of Cassation quashed the judgment of the İzmir Criminal Court dated 6 February 2002 and the case file was remitted to the İzmir Magistrates' Court.

On 22 October 2003, the İzmir Magistrates' Court held that, following the changes in law, the sentence imposed on the applicants for not complying with the İzmir Governorship's order had been classified as an administrative fine.

On 25 February 2004 the Court of Cassation upheld the decision of the İzmir Magistrates' Court.

Proceedings regarding the Platform of Conscientious Objectors to War (concerning second applicant only)

On 9 October 2001 the Association, together with several local non-governmental organisations (NGOs), took part in a civil society movement called the "Platform of Conscientious Objectors to War" and made a collective press declaration in protest against the military operations of the United States of America (USA) in Afghanistan.

A prosecution was initiated against the second applicant for her involvement with an organisation without any lawful status. On 31 December 2001 the İzmir Magistrates' Court, convicted the second applicant as charged and sentenced her to a fine.

On 20 February 2002 the İzmir Criminal Court dismissed her objection against the penal order without holding a hearing.

Complaints

Both applicants complained under Article 6(1) of the Convention that they had been deprived of their right to a fair and public hearing in the determination of the criminal charges against them. They stressed the fact that the courts had determined their cases without holding a hearing. The applicants further alleged a breach of Article 6(3)(a) of the Convention in that they had not been informed promptly of the accusations against them as the public prosecutor's indictment had not been communicated to them. They also maintained that they had been deprived of their rights to defend themselves in person or through a lawyer, and to submit counter-arguments and evidence, including the examination of witnesses, within the meaning of Article 6(3)(b), (c) and (d).

The second applicant further complained that her right to freedom of expression under the Article 10 had been infringed, as she had been convicted of taking part in a movement and participating in a collective press declaration criticising the military actions of the USA in Afghanistan. She also relied on Article 11 of the Convention, complaining that she had been convicted for not annulling the membership of thirteen persons, including her own, of the Human Rights Association.

Held

Article 6

The Court dismissed the Government's claims that the second applicant had failed to exhaust domestic remedies in respect of the second set of criminal proceedings. The Government argued that at the end of the first set of criminal proceedings, at the request of one of the co-accused, the Ministry of Justice had issued a written order and referred the case to the Court of Cassation. The Government claimed that the second applicant had failed to exhaust domestic remedies by not following the same procedure in respect of the second set of criminal proceedings. The Court declared that the remedy referred to by the Government was not directly accessible to people whose cases have been tried, therefore it was not necessary to attempt this remedy in order to comply with the requirements of Article 35(1) of the Convention.

The Court reiterated that Article 6 guarantees the right of an accused to participate effectively in a criminal trial. In general, this includes not only the right to be present, but also the right to receive legal assistance if necessary, and to follow the proceedings effectively. The Court observed that, in accordance with the relevant domestic law prevailing at the time of the events, no public hearing was held during the applicants' prosecution. The procedure followed by the judicial authorities prevented the applicants from exercising their defence rights properly and thus rendered the criminal proceedings unfair. The Court therefore concluded that the criminal proceedings had been unfair, in violation of Article 6(1).

Article 10

The Court observed that the local NGOs which formed the "Platform of Conscientious Objectors to War", including the İzmir Human Rights Association, made a joint press declaration on 9 October 2001 and the applicant, in her capacity as a board member of the Association, was convicted on the basis of the Associations Act (Law No. 2908). The Court considered that the second applicant's conviction and sentence for being part of a movement whose aim was

to draw attention to a topical issue at the time constituted an interference with her freedom of expression.

The Government considered that the interference was prescribed by the Associations Act (Law No. 2908), which prevented associations from forming or being part of a legal entity other than a federation or confederation. It relied on the Section 34 of the Act in force at the time, which provided “Associations may not form organisations other than federations or confederations”. The Court noted that even though the condition of accessibility was satisfied, the law did not meet the criteria of foreseeability, as the wording was not sufficiently clear to enable the members of the Association to have realised that rallying to a movement or “platform” would lead to a criminal sanction. Accordingly, the interference with the applicant’s freedom of expression was not prescribed by law. That being so, the Court was not required to determine whether this interference pursued a legitimate aim or whether it was proportionate to the aim pursued. The Court concluded that there has been a violation of Article 10 of the Convention.

Article 11

The Government denied interference with the second applicant’s rights under Article 11 of the Convention with regards to the second set of criminal proceedings. It stated that the second applicant had not been convicted on account of the aims, political stance or activities of the Association, but sentenced to a fine because of a failure to comply with a procedural obligation under Associations Act (Law No. 2908). However, the Court considered that the second applicant’s conviction on the membership question constituted, in itself, an interference with her rights under Article 11. The Court concluded that interference was not lawful and therefore it was not necessary to determine whether this interference pursued a legitimate aim or whether it was proportionate to the aim pursued. Accordingly, there has been a violation of Article 11 of the Convention.

Article 41

The Court held unanimously that the finding of a violation of Article 6(1) of the Convention constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by the first applicant. In view of the violations found under Articles 10 and 11 of the Convention, and ruling on an equitable basis, the Court awarded the second applicant EUR 1,000 for her non-pecuniary damage.

Freedom of assembly and association

Nurettin Aldemir and others v Turkey

(32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02, 32138/02)

European Court of Human Rights: Judgment dated 12 December 2007

Police intervention contrary to freedom of assembly and freedom of association – Articles 7, 10 and 11.

Facts

The applicants are eight Turkish nationals who live in Ankara and İstanbul. They are members of “EĞİTİM-SEN” (Eğitim ve Bilim Emekçileri Sendikası – The Education Workers’ Trade Union), a trade Union which is a member of KESK (Kamu Emekçileri Sendikaları Konfederasyonu – The Confederation of Public Employees’ Trade Union).

In 2001 “KESK” decided to organise meetings in Ankara to protest against a draft bill on trade unions under discussion in Parliament. The aim was to draw public attention to and to achieve the withdrawal of this bill, which in their view did not meet international standards.

In the meantime, on 18 of December 2000, the Governorship of Ankara had issued a circular, providing guidelines of demonstrations organized in the city of Ankara, in accordance with the Law on Meetings and Demonstration Marches (Law no. 2911).

According to this circular, the meeting place chosen by KESK was not among the permitted areas. On 7 and 25 of June 2001 the applicants took part in rallies in Kızılay.

On both occasions, while the president of “KESK” was reading out press statements, police officers warned the demonstrators that their action was contrary to the law and that they should disperse. The demonstrators blocked the main street of the Kızılay district and attempted to march towards the Prime Minister’s Office. The police officers then intervened and used truncheons, sticks and tear gas to disperse the crowds. Some of the demonstrators attacked the security forces using pavement stones and sticks, injuring seven police officers and destroying a police vehicle. The applicants were also wounded during the

incidents. The applicants filed a complaint against various officials and the police officers involved in the incidents.

On 26 June 2001, 27 demonstrators, including Arzu Doğan and Sami Evren, were charged with violating the Law on Meetings and Demonstration Marches (Law no. 2911).

On 23 July 2001, pursuant the Law no. 4483 the Ankara Public Prosecutor's Office decided to transfer the file to the Ministry of Interior.

On 9 of October 2001 the Ministry of Interior relying on Article 4 of Law no. 4483, decided not to take an action against the officials and officers accused by the applicants as it found that the allegations were of an "abstract nature". The Ministry considered that the force used by the police was lawful and justified in the circumstances and that the officers had been under an obligation to disperse the demonstrators who had organised an illegal meeting. On 14 November Ankara Criminal Court acquitted Arzu Doğan and Sami Evren, as well as other demonstrators. The Court decided that the demonstrators had a right to hold unarmed and peaceful meetings and demonstration without prior permission. On 29 January 2002 the Ankara Public Prosecutor issued a decision of non-prosecution concerning the applicant's complaints.

Complaints

The applicant alleged that the police interference in the meetings constituted a breach of their rights guaranteed by Article 7, 10 and 11 of the Convention. The applicants claimed that the security forces had unlawfully interfered with the exercise of their right to peaceful assembly. The applicants complained that the force used against them during their demonstrations on 7 and 25 June 2001 was disproportionate and amounted to ill-treatment within the meaning of the Article 3 of the Convention. They further alleged that they had been denied an effective remedy in respect of their complaint of ill treatment. The applicants further complained that the police intervention in the demonstration had also breached their rights guaranteed by Articles 1, 5, 14 and 17 of the Convention.

Held

The Court noted that the applicant took part in demonstrations to draw public attention to and secure the withdrawal of a draft bill on trade unions which contravened international standards. However, their meeting was forcibly ended by the police on the grounds that the location chosen was unauthorised. Although two applicants were acquitted of charges and no proceedings were

brought against the others, the interference in the meetings and the force used by the police to disperse the participants, as well as the subsequent prosecution, could have had a chilling effect and discouraged the applicants from taking part in similar meetings. The Court considered that the applicants were affected by the police intervention and that there had been an interference with their right to freedom of peaceful assembly. That interference was prescribed by law and pursued the legitimate aims of preventing disorder and protecting public safety.

As to whether the interference was “necessary in a democratic society”, the authorities had a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens. States also had to refrain from applying unreasonable indirect restrictions upon that right and those principles were also applicable to demonstrations and processions organised in public areas.

The Court observed that there was no evidence to suggest that the two groups in question initially presented a serious danger to public order. Nevertheless, it was likely that would have caused some disruption in a square in central Ankara.. In the Court’s view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance toward peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance. Accordingly, the Court considers that in the instant case the forceful intervention of the police officers was disproportionate and was not necessary for the prevention of disorder within the meaning of the second paragraph of Article 11 of the Convention. In view of the above, the Court therefore dismisses the Government’s preliminary objection regarding the applicants’ alleged lack of victim status and concludes that there has been a violation of Article 11 of the Convention.

Concerning the complaints under Articles 1, 5, 14 and 17, the Court found nothing in the case file disclosing any appearance of a violation of these provisions. It therefore rejected this part of application as manifestly ill-founded.

The applicants did not submit a claim for just satisfaction. Accordingly, the Court considered that there was no call to award the applicants any sum on that account.

Rosca, Secareanu and others v Moldova

(25230/02, 25203/02, 27642/02, 25234/02 and 25235/02)

European Court of Human Rights: Judgment dated 27 March 2008

Excessive administrative fines – Articles 10 and 11.

Facts

The applicants, Iurie Roșca, Ștefan Secăreanu, Petru Buburuz, Anatol Roșcovan and Anatol Eremia, were members and/or sympathisers of the Christian Democratic People's Party (CDPP). The CDPP was the parliamentary opposition party in the Republic of Moldova at the material time.

In late 2001, the Moldovan government publicly expressed its intention to make Russian language studies in schools compulsory for children aged seven years and over. On 26 December 2001, the CDPP informed the Municipal Council of its intention to hold a meeting with supporters in response to the policy's introduction, on 9 January 2002 in the Square of the Great National Assembly in front of government buildings.

The CDPP submitted that it was not required to obtain prior authorisation from the Municipal Council, in accordance with the national Status of Members of Parliament Act, since it was a meeting between members of Parliament and their supporters. Rather, the Municipal Council classified the gathering as a "demonstration", within the meaning of the national Assemblies Act. It however authorised the gathering to be held at a different location.

The CDPP held its gathering as initially planned on 9 January, in the Square of the Great National Assembly. Moreover, it held additional gatherings on 11, 13, 15, 16 and 17 January. It did not seek authorisation for the gatherings as per the Assemblies Act, but had informed the Municipal Council of each occasion in advance.

On 14 January, the Ministry responded by issuing the CDPP with an official warning that it had breached the Assemblies Act. On 18 January, it imposed a temporary one-month ban on the CDPP's activities pursuant to the Parties and other Socio-Political Organisations Act.

On 23 January, the Municipal Council informed the Moldova Ministry of Justice that there was a discrepancy between the relevant provisions of the Status of

Members of Parliament Act and the Assemblies Act. It requested that the Ministry ask parliament for an official interpretation of the legislation. On 26 January, the Municipal Council suspended its decision that the gathering amounted to a “demonstration” until such an interpretation was provided. The decision to ban the CDPP’s activities was lifted by the Ministry on 8 February, although it maintained that it had been necessary and justified.

In relation to the legality of the CDPP’s gatherings, on 21 February the government lodged an application with the Supreme Court of Justice. It requested that the CDPP demonstrations be declared illegal and ordered to cease. On 25 February, the Supreme Court held that the gatherings fell within the scope of the Assemblies Act and were illegal. It found that “[e]ven if one could accept that the CDPP had the initial intention of holding meetings with its supporters, those meetings later took on the character of demonstrations, marches, processions and picketing ...”. The CDPP appealed the decision, which was dismissed by the Supreme Court.

