

Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project

KHRP

Established 1992

(2010) 17 KHRP LR

The Kurdish Human Rights Project

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

AIMS

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

METHODS

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

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Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
CPT	Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
DTP	<i>Demokratik Toplum Partisi</i> (Democratic Society Party)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECRI	Commission against Racism and Intolerance
EEC	European Economic Community
EU	European Union
HRC	UN Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
İHD	<i>İnsan Hakları Derneği</i> (Human Rights Association of Turkey)
KHRP	Kurdish Human Rights Project
KRG	Kurdistan Regional Government
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organisation for Security and Co-operation in Europe
PKK	<i>Partiya Karkaren Kurdistan</i> (Kurdistan Workers' Party)
RSD	Refugee Status Determination
UNAMI	United Nations Assistance Mission for Iraq
UNCAT	United Nations Convention Against Torture
UNCRC	United Nations Convention on the Rights of the Child

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner on Refugees
UNICEF	United Nations Children's Fund
UNOHCR	United Nations Office of the High Commissioner for Human Rights
UNWGEID	UN Working Group on Enforced or Involuntary Disappearances
UPR	Universal Periodic Review

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 4: Prohibition of slavery and forced labour

Article 5: Right to liberty and security

Article 6: Right to 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 12: Right to marry

Article 13: Right to an effective remedy

Article 14: Prohibition of discrimination

Article 35: Admissibility criteria

Article 38: Examination of the case and friendly settlement proceedings

Article 41: Just satisfaction to the injured party in the event of a breach of the Convention

Article 43: Referral to the Grand Chamber

Article 44: Final judgments

Protocol No. 1 to the Convention

Article 1: Protection of property

Article 2: Right to education

Protocol No. 4 to the Convention

Article 2: Right to freedom of movement and liberty to choose one's residence

Protocol No. 6 to the Convention

Article 1: Abolition of the death penalty

Article 2: Death penalty in time of war

Article 3: Prohibition of derogations

Article 4: Prohibition of reservations

Protocol No. 7 to the Convention

Article 1: Procedural safeguards relating to expulsion of aliens

Article 2: Right of appeal in criminal matters

Article 3: Compensation for wrongful conviction

Article 4: Right not to be tried or punished twice

Protocol No. 11 to the Convention

Article 19: Establishment of the Court

Article 20: Number of judges

Article 21: Criteria for office

Article 22: Election of judges

Article 23: Terms of office

Protocol No. 12 to the Convention

Article 1: General prohibition of discrimination

Section 1: Legal Developments and News

Turkish Constitutional Court bans political party

On 11 December 2009, Turkey's Constitutional Court banned the largest pro-Kurdish party in Parliament and removed its members from politics for five years. It based its decision on the *Demokratik Toplum Partisi's* (Democratic Society Party, DTP) alleged links with the illegal *Partiya Karkaren Kurdistan* (Kurdistan Worker's Party, PKK).

The DTP is the largest in a series of pro-Kurdish parties to have been closed down in Turkey. Turkey's Chief Prosecutor, Abdurrahman Yaçınkaya, instigated DTP's closure in 2007.

The Turkish court unanimously voted to ban the DTP after finding it guilty of assisting an illegal organisation. The DTP had become a 'focal point of activities against the indivisible unity of the state, the country and the nation', stated Court President Haşim Kılıç. The DTP President Ahmet Türk emphasised clearly that the party was not affiliated with the PKK in his party's 54-page verbal defence.

DTP leaders Ahmet Türk and Aysel Tuğluk were stripped of parliamentary immunity and banned from politics for five years along with 35 other party members. All party assets would be seized by the Treasury, Mr Kılıç added.

The European Union (EU), which Turkey wishes to join, expressed concern about the ruling. 'While strongly denouncing violence and terrorism, the Presidency recalls that the dissolution of political parties is an exceptional measure that should be used with utmost restraint', said the EU's Swedish Presidency.

The Court's decision has been greeted with widespread criticism from the Kurdish and International community. Members of the DTP have referred the case to the European Court of Human Rights.

Freedom of expression is still not guaranteed in Turkey

Not only are the principles of 'Freedom of Expression' stipulated in Chapter two, section 8 of the Turkish Constitution, but Turkey has also ratified several International treaties (such as the 'European Convention on Human Rights and Fundamental Freedoms', ratified in 1954, and various provisions of the 'International Covenant on Civil and Political Rights', signed in 2000) which take precedence over domestic law according to Article 90 ('Ratification of International Treaties') of the Constitution following its amendment in 2004. In the frame of negotiations with the EU, the latter has requested Turkey to issue various legal reforms in order to improve freedom of expression and of press.

Freedom of expression on the Internet continues to be limited. On Monday 18 January 2010, Miklos Haraszti, Organisation for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, said Turkey's Internet Law was failing to protect free expression in the country and should be changed or abolished. A total of 3,700 websites have been blocked in Turkey, including YouTube and Google. This action has been criticised as being incompatible with Turkey's international obligations towards free speech.

On 18 December 2009, İstanbul's High Criminal Court Number 14 discontinued the publication of the 'Atılım' newspaper for one month after an interview with DTP MP and Co-President

Emine Ayna. The decision of the court was based on Article 6 of the Anti-Terror Law. This latest closure decision is the fifth time 'Atılım' has been closed down in 2009.

Further, intrusion into press freedom is evidenced by the decision of 18 February 2010, the Prosecutor of the Diyarbakır 5th High Criminal Court demanded a 525 year prison sentence for the journalist and former Chief Editor of Kurdish daily Azadiya Welat, Vedat Kurşun. He was charged with 'aiding and abetting an illegal organisation and spreading propaganda' and 'glorifying crimes and criminals'. Ozan Kılınç, who took on the role as Editor-in-Chief at Azadiya Welat after Kurşun was arrested has been tried and sentenced to 21 years for similar offences as those of Kurşun.

Human rights defenders continue to be arrested in Turkey

The Vice President and Diyarbakır Branch President of *İnsan Hakları Derneği*, (the Human Rights Association of Turkey, İHD), Lawyer Muharrem Erbey, was detained on the 24 December 2009 in Diyarbakır. He was arrested in the early morning hours on the 26 December 2009 by the Diyarbakır Special Heavy Penal Court. Although he has not been indicted or brought before the court (due to a secrecy decision in the case), it is believed that the accusations against Muharrem Erbey include the participation of the Constitution Workshop in Diyarbakır and giving a speech regarding the Kurdish issue in the parliaments of Belgium, Sweden and England. Further accusations appear to be that he participated at the 'Kurdish Film Festival' in Italy and that he has become a legal adviser of Osman Baydemir (the Mayor of Diyarbakır). As a result of these activities it is believed that Mr Erbey will be accused of being a member of an illegal organisation. It is believed that the arrest of Muharrem Erbey was part of a broader operation by the anti-terror police, during which a total of 36 people were detained.

KHRP together with the Bar Human Rights Committee of England and Wales, European Lawyers for Democracy and Human Rights, the Haldane Society of Socialist Lawyers, and the Law Society of England and Wales have issued a co-signed statement expressing their grave concern over the arrest and detention of Mr Muharrem Erbey, which they believe violates international human rights principles.¹ To date no trial date has been set for Mr Erbey and, having been refused bail, he remains in custody.

Recent arrests of human rights defenders have become more frequent in Turkey, including regular raids of human rights organisations. Material is being confiscated and used to investigate the individual lawyers.

In 2009, Ms Yüksel Mutlu was imprisoned for a period of six months, she is a member of the Honorary Board of the İHD. A further board member of the Human Rights Association, Filiz Kalaycı, a human rights lawyer, is still being held in detention. Ethem Açıklan, the former president of the İHD, which is based in Adana, is another such example. In May 2009, several affiliates of trade unions in İzmir were arrested. A total of 22 are still pending trial. All of them are charged with being members of an illegal organisation due to their support of Kurdish language education.

1 The full KHRP Joint Statement Concerning Arrest of Mr Muharrem Erbey, is available from www.khrp.org.

UNICEF report on children accused of 'Terror Crimes' in Turkey

In a report following UNICEF's visit to Adana and Hakkari in March 2009, Turkey is urged to protect the right to life of children who attend demonstrations. The report also recommends amendments to the Turkish Anti-Terror Law.

According to the Turkish representation of UNICEF, the government failed to make positive steps regarding the prosecution of children that participated in demonstrations and are now accused of terrorism. UNICEF recommended abstaining from trying children 'under the same condition as adults' to stop victimisation of the children.

The case of a girl called Berivan highlights Turkey's practice of jailing children under counter-terrorism legislation. Berivan is 15-year-old and was arrested at a demonstration in the south-eastern city of Batman in October 2009 after she allegedly threw stones at the police. She has been sentenced to nearly eight years imprisonment for 'terrorist' offences by the court in Diyarbakır and was found guilty of 'crimes on behalf of an illegal organisation' for throwing stones and shouting slogans. She was also convicted of attending 'meetings and demonstrations in opposition to the law' and 'spreading propaganda for an illegal organisation'. During her trial, Berivan denied throwing stones or even being part of the demonstration, but said that she had stopped to watch it out of curiosity on her way to visit her aunt. She claimed that the police had mistaken her for being a demonstrator and that she had confessed only after being beaten in custody. The initial 13-and-a-half-year sentence was reduced on appeal to seven years and nine months on account of her age. Berivan is one of 737 minors who have been charged under counter-terrorism legislation, according to İHD in Diyarbakır.

Turkish laws allow children to be tried as adults and to be jailed for up to 50 years. Official figures reveal that 2,622 minors are currently imprisoned in Turkish prisons. The majority of those jailed are boys. An additional prison has recently been built in Diyarbakır to detain underage girls who are convicted of taking part in banned demonstrations. Recent judgments emanating from the European Court of Human Rights have proved that Turkey's treatment of children accused of crimes falls far short of international human rights norms.

Broadcasting in mother tongue finally arrives

On 23 February 2010, the Radio and Television Higher Board in Turkey (RTÜK) made a decision to allow broadcasting in different languages and dialects.

In 2004, local and national media groups were allowed to broadcast in other languages. This was enforced by the publishing of the 'Regulation on Radio and Television Broadcasting in Various Languages and Dialects that are used by Turkish Citizens traditionally in their daily lives'. Despite this, broadcasting was severely restricted. The limitations of one hour per day and five hours per week were set for the broadcasting in mother tongue. For TV stations this was further limited to 45 minutes a day and 4 hours per week.

Due to the lack of simultaneous translation there was no possibility to broadcast live in mother tongue. Although translation was compulsory, the teaching of the language was prohibited.

The recent decision made by RTÜK on the applications made of media groups to broadcast in different languages has lifted these previous restrictions. RTÜK has granted permission to a total of 14 radio and TV stations. Broadcasting in Kurmanji, Zazaki and Arabic is now possible without any time limitations.

Turkey's homework on minority rights

On 27 January 2010, the Parliamentary Assembly of the Council of Europe (CoE) met and debated how Turkey could implement a series of measures designed at preventing discriminatory practices against religious minorities in Turkey, in particular non-Muslim minorities. The Turkish government must provide a progress report on the issues identified by February 2011.

One major issue concerned ensuring that the lands of Mor Gabriel, one of the world's oldest Christian monasteries, be protected. It was also decided that Turkey must recognise the legal personality of minority run religious institutions, as, despite Turkey's constitution recognising freedom of religion, presently only the Greek and Armenian Orthodox Churches and Judaism are given legal recognition.

Work must also be done to encourage members from minority groups to join public services, such as the army and police force, and to ensure that any hate speech inciting violence be made a criminal offence. In addition, any violence perpetrated against members of religious minorities must be thoroughly condemned and a national campaign against racism should celebrate diversity.

The legal proceedings concerning the murder of Hrant Dink must be completed as expeditiously as possible. Dink was murdered by a Turkish nationalist in 2007 after actively supporting efforts to improve relations between Armenia and Turkey. A Parliamentary sub-committee conducted a report and found that the murder may have been prevented were it not for negligence on the part of the security forces and the police. The Turkish parliament must now consider the findings of this report and conclude legal proceedings.

Committee for the Prevention of Torture in Turkey and Armenia

On 26 and 27 January 2010, a six-member group from the CoE's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) travelled to the prison island of İmralı in North Western Turkey in order to interview Mr Abdullah Öcalan and five other inmates held there.

Abdullah Öcalan, who is serving a life sentence since 1999, was moved to a new cell after the Turkish Justice Ministry transferred five inmates to the prison. The new arrangements took place some time after the CPT disapproved of Ankara for violating Mr Öcalan's human rights through solitary confinement.

The reason for the CPT visit was to examine Mr Öcalan's conditions of detention. He had previously told his lawyers that his new cell was small and that his prison conditions were turning him into 'a man who is half living and half dead'. During their visit the CPT members

also met with the Chief Public Prosecutor of Bursa, Sait Gürlek, and the Enforcement Judge, Yahya Özkök, who is responsible for the İmralı F-type High-Security Closed Prison.

On 19 March 2010, the CPT published a report following its ad-hoc visit to Armenia in 2008. The main reason for the visit was to consider the treatment of people who were detained as a result of the Presidential elections, which were held on 19 February 2008.

On 1 March 2008, a police operation was established in Yerevan in order to try to disperse opposition rallies in the aftermath of the elections. During the police operation several people were killed, hundreds were injured, and dozens of people were detained. Those who were interviewed during the CPT visit alleged that although they did not resist arrest, they were subjected to ill-treatment during arrest and subsequent police questioning.

As a result of the visit, the CPT has recommended that the investigations into the March arrests be conducted in an effective manner.

Commissioner Hammarberg visits Azerbaijan

For the second time since his mandate began, the CoE Commissioner on Human Rights, Thomas Hammarberg, visited Azerbaijan from 1 to 5 March 2010. Freedom of expression, the situation of NGOs, respect for human rights by law enforcement officers and the administration of the justice system, were the main issues under examination during the visit.

The Commissioner noted that there had been improvements to the right to freedom of expression, especially through the decriminalisation of defamation. However, despite this journalists were still said to be being convicted and imprisoned for their work and the opinions they express. Mr Hammarberg visited imprisoned journalists Ganimat Zahidov and Eynulla Fatullayev, as well as youth activists, Emin Abdullayev and Adnan Hajizadeh, in order to speak to them about the situation. The Commissioner took note of recent legislative changes, which are likely to have a negative effect on journalists' activities. Since the visit, Ganimat Zahidov has been released after being detained for 28 months. Other activists however, are still imprisoned.

The implementation of the right to freedom of association in Azerbaijan as guaranteed in Article 11 of the European Convention on Human Rights, was a further concern of the Commissioner. He urged the Minister of Justice to ensure that the process of registering NGOs' would be conducted in a prompt and efficient manner.

On the matter of training law enforcement officers on human rights, the Azerbaijani authorities informed Hammarberg that different initiatives had been taken. Further, the authorities stated that where complaints had been made accusing police officers of ill-treatment and denying individuals their rights, proceedings had been issued against these law enforcement officers. The Commissioner urged the importance of an effective and prompt investigation into such allegations.

The European Court of Human Rights has had several cases against Azerbaijan concerning the issue of the right to fair trial. In these cases a violation was established and re-trials were ordered by the Court. Mr Hammarberg condoned the steps taken to remedy the excessive pre-trial detentions.

During the Commissioner's visit he also met with Vasif Talibov, the Chairman of the Supreme Council of the autonomous Republic of Nakhchivan. This was a first step for the Commission to talk to the Nakhchivani authorities about human rights issues.

'Chemical Ali' Executed in Iraq

On 25 January 2010, Ali Hassan Al-Majid, better known as Chemical Ali, was executed for crimes against humanity. The Iraqi government revealed that the death sentence against Ali Hassan Al-Majid has been carried out.

Hassan Al-Majid who is the first cousin of Saddam Hussein, was sentenced to death for ordering the gassing of more than 5,000 Kurds in the northern Iraqi town of Halabja with chemical weapons in 1988. It was the fourth death sentence the 68-year-old has received for atrocities committed during the brutal three-decade reign of the Ba'athists. Mr Al-Majid was appointed governor of northern Iraq in March 1987, marking the beginning of a sustained offensive, known as the 'Anfal Campaign', by Iraqi troops against the Kurdish population. Mr Al-Majid also received a death sentence in December 2008 for his role in the crushing of a Shi'ite revolt after the 1991 Gulf War and another for his involvement in killing and displacing Shi'ite Muslims in 1999.

Mr Al-Majid had received three previous death sentences for atrocities committed during Saddam's rule, particularly in government campaigns against the Shias and Kurds in the 1980s and 1990s. During this period Mr Al-Majid earned a reputation for ruthlessness for his role in the Iraqi government's campaigns against Saddam's opponents.

Mr Al-Majid was captured after the 2003 invasion of Iraq and charged with war crimes, crimes against humanity and genocide. He was convicted in June 2007 and sentenced to death for crimes committed in the al-Anfal campaign of the 1980s. His appeal against the death sentence was rejected on 4 September 2007 and he was sentenced to death for the fourth time, by hanging, on 17 January 2010.

Mr Al-Majid is the fifth former regime official to be hanged for alleged atrocities against Iraqis during Saddam's nearly three-decade rule.

Human rights and the Iraq inquiry

'To be rid of Saddam has got to be better than anything else', said Ann Clwyd, a senior Labour MP, speaking at the Chilcot Inquiry. Appearing before the Inquiry, which was set up to examine the UK's involvement in Iraq, Clwyd said that for the Kurdish people there was 'no other option' but to forcibly remove Saddam to end years of persecution by his regime.

Ann Clwyd is the Chair of Indict, a body, which since 1996 has been pushing for an international tribunal to put senior figures in Saddam's regime on trial for Crimes against Humanity. Two years after the invasion, in 2003, in Iraq the Former Prime Minister, Mr Tony Blair, appointed her as the UK Special Envoy on Human Rights in Iraq.

In the build-up to that final vote she had been trying to persuade a European country to indict the leading members of the Iraqi regime. Clwyd said that she had not wanted war because she

felt that the Iraqi people had suffered enough. After visiting Kurdistan in February 2003 she had become convinced that 'there was no alternative. We could have gone on for another 10-15 years waiting for weapons inspectors or the UN Rapporteur on human rights in Iraq to be admitted to the country'.

The Kurds had never told her before that they backed a foreign invasion. 'But this time they said to me there is no other way. And that's the first time I ever heard the Kurds, in a very long association with them, say that... So I felt myself there was no other option. I didn't feel that I could go back and face the Kurds and say that I'd argue any other way.'

Since the invasion she acknowledged that progress in human rights had been 'slow'. In particular, the high level of violence against women and the increase in honour killings still remain issues of concern. Ms Clwyd said she regretted the deaths of British soldiers in Iraq and the huge casualty rates among Iraqi civilians.

The UK government had an 'obligation' to continue helping the Iraqi people and although she was 'optimistic' about the future of the country, there were still areas of real concern such as the widespread abuse in the prison system.

UN report highlights improvement beside renewed concerns on the situation of human rights in Iraq

On 14 December 2009, the latest report of the UN Assistance Mission for Iraq (UNAMI) shows improvement as well as concern on the human rights situation in Iraq. This document covers the period from 1 January to 30 June 2009 and draws particular importance to the areas of the rule of law and impunity, the reimplementation of the death penalty, the situation in prisons and detention centres, and allegations of torture.

The report notes that in early 2009 there were improvements in the security situation with fewer high-visibility mass-casualty attacks by the militias, insurgents and criminal groups than in 2008. Despite this, indiscriminate attacks as well as targeted killings of security forces, high ranking officials and civil servants, religious and political leaders, members of professional groups such as journalists, educators, medical doctors, judges and lawyers continued to claim lives throughout the reporting period. Numerous reports indicated an increase in violence directed at persons on grounds of their sexual orientation. The report also highlights violence against women and honour killings, which still remain a grave concern, particularly in the region of Kurdistan. In spite of the efforts by legislators, many crimes were unpunished.

Both UNAMI and the Office of the UN High Commissioner for Human Rights have expressed their concern about the Government's decision to resume executions, noting that the Iraqi criminal justice system does not provide sufficient fair trial guarantees. During the reporting period, 31 death row inmates were executed, including one woman. The report also registers credible allegations of torture and ill-treatment during pre-trial detention in Iraqi detention facilities, including those run by the Kurdistan Regional Government.

UN examines human rights in the Kurdish regions

The Kurdish regions, which can be found in south-east Turkey, north-west Syria, northern Iraq and north-east Iran, are currently under the observation of various UN bodies.

At the beginning of April, KHRP, amongst other NGO's, submitted a shadow report on the Syrian Arab Republic under the UN Convention Against Torture (UNCAT). This is Syria's first periodic report on their implementation of the Convention. KHRP highlights the situation of the Kurds in Syria, stressing in particular the fact that many Syrian Kurds are stateless people who continue to be targeted by the Syrian authorities and subjected to ill-treatment, characteristically in the form of arbitrary arrests, incommunicado detention, extrajudicial killings, disappearances, as well as torture and deaths in custody. Further, KHRP is concerned with Syria's implementation of the Convention and made three submissions in that respect. Firstly, it urges Syria to criminalise the offence of torture. Secondly, it calls on Syria to properly enforce the Convention through national legislation preventing and punishing acts of torture. Finally, KHRP stresses the importance of proper investigations conducted by the authorities into the allegations of torture. The examination of Syria by CAT will be conducted by 14 May 2010. (See below for further information on the CAT report on Syria).

The Universal Periodic Review (UPR) is a new human rights mechanism of the Human Rights Council (HRC) created on 15 March 2006 by the UN General Assembly resolution 60/251. The UPR reviews the fulfilment of all 192 UN member States on their human rights obligations and commitments, as well as their progress, challenges, and needs for improvement. Countries are reviewed every four years.

Since December 2009, a number of the countries of interest to KHRP's work have been and will be examined by the UPR working group, such as Iran and Iraq (in February 2010) and Syria in 2011. Turkey and Armenia were examined in May 2010.

In relation to the UPR for Turkey, the HRC mirrored KHRP's submissions relating to torture and ill-treatment of Kurdish detainees by recommending that allegations of torture are investigated and perpetrators prosecuted and to 'take measures to improve juvenile justice and detention'. Other HRC recommendations, which reflected KHRP's concerns, include recommendations to 'revise laws restricting freedom of expression', to 'take further steps to ensure full respect of the rights of minorities' and to 'take measures to combat persisting hostile and discriminatory attitudes'. In its Circular of the Office of the Prime Minister, the Turkish government acknowledges that in relation to non-Muslim minorities, 'some issues could not have been completely resolved due to problems in implementation'. The Turkish Government announced its pledge to pay 'utmost care in the protection and maintenance of the non-Muslim cemeteries which have been put under municipalities' control, to ensure the strict implementation of court rulings in favour of non-Muslim community foundations by land registry offices (and) to prevent any injustices in the collection of concession fees'.

The three main areas of concern raised by KHRP in its submissions for the UPR of Armenia are reflected in the recommendations of the HRC. First, KHRP's concerns about the independence of the media, as well as violence and harassment towards the media, are reflected in the HRC's recommendation that the independence of the National media commission be bolstered and that steps are taken to ensure protection of journalists and to 'ensure full respect of the right of

freedom of opinion and expression'. Second, KHRP's concerns relating to freedom of assembly, which stemmed from the oppressive events subsequent to the presidential election result in February 2008, were echoed in the HRC's recommendation to 'investigate and prosecute all cases of post election violence, impartiality and transparency of the judiciary' and to 'take measures to ensure free and fair elections'. Finally, KHRP's submissions regarding the treatment of political prisoners during arrest and detention and the procedural violations which occurred in many of their trials were reflected in the UPR recommendations for Armenia to 'continue efforts to improve conditions of detention', 'ensure impartiality and transparency of the judiciary' and to 'set up training programmes for police officers'.

In July 2009, KHRP submitted its draft NGO shadow report on Turkey's implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In May this year, KHRP submitted its NGO shadow report. Main concerns included lie in the area of education and the way this has affected Kurdish women. Further, violence against women, including state violence, is still being subjected on Kurdish women.

UN Committee against Torture adopts KHRP's concerns about Syria's inhumane treatment of the Kurdish peoples

The UN Committee Against Torture, in its concluding observations on Syria issued on 14 May 2010, adopted many of KHRP's concerns about Syria's implementation of the UNCAT in relation to the Kurdish peoples. The KHRP raised its concerns in its NGO Shadow Report, which it submitted to the Committee in anticipation of its review of Syria at its forty-fourth session.

The Committee stated that it was 'deeply concerned at numerous reports of torture, ill-treatment, death in custody and incommunicado detention of people belonging to the Kurdish minority..., in particular political activists of Kurdish origins'. It expressed further concern that military courts are increasingly passing convictions on Kurdish detainees on vague charges of 'weakening national sentiment' or 'spreading false or exaggerated information'. Moreover, the Committee admonished 'the growing trend of deaths of Kurdish conscripts who have died whilst carrying out their mandatory military service and whose bodies were returned to the families with evidence of severe injuries', in violation of Articles 1, 2, 12 and 16 of the Convention. The Committee's concerns echo sentiments expressed in the KHRP's shadow report.

The Committee urged Syria to take 'urgent measures to ensure prompt, thorough, impartial and effective investigation into all allegations of torture, ill-treatment, death in custody, death during military service and incommunicado detention of people belonging to the Kurdish minority' and to 'prosecute and punish law enforcement, security, intelligence and prison officials who carried out, ordered or acquiesced in such practices'. Furthermore, the Committee demanded that Syria amend or abolish 'the vague security provisions under the Syrian Criminal Code that unlawfully restrict the right to freedom of expression, association or assembly'.

Other concerns submitted by the KHRP, which were reflected in the Committee's concluding observations, include the absence of a definition of torture in Syria's legal system (Art. 1); that the provisions of Syrian legislation criminalising torture fail to ensure appropriate penalties, since they set a maximum penalty of three years imprisonment (Art. 4); and that Syria's courts,

tribunals and complaints mechanism lack independence and impartiality. The Committee recommended that Syria 'amend and revise its legislation' and adopt all measures necessary to amend these defects. Furthermore, the Committee echoed KHRP's calls for the rescission of decrees which grant security services and the police immunity for crimes committed whilst on duty and that the state of emergency, which has subsisted in Syria since 1962, not be invoked as a justification of torture.

KHRP would like to thank the UN Committee for holding the Syrian government to account for its actions and International Support Kurds in Syria Association (SKS) for its contribution to the Committee's concluding observations and the plight of the Kurdish peoples.

Criticism of UN Human Rights Council's Resolution on defamation of religion

The UN Human Rights Council (HRC) under its agenda item on racism, racial discrimination, xenophobia and related forms of intolerance adopted a resolution with regard to combating defamation of religions on 25 March 2010. The Resolution expresses deep concern that Islam was frequently and wrongly associated with human rights violations and terrorism. In light of the negative projection of certain religions in the media and the introduction and enforcement of laws and administrative measures that specifically discriminated against and targeted persons with certain ethnic and religious backgrounds, particularly Muslim minorities are targeted. The HRC stated that it was alarmed about the inaction of some states to combat these trends that threatened to impede the full enjoyment of human rights and fundamental freedoms of the targeted persons. It therefore regretted the laws or administrative measures specifically designed to control and monitor Muslim minorities. The HRC requested the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to report on all manifestations of defamation of religions, in particular on the ongoing serious implications of Islamophobia.

However, member states of the HRC came close to rejecting the resolution on 'Defamation of Religions'. In the run-up to the vote, many governments and non-governmental organisations campaigned against the resolution on the basis that it violates international human rights law on freedom of expression and other rights. UN experts and NGOs have repeatedly pointed out that the concept of 'Defamation of Religions,' or the banning of forms of expression considered defamatory of a certain religion, greatly weakened international rights standards, and was often used to discriminate against religious minorities and repress freedom of expression throughout the world. Instead of continuing these unconstructive efforts, the HRC should encourage states to properly implement their existing international human rights obligations, including their positive obligations to respect and protect the rights to freedom of expression and equality. They further claim that the HRC should promote universal ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). States should strengthen domestic laws and policies to combat discrimination and promote intercultural and inter-religious understanding.

20 states voted in favour of the resolution (Bahrain, Bangladesh, Bolivia, Burkina Faso, China, Cuba, Djibouti, Egypt, Indonesia, Jordan, Kyrgyzstan, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal and South Africa), 17 against (Argentina, Belgium, Chile, France, Hungary, Italy, Mexico, Netherlands, Norway, Republic of Korea, Slovakia, Slovenia, Ukraine, United Kingdom, United States of America, Uruguay and Zambia), and 8 abstentions (Bosnia and Herzegovina, Brazil, Cameroon, Ghana, India, Japan, Madagascar and Mauritius). Angola and Gabon were absent at the vote.

UN expert opposes intrusive measures in fight against terrorism

In his report on the erosion of the right to privacy in the fight against terrorism, the UN Special Rapporteur on human rights and counter-terrorism, Martin Scheinin, requested that the current wave of privacy-intrusive measures should be countered through a global declaration on data protection and data privacy.

He critically assessed developments that have adversely affected the right to privacy in various parts of the world using the justification of combating terrorism, which included racial or ethnic profiling, creation of privacy-intrusive databases and resorting to new technology, such as body scanners, without proper assessment of their possible ramifications on human rights.

Based on his evaluation, the UN independent expert dismissed the perception that, in an all-encompassing process of 'balancing', counter-terrorism always outweighed privacy. He called for a rigorous analytical framework for securing that any restrictions on privacy rights were necessary, proportionate and adequately regulated.

Mr Scheinin, who was appointed Special Rapporteur in August 2005, encouraged the Human Rights Committee, the independent expert body supervising compliance with the International Covenant on Civil and Political Rights (ICCPR), to consider the drawing up of a general comment on the right to privacy, including the proper scope of its limitations.

One of his main recommendations is that the inter-governmental Human Rights Council 'should launch a process aiming at a global declaration on data protection and data privacy.'

In his previous reports, Mr Scheinin has addressed themes such as definitions of terrorism, racial and ethnic profiling, the right to a fair trial, the gender impact of counter-terrorism measures and the moral obligation of States to admit asylum seekers who were forced to aid terrorists.

UN reform on gender architecture

Four UN agencies and offices will be amalgamated to create a new single entity to promote the rights and well-being of women worldwide and to work towards gender equality.

The UN General Assembly (UNGA) adopted a historic resolution on 14 September 2009 on improving system-wide coherence within the UN, and the text spells out the support of Member States for a new consolidated body – to be headed by an Under-Secretary-General (USG) – to deal with issues concerning women. The resolution means that the UN Development Fund for

Women, the Division for the Advancement of Women, the Office of the Special Adviser on Gender Issues and the UN International Research, and Training Institute for the Advancement of Women, will be merged.

In a statement issued by his spokesperson, Secretary-General Ban Ki-moon said he was 'particularly gratified' that the UNGA had accepted his proposal for 'a more robust promotion' of women's rights under the new entity. The UNGA's resolution tasked the Secretary-General with providing Member States with a comprehensive proposal outlining the mission statement, structure, funding and oversight of the new entity so that it can be created as soon as possible.

Women's organisations had been pushing for a new, strengthened gender architecture within the UN system for years. GEAR, a coalition of 300 international and non-governmental organisations in favour of gender equality architecture reform, stated that the coalition was pleased that the UNGA expressed strong and unanimous support in adopting the resolution. GEAR had urged Ban Ki-moon to immediately begin the recruitment process to appoint a strong leader, who is grounded in women's rights, as the USG to lead the process of consolidating the four existing entities. Substantial funding was mentioned by both Member States and women's organisations as a requisite to support the proposed field operations.

A report by the Secretary-General proposing details for a new gender entity was issued on 6 January 2010 and presented to the Member States on 4 February 2010, in the first meeting of informal consultations in the Plenary on System-Wide Coherence. It outlines a mission statement (the entity will work for 'the elimination of discrimination against women and girls; the empowerment of women; and the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action, and peace and security'), organisational arrangements, provisions for funding, and options for an Executive Board to oversee operational activities. The report also includes an organisational chart showing a proposed structure of three main divisions. Regarding its governance arrangements, the report proposes that the entity be a subsidiary organ of the UNGA, reporting through the Economic and Social Council. The report suggests that a review process be held three years after the establishment of the entity in 2013.

The functions can be applied at the three levels of the entity, which are the country-level functions, the regional-level functions and the headquarters-level functions. It is proposed that the headquarters of the composite entity be organised into three main divisions: intergovernmental support and strategic partnership (led by an Assistant Secretary-General); program and policy, providing guidance to regional and country-level staff (led by an Assistant Secretary-General); and operations, providing support and oversight in the operational areas (led by D2-level Director).

UN Working group on enforced disappearances celebrates 30th anniversary

2010 marks the 30th anniversary of the creation of the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID). Since its inception the group has been involved in over 50,000 cases in 80 countries from all parts of the world. The *Declaration on the Protection of all Persons from Enforced Disappearances* (47/133) was adopted by the UNGA and enacted

on 18 December 1992, with the purpose of this instrument being to characterise all acts of enforced disappearance.

The primary aim of the organisation is to assist relatives in ascertaining the whereabouts of a family member who was the victim of enforced disappearance. Once a complaint is lodged by a family member, or a human rights organisation representing the family, UNWGEID considers whether the case is one of enforced disappearance. For this to be the case the perpetrators must be State actors or those acting on behalf of State authorities. The principle behind this distinction is that if the perpetrators are not connected to the State then the State has an obligation to investigate the disappearance and provide sanctions to prevent disappearances occurring.

Once a case is deemed an enforced disappearance then UNWGEID act as an intermediary between the victim's relatives and the relevant government. Only two more signatory states are needed for the Convention to be ratified to make it binding.

Extensive global study on secret detention linked to counter-terrorism

International law clearly prohibits secret detention including during armed conflict. Despite this, the use of secret detention is widely used.

On 26 January 2010, a 222-page long study was issued, which had been conducted over the period of one year by two independent UN experts on counter-terrorism and torture, and two UN expert bodies on arbitrary detention and enforced or involuntary disappearances. The study analysed responses from 44 States to a detailed questionnaire as well as interviews from 30 individuals - or their families or legal counsel - who were victims of secret detention. In many cases these individuals were also subjected to torture and other ill-treatment.

The report highlights that secret detention in connection with the 'War on Terror' is still a serious problem, as states conduct these practices either through secret detention facilities, through declarations of a state of emergency or through forms of 'administrative detention', the latter two allowing prolonged secret detention.

The experts stated that investigations were only conducted in a few cases and that no one had been brought to justice. Furthermore, compensation or rehabilitation was almost never received despite the loss of years, jobs or often health. The list of states practising secret detentions is non-exhaustive and currently consists of 66 states. These states are mentioned in relation to a historical analysis of secret detention prior to 11 September 2001, however, in the majority of cases, states are mentioned in connection with secret detention and related activities such as the so-called 'proxy detention', 'rendition, or 'extraordinary rendition' and 'War on Terror'.

The experts reiterate that international law clearly prohibits secret detention which does not only violate human rights law, but furthermore, norms of humanitarian law, which cannot be derogated from under any circumstance.

Brisbane Declaration calls upon governments to guarantee the right to information

The 'Declaration of Brisbane' was issued at the UNESCO World Press Freedom Day 2010 conference on 3 May 2010 in Brisbane Australia. The Declaration calls on national governments, media professionals and UNESCO to promote the right to information.

The Brisbane Declaration calls on UNESCO Member States who have not enacted laws to do so, in accordance with the principle of maximum disclosure. Governments are to take measures to enable unfettered access to information, that laws are properly implemented and that governments ensure that the wider legal environment supports the right to freedom to information by, for example, establishing other disclosure systems. In addition, governments must ensure that international bodies of which they are members adopt effective and enforceable access rules and that media companies raise awareness of freedom of expression.

Its calls on UNESCO are manifold and include the following: to assist governments, individuals and others in realising the right to information; to support initiatives aimed at promoting professional and ethical standards in journalism; and to promote a new approach to media accountability based upon self-regulation. Other demands upon UNESCO include the promotion of the free flow of ideas through the internet and the adoption of its own internal rules on accessing information.

Although the Declaration is not legally binding, it lays down guidelines which can be used as a legal interpretative tool. By protecting the right to information and by supporting a free media, the Declaration helps to ensure that the information people receive is less biased and verifiable. In these ways, it is hoped that the Brisbane Declaration will foster accountability within, and the responsible governing of governments.

ICC approves Kenya investigation

On 26 November 2009, the Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, sought authorisation from the Pre-Trial Chamber II to open an investigation into the crimes allegedly committed in the Republic of Kenya during the 2007 - 2008 post election violence.

After Kenya's flawed elections, which were held in 2007, violence took over the country, resulting in 1,133 deaths and causing 400,000 to flee their homes. The situation escalated bringing the country to the brink of civil war.

As Kenya is a signatory to the Rome Statute, the State has accepted the Court's jurisdiction on crimes such as genocide, crimes against humanity and war crimes. Therefore, the Prosecutor was able to request an investigation into the crimes committed. Article 15 of the Rome Statute enables the Prosecutor to request an investigation on his own initiative, *proprio motu*, without the need of a State or the UN Security Council referring the case to the ICC.

After the post-election violence, both parties in Kenya agreed to set up the 'Waki Commission' to investigate, as well as an independent review committee to consider the flaws in the election.

A truth, justice and reconciliation commission was also set up in order to help heal historical grievances.

On 16 July 2009, the Prosecutor received six boxes of supporting material sent from the Waki Commission. The documentation included a sealed envelope, which contained a list of names identifying key suspects responsible for the violence that had occurred in December 2007 and February 2008. Further to that, the Kenyan authorities forwarded information on the measures of witness protection to the Prosecutor.

On 31 March 2010, a majority decision of the Pre-Trial Chamber II was passed, which approved the Prosecutor's request to launch an investigation into the post-election violence. This is the first such inquiry to be initiated since the ICC was set up, and was requested by the Prosecutor acting on his own initiative.

Special Representative on Sexual Violence in Conflict is appointed

UN Secretary-General Ban Ki-moon's newly appointed Special Representative on Sexual Violence in Conflict, Ms Margot Wallström, a Swedish politician with a long history in defending women's rights, promises a more coherent and effective battle against the scourge.

Deputy Secretary-General, Asha-Rose Migiros, said that the recent appointment was a clear indication of the international community's commitment to ending a crime that devastates millions of women and children. 'Ending sexual violence in conflict situations remains a top priority for the Secretary-General who has called for increased actions by the international community to prevent violence, to protect individuals, to punish perpetrators, and to provide redress to victims,' she added.

The UN Peacebuilding Support Office had previously joined forces with a network of over a dozen other UN entities to prevent sexual violence in armed conflict and respond effectively to the needs of survivors.

Secretary-General Ban Ki-moon, in response to calls from women's groups, rape survivors and NGOs, had formed the inter-agency network known as UN Action against Sexual Violence in Conflict in 2008. The network brings together experts on various issues, including peacekeeping, HIV/AIDS and human rights, to help stop rape and other sexual crimes in conflict-ridden countries.

Mr Ban announced the appointment of his Special Representative on Sexual Violence in Conflict on 2 February 2010 in response to a request by the Security Council last September to appoint a Special Representative to provide coherent and strategic leadership to address sexual violence in armed conflict.

The presentation of Ms Wallström came just a day after the UN Population Fund reported that more than 8,000 women were raped in the Democratic Republic of the Congo during fighting between warring factions last year.

Asked what message she wished to send out about sexual violence, Ms Wallström quoted the dictum of former US Secretary of State Madeleine Albright: 'Violence against women is not

cultural, it's criminal.' Preventing such violence was not a women's issue, but a human rights issue, she emphasised.

Ratification of anti-cluster bomb convention

On 16 February 2010, Burkina Faso and Moldova ratified the Convention on Cluster Munitions (the 'Convention'), thereby providing the final two ratifications, which were needed for the Convention to become binding in international law. It comprehensively prohibits the use, production, and transfer of cluster munitions, provides strict deadlines for clearing affected areas and destroying stockpiled cluster munitions, and requires assistance to victims of the weapons.

The Convention was opened for signature in December 2008 and has taken only 15 months to attain the necessary 30 ratifications, before entering into force on 1 August 2010. The Convention is the result of the Oslo-process, a diplomatic process that included states, civil society, the International Committee of the Red Cross as well as the UN. Following up on the progress made at the Lima Conference (May 2007), the Vienna Conference (December 2007), and the Wellington Conference (February 2008), 107 participating states agreed to adopt the text of the Convention at the Dublin Conference on cluster munitions on 30 May 2008.

The 30 states which ratified the Convention include leaders of the 'Oslo Process' (Norway, Austria, Holy See, Ireland, Mexico, and New Zealand), as well as countries where cluster munition has been used (Albania, Croatia, Lao PDR, Sierra Leone, and Zambia), stockpilers of cluster munitions (Belgium, Denmark, France, Germany, Japan, Moldova, Montenegro, and Slovenia), and Spain. Other ratifying states are: Burkina Faso, Burundi, Luxembourg, Macedonia FYR, Malawi, Malta, Nicaragua, Niger, San Marino, and Uruguay.

According to UNICEF, the deadly weapons have been in use for over six decades and continue to contaminate wide areas of countries like Laos, Vietnam, Cambodia, Afghanistan and Iraq. It is estimated that in the year 2003 alone, the US, France and the UK dropped over 61,000 cluster bombs on Iraqi soil. The failure rate makes these weapons particularly dangerous for civilians, who continue to be maimed or killed for years after conflicts end. Some 98 per cent of victims are civilians and cluster bombs have claimed over 10,000 civilian lives, 40 per cent of whom are children. Children are particularly at risk from cluster munitions as they are small and shiny and attract children's natural curiosity.

In a statement issued by his spokesperson, UN General Secretary, Mr Ban Ki-Moon, said the fact that the Convention was entering into force just two years after countries had adopted the treaty demonstrated the world's collective revulsion at the impact of these terrible weapons. He called on all States that have not ratified to become a party to the convention immediately.

European Commissioner for Human Rights demands more respect for minority languages

On 25 January 2010, Mr Thomas Hammarberg, CoE Commissioner for Human Rights, emphasised that language rights have become an issue of contention within several European

countries and that their denial undermines human rights. The changes of the political map in Europe over the past twenty years have made these problems more acute in some places.

Mr Hammarberg pointed out that this was an area, in which mature political leadership was particularly needed. Language was an essential tool for social organisation, in particular for the very functioning of the state, but also it is a central dimension of individual identity on a personal level, and often especially important for those in a minority position.

The Framework Convention for the Protection of National Minorities (FCNM) is a CoE treaty which, *inter alia*, protects and promotes the language rights of persons belonging to national minorities. The European Charter for Regional or Minority Languages (ECRML) protects and promotes languages as a threatened element of Europe's cultural heritage and the ECHR (the 'Convention') prohibits discrimination, for instance, on the ground of language.² In addition, the OSCE has developed standards in this area. Among the relevant UN documents is the ICCPR, which states that persons belonging to minorities shall not be denied the right, in community with the other members of their group, to use their own language. Less binding but still relevant is the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Mr Hammarberg stated that these treaties and recommendations contained key principles and defined governmental obligations, but that there often was a need to interpret the agreed framework norms in order to meet the intended purpose and achieve the appropriate balance, as the nature of the problems differed greatly from one country to another. The Commissioner for Human Rights mentioned areas where special attention should be paid with respect to minority languages. These included names, not only personal names but also local and street names and other topographical indications. This is particularly the case in areas, which require bilingual public postings, in the absence of which a violation of the Convention would occur. Education in minority languages is absolutely essential for the protection of the language and bilingualism should be encouraged for all. Being able to communicate with local authorities in one's own language is a human right particularly important to people of a minority. Finally, media should be broadcasted in minority languages and not be objected to discriminatory behaviour.

The Commissioner's findings confirm that of the CoE's Committee of Ministers, which in its report on minority languages in Armenia on September 2009 called on the Armenian Government to develop a structured policy to make sufficient teacher training and up-dated teaching materials available in Assyrian, Yezidi and Kurdish at all education levels, and requested that the Armenian authorities should ensure that regional or minority languages can be used in court and that measures be taken to improve Assyrian, Yezidi and Kurdish languages on television.

Reforms at the European Court of Human Rights

By ratifying Protocol No. 14 to the ECHR (Protocol No. 14) during a high level conference on the future of the European Court of Human Rights (ECtHR) in Interlaken, Switzerland on 18

2 Article 14 of the European Convention on Human Rights.

- 19 of February 2010, Russia finally joined the other 46 member states of the CoE, thereby enabling Protocol No. 14 to enter into force on 1 June 2010.

The permanently increasing workload of the Court in the last ten years, caused by a massive influx of individual applications had begun to pose a massive threat to the effective functioning of the Court. In January 2010, some 110,000 cases were pending before the ECtHR. With over 90 per cent of the applications filed with the Court being inadmissible and half of the remaining cases concerning 'repetitive' violations, the ECtHR is at risk of not being able to adequately fulfil its essential functions.

In order to tackle these problems, Protocol No. 14 was opened for signature in May 2004 with the purpose of guaranteeing the long-term efficiency of the Court. It provides for a new system to filter out inadmissible applications: single judges assisted by Rapporteurs will now be able to declare applications inadmissible, in so far as such a decision can be taken without further examination. With respect to well-founded cases, three-judge committees will now have the power, unanimously, to deliver a judgment finding a violation provided that the application is covered by established case law of the ECtHR. A new admissibility criterion now allows the Court to reject more applications. Furthermore, nine-year non-renewable terms of office for judges and an amendment regarding the possible accession of the EU to the ECHR have been introduced.

A joint NGO appeal, which had been signed by KHRP together with 155 other NGOs and by which both the support for the Conference's aim in general but also concerns about some potential proposals in particular were raised, preceded the Conference.

On 19 February 2010, the Conference passed a joint declaration to confirm their intention to secure the long-term future of the ECHR (the 'Interlaken Declaration'), which reflects many of the points raised in the joined NGO appeal. According to the Interlaken Declaration it is necessary to reach a balance between the incoming cases and the settled ones, to reduce the volume of the outstanding cases and to guarantee that new appeals are dealt with in reasonable time. Moreover, the national implementation of the Court's judgments should be improved and the Committee of Ministers should guarantee an effective supervision of the implementation process. For NGOs however, some of the main concerns remain. In addition to the restrictive admissibility criteria, the Interlaken Declaration has left the door open for further possible curtailments of the right of individual application with suggestions to impose a fee on Applicants, the requirement of applications to be submitted in either English or French, for the requirement to be represented by a lawyer as well as other measures.

Council of Europe steps up action to combat sexual violence against children

In ratifying the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the 'Convention') on 22 March 2010, San Marino has cleared the way for the Convention to come into force on 1 July this year.

Designed to protect children against all forms of sexual violence, the Convention represents a significant advance in terms of stepping up prevention, victim protection and the prosecution

of offenders, regardless of where the offences are committed, while also fostering international co-operation. To date, the Convention has been signed by 38 countries and ratified by five of them: Albania, Denmark, Greece, the Netherlands and San Marino.

In July 2007, the CoE adopted the Convention as the first instrument to establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or the family. The Convention fills the gaps in European legislation and harmonises the legal framework to fight against this crime. The Convention contains criminal law measures essential to combat sexual violence, including offences committed through the Internet, such as online child pornography and 'grooming' (adults seeking to enter into contact with children or adolescents for sexual purposes, for example through chat rooms). Further measures include the collecting and storing of data of convicted offenders and eliminating legal loopholes that benefit offenders, such as allowing extraterritoriality in the prosecution of child abusers (a country can prosecute its citizens for a crime committed abroad), as well as extending the limitation period (the Convention requests countries to extend their statute of limitation on sexual offences against children so that proceedings may be initiated after the victim has reached the adult legal age).

Scientific studies carried out in the last decades estimate that 10 per cent to 20 per cent of people in Europe are sexually assaulted during their childhood. According to UNICEF, approximately two million children are exploited by the sex industry each year. There are estimated to be more than one million child abuse images posted on the Internet. Another area of concern is child sex tourism, which is the commercial sexual exploitation of children by persons who travel from one place to another, where they engage in sexual acts with children. This practice has spread in the last decades due to the development of the tourist industry.

In 2001, the CoE adopted the Convention on Cybercrime, which criminalises child pornography on the Internet.

European migration policies discriminate against Roma people

On 22 February 2010, Thomas Hammarberg, CoE Commissioner for Human Rights, criticised the fact that Roma migrants were not given the same treatment as others who are in similar need of protection by European governments. 'Roma migrants are returned by force to places where they are at risk of human rights violations'.

In Germany, Austria and 'the former Yugoslav Republic of Macedonia', large numbers of Roma migrants had been given tolerated status, essentially a form of temporary protection against expulsion, which did not confer residence or social rights (expl 'Duldungs-status' in Germany). Mr Hammarberg claimed that there were credible allegations that Roma from outside the EU were more likely to be provided with 'Duldungs-status' rather than a more durable status, compared with non-Roma third country nationals.

The Commissioner stressed that the EU Directives impacted differently on Roma than on other EU citizens. He claimed that the protective provisions of the 'Free Movement Directive' were breached much more easily in respect of Roma than any other identifiable group; expulsions

of Roma had been carried out in contravention of EU law and in other cases, the destruction of Roma dwellings had been used as a method to 'persuade Roma to leave 'voluntarily''. In the Commissioner's view, European governments did not seem to accept that Roma could have protection needs. The EU policy was that all member states should be considered 'safe countries of origin' in respect of each other in asylum matters, Mr Hammarberg pointed out. Consequently, a citizen of one EU member state might not be granted international protection in another EU member state. He found it sobering to learn that whereas Roma from Hungary had been refused asylum in France, for instance, Roma individuals from the same country – and from the Czech Republic – had sought and been granted asylum in Canada.

His views were published shortly after his second visit within ten months to the lead-contaminated Roma camps of Česmin Lug and Osterode in northern Kosovo, during which Mr Hammarberg deplored that the situation for the inhabitants remained the same: 'The fact that the camps have been inhabited for a full decade is no less than a scandal. The international community has a large part of the responsibility for this situation.' He pointed out that the lead permeated the soil, water and air, and that the lives of the inhabitants, especially children, in the camps were seriously damaged. 'The approximately 600 inhabitants need new, safe housing so that the camps can be closed. They are all in urgent need of medical treatment', he said. Mr Hammarberg also expressed his concern that several European governments were forcibly returning refugees to Kosovo. According to UN statistics more than 2,500 persons were returned from European countries during 2009. Some of the Roma returnees have ended up in the lead-contaminated camps. The refugees are mainly from Austria, Germany, Sweden and Switzerland. The Commissioner explained that the return policy was also ineffective. Of those forcibly returned to Kosovo no less than 70-75 per cent could not reintegrate there and moved to secondary replacement or went back to the deporting countries through illegal channels.

EU accession to the European Convention on Human Rights

The European Commission took an important step towards completing the EU's system of fundamental rights protection on 17 March 2010. The Commission proposed negotiation directives for the Union's accession to the ECHR.

In the hearing of the European Parliament on that day in Brussels, a number of experts addressed the meeting, such as the European Parliament's own Rapporteur of the Committee on Constitutional Affairs, members of the Committee on Foreign Affairs and the Committee on Civil Liberties, Justice and Home Affairs, thereby opening a process, which may take months or probably even years, during which many details will have to be negotiated, both within the EU and between the EU and the CoE.

The EU has long harboured an ambition to accede to the ECHR. However, in 1994, a decision of the European Court of Justice (ECJ), *Opinion 2/94*, declared that the EU could not do so without an explicit treaty basis. In the absence of such a basis in the EC and EU Treaties, accession would have to wait. Commentators at the time accused the ECJ decision of being the product of judicial politics, claiming the ECJ attempted to protect its position at the pinnacle of the EU legal order.

In the absence of EU accession, an EU Charter of Fundamental Rights was agreed in 2000 and has become an important part of EU law (although it only became legally binding once the Lisbon Treaty came into force on 1 December 2009). However, the ambition to join the ECHR remained and a legal basis was finally provided by the Lisbon Treaty (Article 6(2) EU).

The President of the European Commission declared that the accession to the ECHR had political, legal and symbolic importance. ‘The EU’s accession to the European Convention on Human Rights will provide a coherent system of fundamental rights protection throughout the continent. It will complete the level of protection introduced by the Lisbon Treaty through the legally binding Charter of Fundamental Rights’, he said. The Commission has declared that the accession would help to develop a common culture of fundamental rights in the EU, reinforce the credibility of the EU’s human rights’ system, put the EU’s weight behind the Strasbourg system of fundamental rights protection and ensure that there is a harmonious development of the case law of the ECJ and the ECtHR (the Court).

The negotiations for EU accession are ongoing and will address questions such as the relationship between the EU courts system and the Court, the procedures for bringing EU law-related cases to the ECtHR, and whether or not the EU will nominate a judge to the Court (as all other members of the ECHR do).

Section 2: Articles

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

Kristina Touzenis¹ and Shirin Namiq²

Anti-Terrorism Provisions in Turkey and Obligations under the Convention on the Rights of the Child

Abstract

In 2006 Turkey updated its penal code to reflect European and international standards. This update amended the Law on Fight Against Terrorism, Act No. 3713, April 12 1991, also known as Anti-Terror Law, which made it possible to try minors between the ages of 15 and 18 as adults when the crime is deemed to involve terrorism. Since the law was amended over 2,600 children have been prosecuted under Turkey's Anti-Terrorism Law. This paper will analyse the Turkish Penal Code and the Anti-Terror Law and their implementation in light of Turkey's international obligations to protect children. The focus will be on obligations under the Convention on the Rights of the Child (CRC), but other major Human Rights Instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will also be taken into consideration. Case law will be given a prominent place in the analysis. The paper will consider both the possible violations of obligations in the national standards and possible violations in the application of these - this last part will include a brief section on the conditions of children in prison. The analysis will be strictly legal and theoretical but the inclusion of case law will give it a highly practical relevance. I

INTRODUCTION

Over the past decade there has been an increasing effort to combat terrorism. The International Convention for the Suppression of the Financing of Terrorism [1999] defines terrorism as:

any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.

1 Kristina Touzenis is Programme Manager at the International Organisation for Migration. This article has been written entirely and exclusively in K. Touzenis' personal capacity, and especially in the function of former teacher and supervisor for S. Namiq. Any opinions expressed in this article are entirely and exclusively her own and can in no way be understood to reflect in any way the opinion of the International Organisation for Migration.

2 S. Namiq is a MA student at the University of Trieste; the opinions expressed in this Article are her own.

The European Union Council Framework Decision on Combating Terrorism [2002] defines it as: serious violence with the intention of 'seriously altering or destroying the political, economic, or social structures of a country'. UN Resolution 1566 [2004] uses:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Finally the Council of Europe's (CoE) Convention on the Prevention of Terrorism [2005] states that:

Recognising that terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all Parties to prevent such offences and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature; Recalling that acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation; For the purposes of this Convention, 'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

What is certain is that terrorism is considered a threat against the State and therefore, the criminal act or acts which are considered to be terrorism may in certain cases suspend certain human rights of the perpetrators – and maybe even go beyond that and suspend certain human rights of all (derogation in times of emergency as will be seen below). It is therefore of the utmost importance that 'terrorism' is not defined too broadly, so that human rights are not being limited by what should be an effort to protect all. Unfortunately, in many cases this is not the case. Furthermore, when human rights are put on 'hold' certain already weak groups may very well suffer the most. In the example here, children who are suspected of terrorist activities fall within such a group. Children are particularly vulnerable to detention and prosecution and therefore it is extremely important that their rights are protected in such situations. If it is dangerous to suspend human rights of adults, it will have an even more grave effect on children if their rights are suspended.

Experience has shown that criminalisation, and in particular imprisonment, tends to undermine efforts to assist juveniles in reintegrating positively into the community. This article focuses on one State and its criminal proceedings involving children, with a special focus on the Penal Code and the Anti-Terror Law and their implementation in the light of international obligations to protect children.

Turkey became a party to the Convention on the Rights of the Child (CRC) in 1994, and the Convention became part of the Turkish domestic law in January 1995. Turkey has a specialised juvenile justice system and the legislative basis for this was modified extensively in 2005. Notwithstanding, the amendment of recent anti-terrorism legislation has created concern about the protection of children's rights in criminal proceedings and in detention. Here the focus will be on obligations under the CRC, but other major Human Rights Instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will also be taken into consideration. Case law will be given a prominent place in this analysis. The article will consider both the possible violations of obligations in the national standards - this will include a brief section on the conditions of children in prison. The analysis will be strictly legal and theoretical but the inclusion of case law will give it a highly practical relevance.

DETENTION AND JUVENILE PROCEDURES UNDER INTERNATIONAL LAW

The CRC lays down provisions, and thus obligations³ on States Parties. Articles 37 and 40 cover the juvenile justice system and issues of detention. Apart from these specific Articles, which will be the focus of the analysis below, there will also be a focus on the CRC's fundamental principles: the principle of non-discrimination (Article 2), the requirement that in all actions concerning the child, the 'best interests' of the child is a primary consideration (Article 3), the evolving capacity of the child (Article 5), the life and full development of the child (Article 6) and the right of children to participate in decision-making concerning them and to express their views (Article 12), must at all times be respected and be at the basis for any decision and/or policy and law dealing with children. The principles of non-discrimination, the best-interest, evolving capacity and participation reinforce each other to guarantee the 'the survival and development' of children. This implies that practical measures should be taken at all levels to protect children from particular risks that endanger their right to survival. These measures should be regularly evaluated to ensure their effectiveness.⁴

3 This Article does not go into detail regarding levels of obligations but it can be briefly mentioned that States have four levels of obligations when it comes to implementing human rights: the obligation to respect, to protect, to facilitate and to fulfil. In terms of international law, the obligation 'to respect' requires States 'to refrain from any actions which would violate any of the rights of the child under the Convention. The obligations to protect and ensure goes well beyond that of to respect, since it implies an affirmative obligation on the part of the State to take whatever measures are necessary to enable individuals to enjoy and exercise the relevant rights, including protection from third parties.

4 CRC General Comment n. 6 (2005), Thirty-ninth session 17 May-3 June 2005, para. 24.

Article 37(b) of the CRC reflects the article on deprivation of liberty found in the International Covenant on Civil and Political Rights (ICCPR) (Art. 9) which provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The protection of children in the CRC however, goes further than just protecting from arbitrary arrest and detention, in that the CRC takes into account the specific characteristics of childhood and what it would mean for a child to be detained. Thus the CRC states that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Thus, arrest, detention and imprisonment are in principle possible for minors above the national minimum age of criminal responsibility, but should be used 'only as a measure of last resort and for the shortest appropriate period of time.' This provision is based on the experience that depriving children of their liberty tends to increase the rate of re-offending. The only reason for locking up children may be that there are no other alternative ways to deal with the immediate risks to others.

The Committee on the Rights of the Child has stressed⁵ that children who commit crimes should be seen primarily as victims and that no matter how serious the crime (even genocide or war crimes) general principles applicable to juvenile offenders continue to apply. The objective should be the reintegration of the child, and the return to a 'constructive role' in society as provided for in CRC Article 39 as well as the reinforcing of the child's respect for the rights of others found in CRC art 40.⁶ If children have been abused and coerced by terrorist organisations in order to commit a criminal act, Article 39 comes into play as there is a duty on the State to provide recovery and reintegration.⁷ Article 39 is important because it imposes a positive obligation on the State and thus obliges it to take active measures to further the child's respect for human rights and his/hers dignity. This highlights how the main objective is to reintegrate

5 In the reporting guidelines for Article 39 of the CRC, the Committee specifically asks States parties to report on measures taken vis-à-vis children in conflict with the law. Furthermore, in its concluding observations on the reports submitted by States parties, the Committee has frequently grouped Article 39 (rehabilitation of child victims) with Article 40 (juvenile justice). CRC/C/58, 1996.

6 Article 40.1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

7 UNICEF: Implementation Handbook for the Convention on the Rights of the Child. 2002. p 579.

children into society so that they may grow up with respect for themselves and for others.⁸ The Article provides that recovery and reintegration must take place in an environment that fosters the health, self-respect and dignity of the child. The general principles of the CRC require that such measures must be available without discrimination to all child victims; the best interest of the child must be a primary consideration. The maximum survival and development of the child must be ensured; and the views of the child should be respected. Other rights in the Convention include the right to health and health care services (Article 24), to education (Article 28) and to an adequate standard of living (Article 27), to provide special care and assistance to children temporarily or permanently deprived of their family environment (Article 20).⁹

The CRC deals with the juvenile justice system particularly in Art. 40, the purpose of which is that the child's well-being is encouraged and that any proceedings take into account both the child's circumstances and the offence committed.¹⁰ Article 40 covers the rights of all children alleged as, accused of or recognised as having infringed the penal law. Thus, it covers treatment from the moment an allegation is made, through investigation, arrest, charge, pre-trial period, trial and sentence. The Article requires States to promote a distinctive juvenile justice system for children (i.e., Article 1 defines juveniles to be up to the age of 18 or once they reached the age of majority).¹¹ Article 40 details a list of minimum guarantees for the child and it requires States Parties to set a minimum age of criminal responsibility, to provide measures when dealing with children who may have infringed the penal law without resorting to judicial proceedings and provide a variety of alternative dispositions to institutional care. Article 40 should, as all

8 Art. 40.3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

9 UNICEF: Implementation Handbook for the Convention on the Rights of the Child. 2002. p 579.

10 Van Bueren, Geraldine, *The International Law on the Rights of the Child*, 1998, p. 172.

11 Art. 40.1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Articles, always be read in connection with Articles 2, 3, 5 and 12. Article 40.2¹² is also relevant since it imposes upon States an obligation to further children's re-integration. One significant problem with Article 40.2.iv, is that it does not give the child an express right to silence, as does Rule 7 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules).¹³ The obligation to communicate charges in a language the child understands also refers to an adequate manner of communicating concepts which may be difficult for the child to grasp.¹⁴ This again leads to the importance of appointing legal guardians and trained staff that deals with children. When considered in the light of Article 40.1, the CRC does provide important provisions for children during procedures. Article 40.3 places a duty on States to seek to promote diversionary measures without reverting to a formal trial, importantly such measures shall always fully respect human rights and legal safeguards,¹⁵ and establish a minimum age below which children shall be presumed not to have a criminal capacity. The 'Beijing Rules' expand on the encouragement of diversion from judicial proceedings in Rule 11 stating that consideration shall be given, wherever appropriate, when dealing with juvenile offenders without resorting to a formal trial. The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules. Any diversion involving a referral to an appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application. In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision, and guidance, restitution, and compensation of victims. As will be illustrated these rules are far from respected in Turkey.

12 Art. 40.2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees; i) To be presumed innocent until proven guilty according to law; ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; vii) To have his or her privacy fully respected at all stages of the proceedings.

13 GA Resolution A/RES/40/33 from 1985.

14 Van Bueren, *The International Law on the Rights of the Child*, 1998, p. 178.

15 Such as a fair trial, presumed innocence etc. as found in the ICCPR Art. 14.

Further, Article 40.3¹⁶ provides that special courts should be established, that can deal with juvenile delinquency. If for some reason this is not a possibility, child-sensitive rules and processes can achieve the main goal of the Article. Again, this is a recognition of the fact that the enforcement of the criminal justice system can only serve in the child's best interest, but that if children have to be prosecuted, children should be to considered as victims and not perpetrators. By doing so one should take into consideration the special circumstances of the child. The primary goal remains to protect children and ensure that they end up respecting both their own rights and duties and the rights and duties of others.

As mentioned above the principle of the best interest of the child, found in CRC Article 3, should, in any case involving children, be followed. Furthermore, Article 3(3) establishes that State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. The CRC Article 12 implies that the child shall be provided 'the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly or through a representative or an appropriate body.' Implementing the participation requirements of the CRC is a major challenge for many actors requesting a child-rights based mandate that requires fundamental changes in attitudes towards children.¹⁷ The child's right to be heard – the effective right to participation – is likewise a 'general' provision – most often overlooked in reality, but rather easily directly implemented in judicial procedure, as provided for specifically in CRC Article 12.2. These provisions are the base for any sustainable and durable protection of children, who often feel marginalised when their rights and lives are being discussed and determined. An effective participation obviously requires adequate information about the respective procedures, so that a child may make its own informed choices. Further, it includes given children the support they need in order to make choices and take actions, which normally would be made by adults (such as testifying against another accused, making plea-bargains etc.).

In this way it is not only possible to prosecute perpetrators but it becomes a way for children to move on in life as responsible adults. If on the other hand basic principles are not followed, and if no one is present who can take particular care of the child in question, a process might very well have the direct opposite outcome, and children will turn into less law-abiding individuals. Though criminalisation of children should be avoided, this does not mean that young offenders should be treated as if they had no responsibility. On the contrary, it is important that young offenders are held responsible for their actions and, for instance, take part in repairing the damage they have caused. Again the principle of the best interest of the child should be an

16 Art. 40.3 States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

17 United Nation University Policy Brief n 4 2006 – International Criminal Accountability and Children's Rights. p.3.

overall guideline, thus always taking into consideration the individual circumstances and characteristics of each case and each child.

Once it has become clear in a specific case that detention is unavoidable, (e.g. because of the severity of the crime or the security of others or the capacity of the child), such detentions should take place in specific and child-friendly establishments, where young offenders are separated from adult prisoners and, in particular, from hardened criminals. Contact with the family should be encouraged and facilitated, if that is in the best interests of the child. Special needs of an individual at a certain age should be taken into account. Full-time education is particularly essential. Each young offender should be given an individual programme of rehabilitation, a plan that should continue after the detention period with the support of guardians, teachers and social workers. If relations with the parents are impossible, foster parenting might be an alternative. In all this, the child should have a say. This is not only a right but also a more effective solution.¹⁸

There can be no doubt that detaining children increases their vulnerability. Separation from their family deprives them of their protection, and causes severe emotional stress, it is therefore incredibly important to enforce the right of children in detention and to recall that whatever the reason for their detention, they are entitled to receive specific care and protection. Clearly children should be held in separate (and specialised) detention facilities. If detained in the same facilities as adults, children must be held separately from them. Exceptions are possible if they are with their family members, or if their well-being is better ensured by being in an adult prison. Girls must always be guarded by female staff. A number of children are abused by their adult co-detainees or by the guards in exchange for food, protection or a space to sleep. Children have the right to challenge the legality of their detention. They also have the right to speedy and efficient judicial procedures. It is particularly unacceptable for a child to stay in prison for years while awaiting trial. All too often, they are unaware of their rights and risk prolonged detention.¹⁹ It is crucial to remember that respecting children's right in proceedings does not mean ignoring a crime that has been committed, which would be counter productive if the goal is to create law-abiding and respectful citizens. The concepts of 'responsibility' and 'criminalisation' must be separated. It is essential to establish responsibility for conduct, which will create citizens with an inherent respect for the rule of law. But this can only be obtained if during the process of measuring out a just punishment for an offence committed by a child, the child's age and capacity is taken into account.

18 UNICEF: *The Development of Juvenile Justice Systems in Eastern Europe and Central Asia: Lessons from Albania, Azerbaijan, Kazakhstan, Turkey and Ukraine*, July 2009, p 6.

19 ICRC: *United Nations, General Assembly, 64th session, Third Committee, Items 65 of the agenda, Statement by the International Committee of the Red Cross (ICRC)*, New York, 16 October 2009.

THE EUROPEAN COURT OF HUMAN RIGHTS

In the case of *Salduz v. Turkey*²⁰ the European Court of Human Rights (ECtHR) noted that one of the specific elements of the instant case was the Applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody,²¹ the Court stressed the fundamental importance of providing access to a lawyer whenever the person in custody is a minor.

20 *Application no. 36391/02, Judgment 27 Nov 2008*. On 29 May 2001 at about 10.15 p.m., the Applicant was taken into custody by police officers from the Anti-Terrorism Branch of the İzmir Security Directorate on suspicion of having participated in an unlawful demonstration in support of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan the name should be the Kurdistan Worker's Party). The Applicant was also accused of hanging an illegal banner from a bridge in Bornova on 26 April 2001. Subsequently, at about 1 a.m., the Applicant was interrogated at the Anti-Terrorism Branch in the absence of a lawyer. According to a form explaining arrested persons' rights which the Applicant had signed, he had been reminded of the charges against him and of his right to remain silent. In his statement, the Applicant admitted his involvement in the youth branch of HADEP (*Halkın Demokrasi Partisi* – the People's Democracy Party). He gave the names of several persons who worked for the youth branch of the Bornova District Office. He explained that he was the assistant youth press and publications officer and also responsible for the Osmangazi neighbourhood. He further stated that it had been part of his job to assign duties to other members of the youth branch. He admitted that he had participated in the demonstration on 29 May 2001 organised by HADEP in support of the imprisoned leader of the PKK. He said that there had been about sixty demonstrators present and that the group had shouted slogans in support of Öcalan and the PKK. He had been arrested on the spot. He also admitted that he had written 'Long live leader Apo' on a banner which had been hung from a bridge on 26 April 2001. The police took samples of the Applicant's handwriting and sent it to the police laboratory for examination. On the same day the Applicant was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor, he explained that he was not a member of any political party, but had taken part in certain activities of HADEP. He denied fabricating an illegal banner or participating in the demonstration on 29 May 2001. He stated that he was in the Doğanlar neighbourhood to visit a friend when he was arrested by the police. The Applicant also made a statement to the investigating judge, in which he retracted his statement to the police, alleging that it had been extracted under duress. He claimed that he had been beaten and insulted while in police custody. He again denied engaging in any illegal activity and explained that on 29 May 2001 he had gone to the Doğanlar neighbourhood to visit a friend and had not been part of the group shouting slogans. After the questioning was over, the investigating judge remanded the Applicant in custody, having regard to the nature of the offence of which he was accused and the state of the evidence. The Applicant was then allowed to have access to a lawyer.

21 Including The recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, in so far as relevant, reads as follows: Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor' The recommendation of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency (no. R (87)20), adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies, in so far as relevant, reads as follows: Recommends the governments of member states to review, if necessary, their legislation and practice with a view: to reinforcing the legal position of minors throughout the proceedings, including the police interrogation, by recognising, *inter alia*: the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state.'

In another case, *Nart v. Turkey* (application no. 20817/04, judgment 6 May 2008²²) the Court again ruled in favour of the Applicant, underlining that although the Applicant's lawyer brought to the attention of the authorities the fact that the Applicant was a minor, it appeared that the authorities never took the Applicant's age into consideration when ordering detention. In this case the files also showed that, during detention, the Applicant was kept in a prison together with adults, which combined with other factors lead to a violation of Art 5 of the ECHR.

Similar allegations were put against Turkey by the Applicant in *Güveç v. Turkey*²³ where it was alleged, in particular, that detention of a minor took place in prison with adults and the trial was before the State Security Court instead of a juvenile court which the Applicant found had been in breach of Article 3 of the Convention. Under Articles 5 and 6 of the Convention the Applicant also complained that he had not been released pending trial and that he had not been tried fairly. Furthermore, the Applicant, during this process, had told the trial court that, while detained in police custody, he had been given electric shocks, sprayed with pressurised water and beaten with a truncheon; the soles of his feet had also been beaten. He had then signed the statements implicating him in the offences with which he was subsequently charged.

22 On 28 November 2003 at about 11.30 p.m. the Applicant, who was 17-years-old at the time, was arrested by police officers on suspicion of being involved in the armed robbery of a small grocery shop. The police found the Applicant while he was asleep in an empty swimming pool near the shop, which had been robbed that night. On 29 November 2003 he was examined by a doctor at Urla State Hospital. His medical report recorded no signs of physical violence on his body, but noted that the Applicant was drugged and sleepy. It concluded that there was nothing to prevent the Applicant from being taken into custody. On the same day the Applicant was once again examined by a doctor. The medical report described the Applicant as sleepy, unresponsive and physically weak. The same day, the police requested the presence of a duty lawyer from the Izmir Bar Association for the Applicant, who was to be brought before a public prosecutor. On 2 December 2003 the Applicant's lawyer challenged the detention before the Izmir Criminal Court. In her petition, referring to Articles 5 and 6 of the Convention, she submitted that the Applicant was incapable of understanding the charges against him and that he had not been given adequate time and facilities to prepare his defence as she was unable to communicate with him. She further stated that the Applicant was a minor and, according to Article 37 (b) of the United Nations Convention on the Rights of the Child, the detention of a minor should be a preventive measure of last resort. She also maintained that Article 10 § 5 of the Law on the Establishment, Duties and Procedures of Juvenile Courts (Law no. 2253), required that the Applicant be placed in a hospital or in residential social care, instead of being detained in prison. On 3 December 2003, the Izmir Assize Court rejected these objections, having regard to the content of the case file, the nature of the offence attributed to the Applicant and the state of the evidence. On 12 December 2003, the public prosecutor filed an indictment with the Izmir Juvenile Court, accusing the Applicant and his co-accused of armed robbery under Article 497 of the Criminal Code, for which the minimum sentence was fifteen years' imprisonment. On 12 April 2004 the Juvenile Court convicted the Applicant of robbery under Article 493 § 1 of the Criminal Code, instead of armed robbery, noting that the gun used during the incident had been a fake. Accordingly, it sentenced the Applicant to one year and eight months' imprisonment.

23 Application no. 70337/01, Judgment, 20 January 2009.

The Applicant was subjected to a limited visiting regime in the prison and did not have the opportunity to have open visits from his family.²⁴

Referring to the Court's case-law under Article 3 of the Convention, the Applicant submitted that the Contracting Parties were under an obligation to take measures to ensure that individuals within their jurisdiction were not subjected to ill-treatment. 'Such measures should provide effective protection particularly in respect of children and other vulnerable persons and they should include the taking of reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.' It was then alleged that in this case the State, notwithstanding its obligations both under its own domestic legislation and under international conventions, had not provided effective protection. Furthermore, for the first 18 months of that period the Applicant had been tried for an offence carrying the death penalty. As he was being tried for an offence falling within the jurisdiction of State Security Courts, he had been subjected to a severely limited visiting regime in the prison. He had not, for example, had the opportunity to have open visits from his family. The conditions of his detention had adversely affected his mental health and had led him to attempt suicide. The Applicant further complained that during his time in prison he had not been provided with adequate medical care, notwithstanding the seriousness of his health problems. In his opinion, the failure to release him to enable him to obtain adequate medical care had also amounted to inhuman treatment contrary to Article 3 of the Convention.

24 The Applicant's mother attended one of the hearings and informed the trial court of the Applicant's serious psychiatric problems. She asked for the Applicant to be released from the prison. During the same hearing the prosecutor asked the trial court to acquit the Applicant of the charge of arson (Article 516 § 7 of the Criminal Code) but to convict him of the offence of membership of an illegal organisation (Article 168 of the Criminal Code). Nevertheless, the trial court ordered the Applicant's continued detention in prison and referred him to a psychiatric hospital with a view to establishing whether he had the necessary criminal capacity (*doli capax*) at the time of the alleged commission of the offence. Subsequently the prison doctor reported on the problems which the Applicant had been suffering in prison. According to this report, the Applicant had attempted suicide in June 1999 by taking an overdose. In August 1999 he had set himself on fire and suffered widespread and serious burns. He had spent three months in hospital where he was treated for his injuries. During that time in hospital he had also received medication for depression. Following his return to the prison his treatment for the burns had continued for five months. His body still bore burn marks. On 2 June 2000 the Applicant's psychological health had deteriorated and he was taken to the hospital where he stayed for a month and a half. His health had deteriorated even further following his return from the hospital and he was now refusing to speak to anyone. The prison doctor concluded in his report that the situation in the prison was not conducive for the Applicant's treatment. The Applicant needed to spend a considerable time in a specialised hospital. During the 12th hearing held on 10 October 2000 one of the Applicant's legal representatives argued that the Applicant had only been 15-years-old at the time of his arrest. Turkey was a Party to the United Nations Convention on the Rights of the Child. Article 40 § 3 of that Convention recommended that the States Parties establish procedures and institutions specifically for children charged with criminal offences. Indeed, juvenile courts existed in Turkey. However, the Applicant had been charged with an offence falling within the jurisdiction of State Security Courts and, as such, the domestic law prevented him from being tried by a juvenile court. Had the Applicant been tried before a juvenile court, he would not have been kept in police custody for 12 days, a lawyer would have been appointed to represent him and his case would have been concluded within a short time. The lawyer added that the ill-treatment to which the Applicant had been subjected in police custody, coupled with his long detention in prison, had been too much to bear for a child of his age. He had attempted to take his own life on two occasions. He was still suffering from serious psychiatric problems and he found it difficult to attend the hearings. The lawyer asked for the Applicant to be released so that he could receive medical treatment.

The ECtHR observed ‘that the Applicant’s detention in an adult prison was in contravention of the applicable Regulations which were in force at the time, which reflected Turkey’s obligations under International Treaties.’ It further observed that, ‘according to the medical report drawn up, the Applicant’s psychological problems had begun during his detention in the prison and worsened there in the course of his five-year detention.’ Ill-treatment must attain the minimum level of severity for it to fall within the scope of Article 3 of the Convention.²⁵ The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.²⁶ The Court in this case noted that:

the treatment did reach the minimum level of severity to fall within the scope of Article 3 of the Convention, especially underlining that the Applicant was only 15-year-old when he was detained in a prison where he spent the next five years of his life together with adult prisoners.

For the first six and a half months of that period he had no access to legal advice and effectively he did not have adequate legal representation until some five years after he was first detained in prison. The Court found that ‘these circumstances, coupled with the fact that for a period of 18 months he was tried for an offence carrying the death penalty, must have created complete uncertainty for the Applicant as to his fate.’ Furthermore, the ECtHR found that a prison was not an adequate place for the Applicant’s treatment:

he needed to spend a considerable time in a specialist hospital and that the information provided by the prison doctor did not spur the trial court into action to ensure adequate medical care for the Applicant was not acceptable. The only step the trial court took was to refer the Applicant to a hospital; not for the treatment of his medical problems but for a medical examination with a view to establish whether he had the necessary criminal capacity (*doli capax*) when he allegedly committed the offence.

Indeed, the trial court did not only fail to ensure that he received medical care, but even prevented him and his family from doing so by refusing to release him on bail for an additional period of two and a half months. On this basis, the Court concluded that:

although Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example, by providing them with the requisite medical assistance.

A further aggravating factor was that ‘despite the Applicant’s psychological problems and his first suicide attempt, no action appeared to have been taken and no attempts were made to prevent him from making any further attempts.’²⁷ Thus, again the Court underlined the need to have regard to the Applicant’s age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and,

25 See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, § 162).

26 See, among other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, Reports 1998-IV, § 52).

27 See *Keenan v. the United Kingdom*, no. 27229/95, §§ 112-116, ECHR 2001-III.

finally, the failure to take steps with a view of preventing his repeated attempts to commit suicide, the ECtHR found 'that the Applicant was subjected to inhuman and degrading treatment and that there had therefore been a violation of Article 3 of the Convention.' Furthermore, the Court found a violation of Article 5 on the ground of the length of the detention and a violation of Article 6 on fair trial. This was due to several factors but especially due to the lack of de facto legal assistance.

In *İpek and others v. Turkey* (Applications no. 17019/02 and 30070/02), the Applicants who at the time of the events were 16-years-old were arrested in connection with an ongoing investigation against an illegal armed organisation, namely the PKK. The police received information that one of the Applicants, a suspected member of that organisation, had arrived from the rural area in order to conduct activities in cities on behalf of the organisation. Having established the Applicant's address in Diyarbakır, the police conducted a search of the premises, on 1 December 2001 at 1.20 a.m., and the Applicant was arrested. The other Applicants, who were also present during the house-search, were similarly arrested and taken into police custody in order to establish any link they might have had with the organisation. The police did not find anything illegal or incriminating during the search. On 5 February 2002, the Applicants were released pending trial.

In this case the Court reiterated that it 'has held, on many occasions, that the strict time constraint imposed for detention without judicial control is a maximum of four days.' In the instant case the Applicants were brought before a judge approximately three days after their arrest therefore the length of the Applicants' detention in police custody is, *prima facie*, compatible with the requirements of Article 5 § 3. However, the ECtHR underlined specific circumstances in this case: Firstly, the Court held that it is necessary to attach 'great importance' to the fact that the Applicants were *minors* at the time of their arrest and that, this fact did not appear to have been taken into consideration by the investigative authorities, (including the prosecutor, who extended the Applicants' detention for two additional days). Secondly, the Court stated that, these minors were incarcerated for more than three days in absence of any safeguards - such as access to a lawyer - against possible arbitrary conduct by the State authorities. Finally, during this time, the only investigative measure taken by the police seems to have been a questioning on 3 December 2001 - two days after their arrest and a day before they were brought before a judge. In such circumstances, the Court, 'especially in view of the Applicants' young age' found that detention in police custody for more than three days, even in the context of terrorist investigations could not be justified.

In *Okkaly v. Turkey* (Application No. 52067/99), the Applicant was taken to the police station in İzmir by his employer who accused him of stealing. At the police station the Applicant was questioned and at 6.30 p.m. the police told the Applicant's father what had happened after which he went straight to the police station. At 7 p.m. the boy's father and the employer reached an agreement. The employer withdrew his complaint, and the father signed the following statement: '... X has recovered his money and withdrawn his complaint. I am therefore taking my son from the police station. I have no demand or complaint to make concerning my son. I do not want him to have a medical check-up; my son was well treated in the police station and was not ill-treated or tortured ... he was handed over to me in good shape and in good health ...'. However, once outside the police station, the son staggered, tottered and vomited twice. Back

at home, when undressed, the parents and the neighbours present saw numerous injuries and bruises on his body. The boy then told his father that he had been beaten by his interrogators. He was then taken to the hospital where, in a provisional medical report, the doctor made the following observations: ‘The subject is conscious... He has 10 x 10 cm bruises on his arms and legs and large bruises (30 x 17 cm) on both buttocks...’

During a subsequent trial against the accused police officers the boy testified that ‘... at the police station that man (*pointing at Superintendent İ.D.*) said ‘think carefully, you are going to tell me where the money is’, then he ... took me into the toilets and hit me on the hands with a truncheon. At one point I tripped and fell and the dustbin above me fell on my head. While I was down [*İ.D. started hitting me*]; he put his boot over my mouth to stop me screaming; then he went away saying ‘think carefully; I’ll be back’; but he didn’t come back... Then my father and uncle arrived; ... [*my father*] saw me in the cell and told me to sit up straight, but I couldn’t, I was sore all over ... The Superintendent beat me to find out where the money was...; [*another police officer*] held me so I couldn’t move, but he didn’t hit me.... Neither my employer nor my father or my family beat me for losing the money...’

In assessing the case the ECtHR had to first examine whether all national remedies had been exhausted and stated that:

a criminal action was brought and led to the conviction of two police officers for ill-treatment within the meaning of Article 243 of the Turkish Criminal Code. Indeed, it was subsequent to that conviction that the Applicant filed an administrative claim for damages, which was rejected as time-barred. The Court must now, therefore, ascertain whether in the particular circumstances of the case, the Applicant should also have exhausted the civil channel of compensation the Government mention. (...) Having said that, the Court will focus on the real subject of the complaint, which concerns the positive obligation to protect people’s physical and psychological integrity through the law and is not limited to ill-treatment as such.

According to the ECtHR’s ‘established case-law’, when an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of agents of the State, it is the duty of the national authorities to carry out ‘an effective official investigation’ capable of establishing the facts and identifying and punishing those responsible²⁸. What is more, the procedural requirements of Article 3 go beyond the preliminary investigation stage when the investigation leads to legal action being taken before the national courts. As stated by the Court:

the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public’s confidence in, and support for, the rule of law and for preventing any appearance of the authorities’ tolerance of or collusion in unlawful acts.

28 See *Slimani v. France*, no. 57671/00, §§ 30 and 31, ECHR 2004-IX, and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998.

The Court noted first of all that in spite of the legal obligations authorities have when young offenders are arrested, the Applicant was neither assigned a lawyer nor questioned by the public prosecutor. The Applicant was in the police station for a relatively short period of time – about an hour and a half from his arrest as a suspect to his eventual release, free of all charges – but the Court remarked how:

that does not explain the failure to discharge the aforesaid legal obligations, particularly as there is no mention in the case file of any obligation immediately to inform the parents when a minor is arrested, before taking any police action.

The Court noted ‘with regret’ that the domestic decisions and the Government’s observations never mentioned the particular seriousness of the acts, especially considering the victim’s age, nor did they mention any domestic provisions relating to the protection of minors. In the light of the ECtHR’s case-law ‘according to which children, who are particularly vulnerable to various forms of violence, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity,²⁹ the authorities could have been expected to lend a certain weight to the question of the Applicant’s vulnerability.’ The Court observed, however, that not only was concern given to extra protection to the minor in question ‘sorely lacking’ throughout the proceedings, but the impunity which followed was enough to ‘shed doubt on the ability of the judicial machinery set in motion in this case to produce a sufficiently deterrent effect to protect anybody at all, minor or otherwise, from breaches of the absolute prohibition enshrined in Article 3.’ The Court finally found that, ‘far from being rigorous, the criminal-law system as applied in this case was not sufficiently dissuasive to effectively prevent illegal acts of the type complained of by the Applicant.’

TURKISH PENAL CODE AND THE LAW AGAINST TERRORISM IN THE LIGHT OF INTERNATIONAL OBLIGATIONS

Turkey had a weak juvenile justice system at the time it became a party to the CRC. This system was strengthened considerably in 2005 by the adoption of new legislation, expansion of the network of juvenile courts and other reforms. Efforts to improve the system have been encouraged by efforts to qualify for entry into the EU, and by the response to Turkey’s first report to the Committee on the Rights of the Child. Turkey’s initial report on the implementation of the CRC was prepared in 1999 and examined by the Committee in 2001. The Committee expressed deep concern at the state of juvenile justice, and made a number of far-reaching recommendations.³⁰ Turkey is a founding member of the CoE, and ratified the ECHR in 1954. In 2006, the ECtHR awarded damages to a 12-year-old boy who was beaten by police during an interrogation.³¹

29 *inter alia*, *A. v. the United Kingdom*, no. 25599/94, § 22, ECHR 2002-I.

30 Committee on the Rights of the Child, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Turkey, CRC/C/15/Add.152, 2001, paras. 65–67.

31 *Okkaltı v. Turkey* above.

Turkey now has a specialised juvenile justice system, although some components of the system are still in the process of expansion and consolidation. Child police units were established in 2001, and now exist throughout the country. The first juvenile court was created in 1988, but until recently juvenile courts were few in number. They are now a total of 83 courts in 25 provinces, and a specialised prosecutor or team of prosecutors is attached to each juvenile court. More than half of all cases involving juveniles are tried by juvenile courts. The legislative basis for the juvenile justice system was modified extensively in 2005. The minimum age for the prosecution of juveniles (age of criminal liability) was raised from 11 to 12, and the age at which offenders may be prosecuted as adults was raised from 15 to 18.³² The CRC encourages a minimum age to be set for criminal responsibility. Below such an age, it is presumed that a child does not have the capacity to infringe the penal law. Children in Scotland can be held criminally responsible at the age of eight-years-old. In England, Wales and Northern Ireland the minimum age is 10. The CoE's European Committee of Social Rights (which monitors State compliance with the European Social Charter), the UN's Committee on the Rights of the Child and other UN Treaty Bodies have all recommended substantial increases in a number of member states.³³

There are three correctional facilities for convicted juveniles – all open facilities – and three pre-trial detention centres specifically for accused juveniles. Most juveniles detained during investigation and trial, are kept in special sections of closed pre-trial detention facilities, which also house adults. There are 19 such facilities. Convicted juveniles may be transferred to them if they escape from open juvenile correctional facilities.³⁴

Turkey has two principal laws that regulate terrorist offences and punishments: The Turkish Criminal Code³⁵ (New Turkish Criminal Code No. 5237 dated 26.09.2004 lately and most importantly amended by Act No. 5560 of 6 December 2006 to amend several Acts. Resmi

32 Committee on the Rights of the Child, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Turkey, CRC/C/15/Add.152, 2001, paras. 65–67

33 Hammerberg, T. (comment by) at <http://humanrightshouse.org/Articles/10038.html> (last visited April 2010).

34 Ibid.

35 The new Criminal *Procedure* Code No. 5271 is enhanced with the provisions regulating the rights of detainees to prevent torture and ill-treatment. It stipulates that all criminal suspects have, from the outset of detention, the right to access to lawyer, including free legal assistance, private detainee-lawyer consultations and the possibility of lawyers to be present when statements are taken. Any apprehended person is taken to a doctor for the determination of his/her medical condition when (s)he is under custody or (s)he has been apprehended by the use of force or person's location is changed for any reason or the detention period is extended. Whenever a suspect or accused person is apprehended, detained, or the detention period is extended, one of his/her relative or a person of his/her choice is informed of the situation.

Gazete, 2006-12-19, No. 26381³⁶, Act No. 5560 of 6 December 2006 to amend several Acts Resmi Gazete, 2006-12-19, No. 26381, Act No. 5759 dated 30/04/2008 to amend the New Turkish Criminal Code No. 5237 dated 26.09.2004. Resmi Gazete, 2008-05-08, No. 26870; Act No. 5918 dated 26/06/2009 to amend the Turkish Criminal Code and other Acts *Resmi Gazete, 2009-07-09, No. 27283*) and the Law on Fight Against Terrorism. Turkey adopted the Turkish Criminal Code in 1926. This code has been amended many times, and more than half of its Articles have been changed. The Code specifies most crimes and contains the general principles of Turkish Criminal Law, which are applicable to all criminal matters. The Turkish Penal Code adopts the principle of 'territoriality' as a general rule, which means that who ever commits a crime in Turkey shall be punished in accordance with the Turkish law. Turkey specifies the physical territory of the Turkish Republic, as well as ships, airplanes, vehicles under the Turkish flag and also territory that is considered Turkish land, outside its borders (Articles 8-13). According to Articles 18-19 of the Criminal Code if a crime is committed outside of Turkey and the accused is adjudicated in Turkey a comparison will be made between the law of the foreign country and that of Turkey and which ever one results in favour of the accused, will be preferred in application. The exception to this will be crimes, which are committed against Turkey.