In relation to the Ministry’s ban imposed on the CDPP’s activities, on 7 March the Court of Appeal upheld the ban as lawful. The CDPP appealed to the Supreme Court of Justice, relying on Articles 10 and 11 of the Convention. The Supreme Court dismissed the CDPP’s appeal, on the basis that the demonstrations were illegal and the sanction imposed had not been disproportionate.

Court proceedings were subsequently brought against the individual applicants in the Buiucani District Court, under the Code of Administrative Offences. During January and February 2002, the Court found each applicant guilty of having organised and/or actively participated in one or more unauthorised demonstrations held by the CDPP between 9 and 31 January. The court imposed administrative fines on the applicants, ranging from 90 to 450 Moldovan LEU (MDL). The applicants’ appeals of these decisions were dismissed without reasons being given.

Complaints

Relying on Article 11, the applicants complained that the imposition of administrative fines for organising and/or actively participating in unauthorised demonstrations had infringed their right to freedom of peaceful assembly.

Relying on Article 10, the applicants complained that the imposition of administrative fines for organising and/or actively participating in unauthorised demonstrations had infringed their right to freedom of expression.

Held

Article 11

The Court cited the case of *Christian Democratic People's Party v Moldova* (28793/02), in relation to sanctioning of that applicant party for organising the demonstrations relevant to the present case.

The Court in *Christian Democratic People's Party* found that the gatherings of the applicant party were entirely peaceful, with no calls to violent overthrow of the government or any other acts undermining the principles of pluralism and democracy. It noted that the State's margin of appreciation was thus narrowed, due to the public interest in free expression and because the applicant was an opposition political party. Therefore, the applicant party's failure to obtain authorisation from the Municipal Council in accordance with the Assemblies Act would not amount to "very compelling reasons" justifying a ban on the activities of a political party.

In conclusion, the Court could not distinguish the circumstances in the present case from that of *Christian Democratic People's Party*. The Court similarly expressed that it was not satisfied the imposition of administrative fines on the applicants were proportionate to the aim pursued under the Assemblies Act, and these measures did not meet a "pressing social need". It held that this amounted to a violation of Article 11.

Article 10

The Court found it was not necessary to separately consider the applicants' complaint under Article 10, as it related to the same matters under Article 11.

Article 41

The Court awarded Mr Rosca EUR 28 , Mr Secareanu EUR 28 , and EUR 6 each to the other applicants for pecuniary damages. It further awarded EUR 2,000 to each applicant for non-pecuniary damages, except for Mr Rosca and Mr Secareanu.

Prohibition of discrimination

Petropoulou-Tsakiris v. Greece

(44803/04)

European Court of Human Rights: Judgment dated 6 December 2007

Police Brutality – Torture, inhuman or degrading treatment – Lack of effective domestic remedy – Racial Discrimination – Articles 3, 13 and 14.

Facts

The applicant, Fani-Yannula Petropoulou-Tsakiris, is of Roma ethnic origin and lives in the Roma settlement of Nea Zoe, in Aspropyrgos (western Attica). She was two and a half months pregnant at the time of these events.

On the 28 January 2002 the Police Directorate of Western Attica carried out a police operation in Nea Zoe, involving thirty-two police officers of Aspropyrgos police station and one judicial official, with the intention of arresting persons who were suspected of involvement in drug trafficking. In the course of this operation eleven homes were searched and four persons were arrested.

The applicant alleged that she and other Roma women were rounded up by police for a body search. Whilst she was waiting to be searched she noticed some police officers verbally abusing her relative who was disabled. She stated that as she approached the officers she was forcefully pushed back by one of them and kicked in the back by another despite the fact that she had shouted that she was pregnant. Resulting from the kick, she felt intense pain in her abdomen and started bleeding, but although this was obvious to the police officers present, she was not taken to hospital. She did not go to hospital after the incident because she was an unregistered stateless person and feared that she would be refused treatment.

The government stated that the police officers involved in the operation did not use force against any of the civilians, nor were any of them subject to racial abuse. The government further stated that the presence of a judicial officer guaranteed the proper conduct of the officers.

On the 29 January 2002 the applicant informed members of the Greek Helsinki Monitor that she had been kicked by a police officer and was bleeding. She was immediately rushed, by members of that organisation, to Elena Venizelou Maternity Clinic where she was admitted and medically examined.

On 1 February 2002 the applicant suffered a miscarriage. She was kept in hospital until the 5 February 2002 under medical supervision. The medical report stated that she was bleeding when she was admitted to hospital and that she suffered a miscarriage but it did not mention any marks on her body such as bruising, or any possible reasons for her miscarriage.

Criminal proceedings were launched by the applicant's representatives on 1 February 2002. The preliminary investigation was carried out by Aspropyrgos police station, despite the applicant's request that it should be excluded from performing the investigation.

On 16 January 2004 a court Bailiff visited the applicant's settlement to call her and another woman as witnesses to testify before the Elefsina Magistrate. The Bailiff was informed by Aspropyrgos police station that the women had moved "to an unknown address."

On 26 January 2004 the Magistrate returned the file to the Athens public prosecutor and on 3 July 2004 it was closed and labelled "perpetrator unknown." Neither the applicant nor her representative were informed that the case had been closed. The Greek Helsinki Monitor discovered the fact when making an investigation at the Athens public prosecutor's office on 28 July 2004.

Concurrently, the Greek Police carried out an informal administrative investigation into the events. It was launched on 5 March 2002 and directly supervised by the Deputy Director of Police, A.V., who had been actively involved in the original police operation. During the investigation five police officers who had been involved in the original operation were questioned and stated that they had not witnessed any ill-treatment of Roma people by their colleagues. When, on 6 March 2002, the police went to the applicant's settlement to serve her with a summons for interview, they did not find her.

On 7 March the report on the findings of the informal investigation was issued, stating that the presence of a judicial officer during the police operation guaranteed that the public prosecutor would have been informed of any event of police brutality. It further noted that the complaints were exaggerated and that this was "a common tactic employed by the *athinganoi* (Greek word for Roma) to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control." The report recommended that disciplinary proceedings be suspended pending the outcome of the criminal investigation.

Complaints

The applicant complained that she had suffered police brutality amounting to torture, inhuman or degrading treatment contrary to Article 3 of the Convention. Under the same Article, together with Article 13 she complained that she had not been offered effective domestic remedy, as the Greek investigating and prosecuting authorities had failed to carry out an impartial official investigation.

Furthermore she complained of a violation of Article 14 of the Convention, together with Articles 3 and 13, submitting that both the ill-treatment and the lack of effective investigation were in part due to her Roma ethnic origin.

Held

Article 3

The court decided that there was insufficient evidence to prove beyond reasonable doubt that the applicant suffered treatment contrary to Article 3, firstly because the medical report included no reference to any evidence of injury which may have caused her miscarriage and secondly because the applicant failed to provide any other evidence in support of her allegations. The court therefore held, by six votes to one, that there had not been a breach of Article 3 in respect of the treatment of the applicant at the hands of the police.

However the Court affirmed that, read in conjunction with a State's general duty under Article 1, Article 3 also implies a requirement that when an individual claims credibly to have been ill-treated there should be an effective official investigation capable of leading to the identification and punishment of those responsible. Without this, the prohibition under Article 3 would be practically ineffective. The Court noted that it had invoked this procedural aspect of Article 3 due to its inability to reach a conclusion on whether the alleged ill-treatment had taken place and specifically because this inability was due in part to a lack of an effective response from the authorities at the relevant time. Therefore the Court held that there had been a breach of Article 3 inasmuch as the authorities failed to properly investigate the applicant's allegations.

Article 13

Due to the above finding in relation to the investigation, the Court held that there was no reason to examine the claim under Article 13.

Article 14

The Court defined discrimination as "treating differently, without an objective and reasonable justification, persons in relevantly similar situations." Whilst

noting that racial discrimination can be difficult to prove, the Court asserted that it requires particular efforts on the part of the authorities to combat it and to investigate possible cases. In relation to the present case, the Court noted that there was no attempt by the authorities to investigate whether the policemen involved in the incident displayed any anti-Roma sentiment and also that remarks made by the Deputy Director of Police throughout the administrative investigation implied a negative attitude to her Roma origin. The Court therefore found that there had been a violation of Article 14, taken in conjunction with Article 3 of the Convention.

The Court awarded the applicant EUR 20,000 for non-pecuniary damages and EUR 1,000 in legal costs.

Dissenting Opinion

Judge Loucaides gave a partly dissenting opinion that the state party was also in breach of Article 3 in its substantive aspect. He expressed his concern at the Court's inability to establish that there had been ill-treatment on the basis of the credible testimony of the applicant. He considered it dangerous and inviting of future injustice that the testimony of the applicant was not able to be taken seriously by the court because of obfuscation of the facts by the police due to their prejudice against her. He reiterated that the applicant's testimony was coherent and convincing and that it had been rejected by the majority of the Court without their finding any well-founded reason for her to have lied. He pointed out that the fact that the medical report made no mention of bruising was not surprising considering that it was prepared by a gynaecologist and not a forensic doctor.

Further, he argued that the nature of the merely informal police investigation: the fact that it was carried out by the Deputy Director of Police who had been involved in the operation in question and was based entirely on the testimonies of the five police who were present; in itself points to the truth of the applicant's testimony. He asserted that the only explanation of this inadequate and ineffective investigation is that it was an attempt to cover up the guilty behaviour of a colleague.

Commentary

The Court has confirmed the seriousness of racial discrimination and has been prepared to uphold the prohibition against discrimination which is outlined in the convention as a source of positive obligation for the state despite accepting that it is difficult to prove the existence of such discrimination. For example, in

this case the Court stated that “Racial violence is a particular affront to human dignity and ... the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.” (paragraph 61) The Court went on specifically to articulate the obligation enshrined in Article 14 stating “The Court recalls that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.” (paragraph 62) The authorities failure to investigate the applicants alleged anti-Roma sentiment and the remarks made by the Deputy Director of Police confirmed the states violation of Article 14. The Court’s rigorous approach to the prohibition against discrimination can be seen in the case of *Osmanoğlu v Turkey* (48804/99) summarised above, when finding a violation of Article 14 the Court did not rely entirely on concrete evidence from the investigation file. Furthermore, in the case of *Bekos and Koutropoulos v. Greece*, (15250/02) there was no investigation and the Court’s finding of a violation of Article 14 was entirely founded on the fact that the state did not fulfil its positive obligation to investigate any potentially racist motivation for abuse. For a comparison of the Court’s approach towards Article 14 violations of Roma and Kurdish applicants, see the *Stoica v Romania* commentary below.

Stoica v Romania

(42722/02)

European Court of Human Rights: Judgment dated 4 March 2008

Applicant’s ill-treatment by the police and lack of an effective investigation – Application to challenge the military prosecutor’s final decision - Articles 3, 6 (1), 13 and 14 of the Convention.

Facts

The applicant, Constantin Decebal Stoica, is a Romanian national of Roma origin who was born in 1987. He lives in Gulia, a village in Romania which has an 80 per cent Roma population, and is severely disabled.

The applicant alleged that he was ill-treated by the police following a clash between the authorities and Roma outside a bar in Gulia and that the investigation into the incident was inadequate and motivated by racial prejudice against the applicant’s ethnic origin.

On 3 April 2001 at around 8 pm a dispute arose between the state authorities and the owner of the bar and the 20 to 30 Roma gathered in front of the bar. The applicant, a minor at the time, tried to run away with other children but was tripped up by a police officer. He was beaten, kicked and hit on the back of his head, despite warning the officer that he had recently had head surgery and that the beating could endanger his life. The applicant was left unconscious on the ground and later carried to his parents' home by the witnesses to the incident. On the evening of 3 April 2001 he was taken to Sfânta Maria Hospital in Iași. A subsequent medical report, issued on 6 April 2001 certified that the applicant had bruises and grazes caused by a blunt instrument and thoracic concussion and that he needs three to five days of medical care to recover. On 12 April 2001 he was declared to have a first-degree disability.

The Government denied that the applicant had been beaten by the police.

On 4 April 2001, the 3 April incidents between the individuals from the Roma community and the authorities were discussed in the Mayor's office with representatives of the Prefect's Office, the Government and the Roma Party. A report was drawn up and sent to the Suceava Police on 5 April 2001. It excluded the possibility of any racist motivation being behind these incidents.