As regards juvenile offenders, in 2005 the Child Protection Law was designed 'to regulate the procedures and principles with regard to protecting juveniles who are in need of protection or who are pushed to crime, and ensuring their rights and well-being'.³⁷ As mentioned above, a new Criminal Code, the Code of Criminal Procedure and the Law on the Execution of Sentences and Security Measures were adopted in the same year. These laws establish the foundation of the juvenile justice system now in the process of development.³⁸ One of the most important changes made by the new Criminal Code was to raise the minimum age for prosecution or 'age of criminal liability' to 12.³⁹ The new Code of Criminal Procedure prohibits the interrogation of juvenile offenders by police; only prosecutors may interrogate juvenile offenders, and juvenile suspects are entitled to the services of a lawyer as soon as an investigation begins, without having to request one.⁴⁰ Initially, the law allowed mediation for crimes committed by juveniles

36 Amends Articles 4 (repeals the sentence in first paragraph 'lower and high limit...fixed figure), 5 (repeals the sentence in second paragraph 'lower and high limit...fixed figure), 6 (concerning the entry into force of some dispositions) and temporary Article 1 (replaces the date 31/12/2006 by 31/12/2008) of Act No. 5252 dated 04/11/2004 for the enforcement and application of the Turkish Criminal Code. It amends Articles 61 (concerning administrative fines), 73 (repeals the word 'settlement'), 80 (concerning sentences in case of forced labour, forced prostitution, threat, etc.), 87 (sanctions in case of intentional injure), 89 (concerning injure by negligence), 142 (concerning theft), 191 (concerning drugs), 221 (concerning penitence), 227 (concerning psychological therapy), 234 (concerning sanctions for keeping a child even with his consent) and 245 of the Criminal Code No. 5237 dated 26/09/2004. It amends Articles 6, 100, 102, 109, 146, 150, 171, 231, 253, 254, 309, 310 and 325 of Act No. 5271 dated 04/12/2004 on the reasoning to adopt in a penal judgment.

37 Law No. 5395 of 3 July 2005, Article 1.

38 UNICEF: Assessment of Juvenile Justice Reform Achievements in Turkey, July 2009, p 7.

39 Criminal Code, Article 31(1) ARTICLE 31-(1) The children having not attained the full age of 12 on the commission date of the offense, may not have criminal responsibility. Besides, no criminal prosecution may be commenced against such persons; but, it may be deemed necessary to take certain security precautions specific to children.

40 Code of Criminal Procedure, Articles 15 and 150.

punishable with a sentence of two years or less. It was amended in December 2006, due to public outcry against the leniency for repeated offences of theft committed by children.⁴¹ Pursuant to the Law on the Protection of the Child, which replaced the Law on the Establishment, Duties and Procedures of Juvenile Courts on 15 June 2005, persons under the age of 18 can only be tried before juvenile courts. Nevertheless, if the prosecuting authorities allege that the offence with which the juvenile is charged was committed jointly with adults, the juvenile may be tried before the ordinary criminal courts together with those adults. The principle of the best interest of the child as found in Article 4 is protected by the law. With the adoption of the European Convention on the Exercise of Children's Rights, court decisions which do not take into account the best interest of the child are annulled by the Court of Cassation. Relevant parts of the Turkish Civil Code, Labour Code, Criminal Code, Criminal Protection Code and the Law on Persons with Disabilities were amended in line with the provisions of the CRC.

Between the age of 12 and 18 responsibilities may vary according to the mental development and age of the child. According to Article 31.2⁴² children over the age of 12 and less than 15 years of age have criminal responsibility provided that they have the ability to make fair judgments, but punishments shall be reduced. For children between 15 and 18 years of age, it is not necessary for the prosecution to prove judgment ability, however sentences are mitigated proportionally, (Criminal Code, Article 55).

In all these cases, the punishment of juveniles is reduced as specified by related Articles. If the offender is under the age of 18 years at the beginning of the sentence, punishment restricting his personal liberty will be served in a reformatory or in a special section of the adult penitentiaries. If the child is below the age of responsibility, 11-years-old, and if his act constitutes a felony punishable by imprisonment for more than one year, he shall either be placed in the custody of his parent or be committed to an institution under government administration. Under the Criminal Code, the minimum sentence of imprisonment for adults is one month and the maximum, except for life sentences, is 20 years (Criminal Code, Article 49). When a person is sentenced for more than one offence, sentences are always consecutive. Sentences of imprisonment imposed on juveniles aged 15 to 18 years old are reduced by one third, or by one half if the offender is aged 12 to 15. For juveniles aged 15 to 18 years, the maximum sentence is 18 to 24 years of imprisonment, and for those aged 12 to 15 years, the maximum sentence is 12 to 15 years.⁴³ Moreover, if an offender under age 18 is sentenced to a term of

41 UNICEF: Assessment of Juvenile Justice Reform Achievements in Turkey, July 2009, p 8.

42 Art 31(2) In case a person who attained the age of twelve but not yet completed the age of fifteen on the commission date of the offence does not have the ability to perceive the legal meaning and consequences of the offense, or to control his actions, he may not have criminal responsibility for such behaviour. However, security precautions specific to children may be adopted for such individuals. If a person has the ability to apprehend the offense he has committed or to control his actions relating to this offense, then such person may be sentenced to imprisonment from nine years to twelve years if the offense requires heavy life imprisonment; from seven years to nine years if the offense requires life imprisonment. Two thirds of other punishments are abated and in this case, the imprisonment to be imposed for each offense may not be more than six years.

43 Article 31(2) and 31(3). These maximum sentences may be imposed for offences, which, in the case of an adult, would be punishable by life imprisonment. It should be noted, however, that sentences imposed for offences committed on behalf of terrorist organisations are first doubled, before being reduced by one third when the offender is under age 18.

imprisonment of less than one year, an alternative sentence must be imposed.⁴⁴ The alternative sentences recognised by the Criminal Code in these circumstances include fines, enrolment in an educational institution, restrictions on activities and freedom of movement, and community service.⁴⁵ Judges also have discretion to suspend sentences for three years or less if the offender is a juvenile who is a first-time offender and expressed remorse, which leads the judge to conclude that re-offending is unlikely.⁴⁶ Suspension of the sentence may be made on the condition of compensation for the victim.⁴⁷ Other conditions, such as employment or school enrolment, also may be imposed.⁴⁸ Sentencing also may be avoided through reconciliation with the victim. This is known as ‘negotiation and settling’ and can be done by the prosecutor or judge. In 2006, a total of 3,689 cases were resolved in this way – the equivalent of one-third of the cases in which a verdict was pronounced.⁴⁹

Furthermore, Article 19 of the Regulation on Apprehension, Arrest, and Examination, includes special rules applicable to children regarding their apprehension and arrest:

Authorisation of apprehension and examination under oath are limited so that those who have not reached their twelfth birthday on the time of the act, and the deaf and mutes who have not reached their fifteenth birthday; 1) Can not be apprehended under an accusation of a crime and cannot be used for the ascertainment of any crime; 2) Can be apprehended for determination of identification and crime.

They are released right after the determination of their identity. The Office of the Prosecutor is immediately informed about the identity particulars and the crime in order to enable the court to make a decision for temporary injunction.

Those who have reached their 12th birthday but not their 18th birthday may be apprehended for a criminal allegation. These children may be sent to the Prosecutor’s Office immediately following the notification of their next of kin and defenders; the Chief Prosecutor or an assigned Public Prosecutor conducts investigation on these personally. In these cases parents or the guardian of the child are notified about the apprehension of the child, even if the child does not request an attorney, an attorney is appointed, and parents or guardian of the child may appoint an attorney. The juvenile suspect may be examined under oath under the condition that an attorney is present. Parents or guardians may be present during the examination. Juveniles are detained and kept separately from adults. Furthermore, if the crimes are committed along with adults, examinations and investigations on children are conducted separately from the adults. Identification and acts of children are kept confidential. Rather importantly procedures involving children are conducted by personnel in civil attires if possible and children cannot be

44 Article 31(3): person who attained the full age of fifteen but not yet completed the age of eighteen on the commission date of the offense is sentenced to imprisonment from fourteen years to twenty years if the offense requires heavy life imprisonment; and from nine years to twelve years if the offense requires life imprisonment. One half of the other punishments is abated and in this case, the imprisonment to be imposed for each offense may not be more than eight years.

45 Article 50.1(a) - (d) and (f).

46 Article 51.1.

47 Article 51(2).

48 Article 51(4) and (5).

49 UNICEF: Assessment of Juvenile Justice Reform Achievements in Turkey, July 2009.

handcuffed, neither can similar devices be attached to them. Such provisions, if implemented conscientiously could do much to protect children when they are in conflict with the law.⁵⁰

Children arrested in connection with demonstrations are often tricked and threatened by the authorities, such as being told that if they provide information on other children the case against them will be dropped, although this never happens. Under the law the police can only establish the identity of a child but have no power to take evidence from children, as all investigations related to juveniles should be carried out by a Public Prosecutor. However, interviewees stated that the police do in fact report on statements given by children whilst in custody, which are then subsequently used in court. This evidence has apparently been held to be acceptable by the appeal court.⁵¹

The Law on Fight Against Terrorism, (Law Number: 3713, Article 1) defines terrorism as:

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

Terrorist offenders (Art. 7) are defined as:

Any member of an organisation, founded to attain the aims defined in Article 1, who commits a crime in furtherance of these aims, individually or in connection with others, or any member of such an organisation, even if he does not commit such a crime and it is decided that persons who are not members of a terrorist organisation, but commit a crime on behalf of the organisation, are also deemed to be terrorist offenders and shall be subject to the same punishment as members of such organisations. Those who aid members of the organisation mentioned above or propagandise to incite violence and other terror methods shall also be sentenced to one to five years of imprisonment and a heavy fine ranging from five hundred million to one billion Turkish Liras even if their acts constitute another offence.⁵²

Thus, according to the Law on Fight Against Terrorism, assistance to members of terrorist organisations and propaganda of such organisations are terrorist crimes punishable by up to five-year imprisonment. If the propaganda is made in periodical publications, their owners and responsible editors-in-chief are also punished (Art. 7). Those who commit crimes for and on behalf of a terrorist organisation are also considered terrorists, even if they do not take part in such activities, and are punished as members of said terrorist organisation. Further,

50 Unfortunately reports (including UNICEF, 2009 and KHRP, 2010 reports) show that implementation is lacking.

51 Yıldız, K.; Bernu, R. and Stevenson, J.: The Situation of Kurdish Children, KHRP, 2010, p 130.

52 UNODC's English Translation.

the Criminal Code provides that whoever knowingly gives shelter, assistance, provisions, arms or ammunition to such a society or a band, or facilitates their actions, shall be punished with imprisonment of three to five years (Art. 7). Generally, the definitions are rather vague and broad and give an extreme margin of appreciation to the State when deciding whether a crime is a terrorism-related offence or not.

The amendments to the law in 2006 made it possible to try and prosecute juveniles accused of terrorist activities in criminal high courts instead of in juvenile courts (Art. 9)⁵³. This directly contradicts Turkey's treaty obligations under Articles 1, 2, 37 and 40 of the CRC, and Article 6 of the ECHR.⁵⁴ The European Commission stated in Turkey's Progress Report 2006 (Com(2006)649Final) that the new provisions introduced in June 2006 amending the Anti-Terror Law could undermine the fight against torture and ill-treatment. The European Parliament resolution of 10 February 2010 on Turkey's progress report 2009, stated that it 'supports the intention of the Turkish Grand National Assembly to swiftly adopt amendments to the Anti-Terror Law in order to delete the provisions allowing children between the age of 15 and 18 years to be tried as adults'.

A key distinction that should be recognised in relation to the juvenile justice system in Turkey is that the types of crimes committed by children are classified into two subgroups; those that are considered political in nature and those, which are deemed non-political. Political crimes refer to behaviour such as joining demonstrations and rallies. All children charged with non-political crime, and those under the age of 15 charged with a political crime, fall under the jurisdiction of the children's courts.⁵⁵ Again there is a potential direct violation of Arts 1, 37 and 40 of the CRC.

IMPLEMENTATION

The percentage of children in conflict with the law in Turkey is rapidly increasing.⁵⁶ According to police statistics, children committed 60,479 of the 593,636 crimes against public security in 2007, which means that almost 10 per cent of these crimes was committed by children. Of those children, 1,830 were below the age of 10, while the remaining 58,649 were between the ages of 10 and 18. After the establishment of the Turkish Anti-Terror Law, we can see a rise in the

53 'Offences within the scope of this law are to be tried in state security courts; and for those committing one of these crimes or participating in these crimes, the provisions of this Law and the Law 2845 on The Foundation and Criminal Procedures at State Security Courts shall be applied'.

54 A new law has been drafted, *inter alia*, to amend provisions of the Law on Combating Terrorism (No: 3713) related to children who commit terrorism offences. The Law is before the Parliament.

55 Yıldız, K.; Bernu, R. and Stevenson, J.: The Situation of Kurdish Children, KHRP, 2010, p 124.

56 T.C. ADALET BAKANLIĞI Adli Sicil ve İstatistik Genel Müdürlüğü (Republic of Turkey Ministry of Justice General Directorate of Criminal Records And Statistic). 2008 YILI İSTATİSTİK TABLOLARI: ÇOCUK VE ÇOCUK AĞIR CEZA MAHKEMELERİ İŞ YÜKÜNÜN YILLARA GÖRE DAĞILIMI (1988-2008) http://www.adlisicil.adalet.gov.tr/istatistik_2008/cocuk/cocuk11.pdf (last visited April 2010) and statistics from Republic of Turkey Ministry of Justice General Directorate of Criminal Records And Statistic.

Turkish juvenile crime rates. The number of juvenile defendants between the ages of 12 and 18 years per 100.000 population was 675 in 1994, this number increased to 977 in 2002. The most notable increase was in the 16 to 18 years-old group, which are tried before the adult courts.

In June 2008, trial proceedings against members of a children's choir (case number 2008/174), was observed by KHRP in Diyarbakır. The members of the choir were charged under anti-terror laws for singing a Kurdish song at a world music festival in the US in October 2008. Prosecutors claimed the song was associated with the PKK. An Iranian-Kurdish poet, Dildar, wrote the song 68 years ago, which at the time was accepted as the national anthem of the Mahabad Kurdish Republic, which was proclaimed in 1946 and lasted for one year. The song is now used as an official anthem by the Kurdistan Regional Government (KRG) of Iraq. In a statement on the case, Amnesty International argued that singing an historic anthem cannot be declared a threat to public order - and is therefore a matter of freedom of expression. It warned that the children would be considered prisoners of conscience, if they were found guilty. Out of a total of nine children whose case went to trial - all of whom were aged between 13 and 17 at the time of the alleged 'crime' - three were made to appear before an adult court. All were eventually acquitted.⁵⁷

A paradox of this case may very well be that according to the Turkish Criminal Code the children should not have been charged in first place, because the spreading of the alleged 'propaganda' did not take place in the physical territory of the Turkish Republic and as mentioned above, the Turkish Criminal Code adopts the principle of 'territoriality' as a general rule.

As mentioned above, according to Articles 3, 5 and 40 of the CRC, children differ from adults in their physical and psychological development as well as their emotional and educational needs. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. Not having such a system, or not using it when it is available is not compatible with Art 40. A positive aspect of the treatment of the accused in this case was the referral of the accused to the Children's Court. However, as has been established above, minors above the age of criminal responsibility but under the age of 18 should be tried and held accountable for their acts in separate courts or at least in courts with a special system for this group of offenders.⁵⁸

The freedom of expression and freedom of thought (Article 13 and 14 of the CRC) alongside with the cultural and language rights of the concerned children would warrant a special protection for the children. This, however, seems to have been ignored by the national courts. In 2006, the European Commission stated in Turkey's Progress Report⁵⁹ that the prosecutions and convictions for the expression of non-violent opinions under certain provisions of the new Penal Code are a cause for serious concern and may contribute to create a climate of self-censorship in the country. This is particularly the case for Article 301, which penalises insulting Turkishness, the Republic and the organs and institutions of the State. Although this Article

57 KHRP Trial Observation Report, A Children's Choir Face Terrorism Charges: Juveniles in the Turkish Justice System. KHRP, London, September 2008.

58 It is quite common for most States not to have such courts for minors who are above the age of criminal responsibility, which again as discussed above, may very well be counterproductive and create more hardened criminals instead of reintegrating these young people into society.

59 European Commission, Turkey 2006 Progress Report, [COM(2006) 649 final].

includes a provision that expression of thought intended to criticise should not constitute a crime, it has repeatedly been used to prosecute non-violent opinions expressed by journalists, writers, publishers, academics and human rights activists. The General Assemblies of the Civil and Penal Chambers of the Court of Cassation had established restrictive jurisprudence on Article 301. The Court confirmed a six-month suspended prison sentence for journalist Hrant Dink. This was on the basis of Article 301 of the new Penal Code for insulting ‘Turkishness’ in a series of articles he wrote on Armenian identity. The Commission concluded that against this background, Article 301 needs to be brought into line with the relevant European standards. The same applies to other provisions of the Penal code, which have been used to prosecute the non-violent expression of opinions and may limit freedom of expression. The potential impact of the Anti-Terror Law on freedom of expression raises concerns.⁶⁰

A complicating issue is that the Court ruled that the march was sung upon request and that the children did not intend to commit a crime. The implication of the ruling may mean that singing *Ey Raqip* remains a crime, which potentially violates Article 30 of the CRC, ‘children of minority communities and indigenous populations have the right to enjoy their own culture and to practice their own religion and language’. This clearly has to be balanced against the State’s Right to protect itself against unrest and terrorism. A State has the right to derogate from certain human rights even if some human rights may never be suspended in any circumstances. Most international human rights treaties allow states to derogate from (suspend or restrict) certain human rights, though, only in narrowly defined circumstances and only to the extent strictly required by the situation. Such derogation clauses recognise the right of states to avoid exceptional, irreparable damage resulting from war, unrest or natural catastrophes.

Under the ICCPR, states may suspend certain human rights obligations in times of public emergency which threatens the life of the nation. Article 4 of the ICCPR⁶¹ allows a government to suspend certain human rights as long as:

- a) the exigencies of the situation strictly require such a suspension;
- b) the suspension does not conflict with the nation’s other international obligations;
- c) the state of emergency is officially proclaimed and the government immediately informs the UN Secretary-General about what rights have been suspended and why.

Article 15 (1) of the ECHR reads:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law.

60 Ibid.

61 In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’

The European Court has held that for a measure of derogation to be considered necessary and lawful, it must be clear that it is not possible to use other measures with less impact on human rights to solve the problem. In addition, the measure must be likely to contribute to the solution of the problem. The first substantive interpretation of Article 15 of the ECHR was made in the case of *Lawless v Ireland* [A 3 (1961)]. Confirming the determination by the European Commission of Human Rights that Article 15 should be interpreted in the light of its 'natural and customary' meaning, the ECtHR defined 'time of public emergency' as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the community is composed'.⁶² The definition was further developed and clarified in the *Greek Case*.⁶³ Reaffirming the basic elements of the Court's approach in *Lawless v Ireland*, the Commission emphasised that the emergency must be actual or at least 'imminent'. In order to constitute an Article 15 emergency, the Commission held that a 'public emergency' must have the following four characteristics: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organised life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

Under international law a state of emergency can only be declared if there is an exceptional and grave threat to the nation, such as the use or threat of force from within or externally that threatens a state's existence or territorial integrity. By definition, a state of emergency is a temporary legal response to such a threat. A perpetual state of emergency is a contradiction in terms. Unfortunately, a state of emergency sometimes becomes virtually permanent because it is proclaimed once and never lifted, or repeatedly renewed, or because special measures are entrenched in ordinary laws which survive after the emergency ends. The ECtHR has held, however, that State Parties to the European Convention have a 'wide margin of appreciation' in deciding whether there is a state of public emergency threatening the life of the nation. The ECtHR has stated: 'It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves those authorities a 'wide margin of appreciation'.⁶⁴ Despite this 'wide margin of appreciation', the European Commission and Court do assess whether the declaration of a state of emergency is reasonable.

Further, the measures taken in consequence of such an emergency must be strictly required by the exigencies of the situation. A fundamental requirement for any measures derogating from the ECHR or the ICCPR is that such measures are limited 'to the extent strictly required by

62 *Lawless v Ireland* (No 3), Application No 332/57, Judgment of 1 July 1961, 1 EHRR, para 31.

63 *Greek Case* (1969) Yearbook ECHR 1, para 12.

64 [*Ireland v. United Kingdom*, 18 January 1978, A25 para 207; further Brannigan and McBride v. United Kingdom, 26 May 1993, A 258-b, at 49 para. 43].

the exigencies of the situation'. Derogation measures must thus be strictly proportionate.⁶⁵ The Court has stated in *McCann and Others v United Kingdom* that, 'the use of the term 'absolutely necessary' in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is:

necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.

Any derogation measure must fulfil the following five basic requirements: the measures must be strictly required (i.e., actions taken under ordinary laws and in conformity with international human rights obligations are not sufficient to meet the threat); the measures must be connected to the emergency (i.e., they must 'prima facie' be suitable to reduce the threat or crisis); the measures must be used only as long as they are necessary (i.e., there must be a temporal limit); the degree to which the measures deviate from international human rights standards must be in proportion to the severity of the threat (i.e., the more important and fundamental the right which is being compromised, the closer and stricter the scrutiny); effective safeguards must be implemented to avoid the abuse of emergency powers. Where measures involve administrative detention, safeguards may include regular review by independent national organs, in particular, by the legislative and judicial branches.

In this context it does seem fair to conclude that a child choir performing a song cannot constitute such a threat and that preventing them from doing so or prosecuting the performing children would not be a proportionate action on part of the State. Even though the case of the child choir was dropped eventually, the fact that the children went through such an ordeal, shows the country's criminal justice system's inadequate efforts to protect children. Also this type of case shows the threat to human rights in Turkey, especially due to the amended Anti-Terror Law.

In a second case, a 15-year-old girl named Berivan was arrested in the south-eastern city of Batman in October 2009 at a rally for the banned PKK. A court in Diyarbakır found her guilty of 'crimes on behalf of an illegal organisation' after prosecutors alleged she had hurled stones and shouted slogans. She was also convicted of attending 'meetings and demonstrations in opposition to the law' and 'spreading propaganda for an illegal organisation' despite claiming in court that she did not know what the word propaganda means. Berivan denied throwing stones or being part of the demonstration but said she had only stopped to watch it out of curiosity, while on her way to visit an aunt. In an emotional letter published by the Turkish newspaper, Star, Berivan said:

I visited Batman on a family holiday and pleaded to be released. I want to get out of here. I want to be with my family. I always cry here. I cannot get used to this. I have been in jail since 9 October 2009. My heart hurts and I miss my family so much.

65 In *Handyside v United Kingdom* the Strasbourg Court expressly differentiated the 'strictly required' standard in Article 15 from the ordinary standard of 'necessity' or proportionality that is found in some provisions of the ECHR. The Court articulated three tiers of standards found in the Convention: 'reasonableness' (see, eg, arts 5(3) and 6(1) ECHR), 'necessity' (see, eg, art 10(2) ECHR) and 'indispensability'. 19 Indispensability was associated with the phrase 'strictly required' in Article 15 ECHR and the phrase 'absolutely necessary' in Article 2(2).

Berivan's mother exclaimed in court that murderers are not even sentenced to such a long prison term. The initial 13-and-a-half-year sentence was later reduced on appeal to seven years and nine months because of her age.⁶⁶

After Berivan was arrested she confessed to the crimes allegedly as a result of being beaten in custody, which is a clear violation of the CRC Article 37(a) and ICCPR Article 7 and ECHR Article 3. The CRC requires that a child should not be compelled to give testimony or to confess or acknowledge guilt. This means in the first place that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child under Article 37 (a) of CRC.

THE CONDITIONS OF CHILDREN IN PRISON

There are many problems in the Turkish juvenile justice system, one of them being the shortage of rehabilitation centres for children. There are only four juvenile prisons in Turkey; the balance of children convicted of crimes stay in special units in other prisons. According to Sabit Aktaş, from the Ankara Bar Association's Children's Rights Commission, the children stay in normal prisons, as the rehabilitation facilities can be limited. Aktaş says that there is a danger that even if the units are separated; children may have to interact with adult inmates. Adults can abuse them, or the children may become members of adult gangs.⁶⁷ The Associate Professor from Hacattepe University underlines that the Turkish juvenile system is based on punishment without considering the characteristics of the offenders. 'Imprisoning a child might not be helpful in preventing it from committing future crimes because the child might not ask the question, Why am I here?' She also says 'If you design an interconnected system, then you can help the child before the crime is committed. Such a system needs well-organised schools, youth programs and education aimed at the families.'⁶⁸ The US Department of State Country Reports on Human Rights Practices of 2009, reports that the juveniles were held in separate wards to the adults. Detainees and convicts were occasionally held together. The Turkish Ministry of Justice reported that as of 31 October, there were 2,622 children in prisons. A joint report of the Human Rights Association and the Human Rights Foundation claimed that 177 of these were ethnic Kurdish children held under anti-terror laws for throwing stones at police during pro-PKK protests in the Southeast.⁶⁹

66 European Network of Ombudspersons for Children. *TURKEY: Girl, 15, jailed for eight years over 'terror' crimes at Kurdish rally*. The Guardian - UK. <http://www.crin.org/enoc/resources/infodetail.asp?id=21622> (last visited April 2010).

67 Karabat, A., 2010: *Experts call on gov't to fix juvenile justice system*. Today's Zaman. <http://www.todayszaman.com/tz-web/news-200450-experts-call-on-govt-to-fix-juvenile-justice-system.html> (last visited April 2010).

68 Ibid.

69 Bureau of Democracy, Human Rights, and Labor, 2010. *Country Reports on Human Rights Practices for 2009: Turkey*. United States Department of State, Bureau of Democracy, Human Rights, and Labor. <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136062.htm> (last visited April 2010).

CONCLUSION

In the European Commission 'Turkey 2009 progress report' accompanying the Communication from the Commission to the European Parliament and the Council, (COM(2009) 533), the Commission noticed that as regards the *rights of the child*, efforts need to be further stepped up in all areas including administrative capacity, health, education, the juvenile justice system and child labour. Cases of children between the age of 15 and 18 years whom are tried as adults and face disproportionate sentences, raise serious concerns. Members of the judiciary reportedly do not limit pre-trial detention to circumstances where it is strictly necessary in the public interest. This adds to the overcrowding of prisons, where more than half of the inmates await trial. Judges appear to be hesitant to implement probation as an alternative to imprisonment while there are problems with effectively monitoring people released on probation. There are general concerns as regards *juvenile justice*. It further notices that during the reporting period (since the last report in 2006), the ECtHR delivered a total of 381 judgments finding that Turkey had violated the ECHR. The Court concluded that there had been a violation of the right to a fair trial and/or the right to liberty and security in about one third of these cases. Most of the events on which the judgments are based date back to the 1990s or before the new Turkish Criminal Code (TCC) or Criminal Procedure Code were enacted. The majority of the new applications to the ECtHR refer to the right to a fair trial and protection of property rights. A further 11 per cent refer to freedom of expression and 5 per cent to the prohibition of torture. Overall, there were more applications to the ECtHR against Turkey.

As mentioned in the introduction and later on in the text, derogation from certain human rights in times of danger to the State is permissible. However, such derogations are very strictly limited. In the case of children's rights in times of focus on the fight against terrorism it is important to keep in mind that children will suffer severely if their basic rights are not guaranteed at all times. It is also important to notice that in the cases discussed above there has not been an official derogation of rights, but a practice which is neither conform with international standards, nor with national law.

The legal efforts on part of Turkey to bring national legislation to conform with international obligations must be mentioned. The competence of juvenile courts was extended to offences committed by persons aged 15 to 18 years by an amendment to the law on juvenile courts adopted in 2003. This was a major step towards compliance with international standards and the recommendations of the Committee on the Rights of the Child concerning juvenile justice. The Criminal Code adopted in 2005 raised the minimum age of criminal responsibility from 11 to 12 years. This complies with the recommendation of the Committee on the Rights of the Child in 2007. The court evaluates the capacity of the accused offenders aged 12 to 15 years to appreciate the legal meaning and consequences of their act and their ability to control their behaviour, provides additional protection against the prosecution of adolescents not mature enough to be held criminally responsible. The Code of Criminal Procedure adopted in 2005 introduced several provisions that, although they apply to both juveniles and adults, helps to bring the juvenile justice into greater conformity with international standards and principles: Article 109, which increases the availability of supervision as an alternative to pre-trial detention; Article 171, which gives the prosecutor limited discretion not to file charges in certain circumstances; Article 231, which allows for postponement of announcing the sentence

followed by dismissal if the offender does not commit a new offence; and Articles 253 and 254 which require in certain cases an effort to reach settlement between the victim and the accused before trial for certain offences. The Child Protection Law prohibits the detention of juveniles under the age of 15 unless they are charged with a serious offence (i.e. punishable by more than five years of imprisonment) and gives judges broad discretion in determining whether other accused juveniles must be detained during investigation and trial. This is compatible with the principle that any deprivation of liberty must be imposed only as a last resort.⁷⁰

Nevertheless, as case law at the ECtHR shows, much needs to be done in terms of implementation and respect for these laws. It is especially crucial to recall that in cases of severe crimes where the accused is a *child*, the accused is exactly that: a child. Derogating from children's rights and basic principles in judicial proceedings and in detention can have serious consequences for the child and will most probably be counterproductive. Furthermore, in most cases it will be a direct violation of international obligations.

70 See UNICEF: Assessment of Juvenile Justice Reform Achievements in Turkey, July 2009, p 31.

Jiyan Rojin¹

The Development of Positive Obligations under the European Convention on Human Rights

Abstract

The European Court of Human Rights (ECtHR/ 'the Court') has been developing the concept of positive obligations over the last 30 years. This concept has become one of the most important factors in the interpretation of rights under the European Convention on Human Rights (ECHR /'the Convention') by the Court. However, thus far the Court has refused to develop a strict doctrine of positive obligations. Instead, it favours determining the extent of a state's positive obligations on a case-by case basis, which has the potential to lead to uncertainty and conflicting results. This article analyses the Court's case law on positive obligations in order to determine its scope and more generally to attempt to ascertain any applicable rules, which may help to shed more light on the Court's approach to positive obligations. This article will focus on the interpretive tools which have been adopted by the Court to develop positive obligations under the Convention and to define the scope of these obligations.

INTRODUCTION

Human rights are regarded as being embedded in a societal framework and not merely as rights that should not be transgressed. The scope of these rights is now wide and multi-dimensional and embraces a range of philosophies regarding human rights. The drafters of the Convention in 1950 sought to find a 'common denominator', which was rather minimal in scope. The Convention was a result of widespread revulsion caused by the activities of totalitarian regimes (in the period around 1930 to 1945) and the economically weakened states involved were clearly only able to be pressured to provide rather minimal and basic (even if fundamental) human rights protection. Rapidly it became clear that the future direction of human rights legislation would necessarily be concerned with positive actions that would need to be performed by states. The argument was simple: it made no difference for the Applicant whether the violation of his or her rights was caused by an act of the State or by any other cause. Thus, if the State had the power to remedy a situation that, in the case of interference, constituted a human rights violation, its omission constituted a similar violation. The 'modern' origin of human rights thinking is based on ideas originating with the enlightenment as developed by many philosophers like Rousseau,² who emphasised the existence of social inequalities; mainstream thinking and the

1 KHRP Fellow.

2 J.J.Rousseau, *Du Contract Social* [Social Contract], Vol.II, ch XI.

corresponding American and French Human Rights Declarations were characterised by the idea of protection from State interference. However, this understanding of the Convention is not without a parallel in human rights thinking, although the evolution of human rights theory is, on the one hand, older than the evolution of the Convention rights and on the other hand less clear cut and obvious, being by its very nature in constant change and also always subject to controversy. The focus here is on the development of positive obligations under the ECHR.

However, as mentioned above the ECHR and the Protocol are inspired by the classic conception of freedoms, in contrast to rights, differing in this respect from the Universal Declaration of Human Rights and from the European Social Charter. Individual freedoms place purely negative duties on governmental authorities.³ Hence, the Convention imposes upon States primarily (negative) obligations not to take steps infringing rights,⁴ rather than positive obligations to secure the enjoyment of rights and freedoms. Therefore, the Convention needed to be concluded- which means it should also impose obligations on states to take positive measures to protect and safeguard human rights. The European Court of Human Rights has therefore developed the concept of positive obligations over the last thirty years. The concept of positive obligations under the Convention obliges a State to undertake specific affirmative tasks and the State may be required 'to act as guarantor'.⁵ Nevertheless, the Court has still refused to provide an authoritative definition of what a 'positive obligation' entails,⁶ emphasizing instead that whether a positive obligation arises will depend upon the specific circumstances of the case. The consequence of this approach is a lack of uniformity and predictability, which may be problematic for national courts charged with the nebulous task of determining whether a positive obligation should arise on the facts of a particular case. However, the first case where the Court imposed a positive obligation upon States to provide civil legal aid for complex cases was *Airey v Ireland*⁷. Also, in *X. and Y. v Netherlands*⁸, the Court held subsequently that the Convention creates obligations for States which may involve the adoption of measures even in the sphere of the relations of individuals between themselves.⁹

The question arises as to which methodology has been adopted by the Court to determine the existence, scope and breadth of implied positive obligations, which will be discussed in the present article. The basis of this article is an examination of the development of significant

3 *Belgian Linguistic Case* (No. 2) A 6 (1968); (1979) 1 EHRR 252 at §1.A para. 1. The judgments and other decisions of the European Court of Human Rights are available at: <http://echr.coe.int/echr/en/hudoc>.

4 See Karen Reid, 'Practitioner's Guide to the European Convention on Human Rights' (London: Sweet & Maxwell, 2004) Second Edition, Philip Leach, 'Taking a Case to the European Court of Human Rights' (London: Oxford University Press, 2005).

5 R. Lawson, 'Out of Control: State responsibility and human rights: will the ILC's definition of the 'act of state' meet the challenges of the 21st century?', in M. Castermans, F. van Hoof and J. Smith (eds), *The Role of the Nation-State in the 21st Century*, 115, who notes that 'the European Court of Human Rights has consistently applied the principles articulated in the ILC Draft Articles on State Responsibility, without, however, referring expressly to the Draft Articles'.

6 *Plattform 'Ärzte für das Leben' v Austria* (Application no. 10126/82) Judgment of 21 June 1988 at para 31.

7 *Airey v Ireland* (Application no. 6289/73) Judgment of 9 October 1979

8 *X. and Y. v Netherlands* (Application no. 8978/80) Judgment of 26 March 1985.

9 *Ibid* at para 6.

positive obligations upon State Parties to the ECHR¹⁰ as promoted by the ECtHR.¹¹ The analysis that is made in this article is compromised of two main sections. The first part of the article will examine the general classification of positive obligations and will reflect on a more general idea of the way in which rights need to be protected by the state. Then, the methodology, which has been adopted by the Court to determine the concept of positive obligations under the Convention, will be considered. After the theoretical approach has been described, the second part will provide an overview of the application and development of the concept of positive obligations in the ECHR and will examine the development of significant positive obligations under Article 2 of the Convention. By examining Article 2 of the Convention, it will be possible to discover the range of express and implied positive obligations found within their development in the relevant jurisprudence. This article will conclude by further examining the nature of the positive obligations considered in the previous sections, the history of the Court's development of these obligations and the potential for the future expansion of such obligations.

DEFINING THE POSITIVE OBLIGATIONS

As mentioned earlier, in *Plattform 'Ärzte für das Leben'* the Court refused to offer a 'general theory of the positive obligations which may flow from the Convention.'¹² Therefore, it is necessary to consider the general concept as to which rights need to be protected by the state. This section will examine, therefore, descriptions and classifications of positive obligations both in the literature concerning the ECHR and in other writings. For example, Georg Jellinek, a professor from Heidelberg, suggested in his Declaration that a distinction should be made between the rights of the *status negativus* (*liberty in the state*) and the rights of *status positivus* (*citizens who can make claims upon the state*).¹³ This classification into positive and negative obligations has been recognised by the broader human rights literature. Therefore, the term of positive obligations provides for a protective duty that is the responsibility of the state. That means, as Dröge points out that the State may be required to act as a guarantor,¹⁴ where there has been an omission whereas negative obligations are obligations of the State to refrain from interference. The negative obligation may be designated as an obligation to take positive action. However, the concepts of action and omission, as will be explained, cannot be understood in a formal way, but have to be assessed materially. In other words, the differentiation between

10 Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty series No 5 (Rome, 4 November 1950). Hereafter generally referred to as the Convention or the ECHR for the sake of brevity.

11 Hereafter commonly generally referred to as the Court or the European Court for the sake of brevity.

12 *Plattform 'Ärzte für das Leben' v Austria* (Application no. 10126/82) Judgment of 21 June 1988 at para 31.

13 See Georg Jellinek, Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. (1892; Tübingen: J. C. B. Mohr [Paul Siebeck], 1921); *Allgemeine Staatslehre*, p. 417f. See the discussion in Kersten, *Jellinek und die klassische Staatslehre*, 286f; Robert Alexy, 'Grundrecht und Status,' in *Jellinek – Beiträge zu Leben und Werk*, p. 221–25; Stolleis, 'Georg Jellineks Beitrag,' p. 1.

14 Cordula Dröge, 'Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention' (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band. 159; 2003).

negative and positive obligation does not so much depend on the particular action or omission of a certain public actor in a given case, but on the question as to whether the human right ascertained by the right holder can be realised with or without the state's assistance.

However, according to Keir Starmer QC¹⁵ the theoretical basis for such obligations is a combination of three inter-related principles. First, the requirement under Article 1 of the Convention that states should apply to secure Convention rights for all persons within their jurisdiction. Secondly, the Convention rights must be practical and effective. Thirdly, derived from Article 13 of the Convention, effective domestic remedies should be provided for arguable breaches of Convention rights. Therefore, Starmer determines five categories of duties placed upon states by Convention positive obligations. The first category which Starmer points out as being a basic duty, would be a creation of a domestic legal framework which provides effective protection for Convention rights.¹⁶ This duty should prevent breaches of Convention rights. According to Starmer, this preventive duty arises in at least three situations: first, where fundamental rights, such as the right to life (Article 2 of the Convention) are at stake,¹⁷ and secondly, where intimate interests, such as family life (Article 8 of the Convention) are at issue,¹⁸ and thirdly, where Convention rights cannot be effectively protected by the legal framework.¹⁹ Also, according to Starmer, the third duty is that of states providing information and advice relevant to the breach of Convention rights,²⁰ fourthly the duty to respond to breaches of Convention rights, for example by conducting an investigation,²¹ and fifthly, the duty to provide resources to individuals to prevent breaches of their Convention rights.²²

Starmer also concludes that '[i]n many respects positive obligations are the hallmark of the ECHR, and mark it out from other human rights instruments; particularly those drafted before the Second World War.²³ Furthermore, the violation of a right can be caused from two broad situations. One can either result from the behaviour of a third private party or have cause that does not follow from an immediate action by the State or a private individual. This indicates two groups of positive obligations. The first concerns the so called *horizontal dimension* and the second one, concerns the so called *social dimension*. The horizontal obligation concerns the

15 Keir Starmer, *European human Rights Law* (London, Legal Action Group, 1999).

16 For example see in *X & Y v Netherlands* case, a breach of duty was found to have occurred.

17 For example, *Osman v UK* (Application No. 23452/94) Judgment of 28 October 1998 at para 101.

18 For example, *Marckx v Belgium* (Application no. 6833/74) Judgment of 13 June 1979.

19 For example, *Plattform 'Ärzte für das Leben' v Austria* (Application no. 10126/82) Judgment of 21 June 1988.

20 For example, *Guerra v Italy* (Application No. 14967/89) Judgment of 19 February 1998 at para 56-60.

21 For example, *Aydın v Turkey* (Application No. 41954/98) Judgment of 25 September 1997 at para 101.

22 For example, *Airey v Ireland* (Application no. 6289/73) Judgment of 6 February 1981.

23 Keir Starmer, 'Positive Obligations under the Convention' in Jeffrey Jowell and Jonathan Cooper (eds) *Understanding Human Rights Principles* (Oxford, Hart Publishing, 2001) 159.

protection of individual against interference by another private party. In *X and Y v Netherlands*,²⁴ the Court considered the horizontal positive obligations the first time. The Court held in this case that the obligation to secure Convention rights includes the duty to ensure that domestic law provides effective sanctions for unjustifiable interferences with Convention rights by private persons.

The *social dimension* is much broader and complex. This includes all human rights violations that do not precisely relate to a positive action by the State nor to the behaviour of a private party. They are all obligations of the State to realise the effective enjoyment of human rights in social practice. This allows claims by the individual asking for help and for assistance by the State to establish his or her full autonomy and freedom. This category of positive obligations has been accepted by the ECtHR.²⁵ Moreover, these two groups of positive obligations can arise within almost every provision of the Convention and therefore bind together all State powers, the legislative, the judiciary and the executive.

These two groups of positive obligations have been recognised by the ECtHR and both horizontal positive obligations as well as the social positive obligations can be enforced by Applicants through the individual complaints mechanism of the Human Rights System. For example, the *Osman v United Kingdom*²⁶ case represents the first important application of horizontal positive obligations, mandating State authorities to take measures to protect individuals known to be at 'immediate risk to life' from the actions of other living individuals. As demonstrated by the differing approaches above, it is clear that it is not possible to find a unified definition of positive obligations. The Court however, uses several interpretative mechanisms to determine the application of positive obligations under the Convention – these mechanisms will be discussed in the following section.

The evolutionary approach to interpretation of positive obligations under the Convention in 'case-law'

In the absence of a clear definition of positive obligations it is important to examine the methodology used by the Court in determining the existence, scope and breadth of implied positive obligations under the Convention. The Court has developed several interpretative methods that impose positive obligations upon member states. This section will examine three methods of interpretation adopted by the Court, namely the 'practical and effective' principle, 'dynamic and evolutionary' interpretation and the 'Common European Standard'.

24 *X and Y v Netherlands* (Application no. 8978/80) Judgment of 26 March 1985 at para 23; other cases of this category are, for instance, the cases *Plattform 'Ärzte für das Leben' v Austria* (Application no. 10126/82) Judgment of 21 June 1988 or *Osman v the United Kingdom* (Application No. 23452/94) Judgment of 28 October 1998.

25 For example in the cases *Marcks v Belgium* (Application no. 6833/74) Judgment of 13 June 1979 and *Airey v Ireland* (Application no. 6289/73) Judgment of 6 February 1981. Later, such positive obligations appear, often indirectly in the cases of *Gaskin v United Kingdom* (Application no. 10454/83) Judgment of 7 July 1989 or *Z and others v the United Kingdom* Application no. 29392/95) 10 May 2001.

26 *Osman v UK* (Application no. 23452/94) Judgment of 28 October 1998 at para 116.

One of the main important interpretative tools adopted by the Court is the ‘practical and effective’ principle. In the early case of *Marckx v Belgium*,²⁷ the Court established the notion of ‘effectiveness’ as a foundation for the subsequent development of many different positive obligations under the Convention.²⁸ In this case, the Applicant, an unmarried mother, complained that under Belgian law she was obliged to undertake legal proceedings to gain official recognition of her maternal affiliation with her daughter. Ms Marckx contended that this requirement failed to respect her right to family life under Article 8. The Court stated that Belgian law failed to provide effective respect for the complainant’s family life. Therefore, the Court postulated that the State needed to effectively safeguard the plaintiff’s rights under the Convention by taking positive actions. In the next case, *Airey v Ireland*,²⁹ the Court utilised the ‘practical and effective’ test to establish a positive obligation regarding the provision of legal assistance for certain civil proceedings under Article 6 (1) of the Convention. In this case, the Applicant, who claimed that her husband was a violent alcoholic, desired to obtain a judicial separation from the courts, divorce being then impossible in Ireland. She was unable to find a solicitor to act for her, as there was at that time no system of civil legal aid in Ireland. Therefore, Mrs Airey did not have adequate legal representation made available for her by the state; in consequence she had been denied access to the court. The Court held that it was unlikely that the Applicant could have represented herself effectively. Consequently, the Court determined that ‘Article 6(1) encompassed a positive obligation upon States to provide for the assistance of a lawyer in civil proceedings when ‘such assistance proves indispensable for an effective access to court.’³⁰

Another principle is the so-called ‘dynamic and evolutionary’ interpretation, which has also been used as an interpretative tool regarding the Convention by the Court. The principle of dynamic and evolutionary interpretation seeks to adapt the Convention rights to present day conditions. The principle of effectiveness and dynamic interpretation means that the positive obligations following on from there change with time and never remain constant, but rather become wider or narrower. The Court has repeatedly emphasised these two principles and it is not surprising that they are the main methods of interpretation invoked to justify the acceptance of positive obligations under the Convention. (On the other hand, the other interpretative principles of the Convention serve to limit the extent of positive obligations resulting from the effective and dynamic interpretation).

For example, in *Stafford v United Kingdom*,³¹ the Grand Chamber was confronted with the issue as to whether it should depart from the original Court’s view,³² that the sentence of mandatory life imprisonment imposed on convicted murderers in England was a unique punishment and that the Home Secretary’s central role in determining if, and when, convicted murderers should be released on licence was compatible with Article 5 of the Convention. The Grand

27 *Marckx v Belgium* (Application no. 6833/74) Judgment of 13 June 1979.

28 *Ibid* at para 31.

29 *Airey v Ireland* (Application no. 6289/73) Judgment of 6 February 1981.

30 *Ibid* at para 26.

31 *Stafford v United Kingdom* (Application no. 46295/99) Judgment of 28 May 2002.

32 Delivered in *Wynne v United Kingdom* (Application no. 15484/89) Judgment of 18 July 1994.

Chamber said that ‘a failure by the court to maintain a dynamic and evolutionary approach would risk it becoming a bar to reform or improvement. Also, the Grand Chamber concluded that the English law now considered the tariff-setting process to be similar for mandatory and discretionary life prisoners. Consequently, the Home Secretary breached Article 5 as it did not have the independent judicial attributes required of a reviewing body under that provision. In *Christine Goodwin v United Kingdom*³³ the Grand Chamber cited *Stafford* when applying the dynamic and evolutionary approach to determine the extent of the obligations upon States to recognise the new personalities of post-operative transsexuals. So, they are thus equally important as they make the scope of positive obligations, which are, by their very nature, ever changing, more precise and predictable. The wording provides the most important limit to an evolutionary interpretation, as the Convention norms cannot be interpreted in a sense that would contradict their very wording and thereby render the jurisprudence arbitrary.

Another important interpretative principle is the ‘comparative’ interpretative approach, expressed in Strasbourg jurisprudence as the so-called *Common European Standard*.³⁴ The ECtHR is, in most cases, reluctant to go further in their interpretation of Convention rights than that corresponding to an already existing common European standard. This does not mean that there is an exact equivalent of an obligation recognised by the Court in all Member States. Indeed, the systems are too diverse for positive obligations to exist as a common European normative theory. Nonetheless, the positive obligations recognised until now by the Commission and Court limit themselves to reflecting a standard of legal or social guarantees common to most of the Member States.

It is doubtless the case that the different interpretation tools of the Court, as analysed above, are a necessary and important set of methods for adjudicating concerning positive obligations upon states under the Convention. The ‘practical and effective’ principle states that States cannot fulfil their duties under the Convention by simply being passive. As we have seen in the previous section, there are various forms of positive obligations that have been imposed upon different bodies in order to secure a realistic guarantee of Convention rights and freedoms. They included the decisions that domestic law provides an appropriate recognition of family relationships (as in *Marckx v Belgium*)³⁵ and protection for vulnerable persons (as in *X and Y v Netherlands*)³⁶, deploying State personnel (e.g. police officers) to protect lawful exercises of freedom of assembly (*Plattform ‘Ärzte für das Leben’ v Austria*)³⁷ and expression (e.g. *Özgür*

33 *Christine Godwin v United Kingdom* (Application no. 28957/95) Judgment of 11 July 2002.

34 E. Brems, ‘The margin of Appreciation Doctrine in the Case-Law of the European Court on Human Right’, in: ZaöRV 1996, p. 240; also see David Harris, Michael O’Boyle & Colin Warbrick: ‘Law of the European Convention on Human Rights’, Publication: Oxford; 2nd Edition, 12 Mar 2009, p.294.

35 *Marckx Belgium* (Application no. 6833/74) Judgment of 13 June 1979, at para 82.

36 *X and Y v Netherlands* (Application no. 8978/80) Judgment of 26 March 1985 at para 94.

37 *Plattform ‘Ärzte für das Leben’ v Austria* (Application no. 10126/82) Judgment of 21 June 1988.

Gündem v Turkey)³⁸ and undertaking effective investigations (e.g. establishing appropriate legal procedures) into unlawful killings (*McCann v United Kingdom*).³⁹

However, the question might be posed as to the Court has gone too far in holding States to be subject to the above positive obligations by using the 'practical and effective' principle. The answer would seem to be – 'very likely not'. In regard to the limitations on these positive obligations, the Court has been careful not to impose undue burdens upon States. For example, in *Andronicou and Constantinou v Cyprus*,⁴⁰ the Court refused to hold that the effective right to access to a court obliges States to establish a general civil legal-aid programme. In regard to the duty upon States to protect freedom of peaceful assembly, the Court acknowledged that States cannot guarantee this in all circumstances and that their obligation is confined to taking 'reasonable and appropriate measures'. This is called the 'fair-balance' test or the 'proportionality-test'. However, the question that the Court has to find the answer to is the setting of a 'fair balance' between judicial innovation and respect for the ultimate policy-making role of member States in determining the rights guaranteed by the Convention.

DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE CONVENTION

As was made clear in the first part, there are many ways to approach theoretically the issue of positive obligations as related to the ECHR. The final era in the original Court's development of positive obligations began in the mid 1990s and ended in October 1998. During this time the Court rapidly articulated several key positive obligations under Article 2, including the duty to undertake effective investigations into killings⁴¹ and the obligation to provide protection to persons whose lives are known to be at immediate risk from the criminal acts of others.⁴² By the end of this period analogous investigation obligations had been developed under Articles 3⁴³ and 5.⁴⁴ The burgeoning caseload of complainants alleging significant violations of fundamental Convention rights (including the right to life, prohibition of torture and the right to liberty) by the Turkish security forces provided the jurisprudential context in which a number of these positive obligations were developed. This section of will provide an overview of the development

38 *Özgür Gündem v Turkey* (Application no. 23144/93) Judgment of 16 March 2000. In this case, the applicants had owned and published a newspaper in Turkey. They claimed that journalists, distributors and others associated with the paper had been subjected to a number of violent attacks. Despite their requests to the authorities for protection little had been done by the police/security forces to safeguard their right to freedom of expression via the newspaper. The Court held, in this case, that the 'the key importance of freedom of expression as one of the preconditions for a functioning democracy'. Moreover, the Court stated that 'effective exercise of this freedom does not depend merely on the state's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between the individuals'.

39 *McCann v United Kingdom* (Application no. 19009/04) Judgment of 13 August 2008.

40 *Andronicou and Constantinou v Cyprus* (Application No. 25052/94) Judgment of 9 October 1997 at para. 199.

41 First stated in *McCann v UK* (Application no. 19009/04) Judgment of 13 August 2008 at para 37.

42 See *Osman v UK* (Application no. 23452/94) Judgment of 28 October 1998.

43 See *Assenov v Bulgaria* (Application no.24760/94) Judgment of 28 October 1998.

44 See *Kurt v Turkey* (Application no. 24276/94) Judgment of 28 May 1998.

of positive obligations in the European Convention on Human Rights with specific reference to the case-law.

A duty to uphold life by protecting those known to be under threat

This positive obligation under Article 2 is potentially far-reaching and has led to notable findings of violations in recent cases. All relevant State bodies must take steps at the operational level to uphold the right to life of those under threat. As memorably stated by the Court in *Osman v United Kingdom*: 'there is in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another'.⁴⁵ On the facts of that case there was no such Article 2 breach since the threat was not clear enough; and the same befell the similar argument of breach of the positive obligation under Article 8. However, there followed a chain of cases where procedural and investigatory failures by the State did cause an Article 2 violation (see below). In *Osman*, where a teacher, Paget-Lewis, had developed an imbalanced relationship with one of his students, Osman, the ECtHR held that Article 2 imposed a positive obligation on the police to take reasonable steps to prevent a foreseeable killing. The Court was, however, careful to emphasise that this obligation had to be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities⁴⁶ and is not inconsistent with the rights of the suspect. The police and similar bodies acting as representatives of the State thus have a positive obligation to take whatever the Court considers to have been reasonable operational measures to prevent a violation of an individual's rights under Articles 2.⁴⁷ Nevertheless, this case provided an opportunity for the court to further articulate the notion of positive obligations.

In the recent case of *Opuz v Turkey*,⁴⁸ the Court held that the Turkish authorities had failed to protect the Applicant against ill-treatment perpetrated by her former husband under Article 2 and 3. In this case, the Court considered whether a State can be held responsible for acts of domestic violence under Articles 2, 3 and 14. The Applicant claimed violations of the Convention on the basis of Turkey's failure to take action against her husband who committed acts of extreme physical and psychological violence against her and her mother. The Applicant's husband eventually killed her mother and, at the time the case went before the Court, the Applicant was still in danger. The Court explored in this case that the degree of State responsibility to protect the life of domestic violence victims under Article 2, extending the positive obligations to protect life into the most intimate of circumstances. In both cases, the Court applied a two part test which differs from *Osman* in the application of the interpretations principles and the consideration of factors which influenced the respective decisions.⁴⁹

The first part of the test is whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the

45 *Osman v UK* (Application no. 23452/94) Judgment of 28 October 1998 at para 115.

46 *Ibid* at para. 116.

47 The same in fact applies under Article 3, the prohibition on torture and inhuman and degrading treatment or punishment: see below.

48 *Opuz v Turkey* (Application no.33401/02) Judgment of 9 June 2009.

49 *Osman v UK* (Application no.23452/94) Judgment of 28 October 1998 at para 128- 129.

criminal acts of a third party—the ‘knowledge’ element.⁵⁰ The second part of the test is whether the authorities, having been put on notice, failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁵¹ We can call this the ‘due diligence’ element. In *Osman*, the Court held that, although the shooting was ‘tragic’, it could not be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis.⁵² It could also not be said that the measures the police might have taken, ‘judged reasonably’, would in fact have neutralised the harm.⁵³ In *Opuz*, the Court asked, first, whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the Applicant’s mother from the criminal acts of H. Opuz (knowledge); and, if so, secondly, whether the authorities displayed due diligence by taking reasonable measures to prevent the killing of the Applicant’s mother (due diligence).⁵⁴

As regards knowledge, the Court held that it was obvious that there was an escalating and continuing risk to the Applicant and her mother based on H. Opuz’s record of violence and the many complaints submitted by the Applicant and her mother.⁵⁵ On at least five occasions over a period of 12 years the Applicant and her mother had sought the protection of the authorities and on each occasion the State failed entirely to protect them. In particular, after a decade of reported violence, the Applicant’s mother had actually submitted a petition to the Chief Public Prosecutor’s Office stating that her life was in immediate danger.⁵⁶ Two weeks later she was killed by H. Opuz. It was clear that the State authorities had knowledge about, or ought to have foreseen, a lethal attack by H. Opuz. The Court then considered the second part of the test: whether the authorities should have taken reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm, i.e. did the State act with due diligence in attempting to prevent the death of the Applicant’s mother?⁵⁷

However, the ‘due diligence’ element is always difficult for the Court to identify. In general it is to say that states have a margin of discretion which allows them to choose their specific methods for protecting rights. With regard to that, the Court recognised that it is not its role to replace the national authorities and to choose in their stead from the wide range of possible measures that could be taken to secure compliance with their Article 2 obligations. And perhaps it is in this regard that the Court’s approach in *Opuz* and *Osman* most differs. In *Osman*, the Court took into account the public policy objections to bringing legal actions against the police for negligence.⁵⁸ It noted that the judicial review of police conduct ‘may lead to the exercise of a function being carried out in a detrimentally defensive frame of mind’ and that it would cost a ‘great deal of police time, trouble and expense’ which would divert police attention from their

50 Ibid at para 116.

51 Ibid at para 116.

52 Ibid at para 121.

53 Ibid at para 121.

54 Ibid at para 130.

55 Ibid at para 134-135.

56 Ibid at para 135.

57 Ibid at para 136.

58 Ibid at para 90.

most important function of suppressing crime.⁵⁹ In *Opuz*, however, the Court took a more robust approach, noting that it is the role of the Court to ensure that the Convention rights are not theoretical or illusory but practical and effective.⁶⁰ On this basis, the Court examined what actions the State could have taken to prevent the death of the Applicant's mother.

A right to protection by the domestic authority

There remains some doubt as to the scope of the Convention as regards enforcing an obligation to provide police protection. It appears that, when individuals have been exposed to threats to their lives by private individuals, the State will sometimes face a positive obligation to provide police protection.⁶¹ Much will of course depend upon the immediacy of the threat and the protection cannot reasonably be expected to continue for life or to resemble a state-funded private bodyguard; for example, in *Osman v United Kingdom*, the Court found that it was reasonable for the police to have failed to use their powers of arrest, search and seizure, when they reasonably believed that they lacked the necessary standard of suspicion to exercise those powers. However, in the case of *Opuz*, as mentioned before, the Applicant and her deceased mother had been attacked many times by H. Opuz who had a long history of violent behaviour. The failure to protect the deceased was not a mistake. It was a dereliction of duty.

Effective investigation of every death and being capable of finding, trying and punishing any perpetrator: a duty to prosecute

According to the Court in *Aydın v Turkey*⁶² the investigation must be capable of leading to the 'punishment' of the offender, whereas in *Osman v United Kingdom* the European Court found more generously (for the State) that the State must establish effective machinery for the punishment of criminal violations of the right to life.⁶³ But the cases can be separated into two factually distinct categories. First, there are cases where the State itself was in some way responsible for the death, either in the sense that the killing was undertaken by State agents, or that it occurred while the victim was in State custody. The rules are applied somewhat differently in the second situation, when the killing was an ordinary murder or civil wrongdoing committed by a non-State actor. Thus each situation will be examined separately below.

59 Ibid at para 91.

60 Ibid at 165.

61 *W. v United Kingdom* (Application no. 9348/81) Judgment of 28 June 1983 at para. 12.

62 *Aydın v Turkey* (Application no. 23178/94) Judgment of 25 September 1997 at para 103.

63 Ibid at para 115; the Inter-American Court of Human Rights has made similar pronouncements.

Where the death results from State action or occurs in State custody

In this situation the obligations upon the State are very strict, as seen in *Jordan and Others v United Kingdom*:⁶⁴ The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.⁶⁵ The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those objectives may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own volition, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.⁶⁶

An effective investigation into an alleged unlawful killing by State agents requires independence of those carrying out and supervising the investigation from those they are investigating.⁶⁷ But an investigation will also only be 'effective' if it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances⁶⁸ and to the identification and punishment of those responsible. But the latter is an obligation of 'means', not of 'result': the 'authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.'⁶⁹ Thus any weakness in the investigation such that the trail of evidence is undermined or a potential or actual prosecution is damaged, will violate this group of positive obligations. Finally, once a death has been found to be unlawful then the investigation should result in criminal proceedings capable of punishing the offender.

The ECtHR appears to have tightened up the rules on investigations relating to deaths in police custody, particularly those of vulnerable prisoners. In *Edwards v United Kingdom*⁷⁰ the Court found violations of the positive obligations under Article 2, and of the Article 13 right to an effective remedy before a domestic court, where one prisoner had murdered another. For a positive obligation of this nature to arise it must be established that the authorities knew, or ought to have known, of the existence of a real and immediate risk to the life of an identified

64 *Jordan and Others v United Kingdom* (Application no. 24746/94) Judgment of 4 May 2001 at para.105.

65 See also *McCann v United Kingdom* (Application no. 19009/04) Judgment of 13 August 2008; *Kaya v Turkey* (Application no. 22729/93) Judgment of 19 February 1998 at para 86.

66 See further *Ilhan v Turkey* (Application no. 22277/93) Judgment of 26 June 2000 at para.63.

67 *Jordan v United Kingdom* (Application no. 49771/99) Judgment of 10 December 2002 at para. 106.

68 *Ibid* at para 107.

69 *Ibid* at para 107.

70 *Edwards v United Kingdom* (Application no. 46477/99) Judgment of 14 March 2002.

individual from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which might be expected to avoid that risk. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. There had been failures of procedure both before and after the death, which could not be fully elucidated by even a well-conducted and meticulous private inquiry. The Court also criticised the inquiry for the lack of respect for the rights of the victim's family; they were unrepresented, could only attend when they were themselves giving evidence, and were unable to question witnesses.⁷¹

The continuing development of the positive obligations under Articles 2 and 3 underlines the importance of consistent, documented procedures for public authorities with others' lives in their hands if they are to avoid violations. This is the case regardless of whether the alleged victim dies, and regardless of the method by which injuries, suffering or violence leading to death was inflicted. Particular care must be taken with the mentally ill, whether they may harm themselves or another person. The domestic application of the *Edwards v United Kingdom* logic with regard to positive obligations towards those in police or prison custody was seen in the English case, *R (on the application of Amin) v Secretary of State for the Home Department*.⁷² The victim was bludgeoned to death by a violent and racist prisoner and the victim's family claimed that the Secretary of State had failed to hold an open and public investigation into the circumstances of the death. The High Court found that an internal inquiry by the Prison Service and the criminal trial of the assailant did not constitute an effective investigation for the purposes of the procedural obligation under Article 2, principally as it did not establish why on that night the victim was sharing a cell with this particular assailant. Therefore, the claimants were awarded a declaration that an independent public investigation must be held at which the family would have legal representation, access to all relevant materials and the ability to cross-examine the principal witnesses, in order to comply with the positive obligations under Article 2.

Where the killing is an 'ordinary' murder, manslaughter, lawful killing or 'accident'

In these circumstances it has been held that there are still positive obligations on the state. For example, in *Ergi v Turkey*⁷³ the European Court stated that:

"The obligation to investigate a killing is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an

71 For the duties owed by prison authorities in relation to vulnerable prisoners, particularly those who are mentally ill, see *Keenan v United Kingdom* (Application no. 27229/95) Judgment of 3 April 2001.

72 *R (on the application of Amin) v Secretary of State for the Home Department* [2001] EWHC Admin 719.

73 *Ergi v Turkey* (Application no. 23818/94) Judgment of 28 July 1998 at para 82.

obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.’

As seen in *Jordan v United Kingdom*, the Court has repeatedly found that to comply with Article 2, the investigation into any death must comply with the following procedural safeguards: (1) It must be carried out by an independent body, in public; (2) It must be effective, thorough and rigorous, and (reasonably) prompt; (3) It must be capable of imputing responsibility for the death; (4) If agents of the State are responsible, it must be capable of determining whether the killing was or was not justified under Article 2; (5) If initiated on the basis of a criminal complaint, the complainant must be able to take part in the proceedings; (6) It must enable effective involvement of the next of kin.

Every State agency and agent involved must not only act without negligence, but also without bias, prejudice or lack of independence. The Article 2 requirements have been incorporated quickly into some domestic decisions. In the English case, *R (on the application of Wright and Bennett) v Secretary of State for the Home Department*⁷⁴ a mandatory order was issued which required the Home Secretary to initiate an independent and public inquiry into a prison death. The judge applied criteria very similar to those in *Jordan*, and reiterated that Articles 2 and 3 enshrine fundamental human rights; thus in any situation where it is arguable that there has been a breach of either Article, the State has an obligation to procure an effective official investigation. The question as to whether any such investigation or inquiry into a death complies with Article 2 will depend on its practical content and context, not on the ‘paper’ powers of the body or individual carrying it out. Hence an investigatory body with ‘effective’ and comprehensive powers could still be found to have violated the procedural requirements of Article 2 if it did not exercise its powers to the extent found by the Court to be necessary. Conversely, a theoretically weak form of inquiry might manage to do all that the Convention requires by creative or forceful use of its powers, as seen in *Taylor, Crampton, Gibson and King v United Kingdom*,⁷⁵ where, although the inquiry was private in form, it had made its findings public; although it did not have any power to order discovery or compel witnesses, it had in fact been able to obtain all the documents which it had requested; and all witnesses had been called. Thus the scope of the investigation by the State was held to be sufficient for the purposes of Article 2. By contrast, the Court has recently found violations where a public inquiry did take place, but in the absence of the Applicants. However it should be noted that this case concerned a death in prison caused by a prisoner, and as such there were extremely heightened duties upon the state.

The second part of this article has shown the development of positive obligations under Article 2. Examples include the requirement upon public authorities to take protective measures to safeguard individuals (especially vulnerable persons such as children) from serious ill-treatment by others (e.g. as in *Z. and Others v UK*)⁷⁶ and the corresponding Article 2 obligation to protect

74 *R (on the application of Wright and Bennett) v Secretary of State for the Home Department* (2001) EWHC Admin 520.

75 *Taylor, Crampton, Gibson and King v United Kingdom* (Application no. 23412/94) Judgment of 30 August 1994.

76 *Z. and Others v the United Kingdom* (Application no. 29392/95) 10 May 2001.

individuals at immediate risk their lives (*Osman v United Kingdom*).⁷⁷ Although the original Court only began to recognise the existence of positive obligations under Article 2 in its final years of existence, innovative judgments, such as *Osman*,⁷⁸ established the jurisprudential foundations upon which the full-time Court is constructing an ever-expanding range of obligations. These encompass both substantive obligations, for example to provide protection to persons known to be at immediate risk of being killed by State agent or private individuals/groups and procedural obligations, notably to undertake effective investigations into killings.⁷⁹ However, *Opuz* certainly raises the bar of State responsibility under Article 2 to protect individuals from the criminal acts of others. Legislation must meet the nuanced nature of the violence it seeks to prevent and the authorities must be diligent in implementing legislative protection. The Court was also more robust in its public policy analysis. It did not raise the public policy concern about reviewing police conduct and it was very clear on the balance that must be struck between Articles 8 and 2 in the context of domestic violence. But its reasoning, arguably, was quite consistent with *Osman*. In *Osman*, the State had not failed in its Convention obligations. It had made a mistake - a severe and tragic one. The Court's view was that the authorities could not have known that the teacher was capable of violence and that, even if that was obvious, the events leading to the violent incident would not reasonably have pointed to a risk for the second Applicant and his family. If anything, the events would have pointed to a risk for others, such as the second Applicant's school mate or the vice-principal. In *Opuz*, the Applicant and her deceased mother had been attacked many times by H. Opuz, who had a long history of violence. The failure to protect by the Turkish authority was a dereliction of duty and a violation of Article 2. Moreover, in the context of Article 3, the Court analysed the nature of the treatment, its duration, its physical domestic violence as a 'lovers quarrel' requiring moderate police intervention.⁸⁰ In *Opuz*, the Applicant's husband repeatedly threatened to kill the Applicant, her mother and, on occasion, the Applicant's children over a period of 12 years. With this regard, the Court said that the 'overall violence to which the Applicant and her mother were subjected over a long period of time could not be seen as individual and separate episodes and need therefore be considered together as chain of connected events'.⁸¹ Therefore, the Court noted that the Applicant fell within a particularly vulnerable group entitled to heightened protection due the history of violence, her fear of future violence, the ongoing threats, her social background and the vulnerable position of women in south-east Turkey. But the Turkish authority's response to H. Opuz's conduct was manifestly inadequate to the gravity of the offences in question. The Turkish authority's assertion that the Applicant could have sought shelter in a women's refuge would have provided only a temporary solution and the State should have acted on its own accord to provide protective measures rather than expecting the Applicant to make a specific request for the implementation of a particular time. Therefore, the Court noted that the threats against the Applicant continued and that the domestic authorities

77 *Osman v UK* (Application no.23452/94) Judgment of 28 October 1998.

78 *Ibid.*

79 *Kelly and the Others v UK* (Application no. 30054/96) Judgment of 4 May 2001.

80 *Andronicou v Cyprus* (Application no. 25052/94) Judgment of 9 October 1997 at para 183; See also UN Commission on Human rights, *Report Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy: A framework for model legislation on domestic violence* (February 2, 1996) UN Doc.E/CN.4/1996/53/Add.2.

81 *Opuz v Turkey* (Application No. 33401/02), judgment of June 9, 2009 at para 158.

had still failed to provide protective measures until the Court itself sought information as to what had been done. So, there had been also a violation of Article 3 due the State's failure to take protective measures in the form of effective deterrence against serious breaches of the Applicant's personal integrity. Moreover, this case constitutes a very important development in the Court's application of Article 14 in conjunction with Articles 2 and 3. However, this case has shown a very important development of positive obligations under Articles 2, 3 and 14. With regard to Article 14, the Court recognised that failure to protect women from domestic violence amounts a lack of equal protection of the law and that Turkey's unresponsiveness indicated insufficient commitment to address domestic violence and a consequent violation of Article 14. In this case, the Court found for the first time that a failure to adequately respond to gender-based violence violated Article 14. This significant case may justify authorities in taking action against perpetrators in the absence of the victim's consent to do so, as well as the obligation to provide assistance and support for victims. It means States will be called on to ensure that their criminal justice systems are fit for the purpose when it comes to domestic violence. Moreover, this judgment brings the Court's jurisprudence into line with that of other international human rights bodies, which explicitly recognise gender-based violence as a form of discrimination.

CONCLUSION

As was pointed out in the first part, the Court has not articulated a general theory regarding positive obligations under the ECHR. However, where the Court has implied positive obligations across a number of substantive articles, a common justification for this judicial creativity has been to demonstrate that relevant rights are 'practical and effective' in their exercise.

Some positive obligations require a substantial investment of State resources, which raises the question as to whether a unified human rights standard can be instituted throughout the member states of the CoE, considering the great diversity of economic and State structures in the various members, particularly to be seen in the newly joined states of Central and Eastern Europe. Horizontal positive obligations require a specific organisational structure of the State so as to prevent interference by others, and there needs to be a well-developed capacity of the State to control economically powerful private actors. Social rights at times require concrete financial and material investments. The standard achieved by the jurisprudence until now is very high, and with regard to some judgments it is questionable whether their implementation in all member states can be realised.

On the other hand, the social dimension can have a particularly legitimating and integrating effect in those countries with less developed social conditions, since the identification of citizens with a human rights system can only be achieved if the system encompasses guarantees which have a practical meaning for the people concerned. The most important method of adjusting positive demands to the particular conditions of a certain State is a resource available to the new member states and this cannot be circumvented in order to create a completely uniform standard. That the margin of appreciation creates a tension between the autonomous, European interpretation of the Convention and the sovereignty of national entities is unavoidable and must be accepted. It lies in the very nature of the international enforcement and supervision mechanisms and of the Convention rights as justifiable rights, and does no more than create

the same tension as exists within the national system between the executive and legislative on the one hand and judiciary on the other. Moreover, the phenomenon of a common European standard is a corrective that may compel the states to accept a definitive European human rights standard.

As the second part has made clear, in addition to furthering the evolution of existing positive obligations, the full-time Court has created, in addition to the existing ones, several important new positive obligations. These include the duty upon states, under Article 10, to take operational measures (such as involving police and/or military personnel) to protect media organisations and their employees/distributors from acts of violence intended to undermine the freedom of expression of the targeted organisation/persons⁸² or as under Article 14 in conjunction with Articles 2 and 3, to call for authorities to take action against alleged perpetrators of crimes in the absence of the victim's consent to do so, as well as the obligation to provide assistance and support for victims.⁸³

These emerging positive obligations demonstrate that the full-time Court is continuing its predecessor's practice of developing the spectrum of such obligations according to the legitimate needs of both complainants and itself, assessed against the background of contemporary European societies. This study has revealed the growing importance of positive obligations in the jurisprudence of the Court. This evolution of positive obligations in the case law of the Court is an important step for the member states (and especially for the new member states) in that it obliges states to undertake positive measures to safeguard and enhance basic rights embodied in the Convention.

Of course, it should be considered that there are financial costs incurred by states in complying with their positive obligations, for example in *Powell and Rayner v The United Kingdom*⁸⁴ where a GBP 19 million expenditure was necessitated (on sound insulation for 16,000 homes near Heathrow airport designed to reduce the worst effects of noise pollution from aircraft), which enabled the British authorities to demonstrate that they had complied with their Convention duties to respect residents' family and home lives. Thereby, it poses the question as to how far the scope of the doctrine of positive obligations goes and where the limits of positive obligations under the Convention are. This question is linked to the necessity of predictability and acceptance of the jurisprudence by the national courts. Furthermore, the objective should be attained that the positive obligation becomes more a uniform and transparent concept. Although new challenges to human rights and the positive obligations under the Convention arise in many ways from private parties, thereby raising new questions on the responsibility of non-State actors for human rights violations, although the political controlling possibilities of the State are increasingly diminishing, states are, as yet, the only actors with an all-encompassing responsibility for the effective protection of human rights. An alternative giving a comparative level of protection does not exist up to now. The Court has shown clearly that the State has a certain responsibility to prevent human rights violations that do not result from its own actions.

82 See *Özgür Gündem v Turkey* (Application no. 23144/93) Judgment of 16 March 2000 at para 4.

83 *Opuz v Turkey* (Application No. 33401/02) Judgment of June 9, 2009.

84 See *Powell and Rayner v UK* (Application no. 9310/8) Judgment of 21 February 1990 at para 95.

Manisuli Ssenyonjo¹

State Reservations to the ICESCR: A Critique of Selected Reservations²

Abstract

As of 18 April 2008, 42 of the 158 States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant), constituting about 27 per cent of the States parties to the Covenant, had, between them, entered several declarations and reservations of varying significance to their acceptance of the obligations under the Covenant. Yet, unlike most other human rights treaties the Covenant lacks a specific clause on declarations and reservations. This has given rise to several questions examined in this article. Firstly, what reservations to the ICESCR are permissible or impermissible in international human rights law? Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible? Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation? And finally, are some of the existing State reservations to the Covenant incompatible with the object and purpose of the Covenant (i.e. the Covenant's essential rules, rights and obligations) and thus impermissible? If so, how should reservations incompatible with the object and purpose of the Covenant be treated by the Committee on Economic, Social and Cultural Rights (CESCR or the Committee)?

INTRODUCTION

In recent years, complex questions have arisen with respect to the legality of reservations to human rights treaties, and the legal consequences of invalid reservations.³ Unlike

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3 This matter has been a subject of study by the International Law Commission (ILC) under the direction of Special Rapporteur, Mr Alain Pellet. See e.g. Report prepared by Mr Alain Pellet, Meeting with Human Rights Bodies, UN Doc. ILC(LIX)/RT/CRP.1, 26 July 2007; Twelfth Report on Reservations to Treaties, UN Doc. A/CN.4/584, 15 May 2007; Eleventh Report on Reservations to Treaties, UN Doc. A/CN.4/574, 10 August 2006; Tenth Report on Reservations to Treaties, UN Doc. A/CN.4/558, 1 June 2005; Addendum UN Doc. A/CN.4/558/Add.1, 14 June 2005; and UN Doc. A/CN.4/558/Add.2, 30 June 2005. See also generally Ziemele, I. (ed.), *Reservations to Human Rights* Manisuli Ssenyonjo 316 *Intersentia*.

some treaties – such as the Rome Statute of the International Criminal Court,⁴ the Convention against Discrimination in Education,⁵ the Slavery Convention,⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁷ – the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant),⁸ like the International Covenant on Civil and Political Rights (ICCPR),⁹ neither prohibits the formulation of reservations and declarations either expressly or impliedly nor mentions any permitted type of reservation(s). Yet, the General Assembly made an ‘express demand in 1952 that concrete provisions on the permissibility and legal effect of reservations be adopted in the two Covenants, as well as various [UK] initiatives in this direction.’¹⁰ In addition, McNair, in 1961, urged that States should insert into multilateral treaties (such as the ICESCR) express provisions on reservations.¹¹ The absence of a specific clause on reservations and declarations in the Covenant raises four fundamental issues discussed in this article. Firstly, what reservations to the ICESCR are permissible or impermissible? Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible? Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation? And finally, are some of the existing State reservations to the Covenant incompatible with the object and purpose of the Covenant (i.e. the Covenant’s essential rules, rights and obligations) and thus impermissible? If so, how should reservations incompatible with the object and purpose of the Covenant be treated by the Committee on Economic, Social and Cultural Rights (CESCR or the Committee)? The approach and methods used to address these research questions *Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, Martinus Nijhoff Publishers, Leiden, 2004 is to examine the texts of the selected State reservations in the light of the object and purpose of the Covenant while taking into account the general law of treaties as contained in the Vienna Convention on the Law of Treaties (Vienna Convention or

4 2187 United Nations Treaty Series 90, entered into force 1 July 2002. Article 20 provides: ‘No reservations may be made to this Statute’. See Fitzmaurice, M., ‘On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties’, *Singapore Year Book of International Law*, Vol. 10, 2006, pp. 133–173, at pp. 158–160.

5 429 United Nations Treaty Series 93, entered into force 22 May 1962, Article 9 states: ‘Reservations to this Convention shall not be permitted’.

6 Supplementary Convention on the abolition of slavery, the Slave Trade and Institutions and Practices similar to Slavery, 226 United Nations Treaty Series 3, entered into force 30 April 1957, Article 9 stating that ‘[n]o reservations may be made to this Convention’.

7 213 United Nations Treaty Series 222, entered into force 3 September 1953. Article 57 ECHR provides: ‘1. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned’. For a discussion see Van Dijk, P. et al. (eds), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Antwerpen/Oxford, 4th ed., 2006, pp. 1101–1115.

8 993 United Nations Treaty Series 3, entered into force 3 January 1976.

9 999 United Nations Treaty Series 171, entered into force 23 March 1976.

10 Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, 2nd ed., 2005, p. xxviii, citing, inter alia, GA Res. 546 (VI) and UN Docs E/CN.4/L.345, and Add.1, 24 March 1954; and A/C.3/1353 Rev. 1.

11 McNair, A.D., *The Law of Treaties*, Clarendon Press, Oxford, 2nd ed., 1961, pp. 169–170.

VCLT),¹² any objections made by States, concluding observations of the CESCR, and relevant jurisprudence of other human rights bodies.

In fact, upon ratification of the ICESCR, some States have limited their legal obligations under the Covenant by formulating reservations, at times disguised as 'declarations', 'understandings', 'explanations', or 'observations', to some of the Covenant provisions.¹³ While a declaration is a unilateral statement which purports to clarify the meaning or scope attributed to the treaty or some of its provisions, a reservation is defined as:

A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.¹⁴

Though not as seriously afflicted by reservations as some other human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁵ and the Convention on the Rights of the Child (CRC),¹⁶ the Covenant has nonetheless been the object of some wide reservations to which only a few States have made objections¹⁷ within 12 months of communication of the reservations suggesting that States have silently approved, such reservations.¹⁸ As of 18 April 2008, 42 of the 158 States parties to the ICESCR had, entered several declarations and reservations of varying significance to their acceptance of the

12 1155 United Nations Treaty Series 331; 8 International Legal Materials 679, entered into force 27 January 1980.

13 For a list of such reservations, see Declarations and Reservations at www.2ohchr.org/english/bodies/ratification/3.htm#ratifications (hereinafter 'Declarations'). Objections are also available on this website (hereinafter 'Objections').

14 See Vienna Convention, *supra* note 10, Article 2(1)(d).

15 *Ibid.*

16 UN Doc. A/44/49, 1577 United Nations Treaty Series 3, entered into force 2 September 1990. For the text of declarations and reservations to the CRC, see United Nations Treaty Collection at www.unhchr.ch/html/menu3/b/treaty15_asp.htm. For the analysis see Schabas, W.A., 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly*, Vol. 18, No. 2, 1996, pp. 472–491; and Hashemi, K., 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation', *Human Rights Quarterly*, Vol. 29, No. 1, 2007, pp. 194–227.

17 See Objections, *supra* note 11. For the definition of the term 'objection' see ILC, Reservations to Treaties, UN Doc. A/CN.4/L.665, 11 May 2005, paras 2.6.1 and 2.6.2.

18 Article 20(5) Vienna Convention provides that 'unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later'. Although this rule may not reflect customary international law, it is now accepted practice. See UN Depository Practice, Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, UN Doc. ST/LEG/7/Rev.1, United Nations, New York, 1999, paras 213–214 and the Twelfth Report on Reservations to Treaties, *op.cit.* (note 1), paras 214–217. It is arguable, however, that no time limit applies to objections against reservations, which are inadmissible under international law.

obligations under the Covenant,¹⁹ to which only 14 States made objections.²⁰ The scope of these reservations includes the following aspects: (i) the exclusion of the duty to recognise particular rights in the Covenant;²¹ (ii) 'the right to postpone' certain rights in the Covenant;²² (iii) general reservations couched in broad terms, often directed to ensuring the continued supremacy of certain domestic legal provisions over some or all provisions of the Covenant.²³

The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties or make State obligations obscure. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken under the Covenant. Although there have been scholarly analyses of reservations to human rights treaties generally, the focus has been on other human rights treaties (such as the ICCPR and its First Optional Protocol,

19 See Declarations, *supra* note 11. States which have formulated reservations to the ICE-SCR include: Afghanistan; Algeria; Bangladesh; Barbados; Belgium; Bulgaria; China; Denmark; Egypt; France; Guinea; Hungary; India; Indonesia; Iraq; Ireland; Japan; Kenya; Kuwait; Libyan Arab Jamahiriya; Madagascar; Malta; Mexico; Monaco; Mongolia; the Netherlands; New Zealand; Norway; Pakistan; Romania; Russian Federation; Rwanda; Sweden; Syrian Arab Republic; Thailand; Trinidad and Tobago; Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland; Viet Nam; Yemen; and Zambia. These constitute about 27 per cent of the States parties to the Covenant.

20 See Objections, *supra* note 11. These are Cyprus, Denmark, Finland, France, Germany, Greece, Italy, Latvia, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. These constitute only about 9 per cent of the States parties to the Covenant.

21 See e.g. Declarations, *supra* note 11, Denmark: Japan: and Sweden.

22 *Ibid.* Barbados, for example, reserved the right to postpone: (a) The application of sub-paragraph (a) (1) of Article 7 of the Covenant in so far as it concerns the provision of equal pay to men and women for equal work; (b) the application of Article 10(2) in so far as it related to the special protection to be accorded mothers during a reasonable period during and after childbirth; and (c) the application of Article 13 (2) of the Covenant, in so far as it relates to primary education... The Government of Madagascar reserved the „right to postpone the application of Article 13, para. 2 of the Covenant, more particularly in so far as relates to primary education; Zambia made a similar reservation. See *infra* note.

23 See Section 3 below.

CEDAW, CRC and some regional human rights instruments), but not on the ICESCR.²⁴ Despite this, up to July 2006, the Committee, comprised of 18 experts with recognised competence in the field of human rights monitoring the implementation of the Covenant by States parties, had not had a single general discussion on reservations, and is yet to adopt a comprehensive written position on the matter.

According to the Committee member, Mr Philippe Texier, the Committee has not discussed the issue of reservations to the Covenant because 'the number of reservations relating to the International Covenant on Economic, Social and Cultural Rights was not large, and mainly concerned Articles 6 to 8'.²⁵ This raises the question of whether it is the number or the nature of reservations that should trigger off the Committee's interest in the matter. How many States should make reservations to the Covenant before the number could be considered as 'large'? Is it not the case that the (wide) scope and impact of some of the existing reservations, as opposed to the number, would necessitate an examination of reservations to the Covenant?

This article examines the permissibility of reservations to the ICESCR and discusses some selected reservations to demonstrate that some reservations to the Covenant have significant effects on State obligations under the ICESCR. It argues that it is useful to adopt a carefully drafted general comment or statement on reservations to the ICESCR to give an indication to present States parties, and to those States that are not yet parties, of what reservations are compatible or incompatible with the object and purpose of the Covenant. A clarification of the law in this area may provide useful guidance to States in the formulation of reservations, however named, to the Covenant. It may also help to develop the law on reservations to the Covenant. Such a development would help all States in not entering reservations incompatible with the object and purpose of the Covenant and enable the better protection of economic, social and cultural rights (ESC rights).

24 See e.g. Schabas, W.A., 'Reservations to Human Rights Treaties: Time for Innovation and Reform', *Canadian Yearbook of International Law*, Vol. 32, 1994, pp. 39–81; Montalvo, A.E., 'Reservations to the American Convention on Human Rights: A New Approach', *American University International Law Review*, Vol. 16, No. 2, 2001, pp. 269–313; Redgwell, C.J., 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', *International and Comparative Law Quarterly*, Vol. 46, No. 2, 1997, pp. 390–412; McGrory, G., 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp. 769–826; Goodman, R., 'Human Rights Treaties, Invalid Reservations, and State Consent', *The American Journal of International Law*, Vol. 96, No. 3, 2002, pp. 531–560; Korkeli, K., 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', *European Journal of International Law*, Vol. 12, No. 2, 2002, pp. 437–477; Riddle, J., 'Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process', *The George Washington International Law Review*, Vol. 34, 2002–2003, pp. 605–638; Tillson, Jessica L., 'The Role of Reservations and Declarations before the Inter-American Court of Human Rights: The Las Hermanas Serrano Cruz Case and the Future of Inter-American Justice', *Bepress Legal Series*, Working Paper 921, 27 January 2006, available at: <http://law.bepress.com/expreso/eps/921>; and Linton, S., 'ASEAN [Association of South East Asian Nations] States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children', *Human Rights Quarterly*, Vol. 30, No. 2, 2008, pp. 436–493.

25 See Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2006/5, 4 July 2006, para. 8. See also *The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties*, UN Doc. HRI/MC/2005/5, 13 June 2005, para. 20.

The article adopts the following structure. Section 2 considers what reservations are permissible (or not permissible) under the ICESCR and how invalid reservations to the ICESCR should be treated by the treaty monitoring body. Section 3 discusses some questionable reservations based on reservations made by Kuwait, Pakistan, and the Republic of Turkey, upon ratifying, or acceding to the ICESCR. The selection made was based on the need to examine some of the existing widest and more general reservations to the ICESCR, (that is, reservations which appear to be too 'sweeping' to raise the question whether they are compatible with the object and purpose of the Covenant). Although the States considered in this article could be regarded either as Muslim-majority States (or to an extent 'Islamic' States with the exception of Turkey as their national constitutions provide for the supremacy of, or protect some aspects of, Islamic law or Shari'a),²⁶ their reservations to the ICESCR were not stated to have been motivated by Islamic law. While these States are not representative of the geographical diversity in the world, their reservations reflect the nature of questionable reservations to the ICESCR and would raise similar issues if made to other human rights treaties. In section 4 reservations placed by the selected States – Kuwait, Pakistan, and the Republic of Turkey – are compared with reservations of other States drawing examples from Africa and Europe where a number of States have also made declarations/reservations to the Covenant. Are the latter different from the ones made by the selected States, and if so, in what way and why? Section 5 concludes that reservations incompatible with the object and purpose of the Covenant are invalid, and thus of no legal effect. It is pointless to maintain such reservations. It is noted that in the spirit of the Vienna Declaration and Programme of Action, adopted in 1993, States are encouraged 'to regularly review any reservations with a view to withdrawing them'²⁷ particularly those that appear to be incompatible with the object and purpose of the ICESCR. It is observed that the CESCR can play a key role in this crucial and difficult area by examining reservations to the Covenant more systematically in a general comment or in a comprehensive statement and, when applicable, in its concluding observations on State reports.

PERMISSIBLE RESERVATIONS TO THE ICESCR AND THE EFFECT OF AN INVALID RESERVATION

In this section, two issues are examined. Firstly, what reservations are permissible (or not permissible) under the ICESCR given that the Covenant does not exclude or permit expressly the possibility of reservations? Secondly, who should decide whether a reservation under the ICESCR is invalid? And if a reservation under the Covenant is invalid, what is the legal effect of such an invalid reservation?

26 See US Department of State, International Religious Freedom Report 2007, at: www.state.gov/g/drl/rls/irf/2007/ Turkey is a secular State with a predominantly Muslim population

27 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, Part II, paras 5, 26, 39 and 46 (hereinafter 'Vienna Declaration').