On the same day the applicant's father lodged a criminal complaint with Bacău Military Prosecutor against the Deputy Mayor and the police officers present during the incident. The Suceava Police started the investigations into the case. After hearing the evidence from villagers, police officers and the applicant they sent the final report to Bacău Military Prosecutor with the recommendation not to press charges. Military Prosecutor of Bacău decided not to prosecute on the ground that the evidence available did not confirm that the applicant had been beaten. That decision was based on witness statements taken from the applicant, his parents, five villagers, a bar owner and his wife, the Deputy Mayor, the 11 police officers and guards and four passers-by. The military prosecutor disregarded the villagers' statements as biased and unreliable because they had arrived on the scene after the officials' cars had left. Their statements did not corroborate those made by the applicant and his father concerning the beating of the applicant. The report also concluded that the conflict had not been of a racist nature. The prosecutor's decision not to prosecute was later confirmed by the Military Prosecutor's Office attached to the Supreme Court of Justice, on the ground that the case indicated that no violence had been inflicted on persons of Roma origin.

On 23 August 2001 the Suceava Police informed the military prosecutor that the Dolhasca police officers had not filed a report in order to have criminal investigations started against the Roma for insulting behaviour, because “the way in which some of the Roma acted is pure Gypsy behaviour (*pur țigănesc*) and does not constitute the crime of insulting behaviour”.

On 24 June 2003, Article 2781 of the Code of Criminal Procedure was amended by Law No. 281 to provide a new remedy and setting a one-year time-limit for interested parties to appeal a prosecutor’s decision taken before the entry into force of this Law. The possibility of challenging, before a court, the military prosecutor’s decision not to prosecute was available to the applicant in the present case when the Law came into force on 1 July 2003.

Complaints

The applicant alleged that he was ill-treated by the police on 3 April 2001 and that the subsequent investigation into the incident was inadequate. He further alleged that the impugned events and the flaws in the investigation had been motivated by racial prejudice, in breach of Article 14 taken in conjunction with Article 3 of the Convention.

The applicant also complained, relying on Article 6(1) of the Convention, that he had no access to court to obtain redress for the alleged ill-treatment inflicted on him by the police officers. He alleged that no effective remedy was available to him to challenge the prosecutor’s decision in favour of the police officer who had allegedly injured him.

The applicant also complained that the authorities’ failure to carry out an effective investigation capable of providing redress for the ill-treatment suffered by the applicant constituted a violation of Article 13 of the Convention.

The Government did not contest the applicant’s injuries but contended that, based on the conclusion of the domestic investigation, the alleged violence had not been committed by the officials, in so far as neither the identity of the perpetrators nor the exact date on which the violence had been committed could be established with certainty. It also noted the contradictions between the witnesses’ statements and those of the applicant. Furthermore, the Government considered that the investigation carried out by the authorities had been adequate and effective: the prosecutors had heard testimony from the parties and witnesses, the applicant had been examined by a doctor and the facts had been carefully weighed.

Held

Article 3

The Court considered that the degree of bruising found by the doctor who examined the applicant indicates that the latter's injuries were sufficiently serious to amount to ill-treatment within the scope of Article 3. It stated that the Government had not satisfactorily established that the applicant's injuries were caused otherwise than by the treatment inflicted on him by the police officers, and concluded that these injuries were the result of inhuman and degrading treatment, amounting to a violation of Article 3 of the Convention. The Court further stated that the State authorities failed to conduct a proper investigation into the applicant's allegations of ill-treatment. Firstly, although 20 to 30 villagers were present during the incident, only three had testified before Suceava Police and five before the military prosecutor. On the other hand, all the police officers and public guards had given evidence. Secondly, there was no explanation as to why the other villagers had not testified during the investigation, casting doubt on how thoroughly the police had investigated the case. Thirdly, the fact that the police officers had not reported the Roma's alleged insulting behaviour cast doubt on their version of events. Therefore the Court declared there to be a violation of Article 3 of the Convention under its procedural head.

Article 6

The applicant's complaints under Article 6(1) of the Convention were rejected for non-exhaustion of domestic remedies.

Article 13

The Court noted that the applicant's complaint under Article 13 had two distinct branches Firstly, the ineffectiveness of the criminal investigation and secondly, the lack of appeal against the military prosecutor's decision.. As to the effectiveness of the investigation, the Court concluded that there was a procedural violation of Article 3 in respect of the same aspects and therefore it was not necessary to make a separate finding under Article 13 of the Convention. The Court considered that a separate issue arose under Article 13 in so far as the applicant complained that he could not appeal against the prosecutor's decision not to institute criminal proceedings, in particular bearing in mind the fact that the applicant alleged that the prosecutor's decision prevented him from seeking damages before the civil courts. However, it concluded that there has been no violation of Article 13 of the Convention stating that the applicant should have challenged before the courts the prosecutor's decision in the case once the law providing the remedy came into force.

Article 14 taken in conjunction with Articles 3 and 13

The Court noted that in the present case the evidence indicating the racial motives behind the police officers' actions was clear and neither the prosecutor in charge with the criminal investigation nor the Government could explain that the incidents were racially neutral. The Court considered that all the evidence of discrimination was ignored by the police and the military prosecutor. The "pure Gypsy" remark in the Suceava Police report had further proven that the police officers had not been racially neutral, either during the incident or throughout the investigation. Therefore the Court has concluded that there had been a violation of Article 14 of the Convention taken in conjunction with Article 3. Having regard to the finding under Article 13 of the Convention, the Court considered that no particular issue arises under Article 14 taken in conjunction with Article 13.

Article 41

The Court rejected applicant's claims for pecuniary damages as being unsubstantiated. However, it awarded the applicant EUR 15,000 in respect of non-pecuniary damage and EUR 2,278 for costs and expenses.

Commentary

It is interesting that both in the case of *Petropoulou-Tsakiris v Greece*, (44803/04) (above), the Court found the failure to investigate to be a violation of Article 14 as well as Article 3. There have been a number of cases where the Court has found violations against people of Roma origin to be violations under Article 14 as well as other Articles of the Convention. See for example *Moldovan and Others v Romania*, (41138/98 and 64320/01) where the Court found a violation of Articles 8, 3 and 6, but also, in conjunction with Articles 8 and 6 a violation of Article 14. In the case of *Bekos and Koutropoulos v Greece*, (15250/02), as in *Petropoulou-Tsakiris*, the Court did not find a violation of Article 14 in relation to the substantive violations of the Convention, but in the authorities' failure to investigate. Unlike *Moldovan* and the present cases however, in *Bekos and Koutropoulos*, the Court found a violation of Article 14 on the basis of a complete lack of investigation. There was therefore no case file containing discriminatory remarks upon which the Court could base its finding that there had been discrimination, but it was prepared to find that there had been nonetheless.

In contrast to this approach of the Court towards discrimination against Roma people, is its approach to allegations of discrimination by Kurdish applicants. The case of *Nuray Şen v Turkey* (25354/94), which concerned torture and extra-judicial killing, provides a good comparison. As in this case, the Court held that

there was insufficient evidence to find a violation of Articles 2 and 3 but found that there had been a failure to investigate the allegations. However in the case of *Nuray Şen* the applicant also alleged that the failure to investigate constituted discrimination due to her husband's Kurdish origins. The Court did not discuss these allegations at any length in its judgement but stated that it considered them "unsubstantiated" (paragraph 198). See also the case summary above of *Enzile Özdemir v Turkey* (54169/00).

Possibly what convinced the Court that there was discrimination in the present cases was the evidence provided by the reports into the official investigations. In *Petropoulou-Tsakiris* the report contained "tendentious general remarks in relation to the applicant's Roma origin" while in the *Stoica* case the police's reference to the applicant's allegations as "pure gypsy" led the Court to a finding of discrimination. Nevertheless, in *Petropoulou-Tsakiris* the Court also stated that it was "unacceptable that ... there [was] no attempt on the part of the investigating authorities to verify whether the behaviour of the policemen involved in the incident displayed anti-Roma sentiment." Furthermore, in the case of *Bekos and Koutropoulos* the Court was prepared to find a violation of Article 14 based on the total lack of an investigation. Turkish failures to investigate allegations of human rights violations against Kurds could thus be found to violate Article 14, irrespective of whether the Court has any more tangible evidence of discrimination. That the Court has not found this is indicative of its approach to the issue of discrimination against the Kurds in Turkey.

Right of Individual Petition

Mostafa and others v Turkey

(16348/05)

European Court of Human Rights: Judgement dated 15 January 2008

Right of individual petition – Article 34.

Facts

The six applicants, Sirwan Mohammad Mostafa, Diyako Sirwan Mohammad, Hako Sirwan Mohammad, Didar Sirwan Mohammad, Bilal Sirwan Mohammad and Sawsen Maarof Mohammad, are Iraqi nationals who were born in 1970, 1967, 1999, 1991, 2001 and 2004, respectively, and who have been living in northern Iraq since their expulsion from Turkey. The first applicant is the husband of the

second and they are the parents of the four others.

The applicants arrived in Turkey on 29 February 2000 on Iraqi passports. They lodged an application for political asylum with the UNHCR (United Nations High Commissioner for Refugees) in Ankara, but it was rejected on the ground that Sirwan Mohammad Mostafa had been convicted of a serious non-political offence in his country of origin. In August 2003 the Turkish Minister of the Interior decided that the applicants should be deported and they unsuccessfully lodged a number of appeals against that decision.

On 22 April 2005 the Minister of the Interior informed the applicants of his decision to have them deported, finding that they did not fulfil the necessary conditions to be granted political refugee status. He allowed them 15 days to leave voluntarily to a country of their choosing, failing which they would be deported to their country of origin.

The applicants lodged an application before the European Court of Human Rights, which indicated to the Turkish Government on 4 May 2005, under Rule 39 (interim measures) of the Rules of Court, that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicants to Iraq pending the Court's decision on the case.

However, on 11 May 2005 they were deported to northern Iraq. In March and July 2007 the applicants informed the Court of numerous problems, in particular of a political nature, that they said they had encountered since their expulsion.

Complaints

The applicants alleged that their expulsion to Iraq put their lives in danger. The Court, observing that the Government had failed to comply with the measure it had indicated under Rule 39 of the Rules of Court, considered whether there had been a violation of Article 34 of the Convention.

Held

Article 34

The Court reiterated that the undertaking not to hinder the effective exercise of the right of individual application precluded any interference with an individual's right to present and pursue his complaint before the Court effectively.

In the applicant's case the expulsion to northern Iraq had hindered the proper examination of their complaints, as had been consistently found by the Court in similar cases, and had ultimately prevented the Court from according them

the necessary protection from potential violations of the Convention. The Court noted that it had been unable to communicate with the applicants from the time of their expulsion in March 2005 until March 2007. Accordingly, it was not in a position to ascertain whether they had been hindered in the effective exercise of their right of individual application during that period.

However, regardless of whether there had been any such hindrance, Article 34 of the Convention was closely connected to Rule 39 of the Rules of Court. The Court reiterated that by virtue of Article 34 States which had ratified the Convention undertook to refrain from any act or omission that might hinder the effective exercise of an applicant's right of individual application. More specifically, the Court emphasised that a measure of interim protection was, by its very nature, provisional, and that its necessity had to be assessed at a precise point in time in view of the existence of a risk that might hinder the effective exercise of the right of application guaranteed by Article 34.

The Court concluded that, because Turkey had failed to comply with the interim measures indicated under Rule 39 of the Rules of Court, there had been a violation of Article 34.

Article 41

The Court did not afford just satisfaction to the applicants who failed to make a request.

Right of Property (Article 1, Protocol 1)

Demades v. Turkey

(16219/90)

European Court of Human Rights (Fourth Section- Chamber): Judgment dated 22 April 2008

Article 1 of Protocol No.1 – unable to access or enjoy use or possession of property- Articles 8 and 13 of the Convention.

Facts

The applicant was John (Ioannis) Demades, a Cypriot national of Greek- Cypriot origin, (now deceased) who was born in 1929 and lived in Nicosia. He owned a fully-furnished, two-storey house with open views of the coast and a plot of land on the sea front in the district of Kyrenia. He submitted that the house was fully

furnished and equipped and was used as a family home not only for weekend and holiday purposes. He was the registered owner of land. After his death his application was pursued by his heirs; his wife and two children.

Complaints

The applicant, relying on Articles 8 and 13 and Article 1 of Protocol No.1, claimed that since 1974 he had been prevented by the Turkish armed forces from having access to, using and enjoying possession of his property or developing it.

Held

The Court recalled that in its principal judgment it held that there had been a continuing violation of the applicant's rights guaranteed by Article 8 of the Convention and Article 1 of Protocol No.1 by reason of the complete denial of the rights of the applicant with respect to his home and the peaceful enjoyment of his property in Kyrenia. As a result of the being continuously denied access to his land since 1974, the applicant had effectively lost all access and control as well as all possibilities to use and enjoy his property. The Court therefore held by six votes to one that the applicant was entitled to a measure of compensation in respect of losses directly related to this violation of his rights from the date of deposit of Turkey's declaration recognising the right of individual petition under former Article 25 of the Convention, namely 22 January 1987, until the present time².

As it had already decided on the merits of the case in the principal judgement, the Court on 22 April 2008 ruled that the applicant was not now required to apply for compensation to the commission set up under the Law on Compensation for Immovable Properties of the Turkish Republic of Northern Cyprus to deal with compensation claims.

The Court also reiterated its finding in *Loizidou, Cyprus v Turkey* and *Xenides-Arestis v Turkey* that displayed Greek Cypriots, like the applicant, could not be deemed to have lost title to their property and that the compensation to be awarded by the Court is confined to losses emanating from the denial of access and loss of enjoyment of his property. Having regards to the materials provided by the parties, the Court took as a starting point the applicant's figures for the valuation of the property in 1974 rather than the assessment put forward by the Ministry of the Interior and awarded the applicant EUR 785,000 for pecuniary damage.

² See *Cankocak v Turkey*, Nos. 25182/94 and 26956/95, § 26, 20 February 2001

Concerning non-pecuniary damage, the Court considered that an award should be made in respect of the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use his property as he saw fit and enjoy his home and awarded EUR 45,000. The Court also held that EUR 5,000 should be awarded in respect of costs and expenses and unanimously dismissed the remainder of the applicants claim for just satisfaction.

Dissenting Opinion

Judge Metin A. Hakkı in his partly dissenting opinion stated that he was unable to agree with the Court's decision in respect of pecuniary damage and non-pecuniary damage awarded to the applicant. In regards to the non-pecuniary damage awarded he stated that he understood the EUR 45,000 awarded in respect of the anguish and feelings of helplessness and frustration experienced over the period of 1987 until the end of 2007. Mr Demades died on 12 September and that the deceased application's heirs had the requisite interest and standing to continue the application. Although the judge agreed with this observation, he expressed that in the absence of additional facts on this point he was inclined to consider that that decision dealt with a procedural matter. Therefore, he disagreed with the majority as a matter of substantive rather than procedural law.

The judge considered that after Mr Demades' death this head of damages should be considered to have died with him. He cited the principle under English common law, that the death of the plaintiff or applicant extinguishes the cause of action in tort cases. The judge was of the opinion that only registered owners ought to be entitled to an award under non-pecuniary damage. He also considered that, if the property had been registered in the name of the heirs as co-owners, they should be entitled to damages jointly, but only from the date on which they became registered owners until the end of 2007 and suggested that the award should be only a fraction of the figure the Court is contemplating. It is not known if Mr Demades' heirs had a legitimate expectation of obtaining effective enjoyment of the property right, in the sense envisaged by the case-law. Therefore, a mere expectation is not sufficient to make an award to them in respect of non-pecuniary damage³.

The judge considered that the Court should have accepted the valuation report submitted by the IP Commission as opposed to the applicants valuation report when assessing the award in respect of pecuniary damage. The Commission

3 *Marckx v. Belgium* 13 June 1979, Series A no.31

made allowances for the presence of the military in the area as a factor which decreased the property's value and rental value. The judge considered that in assessing pecuniary damages the presence of the military in the area should not have been ignored since the Turkish military is there legally.

C. UK Cases

High Court of Justice, Queen's Bench Division, Administrative Court

The Queen on the Application of Corner House Research and Campaign Against Arms Trade (CAAT) v The Director of the Serious Fraud Office and BAE System PLC

[2008] EWHC 714 (Admin)

Royal Courts of Justice (Queen's Bench Division Administrative Court):
Judgement dated 10 April 2008

Investigation into allegations of bribery by BAE in relation to military aircraft contracts with the Kingdom of Saudi Arabia – SFO's decision against the constitutional principle of the rule of law - Article 5 of the OECD Anti-Bribery Convention.

Facts

The applicants, Campaign Against Arms Trade (CAAT) and the Corner House brought a judicial review against the Director of the Serious Fraud Office's decision to end the corruption investigation into BAE's arms deals with Saudi Arabia.

Between 30 July 2004 and 14 December 2006 a team of Serious Fraud Office (SFO) lawyers, accountants, financial investigators and police officers carried out an investigation into allegations of bribery by BAE Systems plc (BAE) in relation to the Al-Yamamah military aircraft contracts with the Kingdom of Saudi Arabia.

On 14 October 2005 the SFO issued a statutory notice to BAE requiring it to disclose details of payments to agents and consultants in respect of the Al-Yamamah contracts. BAE sought to persuade the Attorney General and the SFO to stop the investigation on the grounds that the investigations would be contrary to the public interest: it would adversely affect relations between the

United Kingdom and Saudi Arabia and would prevent the UK securing what it described as the largest export contract in the last decade. The SFO responded to this request by pointing out the importance of SFO's statutory independence and the significance of Article 5 of the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention. This Article prohibits parties to the Convention from allowing considerations of national economic interests, potential effect upon relations with another State or the identity of the person involved to influence investigations into bribery. The BAE feared that compliance with SFO's independent statutory notice would be regarded by the Saudi Government as a serious breach of confidentiality by BAE and by the UK Government.

When the SFO was granted access to Swiss bank accounts, Saudi Arabia threatened to cancel the arms deal and also to withdraw diplomatic and intelligence co-operation with the UK. These threats were made by Prince Bandar to then Prime Minister's Chief of Staff, Jonathan Powell was reported in the Sunday Times on 10 June 2007. It was alleged that Prince Bandar was complicit in the corruption under investigation. Although these threats were not acknowledged by the government in their response to the court case they did not deny it either. Following further meetings that Prince Bandar held with foreign office officials on 5 December 2006 and just as the SFO was considering inviting BAE to plead guilty Tony Blair, Prime Minister of the time intervened in the form of a personal minute with notes from the Permanent Secretary for Intelligence, Security and Resilience and the Permanent Under-Secretary to the Foreign Office.

On 11 December, the Attorney General and the Prime Minister had a meeting and it was stated by the Attorney General that halting the investigation would "send a bad message about the credibility of the law in this area and look like giving into threats", namely the damage that Saudi-UK cooperation on counter terrorism and Middle East issues. At the final meetings between Attorney and the Director of SFO ("The Director"), the Attorney General expressed his concerns about the strength of the evidence for the case and his concerns at dropping the case in response to threats made. The Ministers advised the Attorney General and the Director that if the investigation continued those threats would be carried out and the consequences would be grave for the safety of British citizens and service personnel. Consequently, on 14 December 2006 the Director of the SFO ended the investigation.

The Director stated in his witness statements to the court that he believed that the UK's national security and innocent lives were at risk if the investigation

continued. He did not believe that the decision was in breach of Article 5 of the OECD Anti-Bribery Convention, but even if it had been, he would still have discontinued the investigation.

The Corner House and CAAT challenged the Director's decision on six grounds, on which the judges rules as follows:

1. It was unlawful and against the constitutional principle of the rule of law for the Director to give in to the threat made by Prince Bandar of Saudi Arabia;
2. The Director failed to take into account the threat posed to the UK's national security, the integrity of its criminal justice system, and the rule of law by giving into the threat;
3. The Director mis-interpreted Article 5 of the OECD Convention and took it into account irrelevant considerations;
4. The Director failed to take into account the fact that Saudi Arabia would be breaching its international obligations on terrorism if it carried out the threat;
5. The advice given by ministers was tainted by irrelevant considerations under Article 5 of the Convention;
6. The Shawcross exercise was improperly conducted as ministers expressed opinion as to what the Director's decision should be.

Held

The Court accepted that the Director was entitled to take into account risk of life and national security given the broad prosecution discretion allowed him.

The Court stated that the Director was not in a position to exercise independent judgment as to gravity of risk. He was entitled lawfully to "accord appropriate weight to the judgement of those with responsibility for national security who have direct access to sources of intelligence unavailable to him".

Under the doctrine of the separation of powers, the courts are not in a position to trespass on the government's areas of foreign relations and national security, and the courts in practice give the executive "an especially wide margin of discretion".

The courts have both the right and the duty to intervene in this case because a threat was made against the British legal system. The essential point of the application for the court was that the Government and the Director submitted to the threat from Prince Bandar. The threat involved the criminal jurisdiction of

this country, then the issue was no longer a matter only for the Government but also a matter for the courts to consider what steps they must take to preserve the integrity of the criminal justice system.

The Court considered that the Government failed to recognise that the threat was aimed not just at the UK's commercial, diplomatic and security interests but also aimed at its legal system. The threat was made, in effect, against the Director in that the threat was designed to prevent the course which the SFO wished to pursue, namely inspection of Swiss bank accounts. Had such a threat been made by one who was subject to the criminal law of this country, he would risk being charged with an attempt to pervert the course of justice.

With regard to the rule of law the Court noted that the threats to the administration of public justice within the UK are the concern primary of the courts, not the executive. It is the responsibility of the Court to provide protection, therefore the surrender of a public authority to threat or pressure undermined the rule of law. The Court also stated that it was their and the courts duty to protect the rule of law and that the rule of law was nothing if it failed to constrain overweening power.

The Court stated that in yielding to the threat the Director ceased to exercise the power to make the independent judgement conferred on him by Parliament in the Criminal Justice Act 1987. That independent judgement was fundamental to the Director's powers since broad prosecutorial discretion is granted to him.

The Court recognised that there may be cases where it will be necessary to save lives which compel a decision not to detain or to prosecute. However, they said that it is for the courts to decide on whether reaction to threat was lawful or not, and to draw the line between "unavoidable submission and unlawful surrender". In effect this cannot be regarded as such in this particular case because there was no specific, direct threat made against the life of anyone. Furthermore, there was no attempt to stand up to the threat or any consideration on how to persuade the Saudis to withdraw the threat. In the judges' opinion there was no evidence whatsoever that any consideration was given as to how to persuade the Saudis to withdraw the threat, let alone any attempt made to resist the threat. In their opinion, "it was incumbent on the Director... to satisfy the court that he had not given way without the resistance necessary to protect the rule of law".

The principle of submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker. This

principle is essential to ensure the protection of the rule of law and to avoid any suspicion that the threat was not the real ground for the decision at all; rather it was a useful pretext. In this particular case, it was obvious that the decision to halt the investigation suited the objectives of the executive. Stopping the investigation avoided uncomfortable consequences, both commercial and diplomatic.

The claimants succeeded on the grounds that the Director and the Government had failed to recognise that the rule of law required the decision to discontinue to be reached as an exercise of independent judgment, in pursuance of the power conferred by statute. This demanded resistance to the pressure exerted by means of a specific threat. The Director failed to satisfy the court that “all that could reasonably be done had been done to resist the threat”. He “submitted too readily” because he focused on the effects which were feared should the threat be carried out and not on how the threat might be restricted.

The Court also held that, no-one, whether within this country or outside was entitled to interfere with the course of justice. It was the failure of Government and the defendant to bear that essential principle in mind that justifies the intervention of this court. The Court therefore intervened in fulfilment of its responsibility to protect the independence of the Director and of the English criminal justice system from threat.

Commentary

On 24 April 2004, the High Court formally quashed the SFO decision to drop its corruption investigation into arms deals between BAE and Saudi Arabia. This follows the Court’s ruling summarised above. The Court also gave permission to the SFO to appeal to the House of Lords against their ruling of 10 April. However, the Court pointed out that the SFO had not identified any grounds for challenging the judgment in law in seeking to appeal and also noted that the SFO decision to stop the BAE-Saudi investigation will remain quashed, whatever the outcome of the appeal.

The SFO was ordered to pay the costs of the judicial review and to recognise the public service which CAAT and The Corner House performed. The court also ordered the SFO to pay all the costs of the House of Lords appeal, regardless of the outcome.

This judicial review constitutes an important challenge by the judiciary to the interference of the executive in judicial matters for apparently political reasons. Yet such a challenge may not be possible in the future. While this case was

ongoing the UK government introduced draft primary legislation in the form of a draft Constitutional Renewal Bill which would significantly increase the powers of the executive over the judiciary. Specifically this Bill proposes to create a new power for the Attorney General to invoke the grounds of 'national security' in order to halt a criminal investigation or prosecution. In using this power the Attorney will not be required to be accountable to Parliament, the Courts or any international body.

A joint committee of members of the House of Lords and Commons is due to report its considerations on the proposed Bill by 17 July 2008. If this Bill comes into force it will not allow the judiciary to challenge the power of the executive as it has done in this case and thus the government, through the Attorney General will be able to limit the actions of the judiciary when this is politically expedient, using the mask of national security concerns.

House of Lords

R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)

[2007] UKHL 58

House of Lords: Judgment dated 12 December 2007

Detention without charge or trial of a terror suspect by British troops in Iraq – whether attributable to the United Kingdom (UK) or United Nations (UN) – whether the UK's obligations under Article 5(1) of the Convention were displaced or qualified by its obligations under Articles 25 and 103 of the UN Charter – whether English Common law or Iraqi law applied to the detention.