Permissible Reservations under ICESCR: the 'Object and Purpose' Test

Reservations are generally permissible in international law as a compromise between the objectives of preservation of the integrity of the normative text of the treaty (so that all parties are equally bound) and the maximisation of ratifications to (or universality of participation in) the treaty.²⁸ From one perspective, reservations to human rights treaties detract from the protection of individuals, which is the purpose of international human rights law and thereby weaken (or in some cases totally undermine) the overall effectiveness of human rights norms.²⁹ Yet another perspective is that reservations are a legitimate, perhaps even desirable, means of accounting for cultural, religious, economic, or political value diversity across nations.³⁰ However, even if reservations could play an important and legitimate role, the absence of a specific prohibition or limitation, in either form or content, on reservations in the ICESCR does not mean that any reservation is permitted. In accordance with the rules of customary international law that are reflected in Article 19(c) of the Vienna Convention, reservations can therefore be made, provided they are not 'incompatible with the object and purpose of the treaty'.³¹

A reservation is incompatible with the object and purpose of the treaty if it has a 'serious impact on the essential rules, rights or obligations indispensable to the general architecture of the treaty, thereby depriving it of its *raison d'être*'.³² This must also include all interpretative declarations whose effect is that of reservations. This is consistent with the practice in other existing international human rights treaties such as CEDAW,³³ and CRC,³⁴ and the International

28 As noted by the Human Rights Committee (HRC): 'Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant'. See HRC, General Comment No. 24 (52): General Comment on Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 4.

29 Schabas, *loc.cit.* (note 14), at p. 472. See also CEDAW Committee, 'Statements on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', in: Report of the Committee on the Elimination of Discrimination against Women, UN Doc. A/53/38/Rev.1, 1998, pp. 47-50, para. 14 stating that '[r]eservations to any human rights treaty limit the application of internationally accepted human rights norms at the national level'.

30 Neumayer, E., 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties', *The Journal of Legal Studies*, Vol. 32, No. 6, 2007, pp. 397-429; and Chairpersons of UN Human Rights Treaty Bodies, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, UN Doc. A/47/628, 10 November 1992, para. 60.

31 Section 313 of the Restatement (Third), *Foreign Relations Law of the United States* (1987), is to the same effect. For a discussion of 'Object and Purpose' see Linderfalk, U., 'On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19', *Nordic Journal of International Law*, Vol. 72, No. 4, 2003, pp. 429-448.

32 See Tenth Report on Reservations to Treaties, Addendum, *op.cit.* (note 1), at p. 14, para. 89, Guideline 3.1.5; and Note by the Special Rapporteur on Draft Guideline 3.1.5, *Definition of the Object and Purpose of the Treaty*, UN Doc. A/CN.4/572, 21 June 2006, at p. 3, paras 7-8.

33 Article 28(2) CEDAW, *supra* note 13, states: 'A reservation incompatible with the object and purpose of the present Convention shall not be permitted'.

34 Article 51(2) CRC, *supra* note 14, provides: 'A reservation incompatible with the object and purpose of the present Convention shall not be permitted'.

Convention on the Elimination of All Forms of Racial Discrimination (CERD),³⁵ all of which protect some ESC rights and prohibit expressly reservations that are incompatible with the object and purpose of the respective treaties.

It is also in line with the conclusions reached by the International Court of Justice (ICJ) in its Advisory Opinion of 28 May 1951 in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (the 1951 ICJ Advisory Opinion or Reservations to the Genocide Convention Case)³⁶. It follows that since the ICESCR is silent on the matter of reservations, a reservation to the Covenant has to pass the compatibility (object and purpose) test to be valid. It is, however, debatable whether a State's reservation to certain provisions in the Covenant is 'compatible' or 'incompatible' with the object and purpose of the ICESCR since this is not defined in the Covenant.³⁷ The question, then, remains what is the object and purpose of the Covenant?

It is useful to note that modern human rights treaties in general (including the ICESCR) are not multilateral treaties of a traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of States parties.³⁸ Their object and purpose is the legal protection of basic rights of individual human beings, and groups of individuals in some contexts, from infringements by the State and non-State actors given their increasing role and power in the international legal system.³⁹ Each of these rights carries with it corresponding obligations primarily for the State. In the words of the CESCR, the 'overall objective, indeed the *raison d'être*, of the Covenant (...) is to establish clear obligations for States parties in respect of the

35 660 United Nations Treaty Series 195, entered into force 4 January 1969, Article 20(2) ICERD provides: 'A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it'.

36 ICJ Reports 1951, 15, at p. 29. The Advisory Opinion (7-5 vote) sanctioned the entering of reservations to international obligations subject the object and purpose of the treaty. The ICJ noted that: 'The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them'.

37 In general the compatibility of a reservation with the object and purpose of the treaty is subject to different views. See e.g. ICJ, Judgment of 3 February 2006, Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo vs Rwanda), Jurisdiction of the Court and Admissibility of the Application (hereinafter Congo vs Rwanda), para. 67; and joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, para. 21.

38 See e.g. the Inter-American Court of Human Rights, The Effect of Reservations on the Entry into Force of the American Convention (Articles 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2, 1982, paras 29-30; Restrictions to the Death Penalty (Article 4(2) and (4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, 8 September 1983, Inter-American Court of Human Rights, Series A, No. 3, 1983, para. 50; European Commission on Human Rights, Austria vs Italy, Application No. 788/60, 4 European Yearbook of Human Rights 116, at p. 140 (1961); and HRC, General Comment No. 24 (52), op.cit. (note 26), para. 17.

39 Ibid. See also Ssenyonjo, M., 'Economic, Social and Cultural Rights and Non-State Actors', in: Baderin, M. and McCorquodale, R. (eds), Economic, Social and Cultural Rights in Action, Oxford University Press, Oxford, 2007, chapter 6, pp. 109-138; Alston, P. (ed.), Non-State Actors and Human Rights, Oxford University Press, Oxford, 2005; McCorquodale, R., 'An Inclusive International Legal System', Leiden Journal of International Law, Vol. 17, No. 3, 2004, pp. 477-504.

full realisation of the rights in question⁴⁰. It follows, then, that at the very minimum, States parties to the Covenant are under an obligation 'not to raise any obstacle' (whether by way of reservations or otherwise) to the exercise of the rights recognised in the Covenant.⁴¹ Although in accordance with State practice not all reservations to the substantive provisions of a human rights treaty are inherently incompatible with the object and purpose of a particular treaty, the following reservations would arguably be difficult to reconcile with the object and purpose of the treaty:

- (i) Reservations worded in vague, general language, which do not allow their scope to be determined.
- (ii) Reservations that offend peremptory or higher norms of general international law (*jus cogens*)⁴² or obligations that concern or bind all States (obligations *erga omnes*) such as freedom from racial discrimination.⁴³ These are prohibited because they might threaten the integrity of the peremptory norm, the application of which must be uniform, and would inevitably affect the 'quintessence' of the treaty. In the context of the ICESCR, a State's obligation to take steps on a non-discriminatory basis in accordance with Articles 2(1), 2(2) and 3 of the Covenant cannot be subjected to reservations because 'the philosophy of the Covenant [is] based on the principle of non-discrimination and on the idea of the universality of human rights'.⁴⁴
- (iii) Reservations that offend norms of customary international law.⁴⁵ In September 2003, the Inter-American Court of Human Rights asserted that the principle of equality and non-discrimination 'forms part of general international law' because it

40 CESCR, General Comment No. 3: The Nature of States Parties' Obligations, Fifth session, 1990, UN Doc. E/1991/23, annex III, at 86, 1991, para. 9 (emphasis added).

41 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2002, ICJ Reports 2004, p. 136, available at www.icj-cij.org/docket/files/131/1671.pdf, para. 112.

42 Vienna Convention, *supra* note 10, Article 53 defines a 'peremptory norm' of general international law (also called *jus cogens*, Latin for 'compelling law') as 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. On *jus cogens*, see Linderfalk, U., 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', *European Journal of International Law*, Vol. 18, No. 5, 2008, pp. 853-871; and Bianchi, A., 'Human Rights and the Magic of Jus Cogens', *The European Journal of International Law*, Vol. 9, No. 3, 2008, pp. 491-508.

43 See ICJ, *Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium vs Spain)*, Judgment, ICJ Reports 1970, 3, at pp. 32-34 (Judgment of 5 February 1970); and Tams, C.J., *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, 16, at p. 57.

44 See CESCR, *Concluding Observations: Algeria*, UN Doc. E/C.12/1995/17, 28 December 1995, para. 16.

45 HRC, General Comment 24 (52), *op.cit.* (note 26), para. 8. This is debatable. See Pellet, UN Doc. A/CN.4/558/Add.1, 14 June 2005, *op.cit.* (note 1), paras 116-129.

is applicable to all States, regardless of whether or not they are a party to a specific international treaty.⁴⁶

- (iv) Any reservation by which a State purports to exclude or modify the application of a treaty provision in order to preserve the integrity of its domestic law incompatible with the object and purpose of the Covenant. For example, a reservation to preserve discrimination against women in accordance with domestic law would be contrary to the object and purpose of the Covenant because the Covenant is predicated on the principles of 'absolute non-discrimination against women' and their full enjoyment of all the rights enjoyed by their male counterparts.⁴⁷ In addition, a reservation to the core obligations arising from the 'minimum essential levels' of the rights protected under the Covenant – including rights to food; education; health; water; the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, the right to work; and the right to social security⁴⁸ – would largely deprive the Covenant of its *raison d'être*,⁴⁹ and thus is unlikely to be compatible with the Covenant's object and purpose.

The Committee confirmed that a State party cannot, under any circumstances whatsoever, justify its non-compliance with these core obligations, which are 'non-derogable'.⁵⁰ To justify such reservations to non-derogable obligations, a State would have a 'heavy onus'.⁵¹ One reason for core obligations of ESC rights being considered non-derogable is because their suspension is irrelevant and unnecessary to the legitimate control of the state of national emergency (for example, the undertaking to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind and to ensure the equal right of men and women to the enjoyment of all ESC rights in Articles 2 and 3 would deserve greater rather than less importance in times of national emergency so as to protect vulnerable groups against discrimination).

Effect of an invalid reservation

Two issues are addressed briefly in this section. First, who should determine the validity of a reservation to the ICESCR? Is it a matter exclusively for a reserving State and those making

46 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 17 September 2003, Inter-American Court of Human Rights, Series A, No. 18, 2003, available at: www1.umn.edu/humanrts/iachr/series_A_OC-18.html, paras 101 and 173(4).

47 CESCR, Concluding Observations: Libyan Arab Jamahiriya, UN Doc. E/C.12/1/Add.15, 20 May 1997, para. 13 (emphasis added).

48 CESCR, General Comment Nos 11 (para. 17); 13 (para. 57); 14 (para. 43); 15 (para. 37); 17 (para. 39); 18 (para. 31); and 19 (para. 59) respectively, all available at: www2.ohchr.org/english/bodies/cescr/comments.htm.

49 CESCR, General Comment 3, op.cit. (note 38), para. 10 (emphasis added).

50 CESCR, General Comment Nos 14, para. 47; and 15, para. 40. See also CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/10, 10 May 2001, para. 18.

51 See also HRC, General Comment 24 (52), op.cit. (note 26), para. 10.

objections or should the CESCR pronounce itself on compatibility with the object and purpose, when the need arises? Second, what legal effect should follow the determination of a reservation to the ICESCR as invalid (unacceptable, irregular, impermissible or inadmissible)?

Who Should Determine the Validity of a Reservation to the ICESCR?

In recent years there has been a tendency for some States, and certain commentators, to view the 1951 ICJ Advisory Opinion as stipulating a regime of inter-State *laissez-faire* in the matter of reservations, in the sense that while the object and purpose of a convention should be borne in mind both by those making reservations and those objecting to them, everything in the final analysis is left to the States themselves.⁵² According to this view, nobody beyond the States themselves has anything to say on reservations. It should, however, be noted that the 1951 ICJ Advisory Opinion did not foreclose legal developments in respect of the law on reservations and should not be read in such a restrictive way.⁵³

The practice of the relevant human rights bodies supports this view. For example, the ECtHR, the Inter-American Court of Human Rights, and the Human Rights Committee (HRC) have not followed the *laissez faire* approach attributed to the 1951 ICJ Advisory Opinion; they have pronounced on the compatibility of specific reservations to the ECHR, the American Convention on Human Rights, and the ICCPR respectively.⁵⁴ They have not thought that it was simply a matter of bilateral sets of obligations, left to individual assessment of the States parties to the Convention concerned. The practice of such bodies is not to be viewed as ‘making an exception’ to the law as determined in 1951 by the ICJ; but rather a development of the law to meet contemporary realities or to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently.⁵⁵ In addition, the practice of the ICJ itself reflects this trend. For example, in 2006 in *Congo v Rwanda*,⁵⁶ the ICJ considered the impact of Rwanda’s reservation to Article IX of the Genocide Convention. The ICJ made its own assessment of the compatibility of such a reservation⁵⁷ and went beyond noting that a

52 *Congo vs Rwanda*, supra note 35, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, para. 4. In 2003, Professor Malcolm N. Shaw stated: ‘At the moment, unless the particular treaty otherwise provides, whether a reservation is impermissible is a determination to be made by states parties to the treaty themselves’. See Shaw, M.N., *International Law*, Cambridge University Press, Cambridge, 5th ed., 2003, p. 828.

53 *Congo vs Rwanda*, supra note 35, Joint Separate Opinion, para. 13; Higgins, R., ‘Human Rights in the International Court of Justice’, *Leiden Journal of International Law*, Vol. 20, No. 4, 2007, pp. 745–751, at pp. 746–747.

54 See in particular, ECHR, *Belilos vs Switzerland*, Judgment of 29 April 1988, Series A, Vol. 132, 1988, 10 European Human Rights Reports 466; *Loizidou vs Turkey*, supra note 42; The Effect of Reservations on the Entry Into Force of the American Convention, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, Series A, No. 2, 1982; *Restrictions to the Death Penalty*; Advisory Opinion OC-3/83, Inter-American Court of Human Rights, Series A, No. 3, 1983; and *Rawle Kennedy vs Trinidad and Tobago*, HRC, Communication No. 845, UN Doc. CCPR/C/67D/845/1999, 31 December 1999. This trend was observed in a Separate Opinion cited in note 35 supra, para. 16.

55 See *Congo vs Rwanda*, supra note 35, paras 16 and 22.

56 Supra note 35.

57 *Ibid*, para. 67.

reservation had been made by one State, which did not occasion an objection by the other. The Court found that Rwanda's reservation 'does not appear contrary to the object and purpose of the Convention'.⁵⁸

The ICJ's opinion supports the view that the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. Should the CESCR assess the compatibility of reservations to the ICESCR with the object and purpose of the Covenant? The compliance of States with their obligations under the Covenant is monitored by the CESCR.⁵⁹ This Committee was established in 1985 by a decision of the Economic and Social Council (ECOSOC) of the UN,⁶⁰ to merely 'assist' it in the 'consideration' of State reports.⁶¹ Thus, the Committee is not a body established by treaty, but a subsidiary body of ECOSOC. It has the primary responsibility for 'monitoring' the implementation of economic, social and cultural rights guaranteed under the Covenant.⁶² It can effectively monitor the measures adopted and the progress made if it can determine the extent of each State party's obligations under the Covenant, and this necessarily involves addressing the issue of the legality of reservations. In particular, whether a reservation is permissible, and whether it is compatible with the object and purpose of the Covenant.

With respect to reservations, the approach of the CESCR has so far involved the following quasi-diplomatic' methods. Firstly, the Committee has made positive remarks welcoming a State party's adherence to the Covenant without any reservations.⁶³ It has also welcomed a State party's statement that it was in the process of reviewing human rights treaty reservations, with a view to withdrawing those superseded by legislation or practice.⁶⁴ Where a State withdrew reservations to the Covenant (Articles 1 and 7), the Committee warmly welcomed

58 See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo vs Rwanda)*, Provisional Measures, Order of 10 July 2002, ICJ Reports 2002, p. 246, para. 72. In its later decision on jurisdiction (*supra* note 35, para. 67), the majority found that 'Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention'

59 See Arambulo, K., *Strengthening the Supervision of the International Covenant on Economic, Social, and Cultural Rights: Theoretical and Procedural Aspects*, Intersentia, Antwerpen, 1999.

60 ECOSOC Decision 1985/17. By Articles 16 and 17 of the ICESCR, States parties to the Covenant are required to submit reports, at intervals defined by ECOSOC, on the 'measures which they have adopted' and 'the progress made' in achieving the observance of the rights in the Covenant.

61 ECOSOC Res. 1985/17, 28 May 1985 (in UN Doc. E/1985/85, p. 15), para. F.

62 See CESCR, Report on the Eighteenth and Nineteenth Sessions, UN Doc. E/1999/22, United Nations, New York and Geneva, 1999, para. 24. The report is available at: www.un.org/documents/ecosoc/docs/1999/e1999-22.htm.

63 CESCR, Concluding Observations: Zimbabwe, UN Doc. E/1998/22, 20 June 1998, para. 67.

64 CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (UK), UN Doc. E/C.12/1/Add.79, 5 June 2002, para. 9.

the withdrawal.⁶⁵ All these examples indicate that the Committee considers the ratification of the Covenant without reservations, or the withdrawal of the existing reservations, as the preferred option and a positive aspect in line with the object and purpose of the Covenant. As the Committee has stated:

[W]hen a State has ratified the Covenant without making any reservations, it is obliged to comply with all of the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more Articles of the Covenant, except in accordance with the provisions of the Covenant and the principles of general international law.⁶⁶

Secondly, the Committee has encouraged reserving States parties either to withdraw 'reservations to the Covenant that have become redundant'⁶⁷ or the withdrawal of reservations to substantive rights (such as Articles 6, 7, 8, and 13) and to withdraw reservations to other human rights treaties (such as the ICCPR and the Convention on the Rights of the Child) without further explanations and without coming to the conclusion whether the reservations in issue are incompatible with the object and purpose of the Covenant.⁶⁸ More recently, in the Concluding Observations on Netherlands Antilles, the Committee noted that the right to strike was recognised in the State party, but regretted that the State party had not clarified 'the reasons for maintaining its reservation to Article 8 (1) (d) of the Covenant in respect of the Netherlands Antilles'.⁶⁹ The Committee recommended that 'the State party give more serious

65 CESCR, Concluding Observations: Hong Kong Special Administrative Region, UN Doc. E/2002/22, adopted 11 May 2001, para. 166.

66 CESCR, Concluding Observations: Morocco, UN Doc. E/C.12/1994/5, 30 May 1994, para. 9.

67 UN Doc. E/C.12/1/Add.79, *op.cit.* (note 62), para. 43.

68 See CESCR, Concluding Observations: The [Democratic Republic of the] Congo, UN Doc. E/C.12/1/Add.45, 23 May 2000, para. 29, the Committee recommended 'that the State Party withdraw its reservation to Article 13, paragraphs 3 and 4, of the Covenant'; Hong Kong Special Administrative Region, UN Doc. E/2002/22, 2001, para. 191, the Committee recommended that the State Party 'withdraw its reservation to Article 6 of the Covenant and the interpretative declaration replacing its former reservation on Article 8'; France, UN Doc. E/2002/22, 2001, para. 874 the Committee recommended that France withdraws its reservation with regard to Article 27 of the ICCPR; Japan, UN Doc. E/2002/22, 2001, para. 613 the committee urged Japan 'to consider the withdrawal of its reservations to Articles 7(d), 8, paragraph 2, and Article 13, paragraph 2 (b) and (c) of the Covenant'; New Zealand, UN Doc. E/2004/22, 2003, para. 198 the Committee encouraged New Zealand 'to withdraw its reservation to Article 8 of the Covenant'; Netherlands, UN Doc. E/1999/22, 1998, para. 225 the Committee encouraged the Government 'to carry out its intention to withdraw its reservation to the Covenant concerning the right to strike'; Sweden, UN Doc. E/2002/22, 2001, para. 739, the Committee recommended that Sweden 'withdraw its reservation to Article 7(d) of the Covenant'; Trinidad and Tobago, UN Doc. E/2003/22, 2002, para. 283, the Committee recommended that Trinidad and Tobago 'withdraw its reservation to Article 8 of the Covenant'; CESCR, Concluding Observations: France, UN Doc. E/C.12/1/Add.72, 23 November 2001, para. 25, the Committee recommended that France 'withdraw its reservation with regard to Article 27 of the ICCPR' and CESCR, Concluding Observations: France, UN Doc. E/C.12/FRA/CO/3, 9 June 2008, para. 49 the Committee recommended that France 'withdraw its reservation to Article 27 of the International Covenant on Civil and Political Rights and to Article 30 of the Convention on the Rights of the Child'.

69 CESCR, Concluding Observations: Netherlands Antilles, UN Doc. E/C.12/NLD/CO/3/Add.1, 31 January 2008, para. 14.

consideration to withdrawing the reservation to Article 8 (1) (d) of the Covenant', but without stating the reason(s) for considering the withdrawal of the reservation and when to consider the withdrawal.⁷⁰ The Committee did not also request the State party to provide the reasons for maintaining the reservation as a follow-up measure within a defined period of time. In addition, the Committee did not state that the declaration was invalid. This cautious approach appears to be a result of fear that States will resent any intervention regarding the legality of reservations and possibly respond by denouncing the Covenant or any Optional Protocol that might be adopted in the future.⁷¹ In addition this approach might discourage some States which have not yet ratified the Covenant from considering ratification in the future subject to some reservations. Although a State may not be able to legally withdraw from the ICESCR since the ICESCR, like the ICCPR, does not provide for denunciation or withdrawal from the Covenant,⁷² from a practical perspective it is desirable to take into account the possible reaction of States to severing reservations made to the ICESCR from consent to be bound.⁷³ As yet, most States have maintained their reservations.

Other UN treaty monitoring bodies have also examined relevant reservations⁷⁴ although for sometime there was no agreed common approach among UN treaty monitoring bodies.⁷⁵ It is interesting to note that some UN treaty monitoring bodies have encouraged States to withdraw reservations to the ICESCR. On one occasion, for example, the Committee on the Rights of the Child (CRC Committee) noted with concern that the reservation made by the Government of Kenya to Article 10(2) of the ICESCR 'limits the family support available to women in employment before and after childbirth'; and recommended that Kenya: 'Strengthen[s] the support available to women before and after childbirth by taking appropriate measures including

70 Ibid, para. 33. In April 2008, the HRC recommended that a State withdraws immediately a reservation it considered to be 'vague and extremely wide' and 'offending peremptory norms of international law'. See HRC, Concluding Observations: Botswana, UN Doc. CCPR/C/BWA/CO/1, 24 April 2008, para. 14: 'The State party should immediately withdraw its reservation to Article 7 of the Covenant, and should also withdraw its reservation to Article 12 of the Covenant'.

71 On 18 June 2008, the United Nations Human Rights Council adopted without a vote an Optional Protocol to the ICESCR and recommended that the General Assembly adopt and open for signature, ratification and accession the Optional Protocol, at a signing ceremony in Geneva in March 2009. The Optional Protocol was annexed to a resolution A/HRC/8/L.2/Rev.1/Corr.1. See Human Rights Council, Resolution 8/2: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf.

72 See also HRC, General Comment 26 (61): Continuity of Obligations, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997.

73 When the HRC applied its General Comment 24 (52) in the *Rawle Kennedy (represented by the London law firm Simons Muirhead & Burton) vs Trinidad and Tobago*, Communication No. 845, UN Doc. CCPR/C/67/D/845/1999, 31 December 1999, Trinidad and Tobago denounced the Optional Protocol again and did not reaccede.

74 See Report on Reservations, UN Doc. HRI/MC/2008/5, 29 May 2008.

75 See generally UN, *The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties*, UN Doc. HRI/MC/2005/5, 13 June 2005.

the removal of the reservation to paragraph 2 of Article 10 of the International Covenant on Economic, Social and Cultural Rights, of 1966.⁷⁶

It may be questioned whether the CESCR is under an obligation or simply has the option of entering into a 'reservations dialogue' with States? Given the mandate of the Committee, as a body monitoring State obligations under the Covenant, and the fact that a reservation becomes an integral part of the treaty, it is arguable that a 'reservations dialogue' with relevant States is more of an obligation than an option. Moreover, any meaningful interpretation of a treaty calls for an interpretation of any reservation made thereto.⁷⁷ Therefore, as a body monitoring the Covenant, the CESCR should consistently determine (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity.⁷⁸ Thus, reservations to the ICESCR must of necessity be interpreted by the CESCR by reference to relevant principles of general international law within the general context of the Covenant and taking into account its object and purpose.

The General Effect of an Invalid Reservation

What are the effects of an invalid reservation? While a detailed discussion of this question is beyond the scope of this article, it is vital to note that the general effect of an invalid reservation to human rights treaties has been a subject of different views since this was not specified in the Vienna Convention. It could be one of the following three options. First, the State remains bound to the treaty except for the provision(s) to which the reservation related.⁷⁹ This means that a State should be bound by the obligations of the treaty beyond the limits foreseen in those reservations. Second, the invalidity of a reservation nullifies the instrument of ratification as a whole and thus the State is no longer a party to the agreement until it makes it clear that it is prepared to be a party without reservation.⁸⁰ Third, an invalid reservation can be severed from the instrument of ratification such that the State remains bound to the treaty including the provision(s) to which the reservation related.⁸¹ But the Vienna Convention is silent on severance because it only regulates the consequences of permissible reservations and objections to them.

76 See CRC Committee, Concluding Observations: Kenya, UN Doc. CRC/C/KEN/CO/2, 19 June 2007, paras 36(b) and 37(b).

77 Restrictions to the Death Penalty; Advisory Opinion OC-3/83, Inter-American Court of Human Rights, Series A, No. 3, 1983, paras 62–66.

78 See final working paper submitted by Françoise Hampson, Reservations to Human Rights Treaties, UN Doc. E/CN.4/Sub.2/2004/42, 19 July 2004, para. 37.

79 See ECtHR, *Belilos vs Switzerland*, supra note 52; and *Weber vs Switzerland*, Judgment of 22 May 1990, ECHR, Series A, Vol. 177, 1990, 12 European Human Rights Reports 508.

80 In its Advisory Opinion of 28 May 1951 on Reservations to the Genocide Convention Case, supra note 34, at p. 23, the ICJ (by seven votes to five) advised that 'a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention' (emphasis added).

81 For a discussion see Goodman, R., 'Human Rights Treaties, Invalid Reservations, and State Consent', *The American Journal of International Law*, Vol. 96, No. 3, 2002, pp. 531–560; and Edwards, R.E., 'Reservations to Treaties: The *Belilos* Case and the Work of the International Law Commission', *University of Toledo Law Review*, Vol. 31, No. 2, 2000, pp. 195–207.

It neither rejects nor supports the severability approach. Which of these three options would enhance the object and purpose of the ICESCR while respecting State consent given that 'in its treaty relations a State cannot be bound without its consent'?⁸²

While there is no consensus on this issue, both the 1951 ICJ Advisory Opinion and Article 19 of the Vienna Convention imply that if the reservation is not compatible with the object and purpose of the treaty, it is not capable of being accepted.⁸³ In that case, there are only two possibilities depending on whether or not a reservation constituted an 'essential condition' of ratification: the State either does not become a party to the treaty at all (clearly an undesirable outcome as this does not enhance the protection of human rights) or it becomes a party without the benefit of the 'reservation'.

Can a prohibited reservation or a reservation incompatible with the object and purpose of a treaty be severed? According to the HRC: The normal [but presumably not automatic] consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.⁸⁴

The above position triggered off critical comments by, among others, certain States notably the US, the UK and France mainly based on the principle of State consent noting that severability is in opposition to State consent.⁸⁵ Although no legal grounds were relied on for the above view of the HRC, the above position is defensible where a reservation is not essential in the sense that a State would have ratified the treaty without it.⁸⁶ Where a reservation constituted an essential part of a State's consent to be bound or a sine qua non of ratification, it is arguable that 'a State which purports to ratify a human rights treaty subject to a [an essential] reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all – unless it withdraws the reservation.'⁸⁷ Some members of the HRC supported this view in the *Rawle Kennedy v Trinidad and Tobago* Case.⁸⁸ Similar comments were made by Sir Hersch Lauterpacht in his dissenting opinion in the *Interhandel* Case, in which he stated that if a 'reservation is an essential condition of the acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then

82 Reservations to the Genocide Convention Case, *supra* note 34, at p. 21.

83 *Ibid*, at p. 23 quoted in note 78.

84 HRC, General Comment 24 (52), *op.cit.* (note 26), para. 18 (emphasis added).

85 See UN, Report of the Human Rights Committee 1995, UN Doc. A/50/40, Vol. I, United Nations, New York, 1996, pp. 126–134 (Observations by the United States of America and the United Kingdom); and UN, Report of the Human Rights Committee 1996, UN Doc. A/51/40, Vol. I, United Nations, New York, 1997, pp. 104–106 (Observations by France).

86 See also Moloney, R., 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent', *Melbourne Journal of International Law*, Vol. 5, No. 1, 2004, pp. 155–168, at p. 168.

87 Observations by the United Kingdom on General Comment No. 24 (52), *Human Rights Law Journal*, Vol. 16, 1995, at p. 426.

88 UN Doc. CCPR/C/67/D/845/1999, *op.cit.* (note 71), Individual, dissenting, opinion of Committee members Nisuke Ando, Prafulachandra N. Bhagwati, Eckart Klein and David Kretzmer (hereinafter 'Kennedy Dissent'), para. 16.

it is not open to the Court to disregard that reservation.⁸⁹ However, if an essential reservation is found to be incompatible with the object and purpose of the Covenant, it is invalid. It follows that such an invalid reservation is to be considered null and void meaning that a State will not be able to rely on such a reservation and, unless a State's contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.⁹⁰ In such a case, a State should be invited to make a careful review of an incompatible reservation with a view to withdrawing it with 'the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded'.⁹¹ As yet there have not been any major difficulties with States parties to the ICESCR on the subject of reservations, even where the Committee examined the Articles to which reservations were made.⁹²

QUESTIONABLE RESERVATIONS MADE TO THE ICESCR

The most problematic reservations to human rights treaties including the ICESCR are those which subject a treaty, or some of the core provisions in a treaty, to national constitution ('constitutional reservation') or to the domestic law generally of a reserving State. Some selected examples of such reservations by Kuwait, Pakistan and Turkey are considered in this section to give an idea of their scope and permissibility. Are these reservations compatible with the object and purpose of the Covenant? If not, what is the effect, if any, of such reservations? Are these reservations different from reservations made by other States?

Kuwait's reservations

Upon accession to the ICESCR on 21 May 1996, Kuwait made an 'interpretative declaration' regarding non-discrimination and equality provisions – Article 2(2), and Article 3 – to the ICESCR. By Article 2(2) the States parties to the ICESCR 'undertake to guarantee that the rights enunciated in the (...) Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Under Article 3 the States parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all ESC rights set forth in the Covenant. Non-discrimination and the equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognised under international law and enshrined

89 ICJ, *Switzerland vs United States (Interhandel case)*, 6 ICJ Reports 95, 1959, p. 117 (emphasis added)

90 See Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2007/5, 9 February 2007, para. 7.

91 See Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2006/5, 4 July 2006, para. 16(7). The ECtHR in the case of *Belilos vs Switzerland*, 1988, 10 EHRR 466, concluded that the willingness of Switzerland to be a party to the ECHR was 'stronger' than its willingness to maintain the reservation in question.

92 Report of the Meeting of the Working Group on Reservations, *op.cit.* (note 88), para. 7. See also CESCR, Concluding Observations: Mexico, UN Doc. E/C.12/1/Add.41, 8 December 1999, paras 23 and 39; and CESCR, Concluding Observations: Mexico, UN Doc. E/C.12/MEX/CO/4, 9 June 2006, paras 16 and 34.

in the main international human rights instruments.⁹³ The ICJ stated in the Namibia Case that 'to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin (...) [constitutes] a denial of fundamental human rights'.⁹⁴ In September 2003, the Inter-American Court of Human Rights noted that '[a]t the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*', because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.⁹⁵

These two principles are at the core of the Covenant and apply to all substantive rights recognised in the Covenant. As the CESCR has pointed out, 'The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States Parties'.⁹⁶ As a 'mandatory' obligation, it is clearly not subject to reservations. Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in Articles 6 through 15 ICESCR.⁹⁷ Notwithstanding the fundamental nature of these provisions, Kuwait made the following 'interpretative declaration': Although the Government of Kuwait endorses the worthy principles embodied in Article 2, paragraph 2, and Article 3 as consistent with the provisions of the Kuwait Constitution in general and of its Article 29 in particular, it declares that the rights to which the Articles refer must be exercised within the limits set by Kuwaiti law.

One question arising from the above declaration is whether such a declaration described as 'interpretative' must be regarded as a 'reservation'? Another question is: can a State formulate such a 'declaration' in order to safeguard the application of its domestic law if it is incompatible with the object and purpose of the Covenant? In addressing these questions, as a starting point, in such cases, 'it is necessary to ascertain the original intention of those who drafted the declaration'⁹⁸ and to 'look behind the title given to it and seek to determine the substantive content'.⁹⁹ Clearly the intention of Kuwait's declaration was to subordinate Kuwait's obligations under the Covenant to its national law without specifying the 'limits set by Kuwaiti law'.

93 With respect to ESC rights, see generally CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/4, 11 August 2005.

94 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, 16, at p. 57.

95 Juridical Condition and Rights of the Undocumented Migrants, *supra* note 44, para. 101.

96 *Ibid* para. 16 citing CESCR, General Comment No. 3, *op.cit.* (note 38) (emphasis added).

97 *Ibid*, para. 17.

98 *Belilos vs Switzerland*, *supra* note 52, para. 48.

99 *Ibid*, para. 49.

The declaration, in the absence of further clarification, could be seen as having been intended to ensure that Kuwait accepted what was already the (less-demanding) law of Kuwait.¹⁰⁰ Accordingly, Kuwait's 'interpretative declaration' amounts to 'a unilateral statement', made by a State, when acceding to the ICESCR, whereby it purports to 'exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.¹⁰¹ As such, it must be regarded as a 'reservation'.

The reservation does not indicate in precise terms the domestic legislation or practices referred to and thus offends the principle that reservations must be specific (that is not couched in terms that are too vague or broad for it to be impossible to determine their exact meaning and scope) and transparent, so that the CESCR,¹⁰² those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken.¹⁰³ What are the 'limits set by Kuwaiti law' to which the Covenant is subjected to? Does Kuwaiti law, for example, protect non-discrimination against women, and the equal right of men and women, in the enjoyment of all ESC rights? In 2004, the CEDAW Committee noted that while the general principles of equality and non-discrimination are guaranteed in Articles 7 and 29 of Kuwait's Constitution and contained in domestic legislation, there is a lack of specific definitions of discrimination against women, in national law, in accordance with Article 1 CEDAW.¹⁰⁴ Furthermore, the Committee noted with concern that restrictions on women's employment, as well as protective employment legislation, policies and benefits for women, perpetuate traditional stereotypes regarding women's roles and responsibilities in public life and in the family.¹⁰⁵

In addition, given that 'the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality',¹⁰⁶ a reservation to Article 2(2) and 3 may be considered as offending peremptory norms¹⁰⁷ and accordingly such a reservation would not be compatible with the object and purpose of the Covenant. This is especially so because the elimination of *de jure* as well as *de facto*, discrimination, whether direct or indirect, is required

100 See e.g. CRC Committee, Concluding Observations: Kuwait, UN Doc. CRC/C/15/Add.96, 26 October 1998, para. 17: The Committee was 'concerned that neither the Constitution nor legislation fully conforms to Article 2 of the Convention [on the Rights of the Child], and does not specifically prohibit discrimination on the basis of race, colour, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The Committee was also 'concerned at the existence of some laws, regulations or practices which are discriminatory towards non-Kuwaitis and girls, especially with regard to the right to education and inheritance'.

101 Vienna Convention, *supra* note 10, Article 2(1)(d).

102 CESCR, General Comment 1, Reporting by States Parties, third session, UN Doc. E/1989/22, 1989, Annex III, at 87.

103 HRC, General Comment 24 (52), *op.cit.* (note 26), para. 19.

104 CEDAW Committee, Concluding Observations: Kuwait, UN Doc. A/59/38, 18 March 2004, para. 64.

105 *Ibid.*, para. 72.

106 CESCR, General Comment No. 16, *op.cit.* (note 91), paras 3 and 41.

107 See Vienna Convention, *supra* note 10, Article 53. See also CESCR, Concluding Observations: Monaco, UN Doc. E/C.12/MCO/CO/1, 13 June 2006, paras 8 and 16.

for the equal enjoyment of ESC rights,¹⁰⁸ as well as civil and political rights of women.¹⁰⁹ Thus, Kuwait's reservation casts doubt on Kuwait's commitment to the object and purpose of the Covenant. Commenting on similar 'interpretative declarations' of Kuwait regarding non-discriminatory and equality guarantees in the ICCPR – (Articles 2(1), 3, and 23 of the ICCPR, as well as the 'reservations' concerning Article 25(b) of the ICCPR protecting the right to vote and to be elected at genuine periodic elections), the HRC noted that these raised 'the serious issue of their compatibility with the object and purpose of the Covenant.'¹¹⁰ In particular, the HRC noted that Articles 2 and 3 of the ICCPR 'constitute core rights and overarching principles of international law that cannot be subject to 'limits set by Kuwaiti law'. Such broad and general limitations would undermine the object and purpose of the entire Covenant.'¹¹¹ In principle this equally applies to reservations to Articles 2(2) and 3 of the ICESCR, protecting essential obligations under the Covenant.

Given the general nature of Kuwait's 'declaration' regarding essential obligations in Article 2(2) and Article 3 of the ICESCR, it has been a subject of some objections by some States including Finland, Italy and Norway. One would have expected more objections from other States parties to the Covenant since such objections may lead to withdrawal or modification of some reservations. However, for the great majority, political considerations seem to prevail. Reservations may be seen (albeit incorrectly) as intervening in the affairs of another State and, thus, perceived as an unfriendly act in international relations. The cooperative interplay among States and the fact that there is no incentive to object to any reservations in a human rights treaty such as the ICESCR explains why States do not object against incompatible reservations regardless of how antithetical they may be to the rights protected by the Covenant. Some States may not have objected because of their belief that they need not object to invalid reservations. Nonetheless the objections of some States parties are useful in illustrating the problem of Kuwait's reservation. Finland, Italy and Norway objected to the reservation made by Kuwait stating that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other States parties of the extent to which the reserving State commits itself to the Covenant and therefore may raise doubts as to the commitment

108 CESCR, General Comment No. 16, op.cit. (note 91), para. 41, stating that '[f]ailure to adopt, implement and monitor effects of laws, policies and programmes to eliminate de jure and de facto discrimination with respect to each of the rights enumerated in Articles 6 to 15 of the Covenant constitutes a violation of those rights'.

109 CEDAW, Concluding Observations: Kuwait, UN Doc. A/59/38, 18 March 2004, paras 60–61.

110 HRC, Concluding Observations: Kuwait, UN Doc. CCPR/CO/69/KWT, 27 July 2000, para. 5.

111 Ibid. The Committee concluded in para. 6 that 'the interpretative declaration regarding Articles 2 and 3 contravenes the State Party's essential obligations under the Covenant and is therefore without legal effect and does not affect the powers of the Committee. The State party is urged to withdraw formally both the interpretative declarations and the reservations'.

of the reserving State to fulfil its obligations under the Covenant.¹¹² The application of such a reservation is also subject to the general principle of treaty interpretation according to which 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.¹¹³ In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.¹¹⁴ However, all the Governments of the objecting States (Finland, Italy and Norway) stated that their objections do not preclude the entry into force in its entirety of the Covenant between the State of Kuwait and each of the objecting States (Finland, Italy, and Norway).

This left ambiguous the effect of the reservation on Kuwait's obligations under the Covenant. Such a statement is regularly found in objections to human rights treaties and illustrates the political dilemma faced by the objecting States.¹¹⁵ Kuwait did not withdraw its reservation and did not reply and so its position remains unknown as to whether it agreed that the entire Covenant came into force for it, despite its reservation.

In addition to the above, Kuwait also made an 'interpretative declaration' regarding Article 9 stating that '[t]he Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis'. This 'declaration' is broad. It is not restricted to a particular category of non-Kuwaitis such as undocumented (illegal) immigrants, but extends to all categories of non-Kuwaitis including long-term residents or permanent residents, temporary residents legally staying in Kuwait, refugees and asylum seekers. This 'declaration' (a reservation in substance for the reasons stated above) is, thus, problematic because it purports to exclude or to modify the legal effect of Article 9, one of the core Articles in the ICESCR, in its application to Kuwait. Article 9 of the ICESCR provides that '[t]he States Parties to the (...) Covenant recognise the right of everyone to social security, including social insurance'. This article, which protects the right to social security is of 'central importance' in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their ESC rights.¹¹⁶ These circumstances might arise inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; and (c) insufficient family support, particularly for children and adult dependents.¹¹⁷

112 Objections, *supra* note 11, Finland, 25 July 1997 and Italy, 25 July 1997. Norway in its objection of 22 July 1997, observed: 'In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities by invoking general principles of internal law may create doubts about the commitment of the reserving State to the objective and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations'.

113 Vienna Convention, *supra* note 10, Article 27.

114 CESCR, General Comment No. 9, The Domestic Application of the Covenant, nineteenth session, 1998, UN Doc. E/C.12/1998/24, 3 December 1998, para. 3.

115 See Objections, *supra* note 11; Aust, A., *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2nd ed., 2007, p. 147.

116 See CESCR, General Comment 19: The Right to Social Security, UN Doc. E/C.12/GC/19, 23 November 2007, para. 1.

117 *Ibid*, para. 2.

The right to social security encompasses 'the right to access and maintain benefits, whether in cash or in kind, without discrimination' in order to secure protection from such circumstances.¹¹⁸ Thus, the right to social security is vital for ensuring that everyone is able to live a life with dignity without the fear of losing income or other support that is essential for maintaining an adequate standard of living, accessing health care and caring for children and other dependents. Since the right to social security in Article 9 extends to 'everyone' within a State's jurisdiction, core obligations of the right to social security require, inter alia, that all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged or marginalised sections of the population (including non-nationals), in law and in fact, without discrimination on any of the prohibited grounds.¹¹⁹

Non-nationals including permanent residents are 'part of a vulnerable group in society' and their exclusion from social security scheme violates both the core rights to equality and non-discrimination on the basis of nationality.¹²⁰ In the context of Kuwait this is essential in view of the fact that the number of non-Kuwaiti nationals exceeds the number of Kuwaiti citizens in Kuwait.¹²¹ Article 2(2) of the Covenant proscribes discrimination, inter alia, on grounds of nationality and the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers (such as non-Kuwaiti workers in Kuwait), have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.¹²² In any case 'the migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights' including the right to social security.¹²³ As noted by Germany and Sweden in their respective objections to Kuwait's 'declaration': 'the declaration regarding Article 9, as a result of which the many foreigners working on Kuwaiti territory would, in principle, be totally excluded from social security protection, cannot be based on Article 2 (3) of the Covenant'.¹²⁴ The final reservation made by Kuwait concerned Article 8, paragraph 1(d) which stated: "The Government of Kuwait reserves the right not to apply the provisions of Article 8, paragraph 1 (d)". Do States have a right 'not to apply Article 8(1)(d)' of the Covenant? To answer this question, it would be useful to recall that by Article 8(1)(d) the States parties to the ICESCR 'undertake to ensure: the right to strike, provided that it is exercised in conformity with the

118 Ibid.

119 Ibid, paras 2, 23 and 59(b).

120 See also *Khosa v Minister of Social Development*, 4 March 2004, (6) South African Law Reports 505 (CC); 2004 (6) Butterworths Constitutional Law Reports 569 (South African Constitutional Court), Justice Yvonne Mokgoro, writing for the majority, paras 74 and 76.

121 CEDAW, Concluding Observations: Kuwait, UN Doc. A/59/38, 18 March 2004, para. 76.

122 See CESCR, General Comment 19, op.cit. (note 114), para. 36. In para. 37, the CESCR stated: 'Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care'.

123 Juridical Condition and Rights of the Undocumented Migrants, supra note 44, para. 134.

124 Objections, supra note 11, Germany (10 July 1997); Sweden (23 July 1997). By Article 2(3) 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the (...) Covenant to non-nationals'.

laws of the particular country'. From the text, it is notable that while a State can subject the right to strike to its national laws, in the absence of necessity in a democratic society, a State has no general 'right' to postpone the right to strike as this would deprive individuals and groups of this right so as to render it meaningless. A general right to postpone the right to strike would be difficult to reconcile with the object and purpose of the Covenant. A State can only regulate the exercise of the right to strike in accordance with its domestic law. However, the relevant domestic law must be in conformity with the Covenant, which requires in its Article 4 that limitations have to 'be compatible with the nature of these rights [protected in the Covenant] and solely for the purpose of promoting the general welfare in a democratic society'. In effect, laws regulating the right to strike must conform to the principle of proportionality. It is difficult to see how not applying a right to (a peaceful) strike can promote the 'general welfare' in a democratic society so as to be compatible with the Covenant.