Facts

The appellant, Hilal Abdul-Razzaq Ali Al-Jedda, is a national of both the UK and Iraq and has been held by British troops in detention facilities in Basra since October 2004 without charge or trial or any prospect of it. He is detained on the grounds that this is necessary for imperative reasons of security in Iraq.

Complaints

The appellant complained that his detention was in breach of Article 5(1) of the Convention and that his right not to be detained without charge or trial was also protected under the Human Rights Act (HRA) and under English Common

law.

The case initially centred on the following questions:

1. Does the legal regime established by UN Security Council resolution (UNSCR) 1546 and subsequent resolutions create an obligation for the UK under Articles 25 and 103 of the UN Charter which overrides or qualifies the obligations under Article 5(1) of the Convention?
2. Does English Common law or Iraqi law apply to the appellant's detention and, if the former, is there any legal basis for his detention?

The appellant's claims were examined by the Queen's Bench Divisional Court and the Court of Appeal, both of which rejected them. With the appellant's appeal to the House of Lords the Secretary of State for Defence raised a new question which became the primary question in the case before the Lords (questions 1) and 2) above then became questions 2) and 3) respectively and will be referred to as such in this summary):

Under the provisions of any or all of the Security Council resolutions which establish legal grounds for the presence of UK troops in Iraq (UNSCR 1511, 1546, 1637, 1723 and 1483), were the actions of UK troops in detaining the appellant attributable to the UN and therefore outside the scope of the Convention?

Held

The Lords found in favour of the appellant in regards to the first question, but unanimously rejected the appeal on the basis of the second and third questions.

i) Whether the actions of British troops in detaining the appellant were attributable to the UN.

This question was raised by the Secretary of State for Defence in the context of the 2 May 2007 admissibility decision of the European Court of Human Rights (ECtHR) in the cases of *Behrami v France and Saramati v France, Germany and Norway* (71412/01 and 78166/01) in which complaints against the respondent governments for the actions of their troops in Kosovo as part of KFOR were held to be inadmissible *ratione personae* as these actions were attributable to the UN. The Secretary of State put forward that the position of UK troops in Iraq was comparable and that the ECtHR would also attribute their actions to the UN.

The Lords held, by a majority of three to one (with Lord Brown being undecided),

in favour of the appellant, that the legal position of UK troops in Iraq was essentially different from that of the troops which made up KFOR in Kosovo and that the action of the UK troops in detaining Mr Al-Jedda were attributable to the UK.

Basing their discussions closely on the arguments of the ECtHR in the case of *Behrami v France*, Lord Bingham, Baroness Hale and Lord Carswell reasoned that there was a distinction between the two forces in their establishment, their function and in who was vested with ultimate authority and control over their actions. KFOR was created under UN auspices and the Security Council *delegated* to the international force the power to carry out a Security Council function (the maintenance of peace and security), whilst maintaining “ultimate authority and control.” In contrast, the Multinational Force (MNF) in Iraq was created by the states of the coalition, it did not have Security Council power delegated to it but instead was *authorised* by the Security Council under UN Charter Chapter VII to stay in Iraq to perform a function which was outside the Security Council’s own scope. They held that in this case the UN did not maintain “ultimate authority and control.” In addition, Baroness Hale stated that the UN’s own role in Iraq was different from that in Kosovo. In Kosovo it was responsible for the maintenance of peace and security while in Iraq its role was the protection of human rights and observance of humanitarian law and the protection of its own humanitarian operations.

In support of their arguments the Lords made reference to the case of *R (Al-Skeini and others) v Secretary of State for Defence*⁴ in which the Secretary of State accepted that the UK was responsible under the Convention for the ill-treatment of Mr Mousa in detention in Iraq. They also referred to Abu Ghraib pointing out that it was nowhere suggested that the abuse of the prisoners there was something attributable to the UN.

ii) *Whether the UK’s obligations under the Convention were overridden by those under UN Charter Articles 25 and 103.*

Article 25 of the UN Charter states that: “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*”

Article 103 states that: “*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations*

4 *R (Al-Skeini and others) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26.

under any other international agreement, their obligations under the present Charter shall prevail.”

The Secretary of State argued that UNSCR 1546 and subsequent resolutions created an obligation for UK forces, under these Charter Articles, to detain the appellant, overriding his rights under Article 5(1) of the Convention. The appellant argued that the wording of the resolutions only *authorise* the UK to detain him, they do not create an obligation. Therefore there is no conflict because Article 103 of the Charter does not apply.

On this question the Lords were unanimous in finding against the appellant. Their chief argument was that although the UNSCRs use the language of authorisation rather than of obligation they nevertheless do entail an obligation under article 103 of the Charter. Three reasons were given for this.

Firstly, they referred to the 1907 Hague Regulations on occupying powers and the 4th Geneva Convention which establish that there is an obligation under international law for occupying powers to restore peace and security and that internment is lawful where it is necessary to this end. They inferred from this that if internment is necessary to maintain peace and security it is in fact an obligation. Although Al-Jedda was detained *after* the period of occupation, the Lords held that the language of the UNSCRs suggest the intention to continue the existing security regime because of the ongoing unstable situation.

Secondly the Lords found that the Security Council is unable to use the language of obligation in phrasing resolutions which relate to standing forces overseas because the UN has not concluded any agreement under Article 43 of the Charter which would allow it to require states to provide forces. They reasoned that in spite of this, in state practice and legal opinion, UNSCRs have still entailed an obligation under article 103 of the UN Charter. In making this argument they referred to the opinion of legal commentators,⁵ citing in particular Frowein and Krisch who have argued that authorisation by the Security Council has in practice been enough to override other treaty obligations and also that this is necessarily the case because “otherwise the charter would not reach its goal of allowing the Security Council to take the action it deems most appropriate

⁵ Goodrich, Hambro and Simons (eds), *Charter of the United Nations: Commentary and Documents*, 3rd ed (1969), pp 615-616; *Yearbook of the International Law Commission* (1979), Vol II, Part One, para 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp 150-151.

to deal with threats to the peace.”⁶ The Lords concluded therefore that this is the correct interpretation of Article 103, being the interpretation of the UN, of individual member states and of legal commentators.

Thirdly the Lords reasoned that since UNSCR 1546 the states which had sent troops to Iraq had acquired the lawful objective of maintaining peace and security and had thus become bound by article 2 and 25 of the UN Charter (“the Charter”) to the furtherance of this. The Lords held that the obligations entailed by the UNSCRs should not be interpreted narrowly as specific obligations to carry out specific acts (such as the detention of the appellant), but should be seen more broadly as an obligation to do whatever was necessary to maintain peace and security. Therefore they concluded that the UK was obliged to use its power to intern where this was necessary for imperative reasons of security.

Thus the Lords’ unanimous opinion was that although UNSCR 1546 used merely the language of authorization, it nevertheless entailed an obligation for the UK under article 103 of the Charter to do whatever necessary to maintain peace and security in Iraq and that this included internment.

They made two further points concerning the relationship between this obligation and the Convention. Firstly they held that, despite the Convention’s special character as a human rights instrument, article 103 of the Charter was unequivocal in its requirement that Charter obligations prevail over obligations under “any other international agreement.” The Lords held that the Convention was not excepted from this. They noted also that the ECtHR would be most likely to reach the same conclusion, citing in particular the decision in *Behrami v France* where the Court made reference to the respondent governments’ obligations under article 25 and 103 of the Charter.

Secondly, in response to the appellant’s argument that any derogation from the Convention obligations should be through the application of Article 15. The Lords held that Article 15 would not apply extraterritorially and that there was a need instead to reconcile the contradictory obligations of the Charter and the Convention in a manner more appropriate to the current situation.

The Lords held slightly varying opinions as to how this conflict should be reconciled. Lord Bingham, Lord Carswell and Lord Brown were of the opinion that while the UK may lawfully detain an individual where this is necessary for

⁶ Frowein and Krisch in Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), p 729.

imperative reasons of security, it must at the same time ensure that the rights of the detainee under Article 5 are not infringed any more than is inherent in the detention itself or any more than is strictly necessary.

Lord Rodger did not see a need to reconcile the opposing obligations at all, having stated his opinion that the UK's Convention obligations were entirely overridden by those of the Charter. He found that the appellant's protection under international law lay in Colin Powell's commitment (in a letter appended to UNSCR 1546) that the MNF would abide by the laws of armed conflict including the Geneva Conventions.

Baroness Hale was concerned by a total abandonment of the appellant's Convention rights. She found that they were qualified but not displaced, reasoning that the UK was not entitled to exceed exactly what was authorised or required by UNSCR 1546 and this was something yet to be established.

iii) Whether English common law or Iraqi law applied to the appellant's detention. The Lords were unanimous in holding that Iraqi law applied to the appellant's detention, based on the Private International Law (Miscellaneous Provisions) Act 1995, Section 11(1). This stated that the applicable law in any case would be the law of the country in which the events occurred, unless it was "substantially more appropriate," due to a closer connection with another country to apply the law of that country. The Lords upheld the finding of the Court of Appeal that such an exception was not relevant in this case.

The Lords rejected the appeal.

Commentary

This decision has the effect of increasing a perception of legitimacy for the use of security concerns as a reason to limit the applicability of human rights. This has implications which reach beyond the circumstances of this case and may influence future policies of the UK both at home and abroad as well as that of other states.

This is particularly a matter for concern in the light of an apparent pattern of UK government attempts to limit the applicability of its Human Rights obligations to the actions of its troops abroad, of which the arguments put forward by the Secretary of State for Defence in this case, as well as in that of *Al Skeini and others*

form a part.⁷ In this context the Lords decision seems to be part of a gradual deterioration of human rights protections.

In their opinions the Lords held that internment without charge or trial was a lawful activity for the UK's forces in Iraq. This was based partly on UNSCR 1546 and partly on the 1907 Hague Regulations on occupying powers and the 4th Geneva Convention. However they pay scant attention to the fact that these last two are applicable only to states which are at war and in October 2004, when Mr Al-Jedda was detained, the UK was not strictly at war with Iraq. The Lords merely stated that:

*“although the appellant was not detained during the period of occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation”*⁸

It could be argued therefore that the authority or obligation to detain, without charge or trial, individuals such as the appellant, who are considered a threat to peace and security, rests solely on the UNSCR 1546 and subsequent resolutions. It could further be argued that there was nothing in these resolutions or in the UN Charter which displaced the UK's human rights obligations to those whom it detained in Iraq.⁹

The Lords held that the resolutions did in fact contain such an obligation. Their decision has some dangerous implications given the often political nature of UNSCRs, in particular when the foreign policy interests of any of the permanent members are engaged. It seems that the Convention is unable in such circumstances to effectively protect the human rights of individuals from an abuse of power by members of the Security Council.

The Lords attempted to reconcile the rights of the individual with their decision but none of their solutions to this problem is entirely convincing in its ability to

7 Amnesty International, United Kingdom: Submission to the UN Universal Periodic Review, First session of the HRC UPR Working Group, 7-18 April 2008, available online at <http://www.amnesty.org/en/library/asset/EUR45/020/2007/en/EUR450202007en.html> (accessed 03/04/2008).

8 *R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58, 21.

9 Amnesty International, United Kingdom: Submission to the UN Universal Periodic Review, First session of the HRC UPR Working Group, 7-18 April 2008, available online at <http://www.amnesty.org/en/library/asset/EUR45/020/2007/en/EUR450202007en.html> (accessed 03/04/2008).

ensure that those rights are protected. To suggest either that the detainees' rights would be protected by a "commitment" to abide by the laws of war or by limiting the infringement of their rights to what is "necessary" does not entail a concrete protection of those rights equivalent to that provided by the Convention. It therefore seems that these individuals, despite being within the jurisdiction of the UK, have fallen outside the human rights protections assured to all within that jurisdiction.

Saber v Secretary of State for the Home Department
[2007] UKHL 57

House of Lords: Judgment dated 12 December 2007

Decision to refer an asylum claim on appeal to a de novo hearing - assessment of the current situation in the country from which the appellant seeks asylum.

The appeal to the House of Lords was rejected.

Facts

The appellant, 'Saber', is an Iraqi national of Kurdish origin. He had illegally entered the United Kingdom in a lorry during July 2000.

Prior to his arrival, the appellant had joined the Patriotic Union of Kurdistan (PUK), a major political faction in Iraqi Kurdistan. The appellant was involved in promoting and recruiting for the PUK. It was submitted that he was publicly known as a political opponent to the Iraqi state, under the regime of Saddam Hussein. The appellant was also involved in smuggling machine parts and medicines into Iraqi Kurdistan for the PUK.

The appellant escaped from Iraq and claimed asylum in the United Kingdom. He claimed that he was a refugee under the Geneva Convention on the Status of Refugees, and his removal would otherwise be in breach of Article 3 and 5 of the Convention. His application for asylum was refused in February 2001.

This decision was overturned on appeal before an adjudicator in July 2001. The appellant would effectively have been recognised as a refugee and, under domestic immigration policy at the material time, be granted indefinite leave to remain in the United Kingdom. However, the Secretary of State for the Home Department successfully appealed the adjudicator's decision, at the Immigration

Appeal Tribunal in June 2002. The Tribunal found that the PUK was able to provide the appellant with protection from the Iraqi government, as the PUK was almost completely free to move within its constituent areas of Iraqi Kurdistan.

The Tribunal's decision was appealed to the Inner House of the Court of Session, Second Division, in Scotland. It found that there was no evidence before the Tribunal of the PUK's willingness to protect the appellant. The appellant's case was ordered to be returned for a *de novo* hearing before a new adjudicator.

Complaints

The appellant complained that the Court of Session had failed to consider the appropriate method in which to administer the appeal, relying on the fact that the court had ordered the case be heard *de novo* by a new adjudicator, rather than restore the original adjudicator's decision.

Held

The House of Lords noted that the situation in Iraq had fundamentally altered since the original adjudicator's decision.

It held that the current situation in the relevant country is always of relevance, in relation to whether removal of an asylum seeker from the United Kingdom is in breach of the Convention.

Furthermore, it found the fact that the appellant would have otherwise been granted indefinite leave to remain, had the original adjudicator's decision been restored, did not deprive the lower court of its responsibility to decide the most appropriate way to deal with the appeal.

The Court rejected the appeal, upholding that it was within the lower court's discretion to order the case be returned to a *de novo* hearing.

Proscribed Organisations Appeal Commission

Lord Alton of Liverpool & Others (In the Matter of The People's Mojahadeen Organisation of Iran) v. Secretary of State for the Home Department
(PC/02/2006)

Secretary of State misconstrued the provisions of section 3(5) Terrorism Act 2000 - Secretary of State failure to direct himself properly as to those provisions of the Terrorism Act 2000 - Secretary of State failure to have regard to relevant considerations in concluding PMOI was "concerned in terrorism".

Facts

This is a KHRP assisted case. The People's Mojahadeen Organisation of Iran (PMOI) (known as "the Mujaheddin-e-Khalq" or MeK) is an Iranian political organisation and a member of the National Council of Resistance of Iran (NCRI). It was founded in 1965. The purpose was initially to oppose the regime of the Shah. Its present stated purpose is, and has been for some years, the replacement of the existing theocracy with a democratically elected, secular government in Iran.

On 28 February 2001, under Section 3(3)(a) of the Terrorism Act 2000 (the 2000 Act), the Secretary of State laid before Parliament, in draft, the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 which sought to add the PMOI to the list of proscribed organisations under Schedule 2 of the 2000 Act. The draft order was approved by affirmative resolution and the Order came into force on 29 March 2001.

Since its proscription in 2001 and the occupation of Iraq in 2003, the PMOI have continually pursued a campaign to legitimise their status as a secular, democratic movement intent upon the peaceful overthrow of the present undemocratic regime in Iran. To this end, they seek to enlist support at the highest level in the United Kingdom (and elsewhere) for the promotion of that object, including the support of the present appellants: sixteen members of the House of Commons and nineteen members of the Upper House.

Despite two applications to the Secretary of State (5 June 2001 refused on 31 August 2001, and 13 March 2003 refused on 11 June 2003) to be removed from the list, an application for judicial review (17 April 2002) of the Secretary of State's August 2001 refusal to de-proscribe, PMOI remained on the proscribed organisation list. PMOI later in June 2003 withdrew its appeal to POAC against the Secretary of State's August 2001 refusal of their application. This appeal was

withdrawn is said by the appellants to have been a “protest” by the PMOI against the decision by the British and U.S. Governments to bomb the PMOI bases within Iraq, shortly before April 2003.

By notice dated 13 June 2006 the appellants applied to the Secretary of State to de-proscribe the PMOI.

Complaints

The essential thrust of the appellants’ grounds of appeal is that, whatever the nature of the organisation’s activities at the time of proscription, the 2000 Act requires consideration of the present position at the time of the decision to proscribe, and at the time when the de-proscription is considered. For a continuous period of 5 years, the PMOI and its members:

- have ceased all military activity and have dissolved its operational units in Iran;
- had only retained its military arms within Iraq until early 2003 for defensive purposes;
- had voluntarily handed over all military arms to the Coalition forces in May 2003;
- had renounced terrorism and rejected violence;

thus, there has been no evidence of activity that could fall within the terms “terrorism” as defined in the Act”.

Accordingly, PMOI asserted that, whatever the true position at the time of the initial proscription, for a period of more than 5 years the it had not been “concerned in terrorism” as defined in sections 1 and 3 of the 2000 Act and could not at the date of the Secretary of State’s decision be lawfully regarded as an organisation “concerned in terrorism”. Thus, the Secretary of State cannot continue the proscription on the basis that at sometime in the past the organisation was concerned in military activities.”

As grounds for opposing the appeal, the Secretary of State asserted it considered on the basis of the evidence available to him, that the PMOI was concerned in terrorism. This was a conclusion he was entitled to reach.

Further, the Secretary of State asserted that the statutory scheme requires a “belief” on the part of the Secretary of State and that “the question [...] is not whether it was so concerned but whether the Secretary of State reasonably held the belief that it was concerned in terrorism, taking account of factors reasonably considered by him to be relevant and according to them such weight he considered to be appropriate. The

Secretary of State asserted it did have evidence of the PMOI being concerned in terrorism after the summer of 2001.

The Secretary of State's main contention was that it is entitled to conclude that the PMOI was "otherwise concerned in terrorism" within the meaning of sub-paragraph (d) of Section 3(5) of the 2000 Act because, although it was not actually committing acts of terrorism, it retained a future will to do so.

Held

The 2000 Act sets out in general terms the approach that the Proscribed Organisations Appeal Commission (POAC) must take in considering whether the decision of the Secretary of State was flawed. Pursuant to section 5(3) of the 2000 Act, POAC shall allow an appeal against a refusal to de-proscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

POAC expressed the view that the clear legislative intent behind the 2000 Act is to ensure that the activities of organisations, which carry out, support or promote acts or threats of terrorism against either the UK or foreign governments and their peoples should be circumscribed.

It recognised that, in considering whether to proscribe an organisation and whether or not to de-proscribe it, there were two stages to the Secretary of State's decision-making process. At the first stage, the Secretary of State has, in the light of all of the relevant evidence, to determine whether he believes that the organisation "is concerned in terrorism" as defined in section 3(4) and (5) of the 2000 Act, that is whether the statutory criteria are met (the "First Stage"). The Secretary of State could only form such an honest belief if he or she had reasonable grounds for that belief. The second stage requires a separate decision whether or not, in the exercise of his or her discretion, the organisation should remain proscribed under the Act (the "Second Stage").

In the light of the authorities referred by the appellants and respondent, POAC accepted that its function is to subject both stages of the decision making process to the requirement of an "intense scrutiny".

POAC stated that in applying the requirement it did not wish to substitute its view for the decision of the Secretary of State. That appropriate deference had to be given to the Secretary of State in, for example, assessments of national security or on foreign policy issues.

POAC also accepted that it must be careful to recognise where the Secretary of State has the benefit of particular expertise, for example in relation to assessments made by the intelligence services. However, POAC did not accept that it can or should simply defer to the Secretary of State on all matters. This deference depended on the nature of the evidence or material being considered. Where the material was essentially factual, as those relevant to the First Stage, POAC was familiar with assessing in ordinary litigation. In contrast, where the material is concerned with assessments of foreign policy and national security, as for the Second Stage, even under the heightened scrutiny test, a greater deference must be accorded to the judgment and assessments of the Secretary of State made on the basis of specific advice and assessments by those particularly qualified to give such advice and to make such assessments.

First Stage

At the First Stage, the question is what is meant by the definition of “concerned in terrorism” in section 3(5) of the 2000 Act.

In POAC’s view, the criteria set out in sub-sections 3(5)(a) to (c) are focussed on current, active steps being taken by the organisation. There could be reasonable grounds for a belief that the organisation is concerned in terrorism based on the organisation’s past activities, but that material would have to be such that it gave reasonable grounds for believing that the organisation was currently engaged in any activities specified in those three subsections. If the acts relied on occurred shortly before the decision being made by the Secretary of State they would be likely to provide powerful evidence to justify his belief, even in the absence of specific material that the organisation was at the time of the decision actively involved in, for example, planning a particular attack. Conversely, if the acts relied on occurred in the distant past, they would, without more, be unlikely to provide a reasonable basis for such a belief. Other factors would also affect the judgment to be made.

Section 3(5)(d) of the 2000 Act is, however, rather different. It is clearly intended to be a general provision which sweeps up organisations who are “concerned in terrorism” that are not caught by the earlier subsections. POAC noted that of particular relevance to the present appeal is Section 3(5)(d) of the 2000 Act. On analysis, this was the only sub-section, which in principle might be applicable to the facts of the present case. “Concerned” in subsection 3(5)(d) must be activity (“action”) of a similar character to that set out in the subsections 3(5)(a) to (c).

In POAC's view, this could include an organisation which has retained a military capability and network which is currently inactive (i.e. not currently committing, participating in or preparing for terrorism) for pragmatic or tactical reasons, coupled with the intent of the organisation or members of it to reactivate that military wing (i.e. to commit, participate in or prepare for terrorism) in the future if it is perceived to be in the organisation's interests so to do. It would not, however, include an organisation that simply retained a body of supporters, without any military capability or any evidence of, for example, attempts to acquire weapons or to train members in terrorist activity, even if the organisation's leaders asserted that it might, at some unspecified time in the future, seek to recommence a campaign of violence. It cannot be said of an organisation in the latter category that a reasonable person could believe that it "is otherwise concerned in terrorism" - i.e. that it is currently concerned in terrorism - merely because it might become involved in terrorist activity at some future date.

Following an assessment to the material before it, POAC concluded that the decision of the Secretary of State at the First Stage was flawed for a number of reasons.

In its view, the absence of any reference to the relevant statutory tests in either the Submission or the Decision Letter, submitted to the Secretary of State by his civil servants and intended to assist him in his decision in the matter, indicate that the Secretary of State failed properly to direct himself as to the requirements of section 3(5) of the Act.

The submission confines itself essentially to a relatively short series of observations designed to refute the grounds advanced on the appellants' behalf. No attempt is made to review any of the other material, which in our view was clearly relevant to a proper approach to answering the First Stage question.

The serious deficiency may, at least in part, be accounted for by a complete absence in the document to any reference to the statutory framework defining the scope of the Secretary of State's duty.

Further, POAC was satisfied that the approach adopted by the Secretary of State to the analysis of whether or not, on the facts, any of the statutory tests were met demonstrates that the Secretary of State cannot properly have directed himself as to what the 2000 Act required before he could conclude that the PMOI met the requirements imposed at the First Stage of the decision.

These failures served fatally to undermine the integrity of the Secretary of State's decision. On that basis alone, POAC held that the decision to refuse to de-proscribe was flawed. POAC held that it cannot be sustained and must be set aside.

POAC considered a further dimension – the examination of all the material that was or could reasonably have been available to the Secretary of State in order to consider whether the PMOI was or could honestly have been believed by him to be concerned in terrorism. POAC subjected all the material to “intense scrutiny”.

In short, POAC held that there was no evidence that PMOI has at any time since 2003 sought to re-create any form of structure that was capable of carrying out or supporting terrorist acts. There was no evidence of any attempt to “prepare” for terrorism. There was no evidence of any encouragement to others to commit acts of terrorism. Nor was there any material that affords any grounds for a belief that the PMOI was “otherwise concerned in terrorism” at the time of the decision in September 2006. In relation to the period after May 2003, POAC held that this could not be described as “mere inactivity” as suggested by the Secretary of State in his Decision Letter. The material showed that the entire military apparatus no longer existed whether in Iraq, Iran or elsewhere and there had been no attempt by the PMOI to re-establish it.

In those circumstances, POAC held that the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before it, POAC held that the PMOI is not and, at September 2006, was not concerned in terrorism.

Second Stage

In the light of its conclusions on the First Stage of the decision-making process, POAC held that it was unnecessary for it to decide the appellants' challenge to the exercise of the Secretary of State's discretion to maintain the proscription of the PMOI (Second Stage). However, in deference to the extensive submissions before it, POAC recorded what its conclusions would have been had it decided on the Second Stage of the decision-making process.