The wide scope of Kuwait's reservations attracted some concern of the CESCR. In 2004, for example, the CESCR noted with concern the reservations and declarations Kuwait had made in respect of the provisions of Articles 2(2), 3, 8(1)(d) and 9 of the Covenant.¹²⁵ The Committee expressed its concern, like other human rights treaty bodies, about the lack of clarity regarding the primacy of the Covenant over conflicting or contradictory national laws, and its direct applicability and justiciability in national courts.¹²⁶ In this regard, the Committee noted that there was no case-law in Kuwait on the application of the Covenant.¹²⁷ However, instead of considering Kuwait's declarations and reservations as invalid and of no legal effect, the Committee took a cautious attitude, encouraging Kuwait 'to consider withdrawing reservations and declarations entered upon the ratification of the Covenant in the light of the fact that they negate the core purposes and objectives of the Covenant'.¹²⁸ While the Committee made this useful finding, it did not state categorically that any particular reservation or declaration was invalid. This left the question whether a reservation or declaration which negates the core purposes and objectives of the Covenant is an invalid one and without legal effect open to speculation. Can a reservation which negates the 'core purposes and objectives of the Covenant' be valid? Although the Committee avoided addressing this question explicitly, it is implicit in its recommendation (urging Kuwait to consider withdrawing its reservations) that such a reservation offends Article 19(c) of the Vienna Convention, and is thus invalid.

It is arguable that reservations incompatible with the core purposes and objectives of the Covenant should not have been made in the first place (Article 19(c) Vienna Convention) and accordingly no other State party is capable of accepting them since they are invalid or inadmissible. The approach applied by the CESCR follows the view of the International Law Commission, that 'in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation,

125 CESCR, Concluding Observations: Kuwait, UN Doc. E/C.12/1/Add.98, 7 June 2004, para. 9.

126 Ibid, para. 8.

127 Ibid.

128 Ibid, para. 28.

or forgoing becoming a party to the treaty'.¹²⁹ However, as yet, Kuwait has neither modified/withdrawn its 'declarations'/reservations nor forgone becoming a party to the Covenant. It is preferable, however, to withdraw such reservations so as to comply with the object and purpose of the Covenant. While the cautious approach applied by the CESCR is a useful starting point, it is submitted that where a State consistently ignores considering withdrawal or reformulation of a clearly incompatible reservation, for which a withdrawal is necessary, the Committee should move towards a stronger position to declare the incompatible 'declaration'/reservation invalid, and without legal effect. In such a case it is likely that a State party committed to the object and purpose of the Covenant would find it pointless maintaining such declarations/reservations. Although such a State unhappy at the result arguably has the option of withdrawing from the Covenant, it is unlikely to do so in practice for good political reasons such as avoiding criticisms regarding its lack of commitment to minimum international human rights standards. In addition, as noted above, a State may not be able to legally withdraw from the Covenant since the ICESCR, like the ICCPR, does not provide for denunciation or withdrawal from the Covenant.¹³⁰

Pakistan's reservations

Pakistan signed the ICESCR on 3 November 2004. Upon signature, Pakistan made the following 'declaration' to the ICESCR subjecting the application of the provisions of the Covenant to the provisions of national law namely the Constitution of the Islamic Republic of Pakistan:

While the Government of [the] Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the Constitution of the Islamic Republic of Pakistan.¹³¹

Although Pakistan's statement was stated to be a declaration, it is a reservation in substance since it is in fact a unilateral act aimed at precluding or modifying the legal effect of the provisions of the ICESCR. This reservation is problematic in two respects. First, the Government of the Islamic Republic of Pakistan declared that it 'will implement the [ICESCR] Provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country'. This formulation is extremely broad. What specific provisions of the Covenant would be implemented in a 'progressive manner' and how progressive is the manner? Is it the entire Covenant including minimum core obligations? What is meant by 'progressive' in this context? It may be argued that the term 'progressive' was derived from Article 2 ICESCR,

129 See 'Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties', in: Report of the International Law Commission on the work of its Forty-ninth Session, 12 May - 18 July 1997, Official Records of the General Assembly, Fifty-second session, Supplement No. 10, UN Doc. A/52/10, 1997, para. 157 (10).

130 See also HRC, General Comment 26 (61), *op.cit.* (note 70), paras 1-5.

131 Declarations, *supra* note 11, Pakistan.

and used in a similar manner. The term 'progressive' realisation as used in Article 2 ICESCR has been understood to impose 'an obligation to move as expeditiously and effectively as possible' towards the full realisation of the rights protected in the Covenant.¹³² It is not clear whether Pakistan's reservation would be understood in a similar way. Since some fundamental obligations resulting from the ICESCR, including in particular the principle of non-discrimination found in Article 2(2) thereof, are not susceptible to progressive implementation and are thus to be guaranteed with immediate effect, the 'declaration' represents a significant qualification of Pakistan's commitment to guarantee the human rights recognised in the Covenant.¹³³ There is no doubt that the elimination of discrimination immediately is fundamental to the enjoyment of ESC rights on the basis of equality. This obligation frequently requires the adoption and implementation of appropriate legislation and does not necessarily require significant resource allocations. Although Article 2(1) of the Covenant allows for a progressive realisation of the provisions, this may not be invoked as a basis for discrimination.

Second, the Government of the Islamic Republic of Pakistan also declared that the provisions of the Covenant shall, however, be subject to the provisions of its Constitution. What specific provisions? As noted above, the object of reservations is to exclude or modify 'the legal effect of certain provisions of the treaty in their application' to reserving States.¹³⁴ This is intended to avoid vagueness and generality of the reservations, which make it impossible for other States parties to take a position on them. As such general reservations must be deemed incompatible with the object and purpose of the Covenant. It is noteworthy that Pakistan made a similar 'declaration' to CEDAW stating that '[t]he accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan'.¹³⁵ In effect international human rights treaties are subordinate to Pakistan's Constitution. Unless this is intended to bring domestic law in conformity with the Covenant this may constitute a total negation of ratification. Apparently what Pakistan did was to indicate that it was unwilling to assume any commitment other than the one already provided by its Constitution.

As noted above, principles of equality and non-discrimination are central to the ICESCR. Does Pakistan accept the principles of non-discrimination and equality between men and women in the enjoyment of all ESC rights? While Pakistan's Constitution, in its Articles 25(2) and 27, stipulates equality before the law, including on the basis of sex, neither the Constitution nor any other appropriate legislation contain a definition of discrimination which encompasses both direct and indirect discrimination in accordance with international human rights law (such as Article 1 of CEDAW), nor provisions on the equality of women with men in line with Article 3 of the Covenant.

Regarding the right to work, for example, Article 18 of Pakistan's Constitution states: 'Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter

132 CESCR, General Comment No. 3, *op.cit.* (note 38), para. 9.

133 Objections, *supra* note 11, Germany (8 November 2004) and Norway (17 November 2005).

134 Vienna Convention, *supra* note 10, Article 2(1)(d) (emphasis added).

135 Available on the UN website at: www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N52.

upon any lawful profession or occupation, and to conduct any lawful trade or business'. While this provision guarantees the right to work (of citizens) to both men and women, it is subject to qualifications 'prescribed by law'.

Some laws in Pakistan do not allow women to work in certain kinds of jobs ostensibly for 'health and safety reasons' and during certain hours at night.¹³⁶ Such laws could result in the potential discriminatory impact on women's employment, which is not specifically prohibited in both public and private sectors.¹³⁷ What possible protection, then, can the Covenant provide to individuals and groups – especially to the most vulnerable ones such as women, non-nationals and ethnic, religious and racial minorities – in Pakistan if it is hierarchically inferior to Pakistan's Constitution?

Pakistan's Constitution requires all existing laws to be 'brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah', and that 'no law shall be enacted which is repugnant to such Injunctions'.¹³⁸ This means that the effect of Pakistan's declaration is to subject every provision of the Covenant to the general injunctions of Islam, without specifying them. Such a general reservation does not appear to be consistent with the object and purpose of the Covenant.¹³⁹ Although when ratifying the Covenant Egypt declared that '[T]aking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument [ICESCR], we accept, support and ratify it',¹⁴⁰ subjecting the Covenant to the general injunctions of Islam is not free from problems. This is especially so because such injunctions are so vulnerable to different interpretations over time and in, as well as within, different societies that it is not easy (given the nebulous, general, unlimited and undefined scope of the reservation) to establish clearly the obligations assumed by Pakistan under the Covenant. In 2003, for example, the Grand Chamber of the ECtHR concurred in the Chamber's view that '[i]t is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, (...) particularly with regard to its (...) rules on the legal status of women and the way it intervenes in all spheres of private and

136 The Mines Act, 1923, Section 23-CC states that '[n]o woman shall be employed in any part of a mine, which is below the ground. No woman shall be allowed to work in a mine, above ground between the hours of 7 p.m. to 6 a.m.'. The Factories Act, 1934 states in section 45 that '[n]o woman shall be allowed to work in a factory except between 6 a.m. and 7 p.m. Except with the permission of the Government, no woman or young person shall be employed in any establishment otherwise than between the hours of 9.00 a.m. and 7.00 p.m.'

137 See Pakistan: Combined Initial, Second and Third Periodic Reports of States, UN Doc. CEDAW/C/PAK/1-3, 3 August 2005, pp. 21-23.

138 See the Constitution of the Islamic Republic of Pakistan, adopted in 1973, Article 227, available at: www.pakistani.org/pakistan/constitution/.

139 See also CEDAW Committee, Concluding Observations: Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/2, 8 April 2008, paras 4, 9 and 10. 'The Committee notes that a general reservation has been made by the State party to the Convention whereby in case of a conflict between the provisions of Islamic law and those of the Convention, the State party gives precedence to Islamic law (...) The Committee is concerned about the general reservation made upon ratification of the Convention by the State party, which is drawn so widely that it is contrary to the object and purpose of the Convention. The Committee urges the State party to consider the withdrawal of its general reservation to the Convention, particularly in light of the fact that the delegation assured that there is no contradiction in substance between the Convention and Islamic Sharia.

140 Declarations, *supra* note 11, Egypt.

public life in accordance with religious precepts.¹⁴¹ However, the Court did not analyse the legal status of women in Sharia, and the different interpretations of Sharia, before making this broad (and debatable) conclusion.

Does Pakistan interpret the Injunctions of Islam as providing for equality between men and women in the enjoyment of all human rights, including ESC rights? Some human rights scholars have taken the view that if the primary source of Islam, particularly the Quran, is interpreted in its 'proper' and 'social' context, the Quran 'never discriminates on the basis of gender' and criticise 'out of context interpretation' reflecting the masculine and patriarchal prejudices of the interpreters¹⁴² or 'narrow interpretations of Islamic texts by authorities'.¹⁴³ This view has been supported by the Committee on the Rights of the Child (CRC Committee) noting that 'the universal values of equality and tolerance [are] inherent in Islam'.¹⁴⁴ However, some interpretations of Sharia are against the enjoyment by women of equality with men.¹⁴⁵ Indeed, a renowned Islamic scholar, Sheikh Muhammed Salih Al-Munajjid, has asserted that [t]hose who say that Islam is the religion of equality are lying against Islam (...) Rather Islam is the religion of justice which means treating equally those who are equal and differentiating between those who are different. No one who knows the religion of Islam would say that it is the religion of equality (...) Not one single letter in the Qur'an enjoins equality, rather it enjoins justice.¹⁴⁶

Although it is arguable that justice is genderless and, thus, entails the principle of equality, in justifying the above view Al-Munajjid observes, inter alia, that with regard to testimony or

141 Case of Refah Partisi (The Welfare Party) and Others vs Turkey, Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003; 37 European Human Rights Reports 1, 2003, para. 123 (Grand Chamber); and Judgment of 31 July 2001, 35 European Human Rights Reports 3, para. 72 (Chamber). In para. 128 the Grand Chamber cited examples of alleged 'discrimination based on gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession'. In contrast the African Commission on Human and Peoples' Rights avoided making comments on Sharia in *Curtis Francis Doebbler vs Sudan*, Comm. No. 236/2000, Decision made at the 33rd Ordinary session in Niamey, Niger 15–29 May 2003, available at: www1.umn.edu/humanrts/africa/comcases/236-2000.html paras 39–41.

142 See e.g. Shah, Niaz A., 'Women's Human Rights in the Koran: An Interpretive Approach', *Human Rights Quarterly*, Vol. 28, No. 4, 2006, pp. 868–903, at p. 903. See also Shah, Niaz A., *Women, the Koran and International Human Rights Law: The Experience of Pakistan*, Martinus Nijhoff Publishers, Leiden, 2006, p. 14; and Western, M.D.J., 'Islamic 'Purse Strings': The Key to the Amelioration of Women's Legal Rights in the Middle East', *Air Force Law Review*, Vol. 61, Spring 2008, pp. 79–147.

143 CRC Committee, Concluding Observations: Egypt, UN Doc. CRC/C/15/Add.145, 21 February 2001, para. 6; Qatar, UN Doc. CRC/C/15/Add.163, 6 November 2001, para. 9; and Saudi Arabia, UN Doc. CRC/C/15/Add.148, 22 February 2001, para. 6.

144 *Ibid.* Representatives of Islamic States such as the Saudi Arabian delegation before the CEDAW Committee have also recently assured that 'there is no contradiction in substance between the Convention and Islamic Sharia'. See CEDAW Committee, Concluding Observations: Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/2, 1 February 2008, para. 10.

145 See CESCR, Concluding Observations: Libyan Arab Jamahiriya, UN Doc. E/C.12/1/Add.15, 20 May 1997, para. 13. The Committee noted that 'the State party has advanced certain arguments against the enjoyment by women of certain family and civil rights on the basis of Sharia law'.

146 See Islam Question and Answer, 'Does Islam Regard Men and Women as Equal?', at: www.islam-qa.com/index.php?ref=1105&ln=eng&txt=equality, citing Quran 16:90 and 4:58.

bearing witness, the Qur'an states that the testimony of one man is equivalent to the testimony of two women.¹⁴⁷ While this might be regarded as an over-generalisation since the Qur'anic text referred to, specifically addressed business transactions at a time when women were not generally heavily involved and experienced in business transactions, this interpretation could have influenced the 1984 Qanun-e-Shahadat (Law of Evidence) in Pakistan, under which a woman cannot be an attesting witness to a legal contract.¹⁴⁸ This *de jure* discrimination in the form of the lack of capacity and the value attached to a woman's evidence may affect women, particularly those in business and legal careers. It also perpetuates patriarchal attitudes and deep-rooted traditional and cultural stereotypes regarding the roles and responsibilities of women and men in the family, in the workplace and in society,¹⁴⁹ which negatively affects women's enjoyment of human rights.

From the foregoing, it is clear that there are different interpretations of some aspects of the application of Islamic injunctions. Pakistan's 'declaration' was couched in terms that were too broad and imprecise for it to be possible to determine its exact meaning and scope. It is not clear whether it would adopt an attitude consistent with the object and purpose of the Covenant in that regard by reconciling rights protected in the Covenant (including equality between men and women) with its interpretation of Islamic texts.

As Denmark and Finland noted in their objections, the general subordination of the Covenant to Pakistan's Constitution without specifying which provisions or contents makes Pakistan's 'declaration' unclear (for other States parties) to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of the Islamic Republic to the object and purpose of the Covenant¹⁵⁰. Shelton observed: 'These general subordination reservations are the most questionable because they deny the very reason for adoption of human rights treaties: the establishment of minimum standards with which domestic laws should be brought into conformity'¹⁵¹. Unsurprisingly, an unusually high number of Western States parties to the ICESCR namely Denmark, Finland, Latvia, the Netherlands, Norway and Sweden objected to the above-mentioned declarations

147 *Ibid.* His view is based on the interpretation of the Qur'anic verse known as 'verse of indebtedness' Al-Baqarah 2:282 which prescribes writing financial/debt contracts as a precautionary measure and having such contracts witnessed in these terms: 'When you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. (...) And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her'. See Yusuf Ali, A., *The Meaning of the Holy Quran*, Islamic Dawah Centre International, Birmingham, 2007; and Taqi-ud-Din Al-Hilali, M. and Muhsin Khan, M., *Interpretation of the Meanings of the Noble Quran in the English Language*, Darussalam, Riyadh, 1996.

148 See Pakistan: Combined Initial, Second and Third Periodic Reports of States, UN Doc. CEDAW/C/PAK/1-3, 3 August 2005, p. 116, para. 474.

149 See CEDAW Committee, Concluding Observations: Pakistan, UN Doc. CEDAW/C/PAK/CO/3, 11 June 2007, paras 28-29.

150 Declarations, *supra* note 11, Austria, 25 November 2005; Denmark, 17 March 2005; Finland, 15 November 2005; and Spain, 15 November 2005.

151 Shelton, D., 'State Practice on Reservations to Human Rights Treaties', *Canadian Human Rights Yearbook*, Vol. 1, 1983, pp. 205-234, at p. 227.

and considered them to be reservations incompatible with the object and purpose of the Covenant.

More importantly, these States noted that their objections did not preclude the entry into force of the Covenant between the Islamic Republic of Pakistan and each of them (Denmark, Finland, Latvia, the Netherlands, Norway, Sweden) some adding ‘without Pakistan benefiting from its declaration/reservation.’¹⁵² This approach went further and ignored the plain fact that the reserving State had made it clear that it was willing to be bound subject to a condition. The question raised here is: should reservations to human rights treaties which subject the Covenant to domestic law incompatible with the object and purpose of the relevant treaty be disregarded or should this be left to the reserving State? What would happen in cases where the reserving State did not determine the appropriate action to be taken as no mechanism exists to oblige the State to take action? Is Pakistan bound by the Covenant despite its reservation?

If one or more contracting States have objected to the reservation as incompatible with the object and purpose of the Covenant, the reserving State should decide whether or not it is prepared to be a party without the reservation. However, Pakistan, following the pattern of most reserving States, did not reply to the above objections, and consequently its opinion is unknown as to whether it agrees that the Covenant comes into force, despite the incompatibility of its reservation. As noted above, a State is not entitled to make a reservation incompatible with the object and purpose of the Covenant and no other State is capable of accepting it even if no formal objection is made.

Therefore, it is necessary to make a careful review of Pakistan’s general reservation with a view to withdrawing it without delay with the presumption, which may be refuted, that Pakistan would prefer to remain a party to the Covenant without the benefit of the reservation, rather than being excluded. This involves undertaking a comprehensive and systematic review and revision of all domestic legislation (which necessitated the reservation), in order to achieve full compliance with all the provisions of the Covenant. Pakistan might wish to follow its earlier practice with respect to withdrawal of general reservations, in particular its withdrawal on 23 July 1997 of the general reservation it had entered to the CRC by withdrawing its reservation to the ICESCR.¹⁵³ Regarding a similar reservation to CEDAW to the effect that accession to the Convention was subject to the provisions of the Constitution of the Islamic Republic of Pakistan, the CEDAW Committee has urged Pakistan ‘to withdraw its declaration to the Convention without delay.’¹⁵⁴

152 See e.g. Objections, *supra* note 11, Latvia, 10 November 2005.

153 Pakistan’s reservation to the CRC (objected to by the Governments of Denmark and the Netherlands) stated: ‘Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values’. See United Nations Treaty Collection, Declarations and Reservations, *supra* note 13.

154 CEDAW Committee, Concluding Observations: Pakistan, UN Doc. CEDAW/C/PAK/CO/3, 11 June 2007, para. 13 (emphasis added).

Turkey's reservations

Upon ratification of the ICESCR on 23 September 2003, Turkey made the 'declarations' and 'reservation' below:

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations. The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance [with] the provisions under the Articles 3, 14 and 42 of the Constitution of the Republic of Turkey.¹⁵⁵

Several issues arise out of these 'declarations' and the 'reservation'. Firstly, are Turkey's 'declarations' used as, or intended to be, reservations? Put in other words, are these 'declarations' in fact an attempt (as in the definition of reservation) 'to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'? Secondly, do these 'declarations' and 'reservation' raise doubt as to the commitment of Turkey to the object and purpose of the ICESCR?

While caution should be exercised before pronouncing a 'declaration' to be a 'reservation' in fact, an examination of Turkey's 'declarations' reveals that they are reservations except only in name. Clearly, the 'declarations' modify the legal effect of certain provisions of the Covenant in their application to Turkey in two essential respects. First, the declarations limit the implementation of the provisions of the Covenant only to the States with which the Republic of Turkey has diplomatic relations. This modifies the scope of the Covenant by excluding States parties without diplomatic relations with Turkey. As noted by the Government of Greece, 'this declaration in fact amounts to a reservation', and more importantly, this reservation is incompatible with the principle that inter-State reciprocity has no place in the context of human rights treaties, which concern the endowment of individuals with rights.¹⁵⁶

Indeed, human rights treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals and, under certain circumstances, groups of individuals and communities with rights or fundamental, inalienable and universal entitlements. In general, therefore, as noted above, the principle of inter-State reciprocity has no place under human rights treaties¹⁵⁷. In this respect the HRC observed that although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.¹⁵⁸ Accordingly, Turkey's reservation purporting to apply the principle of inter-State reciprocity to the ICESCR, in the

155 Declarations, *supra* note 11, Turkey.

156 Objections, *supra* note 11, Greece, 11 October 2004.

157 See also HRC, General Comment 24 (52), *op.cit.* (note 26), para. 17.

158 *Ibid.*, para. 8.

absence of further clarification, raises a serious doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

Secondly, the 'declaration' limits the Covenant 'exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied'. This territorial limitation means that Turkey intended to exclude the application of the Covenant to Turkey's acts and omissions of its agents which produce effects or are undertaken beyond national territory (in other words not to apply the Covenant to those individuals and groups who are not within the Turkey's territory but who are subject to Turkey's jurisdiction). By implication it does not apply in a part of Turkey's territory where the Constitution is not applied. This is a clear modification of the legal effect of the Covenant which is not territorially limited but intended to apply to 'all individuals within its [a State's] territory or under its jurisdiction'¹⁵⁹ – that is in the entire jurisdiction of a State party. It is useful to note that the ICESCR contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights that are essentially territorial.¹⁶⁰ However, as noted by the ICJ, 'it is not to be excluded that it [the ICESCR] applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction'.¹⁶¹ A States party's obligations under the ICESCR 'apply to all territories and populations under its effective control'.¹⁶² It doesn't matter whether or not the Constitution is applied in a territory. By way of example, in General Comments 14 and 15 the CESCR noted that health facilities, goods, services and water have to be accessible to everyone 'without discrimination, within the jurisdiction of the State party'.¹⁶³ Turkey's 'declaration' is, therefore, incompatible with the object and purpose of the Covenant. It is therefore not surprising that some States objected to Turkey's declarations and considered them as amounting to reservations.¹⁶⁴

Regarding Turkey's reservation, it is useful to note that the Republic of Turkey reserved the right to 'interpret' and 'apply' the provisions of the paragraphs 3 and 4 of Article 13 of the Covenant in accordance with the provisions under Articles 3, 14 and 42 of the Constitution of the Republic of Turkey.¹⁶⁵ Before examining the effect of Turkey's reservation, it is relevant to consider the scope of Article 13(3) and (4) of the Covenant.

Article 13(3) has two elements; the first is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions. As noted by the CESCR, this element of Article 13(3)

159 CESCR, General Comment No. 1, *supra* note 100, para. 3 (emphasis added).

160 ICJ, *op.cit.* (note 39), p. 136, para. 112.

161 *Ibid.*

162 CESCR, Concluding Observations: Israel, UN Doc. E/C.12/1/Add.90, 23 May 2003, paras 15 and 31.

163 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4, 11 August 2000, para. 12(b); and CESCR, General Comment 15: The Right to Water, UN Doc. E/C.12/2002/11, 20 January 2003, para. 12(c) (emphasis added).

164 For example, in its objection of 26 November 2003, Cyprus stated: 'These reservations create uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Covenant, and raise doubt as to the commitment of Turkey to the object and purpose of the said Covenant'; Declarations, *supra* note 11, Cyprus.

165 The Constitution of the Republic of Turkey is available at: www.hri.org/docs/turkey/.

permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression.¹⁶⁶ Public education that includes instruction in a particular religion or belief is inconsistent with Article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.¹⁶⁷

The second element of Article 13(3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to 'such minimum educational standards as may be laid down or approved by the State'. This has to be read with the complementary provision, Article 13(4), which affirms 'the liberty of individuals and bodies to establish and direct educational institutions', provided the institutions conform to the educational objectives set out in Article 13(1) and certain minimum standards.¹⁶⁸ These minimum standards, which must be consistent with the educational objectives set out in Article 13(1), may relate to issues such as admission, curricula and the recognition of certificates.¹⁶⁹ Article 13(4) has been interpreted by the CESCR to permit everyone, including non-nationals, (...) the liberty to establish and direct educational institutions. The liberty also extends to 'bodies', i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in Article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society.¹⁷⁰

The effect of Turkey's reservation is to subject the provisions of paragraphs 3 and 4 of Article 13 of the Covenant to Turkey's national law in particular the provisions under Articles 3, 14 and 42 of the Constitution of the Republic of Turkey. Two questions do arise here. First, is this reservation compatible with the object and purpose of the Covenant given that it subjects an international treaty (the ICESCR) to Turkey's domestic law (without specifying the content of the domestic law)? In other words, is the subjecting of the Covenant to domestic law compatible with the object and purpose of the Covenant or the broader view of international law? Secondly, are the provisions of Articles 3, 14 and 42 of the Constitution of the Republic of Turkey consistent with paragraphs 3 and 4 of Article 13 of the ICESCR?

Regarding the first question, as noted above, it is fairly well established that questions relating to the domestic application of the Covenant must be considered in the light of Article 27 of the

166 CESCR, General Comment No. 13: The Right to Education, UN Doc. E/C.12/1999/10, 8 December 1999, para. 28.

167 Ibid.

168 The educational objectives set out in Article 13(1) ICESCR are as follows: 'They [States Parties to the ICESCR] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'. See also CRC, Article 29; Committee on the Rights of the Child, General Comment No. 1, UN Doc. CRC/GC/2001/1, 17 April 2001

169 CESCR, General Comment No. 13, op.cit. (note 164), para. 29.

170 Ibid, para. 30.

Vienna Convention on the Law of Treaties, stating that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. Thus, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.¹⁷¹ Although Article 27 of the Vienna Convention is in a part entitled ‘[o]bservance, application and interpretation of treaties’ and not in a section dealing with ‘reservations’, once the question of the validity of the reservation has been resolved Article 27 can be invoked to limit the applicability of Turkey’s reservation. Viewed from this perspective, Turkey’s reservation could be regarded as having no legal effect in as far as it purports to subject the interpretation and application of paragraphs 3 and 4 of Article 13 of the ICESCR to Turkey’s Constitution.

As regards the second question, it is questionable whether Articles 3, 14 and 42 of the Constitution of the Republic of Turkey are consistent with paragraphs 3 and 4 of Article 13 ICESCR. Article 3 provides that ‘[t]he Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish’. Article 14 states that ‘[n] one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights’. While Article 42 provides that ‘no one shall be deprived of the right of learning and education’, it also states that the scope of the right to education shall be defined and ‘regulated by law’ and that the provisions of international treaties are reserved. More specifically Article 42 provides:

No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law (emphasis added).

As a result of this provision women and girls whose mother tongue is not Turkish may face multiple forms of discrimination in access to and achievement in education¹⁷². Since the Articles considered above subject the right to education to Turkish domestic law, which is not specified, the reference to certain provisions of the Constitution of the Republic of Turkey is of a general nature and does not clearly specify the content of the reservation.¹⁷³ Unless this reservation is understood, as noted by the Government of the Federal Republic of Germany, to mean that the relevant Articles and domestic law will be interpreted and applied in such a way that protects the essence of the freedoms guaranteed in Article 13 paragraphs 3 and 4 of the ICESCR,¹⁷⁴ it creates serious doubts as to the commitment of the reserving State to the object and purpose of the Covenant.¹⁷⁵ In view of this reservation, is Turkey willing to change the relevant domestic laws

171 CESCR, General Comment No. 9, op.cit. (note 112), para. 3.

172 CEDAW Committee, Concluding Observations: Turkey, UN Doc. A/60/38, 28 January 2005, para. 371

173 See Objections, supra note 11, Finland, 13 October 2004, noting that ‘[t]he Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Turkey will ensure the implementation of the rights recognised in the Covenant and will do its utmost to bring its national legislation into compliance with the obligations under the Covenant with a view to withdrawing the reservation’.

174 Ibid, Germany, 13 October 2004.

175 Ibid, Portugal, 13 October 2004; and Sweden, 30 June 2004.

to be compatible with the Covenant? The rights contained in the Covenant should be respected, protected and fulfilled in a State party's jurisdiction. Even though such a widely formulated reservation lends itself to a number of different interpretations, its common denominator is that it essentially renders ineffective the relevant Covenant rights, which would require any change in national law to ensure compliance with the Covenant obligations. In this respect, no real international rights or obligations under Articles 13(3) and (4) have thus been accepted until the withdrawal of the reservation.

It is instructive to consider briefly the nature of reservations and declarations made by other States in other parts of the world to establish whether these are different from those made by Pakistan, Kuwait and Turkey. Some examples are considered below.

RESERVATIONS BY OTHER STATES: EXAMPLES FROM AFRICA AND EUROPE

This section makes a comparison between reservations by Kuwait, Pakistan and Turkey considered above and the reservations and declarations made by other States. Selected examples are drawn from African and European States because some of these States have made several reservations or declarations to the Covenant. Are reservations and/or declarations of these States different from the ones made by the three States considered in section 3 above, and if so, in what way and why?

Reservations by African States

By April 2008, eight African States – Algeria, Egypt, Guinea, Kenya, Libyan Arab Jamahiriya (Libya), Madagascar, Rwanda and Zambia – had entered reservations or made declarations to some provisions of the ICESCR.¹⁷⁶ Apart from the interpretative declarations of Algeria and Libya, most of these reservations and declarations have not attracted objections from other States parties. This is partly because unlike the reservations/declarations considered in section 3 above, reservations by these African States have been more specific, often quite precise in their formulation, and apparently not generally incompatible with the object and purpose of the Covenant.

Some examples are mentioned here for purposes of illustration only. The government of Madagascar stated that it reserves the right to postpone the application of Article 13, paragraph 2, of the Covenant, more particularly insofar as relates to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.¹⁷⁷ Zambia made a similar reservation.¹⁷⁸ While it is difficult to claim that postponing free and

176 See Declarations, *supra* note 11.

177 *Ibid*, Madagascar.

178 *Ibid*, Zambia.

compulsory primary education is compatible with the object and purpose of the Covenant in particular with the minimum core obligations of the right to education,¹⁷⁹ reservations of Madagascar and Zambia are, unlike those of Kuwait, Pakistan and Turkey, limited only to the application of Article 13(2) particularly insofar as it relates to primary education. Rwanda also made a reservation in respect of the right to education. The reservation states that '[t]he Rwandese Republic [is] bound, however, in respect of education, only by the provisions of its Constitution'.¹⁸⁰ This reservation, like that of Pakistan, subjects the right to education to the Constitution of Rwanda without specifying the relevant constitutional provisions. While this is problematic based on reasons stated above with respect to general constitutional reservations, this reservation does not extend to other provisions in the Covenant covering other rights other than the right to education. Thus, it is not as broad in formulation as reservations of Kuwait, Pakistan and Turkey.

In short, the scope of reservations by these African States to the ICESCR are generally limited to some specific provisions in the Covenant either with respect to the right to self-determination or some substantive rights mainly perceived to be resource-intensive such as the right to education. This indicates that these African States parties to the Covenant did not consider that there were problems in complying with their obligations under the Covenant. Moreover, most rights recognised in the Covenant are also protected in the African Charter on Human and Peoples' Rights¹⁸¹ to which all 53 African States are parties¹⁸², and further protected in other human rights treaties in Africa in particular the African Charter on the Rights and Welfare of the Child¹⁸³ and the Protocol to the African Charter on the Rights of Women in Africa.¹⁸⁴ These rights are unequivocally justiciable as any of the other rights in the African Charter.¹⁸⁵ Reservations to rights already protected by regional human rights instruments are therefore unnecessary.

179 See CESCR, Concluding Observations: Kenya, UN Doc. E/C.12/1993/6, 3 June 1993, para. 18 stating that 'the obligation of States parties to the Covenant to ensure that 'primary education shall be compulsory and available free to all' applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school'.

180 Ibid, Rwanda. Article 40 of the Constitution of the Republic of Rwanda 2003, available at: www.cjcr.gov.rw/eng/constitution_eng.doc, states that: '[e]very person has the right to education' and that 'Primary education is compulsory. It is free in public schools'. It is silent on secondary and higher education.

181 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 International Legal Materials 58, 1982, Articles 15–17 and, 20. Notable omissions in the Charter include the rights to social security, and the right to adequate standard of living, including 'adequate food, clothing and housing', and the right to water.

182 See Status of Ratification at: www.achpr.org/english/_info/index_ratifications_en.html.

183 OAU Doc. CAB/LEG/24.9/49, 1990.

184 Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, available at: www.achpr.org/english/_info/women_en.html.

185 Viljoen, F., *International Human Rights Law in Africa*, Oxford University Press, Oxford, 2007, pp. 236–242.

Reservations by European States

Some European States including Belgium, Bulgaria, Denmark, France, Hungary, Ireland, Malta, the Netherlands, Norway, Romania, Sweden and the United Kingdom have made reservations and declarations to certain provisions in the ICESCR. The nature of reservations entered by these States are generally different from those of Kuwait, Pakistan and Turkey because they are limited to some specific provisions of the Covenant and are generally not too wide in scope so as to negate the core purpose of the Covenant. Thus, these reservations, like those of African States considered above, have not attracted objections from other States parties. For purposes of illustration of the scope of key reservations by European States to the ICESCR, a summarised overview is presented below.

Belgium made an interpretative declaration with respect to Article 2(2) and 2(3) only. Belgium's declaration states that with respect to Article 2(2) the Belgian Government interprets 'non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals'.¹⁸⁶ According to Belgium the term should be understood to refer to 'the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies'.¹⁸⁷ The declaration does not appear to be contrary to the Covenant because discrimination under the Covenant has been understood to exclude differences based on reasonable and objective criteria.¹⁸⁸ With respect to Article 2(3) the Belgian Government declared that it 'understands that this provision cannot infringe the principle of fair compensation in the event of expropriation or nationalisation'.¹⁸⁹ No objection has been made to this declaration and the CESCR has not made any comment.¹⁹⁰

Bulgaria made a declaration to Article 26(1) and (3) of the ICESCR and noted that these provisions are of a 'discriminatory nature' because they deprived a number of States of the opportunity to become parties to the Covenant. Hungary, Romania and Ukraine made similar declarations and these have not given rise to any objection.

Denmark restricted its reservation to Article 7(d) noting that '[t]he Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of Article 7(d) on remuneration for public holidays'. Sweden entered a similar reservation in connection with Article 7(d) of the Covenant in the matter of the right to remuneration for public holidays. Although this is a very specific reservation, it is undesirable to maintain it. Thus, in 2001, the CESCR noted that Sweden has maintained its reservation with regard to Article 7(d) of the

186 See Declarations, *supra* note 11, Belgium.

187 *Ibid.*

188 Non-discrimination 'prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status'. See CESCR, General Comment No. 16, *op.cit.* (note 91), para. 10.

189 *Ibid.*

190 See e.g. CESCR, Concluding Observations: Belgium, UN Doc. E/C.12/BEL/CO/3, 4 January 2008; and UN Doc. E/C.12/1/Add.54, 1 December 2000.

Covenant concerning the right to remuneration for public holidays and recommended that 'the State party withdraw its reservation to Article 7(d) of the Covenant'.¹⁹¹

France's declaration extended to five Articles in the Covenant. First, the Government of the Republic declared that 'Articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits'. Second, it declared that it will implement the provisions of Article 8 in respect of the right to strike in conformity with Article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter. This declaration has not been controversial and thus the CESCR has not commented on it.¹⁹²

Reservations of Ireland were restricted to Articles 2(2) and 13(2)(a). The first reservation to Article 2(2) stated that '[i]n the context of Government policy to foster, promote and encourage the use of the Irish language by all appropriate means, Ireland reserves the right to require, or give favourable consideration to, a knowledge of the Irish language for certain occupations'. The second reservation to Article 13(2)(a) provided that 'Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State's obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their state (sic) provided that these minimum standards are observed'.

Given the specific nature of these reservations and the fact that they do not negate the core purposes of the Covenant, the CESCR has not made any critical comments.¹⁹³

Malta made a declaration to Article 13 stating that the government of Malta is in favour of upholding the principle affirmed in the words 'and to ensure the religious and moral education of their children in conformity with their own convictions'. However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of 'small groups', which cases are very exceptional in Malta. Although Malta's declaration is limited to Article 13, it has the potential to lead to lack of respect for religious minorities in schools. It is, thus, understandable that the CESCR has encouraged Malta 'to withdraw its declaration made upon ratification under Article 13 of the Covenant'.¹⁹⁴

191 CESCR, Concluding Observations: Sweden, UN Doc. E/C.12/1/Add.70, 30 November 2001, paras 21 and 32.

192 See e.g. CESCR, Concluding Observations: France, UN Doc. E/C.12/FRA/CO/3 May 2008; and UN Doc. E/C.12/1/Add.72, 30 November 2001.

193 See e.g. CESCR, Concluding Observations: Ireland, UN Doc. E/C.12/1/Add.77, 5 June 2002.

194 CESCR, Concluding Observations: Malta, UN Doc. E/C.12/1/Add.101, 14 December 2004, para. 27. For a discussion of religious education in public schools, see Evans, C., 'Religious Education in Public Schools: An International Human Rights Perspective', *Human Rights Law Review*, Vol. 8, No. 3, 2008, pp. 449-473.

The Kingdom of the Netherlands made a reservation with respect to Article 8(1) (d) in the case of the Netherlands Antilles 'to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned'. Clearly this is a very specific reservation limited only to the right to strike in the Netherlands Antilles. The CESCR has noted that the right to strike is recognised in the Netherlands, but regretted that the State party has 'not clarified the reasons for maintaining its reservation to Article 8(1)(d) of the Covenant in respect of the Netherlands Antilles'.¹⁹⁵ It recommended that the State party give 'more serious consideration' to withdrawing the reservation to Article 8 (1) (d) of the Covenant.¹⁹⁶

Norway made reservations to Article 8(1)(d) 'to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway'. This declaration does not affect the substance of the right to strike and has not been a principal subject of concern.¹⁹⁷

Finally, upon ratification of the Covenant the government of the United Kingdom of Great Britain and Northern Ireland (UK) made specific reservations to several provisions in the Covenant including Articles 1(3), 2(3), 6, 7(1)(a), 8(1)(b), 9, 10(1) and (2), 13(2)(a) and 14.¹⁹⁸ Most of these reservations are now redundant and have not been a cause for particular concern.¹⁹⁹ The UK reserved 'the right to interpret Article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory'. It also reserved the 'right to postpone the application of sub-paragraph (i) of paragraph (a) of Article 7, in so far as it concerns the provision of equal pay to men and women for equal work in the private sector in Jersey, Guernsey, the Isle of Man, Bermuda, Hong Kong and the Solomon Islands'.²⁰⁰ In addition, it reserved the right not to apply sub-paragraph 1(b) of Article 8 in Hong Kong.²⁰¹ Furthermore, while the UK recognised the right of everyone to social security in accordance with Article 9 it reserved 'the right to postpone implementation of the right [to social security] in the Cayman Islands and the Falkland Islands because of

195 CESCR, Concluding Observations: Netherlands Antilles, UN Doc. E/C.12/NLD/CO/3/Add.1, 31 January 2008, para. 14.

196 *Ibid.*, para. 33.

197 No reference is made to Norway's declaration in the concluding observations of the CESCR. See e.g. CESCR, Concluding Observations: Norway, UN Doc. E/C.12/1/Add.109, 23 June 2005.

198 See the United Kingdom of Great Britain and Northern Ireland, Fifth Periodic Reports Submitted by States parties under Articles 16 and 17 of the Covenant, UN Doc. E/C.12/GBR/5, 31 January 2008, para. 54.

199 *Ibid.* See also The United Kingdom Parliament, Joint Committee on Human Rights – Seventeenth Report 2004–5, Reservations to Human Rights Treaties, available at: www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9907.htm.

200 The reservation to Article 7(a)(i) is maintained (but is void for Hong Kong and the Solomon Islands as the UK is no longer responsible for these territories). See UN Doc. E/C.12/GBR/5, para. 53.

201 *Ibid.* The reservation on Article 8(1)(b) is void as the UK is no longer responsible for Hong Kong.

shortage of resources in these territories'. The reservations above have not been objected to by any State. Unlike reservations of Kuwait, Pakistan and Turkey, UK's reservations to the Covenant were limited to specific provisions in the Covenant and to specific territories. Most of these have been superseded by legislation or practice. In this respect, the CESCR welcomed the UK delegation's statement in 2002 that the UK was in the process of reviewing its reservations to international human rights instruments, with a view to withdrawing those that have been superseded by legislation or practice.²⁰² The Committee encouraged the UK 'to withdraw its reservations to the Covenant that have become redundant'.²⁰³ However, apart from declarations and reservations placed in respect of territories for which the UK is no longer responsible (e.g. the Gilbert Islands, Hong Kong; the Solomon Islands; Southern Rhodesia; and Tuvalu) all other declarations and reservations have been maintained.²⁰⁴

CONCLUSION

This article has considered four main questions. Firstly, what reservations to the ICESCR are permissible or impermissible? Secondly, who should decide whether a reservation under the ICESCR is permissible or impermissible? Thirdly, if a reservation under the Covenant is impermissible, what is the legal effect of such an impermissible reservation? And finally, are some of the existing State reservations to the Covenant incompatible with the object and purpose of the Covenant and thus impermissible? If so, how should reservations incompatible with the object and purpose of the Covenant be treated by the CESCR?

Regarding the first question, it is clear from the foregoing that only reservations compatible with the object and purpose of the Covenant, i.e. the Covenant's essential rules, rights and obligations, are permissible. Accordingly, reservations incompatible with the object and purpose of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of ESC rights are impermissible.

The question whether a reservation is compatible (and thus permissible) or incompatible (and thus impermissible) with the object and purpose of the Covenant is subject to interpretation by the CESCR. This could arise mainly in two situations: in the context of the consideration of periodic reports submitted by States and during the examination of individual or group petitions or communications. However, until the Optional Protocol to the ICESCR (OP-ICESCR) providing for the competence of the Committee to receive and consider individual and group of individuals communications is adopted by the General Assembly and comes into force, the latter option is not yet available to the CESCR.²⁰⁵

At present the Committee has one main option to consider reservations during its consideration of States parties periodic reports. Although this is a limitation compared to other treaty monitoring bodies, the Committee has some flexibility necessary to interpret the Covenant as

202 CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN Doc. E/C.12/1/Add.79, 5 June 2002, para. 9.

203 Ibid, para. 43.

204 See UN Doc. E/C.12/GBR/5, *supra* note 196, para. 53.

205 See *supra* note 69.

a living instrument. A well thought out and carefully drafted general comment or statement on reservations to the ICESCR could clarify the Committee's general approach to reservations. Concluding observations could then refer to this general comment or statement.

To assess the compatibility of a reservation with the object and purpose of the Covenant, account should be taken of the following:²⁰⁶ (i) the indivisibility and interdependence of the rights set out in the Covenant; (ii) the importance that the right (or rights) which is (or are) the subject of the reservation has (or have) within the general architecture of the Covenant; and (iii) the seriousness of the impact the reservation has (or is intended to have) upon a particular right, relevant rights or the Covenant as whole. As the above survey demonstrates, impermissible reservations include general and broad reservations subjecting the Covenant to domestic law incompatible with the Covenant or those extending to minimum core obligations, which are non-derogable and thereby depriving the Covenant of its *raison d'être*.

With respect to the third question, as argued above, reservations incompatible with the object and purpose of the Covenant should be treated as invalid, and therefore of no legal effect. Unless a State chooses to withdraw from the Covenant, which may not be legally possible, such reservations should generally be severable, meaning that the Covenant will be operative for the reserving State without benefit of the reservation, however phrased or named. However, as yet the Committee has not applied this approach, although it has encouraged States to review and withdraw relevant reservations.²⁰⁷ The Committee seems to have taken into consideration the realities of the situation by engaging States in a dialogue. The CESCR can advance this by requiring reserving States through their reports to explain: (i) the nature and scope of reservations or interpretative declarations; (ii) the reason(s) why such reservations were considered to be necessary and have been maintained; (iii) the precise effect of each reservation in terms of national law and policy; (iv) any plans to limit or modify the effect of reservations and ultimately withdraw them within a specific time frame.²⁰⁸ Where applicable, the Committee could highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal, whether total or partial, of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.²⁰⁹

On the final question, some of the existing reservations to the ICESCR, as shown above in section 3, do not appear to be compatible with the object and purpose of the Covenant. While it cannot be generally stated that States that have entered no or limited reservations (such as those considered in section 4), or that have removed existing ones, are necessarily doing any better with regard to the respect, protection and fulfilment ESC rights than those that have entered broad reservations (such as the States discussed in section 3), reservations to any human rights

206 See Tenth Report on Reservations to Treaties, *op.cit.* (note 1), para. 7.

207 See e.g. CESCR, Concluding Observations: Monaco, UN Doc. E/C.12/MCO/CO/1, 13 June 2006, paras 8 and 16.

208 See Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2007/5, 9 February 2007, para. 16 (9); and HRC, General Comment 24 (52), *op.cit.* (note 26), para. 20.