POAC agreed with the respondent that the Second Stage is only reached if the Secretary of State has lawfully determined that the organisation is concerned in

terrorism. The issues raised at this stage of the analysis concern the proportionality of the restrictions imposed on the appellants' rights under the ECtHR.

Although it is correct that the appellants' rights under the ECtHR are limited by the provisions of the 2000 Act discussed in the analysis of the First Stage, it was clear to POAC that those provisions are legitimate and proportionate. As previously stated, the questions raised under the Second Stage to issues of national security and foreign policy to which considerable deference must be afforded to the Secretary of State. Even without giving such deference, POAC would have reached the same conclusion.

POAC agreed with the respondent that the concept of "national security" is not limited to those activities that directly affect the United Kingdom or the interests of the United Kingdom and its citizens abroad. It clearly extends to the creation of national and international political conditions, which are favourable to the protection or extension of national values against both existing and potential enemies. The 2000 Act reflects that general policy.

POAC further agreed with the respondent that national security is the necessary foundation for the protection of the values of democracy and human rights inherent in the Convention and that terrorist activity threatens the collective security of the community of nations.

In POAC's view, restrictions that prevent a person supporting an organisation that is concerned in terrorism while, as in the present case, leaving the individuals free to campaign for political change in another state by peaceful and democratic means, are clearly proportionate and lawful. In the present case, there were no restrictions on the ability of the appellants to campaign for change in Iran by peaceful means just as there were no restrictions on their ability to raise funds for or otherwise promote organisations, which sought to achieve such change by methods that are consistent with the democratic ideal. What they were restricted from doing was providing support for an organisation that was, at least at the time of the original proscription, actively concerned in terrorism. The provisions of the 2000 Act, in the POAC's view, represent the least restrictive method necessary to accomplish the aim of circumscribing the activities of a terrorist organisation in the United Kingdom.

Finally, POAC was not persuaded by the appellants:

- 1) that it was unlawful for the Secretary of State not to take into account that the system of government in Iran is undemocratic and repressive because

the Secretary of State was and is entitled to conclude that there is no right to resort to terrorism, whatever the motivation;

- 2) that the Secretary of State took account of irrelevant foreign policy considerations because there was no evidence to that effect;
- 3) that the Secretary of State should have disregarded any foreign policy considerations which were not strictly limited to the question of preventing terrorism by the PMOI in Iran because there is no legal basis on which the Secretary of State's discretion should be circumscribed in that way

In its final conclusion, POAC held that the appeal against the refusal of the Secretary of State to de-proscribe the PMOI is allowed.

Further, having carefully considered all the material before it, POAC concluded that the decision at the First Stage is properly characterised as perverse. POAC recognised that a finding of perversity is uncommon, however, it believed that it is in the, perhaps unusual, position of having before it all of the material that is relevant to this decision.

POAC ordered the Secretary of State to lay before the Parliament the draft of an Order under section 3(3)(b) of the 2000 Act removing the PMOI from the list of proscribed organisations in Schedule 2.¹⁰

Commentary

During the Parliamentary debate on the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, which proscribed 21 organisations, none of them British, there was criticism over the inclusion of groups from countries where repressive regimes prevent the exercise of democratic rights and criminalise dissent.

In the House of Lords debate¹¹ on 27 March 2001 prior to the Order coming into force, Lord Archer of Sandwell was critical of the Home Secretary's failure to consult human rights bodies in making his decision, and of the retrospective nature of the appeals procedure: "there is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them".

¹⁰ POAC refused an application for permission to appeal and the Secretary of State renewed the application before the Court of Appeal. On 7 May 2008, the Court of Appeal ruled that there was "no reasonable prospect of success" for the Secretary of State in proceeding with its appeal of POAC findings. See [2008] EWCA Civ 443.

¹¹ See House of Lords debate *Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001*, March 27, 2001, available at <http://www.publications.parliament.uk>.

Lord Archer of Sandwell rose to move an amendment to Lord Bassam of Brighton's Motion to adopt the draft Order laid before the House:

[...] but that this House regrets that the Mujaheddin e Khalq [PMOI] have been included in the schedule of proscribed organisations contained in the order and invites Her Majesty's Government to lay a further order, removing the Mujaheddin e Khalq from the Schedule."

Lord Avebury took exception to the fact that "any armed opposition group or anybody who supports an armed opposition group in whatever country", including repressive regimes, "in the world is *ipso facto* a terrorist". He claimed that under the Terrorism Act, Nelson Mandela could be considered a terrorist.

Lord Avebury highlighted contradictions in the Home Secretary's selections, with reference to the selection criteria. "11 of the 21 organisations have no overt presence in the UK, or only one or two members who are already being held on extradition warrants". Some of the proscribed groups are from countries where repressive regimes prevent them from exercising democratic rights.

Lord Avebury added that the Home Secretary failed to consider whether "the [proscribed] organisation could have sought its objectives peacefully through the political system". He pointed to the Kurds, who are not recognised as a minority in Turkey, and the PMOI to illustrate his point. In the first case, where Kurds are not recognised as a minority, "advocacy of internal self-government ... is prosecuted under ... terrorism law"; in the second, anyone questioning "the supremacy of the religious leader ... is a criminal", and widespread executions and murders by the Iranian authorities against its members have been documented.

Faced with such criticism, this debate makes it clear why POAC concluded that the Secretary of State's decision was "properly characterised as perverse".

At the close of the debate, Lord Archer of Sandwell withdrew his amendment noting the significance of the debate that there is always a danger of injustice, one that the House of Lords cannot ignore. The House of Lords is not excused from doing the best it can to rectify an injustice, nor can it say that it "should not be bothered with such matters because one day POAC will put it all right".

POAC has risen to Archer of Sandwell's call to "put it all right".

D. European Court of Justice (ECJ)

Yassim Abdullah Kadi v Council of the European Union and Commission of the European Communities

(C-402/05 P)

The Court of Justice of the European Communities: Opinion of the Advocate General dated 16 January 2008

Claim of infringement of the right to be heard, the right to judicial review, and the right to property on account of the appellant's financial interests being frozen having been listed as a person suspected of supporting terrorism - failure to set time limitations for such a measure - inadequate means to challenge the allegation.

Facts

The appellant, Yassim Abdullah Kadi, is a resident in Saudi Arabia.

On 19 October 2001, the appellant was listed by the UN Security Council Sanctions Committee as a person suspected of supporting terrorism. The appellant's funds and other financial resources were frozen in accordance with Council Regulation (EC) No 467/2001, which provided that all States take measures to freeze funds and other financial assets of individuals and entities associated with Osama bin Laden, Al-Qaida and the Taliban.

The Council of the European Union repealed Council Regulation (EC) No 467/2001 on 27 May 2002. It was replaced by Council Regulation (EC) No 881/2002, which continued to list the appellant as a person suspected of supporting terrorism under Annexure I. The subsequent Council Regulation had been adopted on the basis of Articles 60, 301 and 308 of the Treaty Establishing the European Community 1957 (The EC Treaty). Article 308 of the EC Treaty provided that the Council may take "appropriate measures" where necessary, in order to attain one of the objectives of the European Community, if the EC Treaty had not provided for such powers. Articles 60 and 301 related to the Council's ability to take measures against States on capital movements and payments, and to interrupt or reduce economic relations with States on the basis of common foreign and security policy.

The Council Regulation was adopted in order to give effect to the Council's Common Position 2002/402/CFSP, reflecting the objective of suppressing

international terrorism considered essential for the maintenance of international peace and security.

The appellant lodged an application on 18 December 2001 before the Court of First Instance of the European Communities, on the basis that Council Regulation (EC) No 467/2001 should be annulled in relation to himself. The appellant submitted that the Council of the European Union did not possess competence to adopt the Council Regulation. The appellant relied on the fundamental right to property and right to a fair hearing. Following the repeal of the former Council Regulation, the Court treated the case as an action for annulment of the subsequent Council Regulation (EC) No 881/2002.

The appellant's submissions were rejected by the Court of First Instance, and Council Regulation (EC) No 881/2002 was upheld. The appellant appealed to the Court of Justice of the European Communities on 17 November 2005.

Complaints

The appellant complained that the European Community lacked competence in its adoption of Council Regulation (EC) No 881/2002 under Articles 60, 301 and 308 of the EC Treaty.

The appellant complained that the financial sanctions imposed against him in accordance with Council Regulation (EC) No 881/2002 had infringed his right to property.

The appellant complained that the financial sanctions imposed against him for being a person suspected of supporting terrorism, without the opportunity of being heard on the facts and circumstances alleged, and on the evidence adduced against him, had infringed his right to be heard, and right to effective judicial review.

Held

The Advocate General noted the Court of First Instance found that Article 308 was required to implement the financial sanctions, imposed on individuals who do not exercise government control, under Council Regulation (EC) No 881/2002.

The Advocate General expressed the belief that Article 308 was an “enabling provision” whereby it provided the means to introduce certain necessary measures, but not the objectives of the European Community itself. Since Articles 60 and 301 excluded the interruption of economic relations with *non-*

State actors, Article 308 could not be construed as permitting such measures for the purposes of suppressing international terrorism. Therefore, the Court of First Instance had made an error in law, which would amount to sufficient grounds to set the judgment aside. The Advocate General nevertheless proceeded to examine the appellant's allegations of breaches of fundamental rights forming part of the general principles of Community Law.

The Advocate General expressed disagreement with the argument that the Court of Justice ought not to apply normal standards of judicial review, in light of the significance of preventing international terrorism. It was noted that the Court should be mindful of the international context in which it operates, its limitations and potential impact, and recognise the authority of institutions such as the UN Security Council Sanctions Committee. However, the Court should not be inhibited from fulfilling its duty in preserving the rule of law. Rather, the Court should reaffirm the limitations that Community law imposes on political decisions. Therefore, there is no reason to depart from the usual legal interpretation on fundamental rights.

The Right to Property

The Advocate General expressed that the indefinite freezing of a person's assets amounted to a "far-reaching interference" with peaceful enjoyment of property. It was noted that although this measure would intend to have a strong coercive effect, its imposition also demanded appropriate procedural safeguards. The relevant authorities must be required to provide justification for such measures and demonstrate its proportionality for imposition against a particular person. In absence of such procedural safeguards, the freezing of a person's assets for an indefinite period of time constituted an infringement of the fundamental right to property.

The Right to be Heard

The Advocate General expressed that the institutions of the European Community did not afford the appellant with any opportunity to express his views on whether the financial sanctions were justified or should continue to be imposed. The UN Security Council Sanction Committee's de-listing procedure, whereby the appellant could petition for his removal from the list, was considered insufficient. This was due to the lack of obligation to consider the petitioner's views, and a failure to provide the petitioner with access to information on which the original decision was based. The right to be heard is directly relevant to the right to effective judicial review, since parties must be able to defend their rights effectively in subsequent legal proceedings.

The Right to Effective Judicial Review

The Advocate General cited the European Court of Human Rights case of *Klass and Others v Germany* (5029/71), which stated that the rule of law implied that any interference by executive authorities with a person's rights should be subjected to an effective control assured by the judiciary.

The allegations against the appellant were "extremely serious", and formed the basis of the financial sanctions imposed against him. Thus, the rejection of an independent tribunal to assess the fairness of the allegations and reasonableness of the sanctions constituted a "real possibility" that the sanctions may be disproportionate or misdirected. There was no genuine and effective mechanism for judicial review at the level of the UN. The decision to remove a person from the list of those suspected of supporting terrorism was at the full discretion of the UN Security Council Sanctions Committee. The Advocate General proposed that the judgment of the Court of First Instance be set aside, and that the Court of Justice annul Council Regulation (EC) No 881/2002 in relation to the appellant.

Commentary

The issue of combating terrorism and the freezing of financial interests was subsequently discussed by the Court of First Instance, in the cases of *Osman Ocalan, on behalf of the Kurdish Workers' Party (PKK) v Council of the European Union* (T-229/02) and *KONGRA-GEL v Council of the European Union* (253/04).

In *PKK's case*, the PKK brought an action in July 2002 seeking to annul the decision to include it on a similar list of persons, groups and entities involved in terrorist acts, and to challenge the decision to implement Council Regulation (EC) No 2580/2001, which allowed for powers to freeze the PKK's funds and other financial assets or economic resources.

In *KONGRA-GEL's case*, the *KONGRA-GEL* brought an action in June 2004 seeking to annul the decision to include it on the same list of persons, groups and entities involved in terrorist acts, as an alias of the PKK.

The Court of First Instance held in both cases that the failure to provide the applicants with a statement of reasons on which the contested decisions were based, either in the decision or immediately thereafter, amounted to an infringement of Article 253 of the EC Treaty. The applicants were consequently not placed in a position in which they were "able to understand, clearly and unequivocally, the reasoning". This relates to the findings of the Advocate General in the present

case on the fundamental right to be heard, in such that the present case cited a lack of access to information on which the original decision was based.