209 *Ibid.*

treaty 'clearly indicate the degree of commitment of the reserving State to full compliance with a particular treaty'.²¹⁰

Although there is no legal obligation under the ICESCR, and no express provision for the withdrawal of reservations, it would be in accordance with the Covenant's object and purpose, and the spirit of the Vienna Declaration and Programme of Action, adopted in 1993²¹¹, to envisage that laws and practices which necessitated existing reservations in some States would be examined carefully, progressively amended or repealed to ensure that the States parties complied, without reservation, with all the Covenant's provisions. This has certainly happened on some occasions,²¹² and some of the reservations withdrawn appear clearly to have been incompatible with the object and purpose of the Covenant.²¹³ Indeed, it is pointless to maintain reservations, which are incompatible with the object and purpose of the Covenant since these are invalid in law. However, the formal removal of such reservations is still useful as an indicator of a State's commitment to its human rights obligations.

210 See UN, Report of the Committee on the Elimination of Discrimination Against Women 18th and 19th Sessions (containing CEDAW Committee's Statements on Reservations to CEDAW), UN Doc. A/53/38/Rev.1, 1998, pp. 47–50, at pp. 48–49, para. 14.

211 Vienna Declaration, *supra* note 25, para. 5.

212 The States which have withdrawn some reservations to the ICESCR (on the dates shown in the brackets) include: Belarus (30 September 1992); Denmark (14 January 1976); Democratic Republic of Congo (21 March 2001); Malta (upon ratification 13 September 1990); New Zealand (5 September 2003).

213 For example on 21 March 2001, the Government of the (Democratic Republic of the) Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows: 'Reservation: The Government of the People's Republic of the Congo declares that it does not consider itself bound by the provisions of Article 13, paragraphs 3 and 4 (...) In our country, such provisions are inconsistent with the principle of nationalisation of education and with the monopoly granted to the State in that area'.

Carla Ferstman and Melissa Joyce¹

A Call to Action: Ending Threats and Reprisals Against Victims of Torture and Related International Crimes

Without witness protection there can be no fight against impunity. Without witness protection, victims of human rights abuses who complain and seek justice must face serious threats leading to physical harm and possibly the death of themselves or their loved ones. This violence is brought onto them by powerful people, whose power invariably comes from the uniforms they wear.

A legal system that promotes justice but does not set in place the means to protect witnesses is a fraud. When victims of human rights abuses understand this, they do not come forward to assert their rights against the perpetrators. No attempt is even begun to make complaints and assert rights. The victims remain silent, inert and fearful.

A justice system depends upon evidence being collected and brought before the courts. If fear prevails, evidence cannot be collected. When evidence is not collected, the courts either do not take up cases or dismiss the charges against the accused, as the judge can only consider what is brought before the court. In this manner, the perpetrators of torture, extrajudicial killings and forced disappearances routinely escape justice.

In human rights cases especially, the determining factor between one outcome and the other is protection.²

INTRODUCTION

This article, based on a recent report published by REDRESS,³ focuses on the countless incidents in which victims of torture, their families, witnesses in their case and their representatives have been threatened or where reprisals have actually been taken against them in an attempt to prevent them from speaking about what happened to them. Reprisals have included killings and physical attacks on them, their families, legal counsel, human rights defenders who take up their cause and key witnesses in addition to the making of death threats, intimidation and constant harassment, defamation, arrests and re-arrests, fabricated charges, loss of jobs, forced

1 Carla Ferstman is Director of REDRESS, Melissa Joyce is a member of REDRESS.

2 B. Fernando, 'The Importance of Protecting Witnesses', in *Special Report: Protecting Witnesses or Perverting Justice in Thailand*, Article 2, Vol. 5 No. 3, June 2006, at: www.Article2.org/pdf/v05n03.pdf, pp. 2-3.

3 See, REDRESS, *A Call To Action: Ending Threats and Reprisals Against Victims of Torture and Related International Crimes*, December 2009. The Report is available in English, French, Spanish and Arabic on REDRESS' website: <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%202010%20Dec%202009.pdf>.

relocation and attacks and burning of houses. Threats and reprisals can often result in victims withdrawing their case and key witnesses failing to testify. They can also have the broader effect of deterring other victims and witnesses from bringing complaints out of the fear that they too will be subjected to similar action. This article also draws attention to the accompanying serious inadequacy of protection measures available to victims of torture and related international crimes.

In September 2009, the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) convened an expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes. In her introductory speech, the High Commissioner Navanethem Pillay noted the need to 'refine the effectiveness of witness protection methods through the provision of adequate financial, technical and political support for programs at the national level'. She posited that 'in view of the overarching objective of combating impunity, the consideration of common standards and the evaluation of best practices that would serve as guidelines may also be useful to enhance human rights protection in trials concerning gross violations.'⁴

In response to the United Nations call to 'develop common standards and promote best practices that would serve as guidelines to States in protecting witnesses' REDRESS published the report with a view to assisting governments contemplating the development of protection systems and civil society groups advocating for such systems to be adopted. The findings of that report are not discussed at length herein, but the main problems and recommendations appear below.

From a normative perspective, the right to protection is little understood and in need of clarification. There is a diversity of opinion as to what this right entails, to whom it applies and who are the duty bearers. The lack of clarity of the right is not only a problem of law but transfers into the domain of implementation, leading to the range of practical challenges. There are a variety of contexts in which victims have been subjected to threats and reprisals, and a variety of consequences stemming from such practices. Likewise, there are a variety of protection needs that emerge and consequences flowing from the failure to protect. The REDRESS report considers the different methods of protection that have been employed by judicial and non-judicial bodies as they relate to different categories of persons and circumstances, considering who is deciding on protection-related matters and how such decisions are taken, and analysing the challenges inherent to the implementation of protection measures by international judicial or quasi-judicial bodies, and in particular their relationship with the territorial state where the crimes giving rise to the original victimisation took place.

FINDINGS IN BRIEF

In sum, the key protection problems that victims of serious human rights violations who have had the courage to seek justice have faced, and continue to face are diverse, ranging from lack of clarity as to the content of the right to protection, the absence of suitable structures at the

4 UN High Commissioner for Human Rights, Introductory Remarks by Navanethem Pillay at the OHCHR Expert meeting on witness protection for successful investigation and prosecution of gross human rights violations and international crimes, Geneva, 29 Sept. 2009.

domestic level to afford protection to victims of crime, the inability of states to afford protection in a context of conflict or protracted instability, the failure of governments to establish appropriate mechanisms to deal with allegations of state abuses, insufficient implementation structures and coordination for states to effectively respond to precautionary or provisional measures ordered by international bodies and a failure by international bodies and courts to appreciate and respond to the specificities of the risks posed.

Many of the challenges relate to a lack of resources – both personnel and financial, a lack of skill, and a failure to appreciate the gravity and scale of the problem. Part of the problem is also the narrowness of the approach taken by many states and international bodies when dealing with protection. Protection measures should be designed with regard to the particular problems that present themselves, having regard to the specific circumstances of the individuals in need of protection, their vulnerabilities, social, cultural and economic context, and the security environment in which they live. A one size-fits-all approach to victim and witness protection is nothing but an ill-fitting template that will provide only partial solutions to a very limited percentage of persons that require urgent assistance. Flexibility as to who may qualify for protection – whether it is the victim or witness themselves, the families, communities, or the legal representatives, human rights defenders, or others supporting them, and flexibility on the range of measures that may be afforded – whether formal or informal, is essential if progress is to be made. Protection should be about prevention – establishing transparent systems to ensure that victims are able to interact with the law in safety and dignity. Protection is also about sanction – ensuring that those who threaten and maim or kill victims and witnesses are appropriately prosecuted and punished, and that those who divulge confidential information that puts victims and witnesses at risk are sanctioned. Policymakers should be consulting with victims themselves in all their diversity about what measures may be necessary, and including them in decision-making processes.

Both at the international level and in a number of national jurisdictions, there has been a significant amount of work done to address the particular issue of the protection of witnesses. For example, in 2008 the United Nations Office on Drugs and Crime (UNODC) produced a seminal manual entitled 'Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime'⁵ and a model witness protection bill.⁶ In addition, international criminal tribunals have established specialised victim and witness protection units and have developed extensive expertise in handling the protection needs of witnesses, including witness relocation, structures for ensuring confidentiality and systems to protect witnesses prior to and post trial. Just recently, the International Criminal Court convened an expert meeting in which some of this best practice was explored.⁷ Despite this progress, more work needs to be done.

5 UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Hereinafter 'UN Good Practices Study'), Feb. 2008, available at: www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

6 Available on the website of UNODC: http://www.unodc.org/pdf/lap_witness-protection_2000.pdf.

7 See, ICC, *Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing before the International Criminal Court*, 29-30 Jan. 2009, available at: www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf.

In certain states where abuses are most rampant, the failure to protect victims and witnesses is a matter of design; it is a feature of the overall contempt shown for the rule of law and a triumph of autocracy. At the international level, much more needs to be done to respond to these particular challenges. By offering support and assistance to countries that need the help to develop workable systems, not only to curb organised crime, but also to tackle the specific challenges associated with serious violations of human rights. At the same time, much more needs to be done to condemn and sanction those states that show complete disregard for the need to protect victims and witnesses.

RECOMMENDATIONS

The Report recommends a number of measures that should be taken by states and others to improve the protection offered to victims and witnesses. In particular, it is recommended that states develop clear and coordinated policies on victim and witness protection and ensure training of police and prosecution services on best practices on protection. It is also recommended that states consider the reform of legislation in order to introduce protective measures –procedural and non-procedural, not only for general crime cases but catering specifically for human rights cases including the criminal abuse of power by state officials. Also, states should incorporate as an offence the threatening and intimidation of victims and witnesses; the fact that it was committed by an official should be an aggravating factor. The threatening and intimidation of victims and witnesses should also be a disciplinary sanction and a mechanism should be available whereby (law enforcement) officials can complain to their superiors about any such acts anonymously (whistleblower legislation).

- Set up or designate a national body responsible for victim and witness protection in cases of serious crimes, expressly including human rights violations
- Provide a clear legal basis for the status of the body concerned
- Ensure independence of the body, either within the criminal justice system or separately
- Provide a clear mandate and furnish body with adequate powers to issue binding orders
- Bodies should be provided with adequate resources and subject to transparent external accounting and review
- Ensure publicity of work of protection body through outreach and accessibility throughout the country
- Develop an adequate admissions system, taking into account both the importance of the case and the victim's/witness' testimony, the level of threat and the suitability of the protection programme, taking into consideration victims' wishes. Admission should be open to others apart from the direct victims and witnesses who are at risk as a result of the original violation. Where appropriate those attempting to seek justice and protect human rights, such as family members, community members, human rights defenders and journalists should also be allowed admission into the programme

- The body should have the full range of open-ended protection measures at its disposal. In choosing adequate measures of protection, the body should consult with the victim/witness, his or her lawyers, human rights defenders and others, as appropriate on the measures that are at the same time most effective and least disruptive. This should include temporary measures of protection and providing victims and witnesses with an allowance for self-help measures

(i) National Judiciary

- Develop national jurisprudence in line with international standards, taking into consideration best practices of victim and witness protection
- Be mindful of the need of victim and witness protection and order adequate measures where requested or required, taking into account defence rights and fair trial standards. This should include hearings closed to the public, use of pseudonyms, redaction of documents and expunging victim/witness identity from public records; shielding testimony through the use of a screen, curtain or two-way mirror; testimony via closed-circuit television or audio-visual links, voice and face distortion; use of pre-trial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony; change/deferral of the trial venue or hearing date; and presence of an accompanying person as support for the witness; pre-trial detention of suspects; suspension from official duty of police or others accused of human rights abuses; contempt proceedings
- Monitor the efficacy of protection measures and recommend changes in system where systemic failures become apparent

(ii) Other

- Encourage and enable NGOs or others to provide independent victim support and protection services
- Protect media in its work to expose threats and intimidations, and perpetrators of such acts through legislation as well as investigations and prosecutions
- Engage with international criminal courts by signing relocation agreements where expedited processes are envisaged and with access to the national victim and witness protection programmes

Recommendations to Human Rights Treaty Bodies and Courts

- Respond to request for interim measures in protection cases with utmost urgency; use available powers to issue interim measures on own motion as required
- Consider best practices from other bodies when ordering interim measures for protection
- When issuing interim measures require the state to include the views of the victims and victims' legal representatives in the determination of the nature or modality of the protection measures to be offered where feasible

- Alert political bodies within which treaty bodies and courts function (e.g. UN Human Rights Council, Council of Europe Committee of Ministers, Organisation of American States, African Union) of systemic problems in country/region; undertake special fact-finding missions where required
- Set up a specialised body/unit with sufficient staff having the required expertise that is tasked with ensuring the protection of Applicants and witnesses, which could be mandated to monitor the implementation and functioning of interim measures and look after the well-being of those participating in proceedings
- Assist with technical support to states to enable the adoption of the necessary measures to adequately follow-up the implementation of interim measures
- Strengthen follow-up mechanisms when granting interim measures and their evaluation systems to determine the need to maintain, modify or lift them

Recommendations to International Criminal Tribunals and Special and Hybrid Courts

(i) Policy

- Develop victim/witness policy within mandate of tribunal
- Consult with wide range of stakeholders, in particular victims, victims' groups and NGOs, in developing policy

(ii) VWU Units

- Set up VWU units where they do not already exist
- Ensure that adequate structures, systems and financing is in place to protect victims participating in proceedings who are not prosecution or defence witnesses, both those whose participation status has been confirmed and Applicants, as required
- Extend protection to lawyers, civil society groups and others who may be at risk on account of their support to victims and witnesses
- Provide adequate budgetary funding to the VWU in order to allow them to fulfil their mandate at the seats of the court but also in the field
- Use the Special Court for Sierra Leone Best-Practice Recommendations as a guideline for adapting current practices
- Include a psycho-social perspective in the protection and assistance provided envisaging the inclusion of long-term plans which might involve the collaboration of states, international agencies and intermediaries
- Use resettlement or in-country relocation measures more often by making the necessary networks and agreements in order to provide protection and services to avoid international relocation when possible

- Strengthen the capacity of the VWU offices in the field by staffing them with specialised and skilled personnel in order to broaden the protection and support services directly provided by the courts
- (iii) Other measures
- Use expedited contempt proceedings to punish those who violate protective measures
 - In the context of completion strategies, consider the creation of a centralised body to keep a safe record of those persons under protection. Such a body could keep track of the protection and assistance already provided, serve as a focal point for protected persons and conduct follow up analysis on the security situation in order to continue, modify or conclude the protection measures. Also, such a body could handle the documents and records, including the confidential documents and transcripts that have been expunged or redacted as a protective measure, and liaise with states undertaking protective functions in the countries concerned
- (iv) Monitoring
- Set up regular monitoring systems which include ongoing presence in the field with well trained local staff to monitor the situation locally and address any security concerns on a daily basis
 - Develop links with national counterparts or NGOs as appropriate to enable the best possible assessment of security situations that arise
- (v) Capacity building
- Help building states' national capacity in protection and support services
 - Share experiences with other national, regional, international, hybrid courts with a view to constantly developing best practices

Recommendations to International Organisations, States and Donor Community

- Provide adequate budgetary funding to address the protection mandate of human rights bodies as well as international criminal courts
- Ensure that thematic work on victim protection (UNODC, OHCHR, UNHCR) is well-coordinated and disseminated to all relevant actors. Establish a joint forum for continuous discussion
- OHCHR and UNDP and others should make victim and witness protection an integral part of their work on the administration of justice in field missions
- Special Rapporteurs should review their urgent action procedures and use best practices when engaging with states on victim and witness protection
- Develop the normative framework for the right to protection. OHCHR should establish a consultation process with relevant international, regional and national actors and experts to foster such a process

- The UN, CoE and other regional organisations should translate into relevant languages and make available the Guidelines and Manuals currently available in order to facilitate knowledge transfer and implementation

Recommendations to Non-governmental organisations

- Familiarise with standards and build own capacity
- Raise awareness about the need for victim and witness protection
- Monitor victim and witness protection in-country
- Advocate for changes in legislative and institutional set up where there is a failure to provide effective protection
- Engage with victim and witness protection programmes with a view to instituting best practices
- Advise victims, relatives and witnesses of potential risks and precautionary measures to be taken
- Use available domestic, regional and international legal avenues to seek protection in individual cases
- Provide direct assistance and protection where other avenues have been, or are bound to be, ineffective
- Seek to have incidents of threats, harassment or intimidation investigated, prosecuted and punished, and otherwise remedied locally, or before mixed or international bodies where possible.

CONCLUSION

Silencing victims through fear is one of the worst forms of impunity. It maintains the illusion of the rule of law and a legal system capable of following up wrongdoing, but somehow – even in countries, in which torture is thought to be endemic – very few, if any, complaints are made and, if they are, they rarely result in prosecutions or convictions. Silence denies the existence of the problem; the problem may be known but is never spoken about. Victims' experiences become shadowy, unacknowledged reflections of practice that does not officially exist. Such a state of denial maintains victims' isolation and typically entrenches their psychological trauma and provides an enabling environment for the torturers to continue unchecked and with complete impunity. The protection of victims from threats and reprisals is a necessary condition precedent to justice. Without it, the torture becomes a double torture; the experiences are simply relived day in and day out. As such, robust and effective victim and witness protection measures are of central importance to ensure that the absolute prohibition of torture and torture survivors' right to an effective remedy and full and adequate reparation are ensured in practice.

Section 3: Case Summaries and Commentaries

A. ECHR Case News: Admissibility Decisions and Communicated Cases

Right to Life

Tunç v Turkey

(24014/05)

European Court of Human Rights: Communicated 11 March 2010

Death of military soldier – conduct of effective investigation – unlawful killing - Article 2.

This is a KHRP case.

Facts

The Applicants are Turkish nationals and live in İstanbul, Turkey. They were born respectively in 1946 and 1952. They are the parents of Cihan Tunç who was born in 1983 and died in 2004.

On 13 February 2004, Cihan Tunç was injured by a gunshot during his military service. One hour after the incident he was declared dead at the military hospital in Diyarbakır. On the night of the incident Mr Tunç was on watch patrol duty together with some other soldiers at the military camp Perenco. Mr Tunç was assigned to Tower No. 4.

An internal investigation into the death of Mr Tunç was carried out. When considering the investigation, the Court first looked at the questioning of the soldiers present at the camp at the time of the shooting, then considered the medical examination and then considered the additional information.

Several soldiers and officers who were at the military base that night were questioned. Soldier M.S. who was with Mr Tunç shortly before the incident, told the internal investigating officer that Mr Tunç came up to him about 15 or 20 minutes before the incident took place. Mr Tunç told M.S that he was not in a good mood, but would not tell him the reason. Mr Tunç entered the Tower. During this time Mr Tunç was playing with his gun and when M.S. requested that he stop, he told M.S to mind his own business. Whilst M.S was standing outside smoking a cigarette he said he heard a gunshot. M.S. said that he rushed inside the tower and saw Mr Tunç lying on the floor with his gun in his right arm. M.S. said that he removed Mr Tunç's gun and tried to keep him awake. Shortly after, sergeant A.A arrived and Mr Tunç was taken to hospital in a police car.

When M.S. was questioned by the military prosecutor he gave a slightly different version of events. This time M.S. said that Mr Tunç had entered the tower and had started playing with his gun. M.S. told him to stop. He heard Mr Tunç load the gun about four times. M.S went to see what had happened and saw Mr Tunç lying on the floor with the gun on top of him. Sergeant A.A. arrived with some other soldiers. M.S told the prosecutor that Mr Tunç was transported in a marked Renault to the hospital in Diyarbakır.

M.S. said that he could not remember where the gun was just after the incident took place. Sergeant A.A told the investigation that he had heard a shot and rushed to the tower. When he arrived there, M.S was already at the scene.

A couple of hours after the incident the police examined the scene. They found two bullets, one bullet cartridge as well as a blow in the floor. Sketches and photos were taken of the scene. On the same day an autopsy was carried out of Cihan Tunç's body. The entry wound was established to be on the right side of the neck. The exit wound was on the left shoulder. There were no traces of violence to be found on the body. The medical examiner concluded that his death was due to a haemorrhage caused by a gunshot wound.

On the 16 February 2004, the laboratory of the criminal investigation returned their report on the findings they made. This stated that M.S. and Cihan Tunç both had traces of gun powder residue on their hands. On 17 February, the police ordered a ballistic report on both the guns that were found at the scene. It was held that the bullet cartridge came from Mr Tunç's gun.

On 30 June 2004, the Military Court decided that there was no negligence or misconduct involved in the death of Mr Tunç, which was declared a suicide. The Applicants appealed this decision on the basis that many questions had been left open and the investigation was not properly conducted. On the 14 October, the Military Court allowed the Applicants appeal against the decision to stop the investigation. The Military Court held that there had been no reasonable explanation for the finding of suicide and that there were issues which had not been resolved in the investigation, such as the fact that gun powder residue was found on M.S.'s hands.

On 24 November 2004, the military prosecutor returned to the scene in Perneco. By that time 13 out of the 15 involved soldiers had left the military service, amongst them M.S. The prosecutor accompanied by three investigators went to the tower where the incident had taken place. New concrete had been laid on the floor of the tower. At the scene they reconstructed the incident.

About two weeks later the prosecutor closed the investigations and handed the case file to the Military Court on 8 December. The investigation report concluded that the residue found on M.S.'s hand came from when he touched the floor just after the incident had taken place. Further, it stated that such material was easily found in a military camp such as Perneco and the story was consistent with what had been said by other soldiers. It concluded that the cause of death was not suicide, but an accident, and that the events were as follows: Mr Tunç was playing with his gun whilst sitting on a chest in the tower. When he got up he leant on the gun and pulled the trigger. The bullet entered the right side of his neck and exited through his left shoulder blade.

The Applicants appealed the decision, though the military tribunal rejected the appeal on 17 December 2004. The Applicants submitted an expert report

Complaint

The Applicants claimed that their son was murdered, and not killed in an accident, which violated his right to life enshrined under Article 2 of the Convention. They reasoned that the authorities did not have a plausible explanation for the death of their son. Further, the investigation was not independent. The Applicants relied on Article 3 in order to claim for the pain they had suffered due to the loss of their son and the insufficient investigation. Relying

on Article 13, the Applicants complained that they should have received compensation for the violation of Article 2. Further, the Applicants alleged that the Military Court had not been independent and impartial, in violation of their right to a fair trial guaranteed by Article 6 of the Convention. The Applicants alleged that the authorities did not work in an efficient manner because they knew that Mr Tunç was Kurdish. Therefore they claimed that Article 14 (non-discrimination) had been breached.

Held

The Court put two questions to the parties which will have to be answered and supported by documentation. The first question is as follows: Was the Applicant's son's right to life protected? In particular, did the authorities form plausible explanations about the circumstances of the death? The second question asks: With regard to the procedural aspect of Article 2 was the investigation in compliance with the requirements of Article 2?

Freedom of expression

Aydın and Others v Turkey

(49197/06, 23196/07, 50242/08, 60912/08, 14871/09)

Punishment for speaking in Kurdish – Articles 9, 10, 11, 14 and Article 3 of Protocol No. 1.

European Court of Human Rights: Communicated on 22 March 2010

Facts

The first Applicant, Ms Şükran Aydın, is a Turkish national who was born in 1957.

The Applicant was the Mayor of Bismil at the time of the incident. She was standing for the Parliamentary elections of 3 November 2002 as a candidate of the Democratic People's Party (DEHAP) in the province of Diyarbakır.

On 26 October 2002, Ms Aydın held speeches in Kurdish whilst campaigning for the election, On 2 January 2003, criminal proceedings were brought against the Applicant because she had allegedly breached the laws governing elections and voter registration (Law No. 298) by addressing the crowd in Kurdish.

Whilst the Applicant was on trial she explained to the Lice Criminal Court that she had spoken Kurdish because the population she was addressing was Kurdish. Furthermore, elderly people and women would not have understood her had she spoken in Turkish. On 26 January, the Court sentenced her to six months imprisonment and imposed a high fine. The Court then reduced the sentence to a simple fine and ordered a stay of execution.

On 11 May 2006 the Court of Cassation rectified the sentence to the original fine and upheld the judgment that was handed down by the Court of First Instance.

A second Applicant, Ms Ayşe Gökkan, is a Turkish national who was born in 1965. She was also standing for the Parliamentary elections of 3 November 2002 as a candidate of DEHAP in the

province of Şanlıurfa. Criminal proceedings were brought against her on 6 November 2002 for having acted contrary to Law No. 298 by campaigning in Kurdish.

During her trial, before the Viranşehir Criminal Court of First Instance, she submitted that the reason for her choice of language was that she was addressing a Kurdish crowd. The Court sentenced her to six months imprisonment and ordered the payment of a high fine. Due to her 'good character' the Court commuted the prison sentence into a fine and ordered a stay of execution.

On 29 November 2006 the Court of Cassation rejected the Applicants appeal because it was written in Kurdish. Further, the Court increased the amount of the fine and upheld the judgment of the Court of First Instance.

A third Applicant, Mr Ayhan Erkmen, is a Turkish national who was born in 1973. He was the mayor of Dağpınar at the time of the incident. The facts are the same as in the two cases above. The Court of First Instance sentenced him to five months imprisonment and finally deferred sentencing for five years.

A fourth Applicant, Mr Orhan Miroğlu, is a Turkish national who was born in 1952. He stood for the parliamentary elections as an independent candidate for the province of Mersin. Criminal proceedings were issued against him for speaking to a crowd in Kurdish on 27 June 2007. He was sentenced to six months imprisonment for violating Law No. 298 and addressing a crowd in Kurdish. The Mersin Magistrates Court sentenced him to six months imprisonment although later deferred sentencing for five years, taking into account the Applicants' good behaviour and the circumstances of the case. On 7 July 2008, the Mersin Criminal Court dismissed the Applicant's objections.

A fifth Applicant, Mr Mesut Beştaş, is a Turkish national who was born in 1966. On 16 June 2004 criminal proceedings were issued against him for addressing a crowd in Kurdish contrary to Law No. 298 during his campaign for the municipal elections in the province of Siirt.

On 10 May 2005, the Siirt Criminal Court of First Instance sentenced him to six months imprisonment and to a heavy fine. On request of the public prosecutor the court re-examined the Applicant's conviction and sentence and ordered him to pay a smaller administrative fine. On 11 October, the decision was quashed by the Court of Cassation. On 18 December 2008, the Siirt Assize Court dismissed the Applicant's objections to the above decision.

Complaints

The Applicants complained that their convictions and sentences, handed down by the national courts, for holding speeches in Kurdish violated their rights under Articles 9, 10, 11 and 14. Further, they complained that it violated their right to free elections under Article 3 of Protocol No. 1.

The second Applicant also complained of a violation of her right under Article 6 because her petition had been rejected by the Court. The third Applicant complained that his Article 11 rights had been violated because the presence of the gendarmes had deterred the speakers. The fourth Applicant complained that Article 13 had been violated as there was no effective remedy for him to challenge his conviction.

Held

The European Court of Human Rights (ECtHR) posed two questions which Turkey is required to answer. They were stated in the following terms:

1. Has there been interference with the Applicants' freedom of expression within the meaning of Article 10(1) of the Convention? If so, was that interference prescribed by law and necessary in terms of Article 10(2)?
2. Have the Applicants suffered discrimination in the enjoyment of their Convention rights on the ground of language, contrary to Article 14 of the Convention read in conjunction with Article 10?

The Government was requested to provide updated information on the judicial practice concerning the application of section 58 of Law No. 298 and any other relevant date under this head.

Le Pen v France

(18788/09)

European Court of Human Rights: Admissibility decision 20 April 2010

Politician's speech inciting hatred, violence and discrimination – not within the right to freedom of expression.

Facts

The Applicant, Mr Le Pen is a French national, who is the political party leader of the French National Front. On 19 April 2003, during an interview with *Le Monde* he stated amongst other things the following: 'The day there are no longer 5 million but 25 million Muslims in France, they will be in charge.' On 2 April 2004, the Paris Criminal Court sentenced him for 'the incitement of discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion'. Mr Le Pen was fined 10,000 EUR by the Criminal Court.

On 29 March 2006, the Paris Court of Appeal postponed the merits of the case to a later hearing. On 12 March 2008, after the Applicant had commented on his original statement in the weekly *Rivarol*, the Court of Appeal sentenced him to a further fine of 10,000 EUR. The Court of Appeal held that the Applicant's freedom of expression could not justify the provocation of discrimination, hatred or violence against a group of people.

The Applicant appealed this decision, stating that his remarks and references to Islam were done in a political nature and not due to their religious faith. On 3 February 2009 the Court of Cassation dismissed the appeal. The Court of Cassation held that the appeal judge had correctly assessed the issue and characterised the crime in its entirety.

Complaint

The Applicant alleged that there had been a violation of his right to freedom of expression under Article 10 of the Convention because of his conviction by the French courts. He argued that his remarks were part of the political debate on the issue of immigration.

Held

The Court held that the Applicant's conviction did amount to an interference with his right to freedom of expression. However, the Court also noted that this interference was prescribed by law. The Court held that the only thing they had to consider here was whether the interference was proportionate.

Under Article 10 § 2 the Court held that if the interference was to pursue a legitimate aim, that of protecting the rights and reputation of others, then there was no violation. Further, it would have to consider whether the interference was 'necessary in a democratic society'.

Although anyone who enters a public debate may use a degree of exaggeration or even provocation, it should not exceed certain limits; particularly with regard to the rights of others as was held in *Mamère v France* (12697/03).

The Court held that the Applicant's remarks were capable of giving a negative image and even disrupting the Muslim Community as a whole. The Applicant had objected to Muslims, which could generate the feeling of rejection and hostility towards the Muslim community.

Therefore, the reasons given by the domestic courts were relevant and sufficient. Further, having considered that the Applicant had risked imprisonment, the punishment was not disproportionate. The Court held that the interference to the Applicant's right to freedom of expression was 'necessary in a democratic society'. Therefore, the Court held that the Applicant's complaint was manifestly ill-founded.

Right to peaceful enjoyment of property

Sinan Yıldız v Turkey

(37959/04)

European Court of Human Rights: Admissibility decision on 12 January 2010

Interference with property – non-payment of compensation – Article 1 of Protocol 1 – Turkish neighbours were treated in a different manner – discrimination – Article 14.

This is a KHRP case.

Facts

The 24 Applicants in this case are Turkish nationals and live in Hakkari. They were born respectively in 1982, 1976, 1974, 1972, 1962, 1946, 1959, 1962, 1964, 1970, 1980, 1982, 1981, 1981, 1956, 1946, 1962, 1973, 1976, 1977, 1948, 1961, 1968 and 1972.

Parcel No. 47 is a plot of land of 1,564 square meters. It is owned by the Applicants and was declared an archaeological site by the authorities on 11 November 1999. At the same time parcel No. 48, which belonged to the Applicants' neighbours, was also declared an archaeological site. On 14 December 2001 the Minister of Cultural Affairs expropriated parcel No. 48 and paid the owner 37,149,600,000 Turkish Lira (TLR) (which is approximately EUR 28,825). Parcel No. 47 was valued at 125,196,800,000 TLR. However, because the authorities had run out of their budget, no money was awarded to the Applicants and the plot of land was not expropriated, though the restrictions by declaring it an archaeological site were still imposed. This included the need to get permission from the authorities if the Applicants wanted to sell their land.

On 19 September 2002, the Applicants brought their case to the High Court of Hakkari and claimed for damages as they had not received any form of compensation. On 15 November 2002, the High Court appointed an expert to value the property which he set at 341,522,885,917 TRL. The Court held that as the land had not been confiscated from the Applicants and they were allowed to live in their house, there was no real interference. Therefore the claim was dismissed.

Complaint

The Applicants complained that although they were allowed to continue to live on their land, their property rights were so severely restricted by the authorities that their rights under Article 1 of Protocol 1 were violated. Further, the Applicants relied on Article 14 to complain that their neighbours were provided with financial compensation by the Department for Cultural Affairs which was a discriminatory act towards them because they were Kurds.

Held

Article 1 of Protocol 1

The Court considered the implications of classifying the plot of land, parcel No. 48, an archaeological site. The Government submitted that they did not have to demolish the house and that the Applicants were able to cultivate the land as they did before. Further, the Government stated that the reason the Applicants had not been provided with any money was because the authorities had run out of funds, not because of their ethnic background. The Applicants, on the other hand, submitted that the interference was disproportionate to their rights.

The Court did not find it necessary to consider the question of whether the Applicants had exhausted the national remedies because the case was inadmissible. The Court pointed out that in the second paragraph of Article 1 of Protocol 1 the State was allowed to enforce such laws as it deemed necessary to control the use of the property. The Court held that the aims of the restrictions imposed by the State came within this Article. Further, the archaeological heritage required protection by the State.

The Court stated that the first paragraph of Article 1 of Protocol No. 1 had to be balanced against the second paragraph. When considering the relevant national law, the Court held that Law No. 2863 still allowed the Applicants to exercise their rights. Further, the requirements did not prevent the Applicants from selling their property because it only required authorities' permission prior to sale. Therefore, the requirements imposed on the Applicants were not

excessive or disproportionate to their rights under Article 1 of Protocol 1 and rejected the application made under Article 35.

Article 14

With regard to Article 14, the Court held that the Applicants had not demonstrated that they were victims of ethnic discrimination. The claim was manifestly ill-founded. The application was rejected.

The Court, sitting as a full panel, came to a majority decision and found the application inadmissible.

Right to private and family life and peaceful enjoyment of possessions

Demopoulos v Turkey and 7 other cases

(46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04 and 21819/04)

European Court of Human Rights: Admissibility decision 3 March 2010

Right to enjoyment of property and home – complaint of breach of Article 1 of Protocol No. 1 due to Turkish invasion in 1974.

Facts

The Applicants are 17 Cypriot nationals of Greek-Cypriot origin, living in Nicosia, Limassol, Lakatamia and Larnaca. They complained that they had been deprived of the use of their property and/or access to their homes in northern Cyprus, which was under the control of the ‘Turkish Republic of Northern Cyprus’ also known as the ‘TRNC’. Their properties included various plots of land, some of which were cultivated and some of which contained houses or buildings.

In July and August 1974, Turkish military operations took place in northern Cyprus. The peoples resisted the occupation. Nevertheless the Turkish military continued to divide Cypriot territories, which resulted in the proclamation of the TRNC in 1983. The proclamation was declared legally invalid by the United Nations. The Council of Europe (CoE) decided that the Government of the Republic of Cyprus should continue to be regarded as the sole legitimate government of the country. On December 2005, new legal provisions came into force (Law 67/2005), which permitted all natural and legal persons claiming rights in immovable or moveable property to bring a claim before the Immovable Property Commission (‘IPC’). However, a fee of 100 Turkish liras and a submission of title deeds or proof of ownership were required for each application.

As of November 2009, 433 cases were brought before the IPC. Out of these cases 85 had been concluded, the vast majority of which by means of friendly settlement. In more than 70 cases compensation had been awarded. Some 361,493 square metres of property were subject to restitution and approximately 47 million EUR paid in compensation.

Complaints

The Applicants relied on Article 1 of Protocol No. 1 (protection of property), Article 8 (right to respect for home) in order to complain that they had been prevented from enjoying their property and homes following the invasion of northern Cyprus by Turkey in 1974. In addition, they alleged that they had been victims of discrimination.

Further, the Applicants complained, in reliance upon Article 13, of a lack of an effective remedy in respect of their Convention rights under Article 8 (respect to respect for private life and family life) and Article 1 of Protocol No. 1.

The applications were lodged between January 1999 and March 2004. By a decision of 19 May 2009 the Chamber, to which the case had originally been assigned, relinquished its jurisdiction in favour of the Grand Chamber (Article 30 of the Convention). On 18 November 2009 a Grand Chamber hearing was held in Strasbourg.

Held

Article 1 of Protocol No. 1

The present eight cases were the first applications to be examined as to their admissibility following the pilot-judgment procedure in *Xenides-Arestis v. Turkey*. Although the Chamber in this case concluded that the remedy offered was adequate, no detailed explanation was provided, nor was the judgment binding upon the Grand Chamber.

The Court considered whether the requirement to exhaust domestic remedies (Article 35 § 1) applied to the situation of Greek-Cypriot owners of property under the control of the ‘TRNC’.

With the pending resolution of the illegal occupation of northern Cyprus, the Court maintained its view that it was crucial that individuals nonetheless continued to receive protection of their rights on a daily basis. Even if the Applicants did not live under the control of the ‘TRNC’, the rule of exhaustion applied if there was an effective remedy available for their complaints there. This did not put in doubt the fact that the Government of the Republic of Cyprus remained the sole legitimate Government of Cyprus. The Court reiterated that the domestic body was clearly more appropriate for deciding upon difficult matters of property ownership and valuating and assessing financial compensation, notwithstanding the time and efforts required from the Applicants to exhaust domestic remedies.

Since Turkey was regarded as being in illegal occupation of northern Cyprus by the international community, this did not mean that, when dealing with individual complaints under the Convention concerning interference with property, its discretion as to the manner in which it executed a judgment should not be respected. Due to the many changes that had occurred some 35 years after the properties had been left, it would risk being injudicious for the Court to impose an obligation to effect restitution in all cases – which would result in the forcible eviction and re-housing of many men, women and children – even with the aim of vindicating the rights of victims of violations of the Convention.

The Court was not convinced by the allegation that IPC members lacked subjective impartiality or the allegations relating to the presence of Turkish military personnel and the appointment of members of the IPC by the ‘TRNC’ President. Nor was it of the opinion that the sums of

compensation awarded under Law 67/2005 would fall short of what could be regarded as reasonable. The Court reiterated that claims under the Convention had to be substantiated by evidence and, in these cases, by title deeds or proof of ownership. It was not convinced by the Applicants' argument that the procedure laid down in the amended Law for the payment of compensation was unduly onerous or inaccessible, in particular with respect to legal representation, translations, lack of transparency and undue pressure. Moreover, none of the Applicants had appealed to the High Administrative Court in relation to the sums awarded or the allegations of material unfairness and procedural irregularity.

The Court concluded that Law 67/2005 provided an accessible and effective framework of redress for interferences with property owned by Greek Cypriots. The Applicants had not made use of this mechanism. Therefore, their complaints under Article 1 of Protocol No. 1 to the Convention had to be rejected owing to their failure to exhaust domestic remedies. The Court stressed that this decision was not to be interpreted as an obligation to make use of the IPC as the claimants could choose to await a political solution. However, if the Applicants wished to lodge an application before the ECtHR, its admissibility would be decided in line with the present principles.

Article 8

The Applicants, who were property owners, complained of an ongoing interference with their right to a private and family life. Their attempts to exhaust domestic remedies were precluded because their claim before the IPC was refused.

In respect of Application No. 13751/02, the Court was not persuaded that Mrs Ariana Lordou Anastasiadou's had had any realistic prospect, as a non-property owner, of applying either to the IPC or 'TRNC' courts. The Court found that the facts of her case did not disclose any interference with her right to respect for her home, as she had not been living in the family home for almost her entire life. The possible inheritance of a share in the title of that property was hypothetical and consequently this part of the application was rejected as being manifestly ill founded.

Other Complaints

The Court considered that no further issue arose for examination concerning the remaining complaints made by the Applicants in relation to its findings under Article 1 of Protocol No. 1 and Article 8.

Right to education

Horváth and Vadászi v Hungary

(2351/06)

European Court of Human Rights: Communicated 12 February 2010

Segregation of classes which were taught fewer subjects – discriminatory towards Roma – Article 14 – more damaging effects than supporting – degrading treatment – Article 3 – Right to education – Article 2 of Protocol No. 1 .

Facts

Both Applicants are Hungarian nationals of Roma origin. The Applicants were born in 1987 and live in Kesznyéten, Hungary. After an examination the Applicants were diagnosed as having a mild intellectual disability, as a result of which they were placed in a special class. In 2000, a further examination was carried out which confirmed the first results. The Applicants attended a special class from 1994 until 2002.

The Applicants alleged that in the special class their education was neglected in that they were not taught any of the following subjects: biology, chemistry, physics or a foreign language. The Applicants' lawyer alleged that the education the Applicants had received in the special class had jeopardised their intellectual progress, not only because they were taught fewer subjects but also because their teacher was not fully qualified. The lawyer filed a charge against unknown perpetrators for endangering minors.

An investigation was undertaken. The report of the investigation highlighted that the limited subjects taught in the special class might have jeopardised the Applicants' higher education. However, a further examination of the Applicants was carried out which confirmed the previous findings. This suggested that, due to their mental disability, it was not possible that their development could have been jeopardised. The public prosecutor held that there had been no grave breach of duty and the investigation came to a close in December 2004.

The Applicants' lawyers hired a clinical psychologist and a public education expert who concluded that being put in the special class had endangered their mental and psychological development. Based on this report, the Applicants brought a civil action against the school director for endangering minors. In June 2005, the District Court dismissed the claim.

Complaint

The Applicants relied on Article 3 claiming that they had been treated in a degrading manner. Further, the Applicants relied upon Article 2 of Protocol No. 1 claiming that they had been denied their full rights to education. This Article was relied upon in conjunction with Article 14 because, according to the Applicants, they had been discriminated against by reason of their ethnic background.

Held

The Court posed the following questions:

1. Do the Applicant's allegations fall within the ambit of Article 3? If so, were the procedural requirements flowing from that Article complied with, read alone or in conjunction with Article 14? In view of the reasons which the authorities gave for the non-pursuit of the Applicants' criminal complaints, were the relevant substantive and procedural provisions of the Hungarian criminal law sufficiently clear to enable an adequate investigation in their circumstance?
2. If not, has there been a violation of the Applicants' rights under Article 8, read alone or in conjunction with Article 14? Has Article 35 § 1 (exhaustion of local remedies) been complied with in this regard?

B. Substantive ECtHR Cases

Right to life

Babat and others v Turkey

(44936/04)

European Court of Human Rights: Judgment dated 12 January 2010

Right to life, Right to freedom of expression, Prohibition of Discrimination- Article 2, Article 13 and Article 14 of the Convention.

Facts

The Applicants are Turkish nationals, Aziz and Azime Babat and their daughter, Marifet Akgün (Babat). They live in İstanbul, Turkey.

The first and second Applicants' 25-year-old son, Önder Babat, was a student at the Law Faculty of İstanbul University. He had been the subject of disciplinary investigations at the University and had criminal proceedings pending against him for participating in an illegal demonstration. He was a Kurdish Alawite and had strong left-wing political views.

On 3 March 2004 Önder Babat was allegedly shot dead after visiting the office of the *Devrimci Hareket Dergisi* (*Revolutionary Movement Magazine*- a magazine with left-wing political views) with his three friends. Immediately after they left the office, Önder Babat collapsed in the street bleeding heavily from the head. His friends, with the help of other people, took him to Taksim İlkyardım Hospital where he died.

The Applicants' alleged that he was shot to death in the street by State agents and that the Turkish authorities had failed to carry out an effective investigation into his death. They also

claimed that the authorities had attempted to cover up the real cause of Önder Babat's death by insisting other factors may have caused his death, that they had not drawn up a proper sketch plan of the scene of the incident, and witness statements were not sought properly.

Complaints

The Applicants relied on Articles 2 and 13 of the Convention and claimed that no effective investigation had been conducted into his death.

Relying on Article 14 of the Convention, the Applicants also claimed that both Önder Babat's death and the ineffectiveness of the ensuing investigation had been motivated by the fact that he was Kurdish and had strong left-wing political views.

Held

Article 2

When considering the violation of Article 2 the Court considered principles established in previous case law, such as *McCann and Others v. the United Kingdom* (324) and *Buldan v. Turkey* (28298/95). When considering the burden of proof, the Court concluded that there was not enough evidence to conclude with certainty that Önder Babat was targeted or that his killing was politically motivated. It therefore held that, on the evidence, it could not conclude 'beyond reasonable doubt' that Önder Babat was killed by a State agent or a person acting on behalf of the State authorities. It follows that there was no violation of Article 2 of the Convention on account of the killing of Önder Babat and that there was no need to examine separately the complaint under Article 14 of the Convention.

With regard to the investigation, the Court held that it was not convinced that the authorities had taken all reasonable steps to secure the evidence of the case. The Court noted that no attempts were made to find witnesses of the incident. Therefore, the Court held that there had been a violation of Article 2 on account of the ineffectiveness of the criminal investigation into the Applicants' sons death.