Since the Council Decisions in *PKK's case* and *KONGRA-GEL's case* were annulled on the basis of Article 253, the Court of First Instance did not proceed to consider the applicants' additional pleas on the rule of law, the right to access to a court, the right to a fair trial and the right to an effective remedy. Had the Court done so, its findings would have been concerned with those matters expressed by the Advocate General in the present case.

A summary of the two cases can be found in this edition of *Legal Review 13*. The pending findings of the Court of Justice in the present case will be of much significance, especially in light of the Advocate General's findings and subsequent rulings by the Court of First Instance. The collegium of judges of the Court of Justice will now seek to reach a majority agreement as to whether the Advocate General's opinion shall be followed. In practice, the Court broadly follows the Advocate General in the majority of cases, although it is by no means bound to do so. No further hearing is held or further written submissions accepted between the release of the Advocate General's opinion and the final Court judgment, since the opinion constitutes the closure of the parties' arguments. A judgment is not expected for at least eight weeks.

This edition also provides a case summary of *People's Mojahedin Organization of Iran v Council of the European Union* (T-256/07), dealing with the intervention of victims of terrorist attacks as interested parties, for court proceedings on terrorism and freezing of financial interests.

People's Mojahedin Organization of Iran v Council of the European Union
(T-256/07)

Court of First Instance: Judgment dated 14 February 2008

Specific restrictive measures directed against certain persons and entities with a view to combating terrorism - Persons claiming to be victims of a terrorist attack - application for leave to intervene in present case.

Facts

The applicant, People's Mojahedin Organization of Iran, was established in Auvers-sur-Oise, France. The applicant lodged an application on 16 July 2007 under Article 230 EC to seek partial annulment and repeal of previous decisions of the Council. In particular, the applicant was seeking partial annulment of the

Councils decision to implement Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures to combat terrorism directed at certain persons and entities.

On 20 November 2007 the Court of First Instance granted the UK, the Commission of the European Communities and the Netherlands leave to intervene in the proceedings in support of the Council.

On 6 December 2007 Farideh Khezadeh, Ebtesam Jalizavi, Mohammed Jalizavi, Elham Jalizavi, Abdolnabi Beit-Salem and Massoumeh Youssofi-Nissi applied for leave to intervene in proceedings in support of the Council's order on the basis that on 25 November 1999 the People's Mojahedin Organization of Iran carried out an attack in Iran in which members of their families were killed or injured. The attack was said to be related to a case of criminal association with a terrorist organisation and of financing a terrorist organisation.

Complaints

The applicants for leave to intervene complained that as they were victims of the attacks committed by the applicant they had an interest in the result of the case. They argued that they had an interest in the applicant remaining on the list of persons, groups and entities affected by a freezing of funds at EC level. In addition, the Council was not bound to remove the applicant from the list on the basis of the decision of the Court of First Instance (*Organisation des Modjahedines du People d'Iran v Council* (T-228/02)) Finally, they argued that for terrorist organisations the right of defence should be strictly limited.

Held

The Court referred to the settled case law and decided that the applicants for leave to intervene were not able to establish an interest in intervening in the present case. The Court said that the applicants were unable to show any special circumstances which were capable of establishing the existence of a personal interest in the main proceedings. Furthermore, they did not show that the outcome of the dispute would affect their position in a sufficiently specific manner.

The Court held the applicants for leave should be responsible for their own costs and the costs incurred by the People's Mojahedin Organization of Iran in connection with the application to intervene.

Osman Öcalan, on behalf of the Kurdish Workers' Party (PKK) v Council of the European Union and KONGRA-GEL v Council of the European Union
(T-229/02 and T-253/04)

Court of First Instance: Judgment dated 3 April 2008

Common foreign and security policy – Restrictive measures directed against certain persons and entities with a view to combating terrorism – Freezing of funds – Action for annulment – Statement of reasons.

Facts

The first applicant, the Kurdish Workers' Party (PKK), emerged in 1978. The second applicant, the People's Congress of Kurdistan (KONGRA-GEL), was formed in 2003.

In July 1999 the PKK announced a unilateral ceasefire. To reflect the transformation undertaken by PKK a new constitution for the PKK was created. A new group was founded, the Kongreya Azadi û Demokrasiya Kurdistan (Kurdistan Freedom and Democracy Congress – KADEK), with the aim of finding a solution to the Kurdish question by peaceful means.

On 31 July 2002 the PKK, represented by Osman Öcalan, and the Kurdistan National Congress (KNK) brought an action to annul the Council's decision of 2 May 2002 (2002/334/EC) which updated the list of the persons, groups and entities to include the name of the PKK. This decision implemented Article 2(3) of Regulation No 2580/2001 providing specific restrictive measures with a view to combating terrorism such as freezing funds and other financial assets or economic resources of certain persons or entities. The Council updated the list on several occasions and the applicants name continued to appear on the list. The applicants sought to challenge the decision of 17 June 2002 (2002/460/EC) which continued to include the PKK on the list.

On 17 June 2003 the Court granted the United Kingdom and the Commission leave to intervene in support of the Council.

On 15 February 2005 the Court of First Instance dismissed the action as inadmissible. The Court held that Osman Öcalan had failed to show that he represented the PKK since according to his statements the PKK had dissolved itself in April 2002. With regard to the KNK's claim, the Court held that it was

not individually concerned by the Council's decision to include the PKK on the list.

The PKK and KNK appealed to the Court of Justice against the order.

On 2 April 2004 the Council adopted the decision to include the names of KADEK and KONGRA-GEL onto the list of 'groups and entities'. On 25 June 2004 KONGRA-GEL lodged an application, along with 10 other individual applicants, to challenge the decision. On 17 February 2005 the UK was granted leave to intervene in the proceedings of KONGRA-GEL.

On 18 January 2007 the Court of Justice set aside the Court of First Instance's order of 15 February 2005 regarding Mr Öcalan's application to represent the PKK. It was held that the conclusion of the Court of First Instance that the PKK no longer existed was not consistent with the evidence available to them. The case was referred back to the Court of First Instance for judgment in relation to the Council's decision of 17 June 2002. The Court of Justice dismissed the appeal regarding the Council's decision of 2 May 2002 since the application was submitted outside the time limit.

On 23 May 2007, with the agreement of all parties, the cases of *Osman Öcalan, on behalf of the Kurdish Workers' Party (PKK) v Council of the European Union* (T-229/02) and *KONGRA-GEL v Council of the European Union* (T-253/04) were joined for the purposes of the hearing.

Complaints

The PKK complained about their inclusion on the list of persons, groups and entities involved in terrorist acts in the Annex of Article 1(1) of Common Position 2002/340. The applicants argued that the Council infringed their obligation under Article 253 in their failure to state the reasons for their inclusion on the list. In addition, the applicants questioned their inclusion on the 2002 list of organizations since the PKK was not on the previous list adopted in December 2001. The applicants argued that since they did not fulfil the criteria to be included on the list in 2001 the Council was under a greater duty to provide reasons for the inclusion on the 2002 list. The applicant further submitted that there was no material change of circumstances to justify their inclusion on the subsequent list.

In addition, the applicants argued that the failure to disclose the material which the Council relied on was in contravention of their rights provided under Article 6 of the Convention.

KONGRA-GEL complained about the decision to include it as an alias of the PKK on the list of persons, groups and entities involved in terrorist acts in common position 2004/309. KONGRA-GEL submitted that the organization was fundamentally different and distinct from the PKK. They argued this was demonstrated by KONGRA-GEL's aims, objectives, organizational structure, base and activities. The applicants are members of KONGRA-GEL and argue that they have an interest in bringing proceedings against the decision to include KONGRA-GEL on the list as this affects their economic positions, right to peaceful possession and enjoyment of their property.

The applicants argued that freezing the funds of KONGRA-GEL as an alias of the PKK affected the activities of the members. The applicants highlighted the situation in the UK where under the Terrorism Act 2000 the PKK is a proscribed organization. As some of the applicants live in the UK they are subject to possible criminal sanctions due to the Council's decision to include it as an alias of the PKK.

The applicants argued that there was no other court available for them to challenge the Council decision. The applicants noted that if the Court dismissed the claim as inadmissible this would be incompatible with the rule of law, the right to access to a court, the right to a fair trial and the right to an effective remedy enshrined in Article 6 and 13 of the Convention and Article 47 of the Charter of Fundamental Rights of the European Union. The applicants argued that they would be able to submit a human rights case to the European Court of Human Rights.

In order to support their claims the applicants asked the Court to make certain general findings of fact. The facts concerned the status of the Kurds in Turkey.

Both applicants argued that they had a real and continuing interest in the action to annul the contested decision, despite the Council's decisions to maintain them on the list. This was based on the applicants' submission that the illegal decision would continue to exist in the community order if there was no annulment.

Held

The Court held that the actions concerning the contested decision which includes the PKK and KONGRA-GEL on the list of persons, groups and entities must be

annulled. It was held that the Council had failed to provide the applicants with an adequate statement of reasons confirming the reasons why they were included on the list, as required by Article 253 EC.

The Court confirmed that KONGRA-GEL was directly and individually concerned by the contested decision. The Court noted that there was no need to examine the entitlement of the nine individuals eligibility to bring proceedings.

The Court held that the applicants request for the Court to make certain general findings of fact in relation to the situation of the Kurds was inadmissible. The Court confirmed that under Article 230 the Court is not required to make such findings of fact, furthermore the request was beyond the scope of the application for annulment.

The Court held that since the annulment of the contested decision was confirmed there was no need to rule on the other pleas in law and arguments advanced. Furthermore, the Court held that the action to challenge the contested regulation was inadmissible. The Court noted that the regulation was published on 28 December 2001 and the applicants claim for annulment did not meet the time limits specified in Article 230.

The Court ordered the Council to bear all the costs incurred by both the applicants in addition to its own costs.

Commentary

This decision follows on from previous decisions of the Court of Justice in relation to the proscription of a number of organizations. In particular, in the landmark case of *Organization des Modjahedines du peuple d'Iran (PMOI) v Council* in December 2006 the Court held that the Council's refusal to supply PMOI with a clear statement of reasons as to why it had been included on the list infringed the principles of EU law. In response the Council addressed the issue of the lack of an adequate statement of reasons by amending its procedures. Despite the Court's decision the PMOI continued to remain on the list and the Council gave the organization the reasons for their inclusion.

Following the Court's decision in this case the PKK and KONGRA-GEL continue to remain on the list. This is based on subsequent decisions which were taken which have not been challenged. The Council submit that the procedural issues have been remedied, further the Court did not state whether PKK and KONGRA-GEL were terrorist organizations. This case further highlights issues

around the effectiveness of the list in its current form.

The list is due to be reviewed again in June 2008 and there are a number of pending challenges before Court. For example, the PMOI has submitted a new case to the Court to challenge the latest decision by the Council to include them on the current list.

It remains to be seen if subsequent proscription decisions of the Council follow the principles of fairness and justice and are compatible with Article's 6, 8, 10, and 11 of the Convention.

“Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey’s political-legal configuration. The BHRC is proud of its close association with the KHRP.”

Stephen Solley QC, Former Bar Human Rights Committee President

“KHRP can count many achievements since its foundation ten years ago, but among these its contribution to the fight against torture and organised violence has been one of the most important. Through its litigation strategies, notably at the European Court of Human Rights, its reports and public advocacy, KHRP has helped expose continuing abuse against both Kurds and others, particularly in Turkey, and to raise hopes that victims and survivors of torture and other state violence may obtain recognition of their ordeal, compensation and justice.”

Malcolm Smart, Director of Amnesty International’s Middle East and North Africa Programme

“KHRP’s work in bringing cases to the European Court of Human Rights, seeking justice for the victims of human rights violations including torture and extra-judicial killings, has been groundbreaking. In many of these cases the European Court of Human Rights has concluded that the Turkish authorities have violated individual’s rights under the European Convention on Human Rights. Amnesty International salutes the work of this organisation over the last 10 years in defending human rights.”

Kate Allen, Director Amnesty International UK

“For more than a decade after the military coup, governments in Turkey committed the gravest of human rights abuses while blandly denying that the violations were taking place. By pioneering the use of the personal petition to the European Court of Human Rights in Turkey KHRP helped to make those violations a matter of record in the form of court judgments. This has added valuable leverage in the continuing struggle to bring abuses such as ‘disappearance’, forced displacement, torture and repression of free speech to an end.”

Jonathan Sugden, Turkey Researcher

“In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better.”

Can Dunder, 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
Registered charity (No. 1037236)
A Company Limited by guarantee
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