Article 13 and 14

The Court dismissed the remainder of the Applicants' claim without any reasoning.

Article 41

It was held that that the respondent State is to pay the Applicants €15,000, jointly to Mr Aziz Babat and Ms Azime Babat, and €5,000 to Ms Marifet Akgün (Babat) in respect of non-pecuniary damage and any tax that may be chargeable on the above amounts.

Dubayev and Bersnukayeva v Russia

(30613/05, 30615/05)

European Court of Human Rights Chamber: Judgment dated 11 February 2010

Disappearance of two members of an illegal armed group – no information or proper investigation by State – grief caused to families – presumption of death – Articles 2, 3, 5, 13 and 41.

Facts

The first Applicant, a Russian national of Chechen origin was born in 1982. He is the father of Islam Dubayev. The second Applicant is also a Russian national of Chechen origin. She is the mother of Roman Bernukayeva and was born in 1983.

In December 1999 Islam Dubayev and Roman Bernukayeva joined an illegal armed group to fight against the Russian troops. In March 2000 they were told by a group of men that the State Duma announced an amnesty to all those who would voluntarily surrender fighting with the armed groups in Chechnya. Both men went to a Russian check-point and turned themselves in. In accordance with the Amnesty Act, the Federal Security Services issued the intention of the authorities' not to commence with criminal proceedings against the two men. The decisions were signed by Islam Dubayev and Roman Bernukayeva and approved by the prosecutor.

The Government claims that both men were released in March 2000, though they have not been seen since. In March 2000 a man told the first Applicant that his son had surrendered. Acting upon this information the first Applicant went to the village where his son was said to be detained. It was confirmed that his son had surrendered. After further searches for his son, the first Applicant met with the head of the District Department who showed the first Applicant the documents stating that no criminal proceedings would be issued against Islam Dubayev. The head of the District Department further mentioned that if Islam was not already home he most likely went back to the mountains.

In April 2000 the second Applicant's husband received a visit at his home stating that his son had been detained by the Russian forces. After further investigation the second Applicant was able to speak to a man who was detained with her son. He told the second Applicant that Roman wanted to surrender but was told by the armed men they had met, that he could only do so if he was armed. Before he turned himself in he armed himself with a machine gun.

Both Applicants have been searching jointly for their sons since April 2000, though without success. The Applicants have requested information about their sons' detention and have asked for support from various public bodies to issue an investigation.

In November 2000, the authorities launched an investigation into the disappearance of Islam Dubayev. The same was done in February 2001 regarding the disappearance of Roman Bernukayeva. In July 2001 both Applicants applied to the district prosecutor's office for victim status, which they were both granted. However, both Applicants were refused full disclosure of information until the criminal investigation was completed.

The first Applicant lodged a complaint with the Urus-Martan town court. The complaint concerned the failure of the prosecutor to conduct a thorough and impartial investigation into the abduction of his son. In April 2004 the Court allowed the complaint and instructed

the prosecutor. The first Applicant issued a further complaint on the basis that the prosecutor had failed to draw attention to the fact that not all of the relevant evidence was available. The Court accepted that the prosecutor should have issued a full and impartial investigation and dismissed the rest of the complaint. The first Applicant's appeal was rejected by the Supreme Court. The second Applicant also issued a complaint with the Urus-Martan Town Court, which was rejected. This decision was upheld by the Supreme Court.

Complaints

The Applicants both relied upon Article 2; firstly, in respect of their sons and, secondly, on account of the failure of the State to conduct an effective investigation. In addition, they relied upon Article 3 alleging that they had not been given sufficient information regarding their sons' disappearances. Article 5 (the right to liberty) was violated, according to the Applicants, on account of the actual disappearance of both men. Lastly, Article 13 was relied on, in conjunction with Article 2, on the basis of the State's failure to provide an effective remedy.

The Government submitted that the Applicants had never witnessed their sons in detention and that there had been no grounds to allege that the men were arrested or detained by the State.

Held

The Court requested further information from the State spanning the whole investigation. The Russian Government, however, only provided part of the documentation stating that it was incompatible with national legislation to produce information before the investigation had been completed. The Court found that Russian's explanation was insufficient.

Article 2

The Court held that Islam and Roman were both detained by State agents and had not been seen since their alleged release. Furthermore, the investigation had not provided any information about what happened to them or their whereabouts. No documentation about their detention or their release was provided. Therefore the men should be presumed dead. The Court further held that their death could be attributed to the fault of the State and that, as a result, Article 2 had been violated.

The Court held that there was a further violation of Article 2 which related to the authorities' failure to carry out an effective investigation into the disappearance of Islam Dubayev and Roman Bernukayeva.

Article 3

As a result of the disappearance of their sons the Applicants suffered from distress. This was further aggravated by the authorities' reaction as well as their failure to investigate what had happened to the Applicants' sons. The Court held that the Applicants had been treated inhumanely by the authorities and, therefore, a violation of Article 3 was found.

Article 5

The Court held that the authorities should have been more alert with regards to the disappearance of the Applicants' sons. Considering the Court's finding in relation to Article 2, as well as the fact that the authorities had failed to safeguard the men against the risk of disappearing, the

Court held that Islam and Roman were held in detention without the safeguards contained in Article 5. Therefore Article 5 was violated.

Article 13

The Court held that the investigations by the State into the disappearances of the men were ineffective. Since there was no other form of remedy available to the Applicants, the State had failed in its obligations under Article 13. The Court held that there had been a violation of Article 13 in conjunction with Article 2.

Each Applicant was awarded the sum of EUR 60,000 as non-pecuniary damages. Further the Court awarded EUR 639 for costs and expenses.

Kalender v Turkey

(4314/02)

European Court of Human Rights: Judgment dated 15 December 2009

Right to Life and investigation, Right to a fair Hearing, Impartiality of Court – Articles 2 and 6 § 1 of the Convention.

Facts

The Applicants are Turkish nationals; namely, Mrs Sevim Kalender, Mr Adnan Kalender and Ms Aysun Kalender. They live in İstanbul. Mrs Sevim Kalender's husband Kadir Kalender, and her husband's mother, Şükriye Kalender, were killed in an accident in a railway station. On 4 May 1997 the victims were on a Turkish national railway company train. On their arrival at the station they were hit and killed by a goods train on the adjacent track because they had erroneously disembarked the train on the wrong side and had been attempting to cross the track.

After the incident, a criminal investigation took place and found that the liability was shared between the Turkish national railway company train, the insufficient safety measures in the station and the Applicants' relatives. The train driver was acquitted of manslaughter. The Criminal Court subsequently requested that a criminal investigation be opened into breaches of safety regulations on the part of the Turkish national railway company train. However, the requested investigation was never opened.

The Applicants brought civil proceedings against the Turkish national railway company for their pecuniary and non-pecuniary damages. The Turkish Railway Company counter-claimed for damages flowing from delays caused by the incident. An expert concluded that Kadir and Şükriye Kalender were 60 per cent liable and that the railway company was 40 per cent liable. In June 2006 the Applicants, after having brought enforcement proceedings, obtained full payment of the compensation.

Complaints

The Applicants' relied on Articles 2 and 6 § 1. They complained that the authorities' had failed to protect their relatives, that the Court, which heard their case, had not been impartial and that the length of the proceedings had been excessive.

Held

Article 2

The appointed experts provided a report of the incident. Having regard to this evidence, the Court concluded that the structure of the station and its management had failed to comply with minimum safety requirements in the following ways; there was no subway, the passage was blocked by a goods train thus obliging passengers to cross the track, a failure to provide information on the train and a lack of staff. Therefore, the accident was not the fault of the victims. The Court found that the authorities had failed in their duty to implement regulations for the purpose of protecting the lives of passengers and that there had been a violation of Article 2.

The Turkish criminal justice system had not been in a position to determine the full extent to which the authorities were liable for the accident, and had not effectively implemented the provisions of domestic law that guaranteed the right to life. Although the authorities had reacted straight after the accident, the Court's subsequent request for the opening of a criminal investigation concerning the TCDD had never been followed up. For this reason the Court also held there had been a violation of Article 2.

Article 6 § 1

Since the Applicants did not dispute the appointed expert's report in relation to the shared liability of the accident, the Court rejected the complaint about a lack of impartiality and independence of the Court.

As to the second complaint under Article 6 § 1, the Court noted that the proceedings had lasted eight years and seven months and that the case was not a particularly complex one. Enforcement had taken about three years. The Court found that the length of the proceedings had not been reasonable and, for this reason, there had been a violation of Article 6 § 1.

Article 41

The Court awarded, in respect of all heads of damage, €35,000 to Sevim Kalender and to Aysun and Adnan Kalender €25,000 each. It also awarded €1,500 to the Applicants for their costs and expenses.

Mikayil Mammadov v Azerbaijan

(4762/05)

European Court of Human Rights: Judgment dated 17 December 2009

Right to Life, Prohibition on Torture, Right to a Fair Trial, Right to an Effective Remedy - Article 2, 3, 6 and 13 of the Convention.

Facts

The Applicant, Mr Mikayil Sattar Oğlu Mammadov is an Azerbaijani national who was born in 1961 and currently lives in Sumgayit, Azerbaijan.

The Applicant and his family have been internally displaced persons since 1993. They lived in a room in a State-owned hostel in Sumgayit. In 2003 they discovered three vacant rooms nearby, which belonged to the local army recruitment office. The Applicant repaired those rooms and moved into them together with his family at the end of 2003.

On 26 March 2004, a group of local authorities' representatives and police officers turned up at the Applicant's dwelling without a court order for eviction. Believing that they had come to evict the family, the Applicant's wife poured kerosene over herself and set it on fire. As a result, she suffered multiple serious burns affecting half of her body and died from complications on 30 March 2004. The Applicant alleged that the police officers did not take her threat to set herself on fire seriously, but instead had encouraged her to carry out her threat. This accusation was denied by the authorities who submitted that at least one police officer tried to help his wife put out the fire inside the dwelling.

Following the incident, the police loaded the Applicant's family possessions onto a truck and took them back to the hostel room where the family had resided previously.

A preliminary inquiry was carried out into the death of the Applicant's wife. A decision was taken by the investigator in May 2004 not to start criminal proceedings due to the lack of evidence that her attack had been provoked. The prosecutors, between July and September 2004, confirmed that decision many times. In 2005, criminal proceedings were eventually brought relating to the Applicant's wife's death and investigative measures were ordered. A number of witnesses were questioned including, the Applicant's family members, representatives of the local authorities and the police who were at the scene. The investigation was subsequently suspended several times for failure to identify the person who had incited the wife to commit suicide. It was finally terminated in September 2008.

Complaints

The Applicant relied on Articles 2, 3, 6 and 13. The Applicant complained that the Azerbaijani authorities had been responsible for his wife's death because, among other things, they had entered his dwelling unlawfully and failed to save his wife when she had set herself on fire.

Held

Article 2

The Court held that the Applicant's wife's death had been the result of suicide and not of force caused by another person. It had also been clear that the authorities had asked the Applicant and his family to vacate the dwelling on numerous occasions. By conducting the operation to evict the Applicant's family, the authorities could not be considered to have intentionally put the life of the Applicant's wife at risk. Given the diverging versions of the events presented by the Government and the Applicant, it was impossible to establish whether the authorities had become aware of the danger in time to prevent the fire or extinguish it as soon as possible. Consequently, there had been no violation in respect of the authorities' obligation to guarantee and protect the right to life.

However, the Court considered that the investigation carried out into the death of the Applicant's wife had been inadequate, because it did not cover all the issues relevant for the assessment of the State's responsibility in the incident. In particular, the investigation had been limited to the question of whether the State agents incited the wife to commit suicide, while it should have examined also whether the authorities had done everything necessary to prevent her death or minimise the injuries she received. The investigation had been marked by a number of other shortcomings, such as the failure to take immediate action, the fact that it had lasted over four years, the omission to reconstruct the sequence and duration of the events and to address the discrepancies in the witness statements. Therefore, there had been a violation of Article 2.

The Court rejected the Applicant's other complaints.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court awarded the Applicant €20,000 Euros in respect of non-pecuniary damage.

Oyal v Turkey (4864/05)

European Court of Human Rights: Judgment dated 23 March 2010.

HIV – Blood transfusion – Article 2 – positive obligation – Article 6 – Article 13.

Facts

The Applicant was born prematurely on 6 May 1996 and, owing to a medical condition, required a number of blood and plasma transfusions. These were administered between 19 May 1996 and 7 June 1996. The Applicant was discharged from hospital on 17 June 1996.

The Applicant was diagnosed with the HIV virus approximately four months after the blood transfusion. It was deduced that the donor of the transfusion had suffered from the virus. This became apparent after screening was carried out on the donor in October 1996 when he tried to donate blood once again. This screening took place after the blood had been administered to the Applicant, and the later donation was subsequently destroyed.

On 7 May 1997, the Applicants issued criminal proceedings against the İzmir Directorate of the Kızılay (Red Moon, equivalent to the Red Cross) and against the Ministry of Health. The Court found that blame could not be attributed to the doctors working for the Kızılay as the hospital in question did not perform the necessary tests to determine if donated blood was infected. It was also found that no case could be brought against the Minister of Health because the Turkish Constitution requires such a measure to be brought in Parliament. The matter was therefore out of the jurisdiction of the public prosecutor.

The Applicants also issued civil proceedings against the Kızılay and the Ministry of Health, and were awarded a total amount of 54,930,703,000 Turkish Lira (TRL) in non-pecuniary damages. However, the Court was keen to stress that no amount of damages awarded could possibly compensate the family for the sorrow and pain that they had suffered.

Complaint

The Applicants complained that the positive obligation contained in Article 2 of the Convention to protect the right to life had been breached.

The Applicants further alleged that the length of the administrative proceedings in the national courts had resulted in a breach of Article 6, as the case had not been heard within a 'reasonable time'. They also alleged that they were denied a fair hearing by an independent and impartial tribunal in contravention of Article 6(1).

The final allegation was that a lack of suitable domestic remedies available resulted in a breach of Article 13.

Held

Article 2

The question the Court considered was whether the damages awarded were appropriate and sufficient. The amount awarded only allowed the family to afford one year's worth of treatment. The family had subsequently been left poverty stricken due to the high costs of treating the infection.

It had been decided that the appropriate authorities would pay the Applicant's medical expenses but this never materialised. A special green card had also been awarded, allowing free health care for the Applicant but this was also withdrawn by the Ministry of Health.

Whilst the Court did commend the national courts for ordering damages to be paid, they also stated that the most appropriate remedy would have been to order the Defendant's to pay for both treatment and medical expenses throughout the Applicant's lifetime. The remedies offered by the national courts were deemed insufficient and, as such, the national authorities had failed to abide by the positive obligation imposed on them under Article 2 to protect the Applicant's right to life.

Article 6

The Court considered the case 'not at all complex': negligence and liability on behalf of the authorities had already been established by the national courts. There was no fault on behalf of the Applicant for the delayed proceedings and, taking into account the severity of the

Applicant's condition, the national courts had failed in their duty to hear the case within a 'reasonable time'. Reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the Applicant, the relevant authorities and what was at stake for the Applicant.

The Court considered the allegation that the Applicant's had not received a fair trial by an independent and impartial tribunal to be inadmissible.

Article 13

The Court referred to its earlier judgment in *Tendik and Others v. Turkey* (23188/02) and confirmed that a breach of Article 13 had occurred because the Turkish legal system did not provide a means of challenging the length of the proceedings.

Rantsev v Cyprus and Russia (25965/04)

European Court of Human Rights: Judgment dated 07 January 2010

Right to life, prohibition of slavery and forced labour, liberty and security– Article 2, 4 and 5.

Facts

The application was brought by Nikolay Rantsev, a Russian national who was born in 1938. He is the victim's father. The victim, Oxana Rantsev, was born in 1980 and was also a Russian national.

On 5 March 2001, Ms Rantsev was trafficked into Limassol, Cyprus from Russia under an 'artiste' visa scheme which gave her a permit to work as an artist in Cyprus. She started working on 16 March 2001 and was subjected to sexual exploitation in the cabaret club. On 19 March 2001 she decided to go back to Russia and ran away. The cabaret club manager, M.A., reported her to the police so that she would be put on the list to be expelled from Cyprus. On 28 March 2001, at approximately 4 a.m., she was spotted by a fellow cabaret artist. M.A. came to the club where she was seen and took her to the police. He asked them to declare her presence in the country illegal and to detain her. The police refused to do so and asked the cabaret club manager to collect her. She was detained until M.A. picked her up. Further, the police told M.A. that there was no record of any complaint made about her and, even if there was one, she would not be declared an illegal immigrant until 15 days after the date of the complaint. On 28 March at about 5.45 am, M.A. arrived back in the flat with Ms Rantsev. M.A. said that she looked drunk and did not eat or drink anything when they arrived at the flat. The police, however, had stated that she was not drunk. At about 6.30 am on 28 March 2001, Ms Rantsev was found dead below a window of a private home belonging to an employee of the cabaret club. That was the same apartment she had stayed in the night before. An inquest following her death found that a bedspread had been looped through the balcony railing of the room in which she had been staying. An autopsy was conducted the next day, which revealed that she had a number of injuries on her body as well as internal injuries. It was concluded that she had sustained these injuries through a fall, which had also caused her death.

The Applicant travelled to Cyprus with a lawyer and went to see the police. Despite the Applicant's request to participate in the inquest proceedings, the inquest hearing was held in his absence on 27 December 2001. The Court held that Ms Rantsev had died accidentally in her attempt to escape the apartment and that there was no evidence to suggest any criminal liability.

Complaints

Mr Rantsev complained that Cyprus had violated Article 2 due to the lack of investigation into his daughter's death. Further, he claimed that Russia and Cyprus had violated Articles 3 and 4 for the trafficking of his daughter and not sending her back to Russia. The Applicant also relied on Article 5 claiming that Cyprus had violated his daughter's rights when she was unlawfully detained.

Held

Article 2

The Court pointed out that Article 2 did not only prohibit the unlawful taking of a life but also imposed a positive obligation on states to take steps to safeguard the lives of those within its jurisdiction. The Court held that for Article 2 to be violated the authorities must have known, or ought to have known, at the time of a real and immediate risk to the victim's life. At the time the police could not have known about the risk to Ms Rantsev's life. For this reason, the Court concluded that the Cypriot authorities had not violated their positive obligation to protect Ms Rantsev's right to life under Article 2. The Court also found that Cyprus had contravened the procedural rules of Article 2 as the authorities had failed to effectively investigate Ms Rantsev's death. However, since the death had occurred outside of Russia's jurisdiction, it had not violated Article 2.

Article 3

Article 3 complaints were considered under Article 4 because any ill-treatment suffered would have been as a result of the trafficking.

Article 4

Both Cyprus and Russia were found to be in violation of Article 4 for failing to protect individuals against trafficking. Cyprus' regime of 'artiste' visas had failed legally and administratively to combat trafficking: The trafficking police had known that 'artists' visas were being used to traffic people, but had failed to take operational measures to protect the victim. Russia had violated Article 4 by failing to investigate the circumstances surrounding Ms Rantsev's recruitment. The Court also clarified states' positive obligations in relation to investigating trafficking, as well as taking protective measures through an administrative and legal framework. This included cross border cooperation and coordination, involving states of origin, transit and destination.

Article 5

Cyprus was also found to be in violation of Article 5 as the victim had been detained at the police station despite confirmation that she was not illegal and confined in the private apartment arbitrarily and unlawfully.

Cyprus was ordered to pay the Applicant €40,000 for non-pecuniary damage and 3,150 for costs and expenses. Russia was ordered to pay €2,000 for non-pecuniary damages.

Prohibition of torture and inhuman and degrading treatment

Al-Agha v Romania

(40933/02)

European Court of Human Rights: Judgment dated 12 January 2010

Prohibition on Torture, Right to Liberty and Security - Article 3 and 5 of the Convention.

Facts

The Applicant, Mr Akram Ahmed M. Al-Agha, was born in 1945 and lives in Bucharest, Romania.

In 1962 he left the Gaza Strip, then under Egyptian administration, with an Egyptian travel document, to study in Cairo. Following the 1973 Yom Kippur War, the Egyptian authorities did not renew his travel document but he obtained an Iraqi passport for Palestinian refugees, issued by the Iraqi Embassy in Tripoli. In 1993 he arrived in Romania on that passport together with a Romanian visa, and settled there as a businessman.

On 31 July 1998, an Order (No. 779) was made on the basis of the Law on the rules governing aliens in the Socialist Republic of Romania. The Ministry of the Interior revoked the Applicant's right to reside in Romania and declared him 'undesirable.' The Order was not served on him.

On 3 August 1998 he was asked to leave the country, however the Applicant was unable to leave Romanian territory within the prescribed time-limit because he did not have a passport.

On 15 February 2000 he was arrested and detained in the holding centre at Bucharest Otopeni Airport for failure to comply with this Order.

On June 2001 the Bucharest Court of Appeal upheld an application by the Applicant for his release, the annulment of the Order and an award of damages for his unlawful detention. It was noted that the Applicant had only been informed that his obligation to leave the county was due to the expiry of his residence permit. He had not been informed that he had been declared 'undesirable'.

On 25 September 2003 a final judgment by the Supreme Court held that the Applicant had been officially notified of the effects of the Order even though the Order had not been served on the Applicant since it was a secret document. He had been informed of the Order's existence while in the holding centre, where he had been placed in accordance with the law.

The Applicant claimed that in the centre he had endured precarious conditions in terms of hygiene and that there had been a lack of healthy food and physical exercise. He had been examined twice by way of routine medical assistance and after going on hunger strikes, but on several occasions he refused the treatment recommended. In February 2003 he was admitted to hospital and underwent specialist consultations and general tests.

In July 2003, he was released as the five-year period during which he had been declared undesirable had expired. Having been granted a refugee permit, he is now living in Romania in a centre managed by the National Refugee Office.

Complaints

The Applicant relied on Articles 3 and 5 of the Convention and alleged that his deprivation of liberty had been unlawful, he did not have an effective remedy to challenge it and during his time in the holding centre at Bucharest Airport, the living conditions had been very poor.

Held

Article 3

The Court first considered the Applicant's detention in the centre before September 2002. The Court held that there was a breach of Article 3. Following its visit in 1999, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) issued a report concerning the conditions in the centre in which the Applicant had been held. The Court referred in particular, to the access to showers only once a fortnight, the limited physical exercise and the CPT's comment that the centre was not suitable for long periods of captivity. Furthermore, the Applicant had received medical treatment only during his hunger strikes. Although there had been no intention on the part of the authorities to humiliate or debase the Applicant, the living conditions he had endured from February 2000 to September 2002 had undermined his dignity and had caused him to feel degraded. On this basis the Court held that there has been a breach of Article 3. In

Subsequently the Court considered the Applicant's detention in the centre after September 2002. In September 2002, the Court noted the CPT had found the material conditions in the centre to be satisfactory and that in January 2003 the Applicant had refused a specialist medical examination. In those circumstances, it was not established that the Applicant's living conditions in the centre after September 2002 had been sufficiently severe to breach Article 3.

Article 5

Article 5 § 1

The Court held that the Applicant had suffered deprivation of liberty because during his three years and five months in the centre, he could not leave except with the authorities' consent.

Detention in a holding centre with a view to deportation had a basis in Romanian law and this satisfied the criteria for accessibility. Although the Government had justified keeping the Applicant in detention by citing a risk to national security, no proceedings had been brought against him on that account and the Romanian authorities had not referred to any specific accusations against him.

Article 5 § 4

The Court also found a breach of 5 § 4 because the Applicant had not had an effective remedy to challenge the lawfulness of his deprivation of liberty. The Court noted that the Romanian courts were aware that it had been impossible for the Applicant to challenge the Order if it

was not served on him and he could not have benefited from the legislative status of being 'undesirable'.

Article 5 § 5

Although the Applicant could have obtained compensation under the Civil Code, the Government did not give any examples of relevant case law. The Applicant tried to seek compensation but he was unsuccessful in the national courts for unlawful detention. The Court held it was not clear that the Applicant had the possibility of obtaining compensation for his deprivation of liberty and thus found a violation of Article 5 § 5.

Article 41

Under Article 41 (just satisfaction), the Court awarded the Applicant €17,000 in respect of non-pecuniary damage.

Cemalettin Canlı v Turkey (no. 2)

(26235/04)

European Court of Human Rights: Judgment dated 9 February 2010

Prohibition of Inhuman or Degrading Treatment – Article 3 of the Convention.

Facts

The Applicant, Cemalettin Canlı, is a Turkish national who was born in 1969 and lives in Ankara.

He had taken part in a demonstration organised by the Confederation of Public-Sector Workers' Unions. The police had informed the participants that the demonstration was illegal and used force to arrest them, but the demonstrators reacted by throwing stones. The Applicant was arrested and taken in to police custody for breaching the Public Meetings and Demonstrations Act.

After the Applicant was released, he had two medical examinations which showed that his injuries would render him unable to work for three days. The Applicant made a complaint against the police officers that had arrested him and alleged that they had mistreated him.

Due to the fact that he had taken part in an unauthorised demonstration and most of the demonstrators had refused to disperse, it was permissible for the police officers to use force in accordance with the Public Meetings and Demonstrations Act. As a result, the prosecutor ruled that there was no case to answer. The Applicant had appealed against this decision but his appeal was dismissed by the Sincan Assize Court.

Criminal proceedings were also opened against the Applicant for breach of the Public Meetings and Demonstrations Act, but the Ankara Criminal Court acquitted him on 8 December 2005.

Complaints

The Applicant relied on Article 3 of the Convention in his complaint that during the demonstration, the police officers used unnecessary force and inflicted ill-treatment upon him. He also alleged that the investigation against the police officers in question had been ineffective.

Held

Article 3

The Court examined whether an effective investigation had been conducted in to the treatment of the Applicant. It was clear that the police officers had used force when arresting the demonstrators and the Applicant. His medical examination after the incident showed that the majority of the injuries could have resulted from force used by police officers during the demonstration. The Government had not shown that use of force was necessary. Nor had the Government established the exact circumstances of the Applicant's arrest. It was not alleged that the Applicant had retaliated or was violent, requiring the police officers to forcefully intervene. In view of the ill-treatment inflicted on the Applicant and the ineffective nature of the investigation, the Court concluded unanimously that there had been a violation of Article 3.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court awarded the Applicant €12,000 in respect of non-pecuniary damage and €1,000 for costs and expenses.

Daoudi v France

(19576/08)

European Court of Human Rights: Judgment dated 3 December 2009

Prohibition of inhuman or degrading treatment, Right to Respect for Private and Family Life—Article 3 and 8 of the Convention.

Facts

The Applicant, Kamel Daoudi, is an Algerian national who was born in 1974. He arrived in France with his parents in 1979. As well as his parents, his brother and sisters also live in France and are of French nationality. He acquired French nationality by naturalisation on 14 January 2001. Between 1999 and 2001 he allegedly began and maintained close contacts with radical Islamist groups and admitted having attended a paramilitary training course in Afghanistan in 2001. He is currently subject to a compulsory residence order in the French Creuse department.

During an operation to dismantle a radical Islamist group affiliated to al-Qaeda, the Applicant was arrested because he was suspected of having prepared a suicide attack on the United States Embassy in Paris on 25 September 2001. He was later charged with conspiring to prepare an act of terrorism and using a forged passport. He was stripped of his French nationality. On 15 March 2005 the Paris *tribunal de grande instance* found him guilty as charged, sentenced him to nine years' imprisonment and ordered his permanent exclusion from French territory. The

Paris Court of Appeal subsequently upheld the judgment but reduced the sentence to six years' imprisonment.

On 7 April 2008 the Applicant lodged an application to have the order, which permanently excluded him from French territory, set aside. Shortly after his release he was taken to an administrative detention centre where he immediately applied for asylum and requested suspension of the deportation order. On the same day he also lodged a request with the ECtHR under Rule 39 of the Rules of Court (interim measures).

The Court requested that the French Government not deport the Applicant to Algeria whilst there were pending proceedings before the Court. He was then made the subject of a compulsory residence order in the Creuse department. The Applicant's applications and appeals were subsequently dismissed.

On 30 April, the Paris Administrative Court decided that the application for suspension of the deportation order, following the application of Rule 39 of the Rules of Court, was not necessary. The Paris Court of Appeal dismissed his asylum application and dismissed the application for the order excluding him from French territory to be lifted. On appeal, the National Court of Asylum (CNDA) ruled against the decision refusing him asylum. Due to his involvement in radical Islamist movements it was reasonable to believe that the Applicant could be subjected to inhuman or degrading treatment on his arrival in Algeria.

However in this case, under the relevant domestic and international provisions, no protection was given to persons who gave serious cause for belief that they were guilty of acts contrary to the purposes and principles of the United Nations. An appeal on points of law against that decision is pending before the *Conseil d'Etat*, the French Council of State.

Complaints

The Applicant relied on Articles 3 and 8 of the Convention and he alleged that the implementation of the order deporting him to Algeria would expose him to a risk of inhuman or degrading treatment prohibited by Article 3.

He also alleged that he has no ties with Algeria as he had come to France when he was five-years-old. His deportation would be a disproportionate interference with his right to respect for his private and family life guaranteed by Article 8.

Held

Article 3

The Court considered that it was legitimate for states to show great firmness in dealing with those who took part in acts of terrorism. Although the Court had to consider and assess the risk incurred by the Applicant if he were to be deported to Algeria with regards to the absolute prohibition of torture and of inhuman or degrading treatment or punishment.

The Court noted that the Algerian authorities were aware of the Applicant's identity and of the serious crimes of which he had been convicted and there was nothing to suggest that he was or could be the subject of criminal proceedings in Algeria for the offences at the beginning of this case.

It was clear from recent sources, such as reports of the United Nations Committee against Torture and a number of non-governmental organisations, that in Algeria anyone allegedly involved in terrorist acts were liable to be arrested and detained by the Department for Information and Security (DRS), without a clear legal base and essentially for the purposes of obtaining information, rather than a purely judicial aim. According to the reports, such persons placed in detention without review by the judicial authorities and without any communication with the outside could be subjected to ill-treatment, including torture. Evidence to refute those assertions was not produced by the Government and the National Court of Asylum reasonably believed that on his arrival in Algeria, the Algerian security might have arrested the Applicant and subjected him to torture. For those reasons, it held unanimously that a decision to deport the Applicant would amount to a violation of Article 3. Not only was he suspected of having links with terrorism, but he had also been convicted of serious crimes in France and of which the Algerian authorities were aware. For these reasons the Court felt that it was likely that the Applicant would become a target for the DRS.

Article 8

The Court did not consider it necessary to examine whether the Applicant's right to private and family life would be violated if he were deported, as the Court had already held that the Applicant's deportation to Algeria would amount to a violation of Article 3. Further, the Court held that it had no reason to doubt that the French Government would comply with the present judgment.

Article 41 (just satisfaction)

The Court considered that its conclusion under Article 3 amounted to sufficient just satisfaction in respect of non-pecuniary damage. However, it awarded the Applicant €4,500 for costs and expenses.

Denis Vasilyev v Russia

(32704/04)

European Court of Human Rights: Judgment dated 17 December 2009.

Right to an effective remedy and prohibition of torture– Article 13 and Article 3.

Facts

Denis Vasilyev was born in 1983 and is a Russian national. On 29 June 2001 Mr Vasilyev and his friend were attacked in their neighbourhood. They were both left unconscious and various items were stolen from them. When the police arrived, believing that the Applicant and his friend were drunk, they dragged them to nearby rubbish bins and abandoned them there in order to attend to a property alarm. An ambulance was called when a janitor found the pair unconscious the following morning.

The Applicant was diagnosed with alcohol intoxication. From the time of his arrival at 9 a.m. until 5 p.m. the following day, he was left unconscious and undressed on a trolley in the corridor of the hospital. As a result, emergency surgery was required and nine days later, whilst he was

comatose, the Applicant was transferred to another hospital. Numerous operations were carried out from June 2001 until July 2001. In October 2001, the Applicant was declared to have a second category disability.

On 30 June 2001, police received hospital reports detailing the Applicant's and his friend's injuries. Twenty days later an internal inquiry was opened and then after two months it was discontinued. Criminal proceedings were also brought and suspended several times, before it was eventually concluded that the perpetrators of the crime could not be identified. The two police officers that had abandoned the Applicant and his friend were acquitted following another enquiry in January 2002, as the courts found no evidence to show that the officers had known the seriousness of their condition.

In March 2003, two medical studies were carried out in order to investigate whether medical negligence had taken place, however the findings conflicted. The study based on the medical file found that the Applicant was not examined or treated adequately at the hospital, leading to the drastic worsening of his condition. The other study found that both the diagnosis and surgery had been carried out in appropriate time. However, this study was based on partial copies of the medical file, which had for a period of time been lost. No charges had been brought by November 2006.

Complaints

The Applicant complained of the police officers' failure to assist him when he was found unconscious and the failure to provide adequate medical care under Article 3 (prohibition of inhuman or degrading treatment). He also complained about the lack of adequate investigation in regards to the assault, the actions of the officers and the medical negligence under Article 13 (right to an effective remedy).

Held

Article 3

The Court held that the police had been aware of the seriousness of the Applicant's condition as he had been found unconscious and therefore had a duty under domestic law and the European Convention to protect the physical well-being of vulnerable individuals. Contrary to this, the officers had not called an ambulance or examined the Applicant and instead had dragged him by the armpits in breach of the law. Furthermore, the Court found that prioritising private-security matters over the orders of the officers-on-duty meant that protection of private property had been put before the Applicant's life.

On the basis of the medical study that was based on the medical file, the Court found that inadequate medical care had been given to Mr Vasilyev, as even the most basic procedures had not been implemented. The Court did not find the other medical study reliable as it had been affiliated with the Moscow authorities.

There had also been a lack of effective investigation as the police officers had failed to report or open an inquiry into the assault suffered by Mr Vasilyev. This was admitted by the prosecuting authorities, who also admitted the fact that various other investigative steps had not been taken. Moreover, there were a number of other procedural defects in the investigation process for the

assault. In relation to the actions of the police, investigations had been incomplete, leading to the acquittal of the officers. The medical negligence investigation had also been disposed of hastily. Furthermore, the original medical record had been lost making it impossible to determine what the repercussions of the inadequate medical attention were on the Applicant. For the aforementioned reasons the Court held that Article 3 had been violated.

Article 13

Since civil claims for damages have a limited chance of success where State officials are acquitted or where criminal proceedings against them are discontinued, the Court held that there had been a violation of Article 13.

The Applicants were awarded €75,000 for pecuniary damages and €78,000 for non-pecuniary damages under Article 41 (just satisfaction).

Hussun and Others v Italy

(10171/05, 10601/05, 11593/05 and 17165/05)

European Court of Human Rights: Judgment dated 19 January 2010

Right of individual application – Articles 2, 3, 13 and Article 4 of Protocol 4 of the Convention.

Facts

In March 2005, the 84 Applicants landed on the island Lampedusa in Italy from Libya. Most of the Applicants appeared to be from Arab states. They had sailed to Europe on board unsafe vessels (most of whom carried no identity documents), in search of a better economic situation and/or political asylum. When they arrived they were placed in holding centres. At the end of March 2005 they instructed a lawyer to represent them, however many of the Applicants had subsequently escaped the holding centre.

The Applicants were divided into three groups. The Court had some documents (although incomplete), such as powers of attorney, belonging to 57 of the Applicants whose whereabouts were unknown. In April 2005, the second group of 14 Applicants had been expelled by decision of the Prefect of Crotone, after a district court had heard each of them in the presence of a lawyer and an interpreter and endorsed the expulsions. The remaining 13 Applicants had been released when the time limit for keeping them in the holding centre expired and their representatives had lost contact with all but one of them, Mr Kamel Midawi.

Complaints

The Applicants relied on the following Articles: Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), Article 13 (right to an effective remedy) and Article 34 (right of individual application), as well as on Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens). They complained that: there is a risk of expulsion, there is a lack of remedies available against the expulsion, their collective expulsion as aliens' is unlawful and also of having been obstructed in their right to apply to the Court.

Held

The Court ordered an examination of the handwriting in the powers of attorney of the first group of 57 Applicants as the Government had questioned the authenticity of the powers of attorney. It revealed that in at least 34 cases, the powers of attorney had been written and signed by the same person. Counsel subsequently withdrew the applications lodged on behalf of 22 Applicants. The representatives had lost all contact with the Applicants and were unable to trace them, with the exception of Mr Kamel Midawi (who lived in Italy). Therefore the Court was unable to get more information about the particular situation of each Applicant, such as where in Libya the group had been expelled to, or what kind of reception the Libyan authorities had given them. The Court held that further examination of the applications in this respect was not justified and they should be struck out of the list.

The Court found it was not justifiable to examine further the applications, for the same reasons as mentioned above. It followed that they should be struck out of the list. Mr Kamel Midawi's application was an exception.

In Mr Kamel Midawi's case, the Court found that there was no sign of any conduct on the part of the domestic authorities that might have prevented this Applicant from lodging an application with the domestic court. The Court held that there had been no violation of Article 34.

Kayankin v Russia

(24427/02)

European Court of Human Rights: Judgment dated 11 February 2010

Compulsory military duty – medical condition – ill-treatment by armed forces– Articles 3, 6 and 13.

Facts

The Applicant, a Russian national, was born in 1980. He lives in the village of Sosnovo. In November 1987 he was diagnosed with hypertension. This was recorded in his medical records.

In 1996 the District Military Board registered the Applicant for compulsory military service. On 12 February 1997 after a medical examination, the Applicant was assigned category D on the medical scale, which meant that he was 'temporarily unfit' for service. This was based on the fact that the Applicant's weight and height were disproportionate.

On 18 February 1997, the Applicant was examined by an endocrinologist who held that his health condition was satisfactory. He also diagnosed the Applicant with a diffuse enlargement of the thyroid gland. In October 1998, the Applicant was examined by the medical commission. This time he was held to be 'fit for military service.' The Applicant's call-up was listed for April 1999. The Applicant was drafted into the army on 3 June 1999.

The Applicant alleged that he was beaten on several occasions by senior conscripts. On 5 September 1999 the Captain allegedly hit the Applicant five times in the head with an artillery gun shell.

On 27 October the Applicant left the unit without authorisation. He travelled to St. Petersburg with his mother. In St. Petersburg he underwent a medical examination at the Bekhterev Scientific Research Psychoneurology Institute. The Applicant was diagnosed with organic brain disease. It was recommended that he limit all physical activities and possibly seek a placement in a hospital.

On 12 November 1999 the Applicant complained to the military prosecutor that his conscription had been unlawful and that he had suffered from ill-treatment during his service. On 15 November he was admitted to the military hospital. On 25 January 2000 the Applicant was discharged from military service and in December he was issued with a medical certificate stating that he had third-degree disability due to his illness.

On 19 January 2000 the Applicant brought a claim before the Priozersk Town Court against the Drafting Military Commission requesting compensation. Over a period of four years the Court heard the case, which was interrupted by several adjournments. On 18 March 2004 the Court dismissed the claims for compensation and held that the application to quash the decision of the 3 June 1999 was ill-founded. On 2 June 2004 the Leningrad Regional Court upheld the judgment.

A complex medical examination of the Applicant was conducted. The experts issued a report in which it was argued that the Applicant did not sustain any injuries in autumn 1999 when the alleged ill-treatment took place. On 7 February 2001, the criminal proceedings against the Captain were dropped. On 10 January 2002 the prosecutor of the North-Caucasian Military Circuit ordered a fresh investigation based on the fact that the Applicant's complaint of ill-treatment by other senior conscripts had not been fully investigated. On 17 June 2002 the criminal proceedings were closed because there was no case to answer.

Complaints

The Applicant relied on Article 3 in that his conscription to the armed forces amounted to degrading treatment. The Applicant further complained that he had been subjected to treatment incompatible with Article 3 and that no effective investigation had been carried out by the authorities. He therefore claimed a breach of Article 13. The Applicant complained that the length of the proceedings in his tort action had been incompatible with Article 6.

Held

Article 3

The Court held that it was not disputed by the State that the threshold of Article 3 was reached. However, it had to be considered whether any suffering prohibited by Article 3 was due to the State's failure. The Court was not able to conclude that the Russian authorities had acted negligently by finding him fit for military duty. Furthermore, he was medically examined three times before he was drafted. The Court further stated that the Applicant had at no time during the three medical examinations complained of any ill-health. The Court therefore held that the application was manifestly ill-founded and it rejected this part of the application in accordance with Article 35(4).

The Court held that the Applicant had not established that he was subjected to treatment contrary to Article 3 during his military service. The issue which had to be considered was not whether an investigation had taken place, as it clearly had, but whether it had been done adequately. The Court considered that the investigation was conducted very promptly and clearly medical evidence was considered thoroughly. The investigation was also reviewed by a high-ranking prosecutor. Therefore the Court held that the investigation was conducted effectively for the purpose of Article 3.

Article 6

The length of the proceedings covered over approximately four years and four months in front of two different levels of jurisdiction. The Court considered that the authorities did not take adequate steps to ensure the attendance of State officials and that they had failed to show up on at least five occasions. It further held that the domestic courts did not take action in order to apply discipline on the participants of the proceedings. Therefore, the Court held that the Applicant's case had not been heard within a reasonable time and consequently, Article 6 had been breached.

The Court awarded the Applicant EUR 2,000 in respect of non-pecuniary damages. The Court did not award any sum for costs and expenses since the Applicant did not claim for any.

Orchowski and Norbert Sikoski v Poland

(17885/04 and 17599/05)

European Court of Human Rights: Judgment dated 22 October 2009

Overcrowding in Polish prisons - Article 3, 8 and 46.

Facts

The Applicants Mr Krzysztof Orchowski and Mr Norbert Sikorski, who were born in 1971 and 1975 respectively, are Polish nationals. They are both currently serving prison sentences in Poland.

The Applicants alleged that, from the date of their imprisonment to the day they lodged their applications, they had less than the statutory three m² of living space per person in the four different detention centres in which they had been detained. Prison Service statistics indicated that on average the prison population stood at 110%.

The Prison Service stated that the overcrowding suffered by prisoners was justified, as there was chronic overcrowding nationwide. The penitentiary judge gave support to this notion under Article 248 of the Code of Execution of Criminal Sentences, dismissing the Applicant's complaints as ill founded.

The Applicants also lodged claims for damages. Mr Orchowski's claim is still pending. Mr Sikorski was awarded 5,000 Polish zlotys PLN (approximately €1,200) for his claim for compensation for harm done to his health as a consequence of being imprisoned with smokers. However, his claim for compensation due to unhealthy living conditions at Koszalin Prison and damage done to his mental well-being were dismissed.

Complaints

The Applicants relied on Articles 3, 8 and 46 of the Convention. They complained about the lack of space in their cells and other conditions of detention and the right to respect for private and family life. Mr Orchowski and Mr Sikorski's applications were lodged on 11 May 2004 and 4 May 2005 respectively.

Held

Article 3

According to the Court, where prison overcrowding reached a certain level, the lack of space in a prison could amount to a violation of Article 3. On 26 May 2008 the Polish Constitutional Court held that where prison overcrowding became serious and chronic, this could amount to inhuman and degrading treatment. As Article 248 of the Code of Execution of Criminal Sentences was incompatible with Article 40 of the Constitution and as Article 40 of the Polish Constitution was drafted almost identically to Article 3 of the Convention, the Court considered that a violation of the latter can be inferred where detainees are deprived of the minimum of 3 m² of space in his/her cell for extended periods. This had been established in both cases and had been aggravated by other issues, such as insufficient outdoor exercise and privacy, insalubrious conditions and frequent transfers.

The Court considered the submissions made to the Polish Constitutional Court by the Helsinki Foundation for Human Rights. The official figures of Polish prison populations were inaccurate. In calculating the figures the penitentiary authorities compared the number of detainees in a facility to the total surface area of the entire detention facility, including entertainment rooms, gymnasia and larger single-person cells, rather than to the actual living space. Therefore official rates of overcrowding were much lower than they were in reality and in certain detention facilities maximum occupancy rates were exceeded by up to 50%.

The Court concluded that there had been a violation of Article 3 as both the Applicants had endured levels of hardship that exceeded the unavoidable level of suffering inherent in detention.

Article 8

The Court held that it was not necessary to consider a violation of Article 8 as it had already concluded that Article 3 had been violated.

Article 46

Approximately 160 applications were pending against Poland in relation to inadequate prison conditions under Article 3 of the Convention. The Polish Constitutional Court and State authorities acknowledged the seriousness of the overcrowding in Polish detention facilities and its incompatibility with the Convention. The Constitutional Court had further declared unconstitutional the domestic law the authorities had used to legitimise the problem.

Poland's recent attempts to improve conditions of detention could not remedy past violations and therefore, a general solution was required to address the core of the problem. The Court

encouraged the State to develop an efficient system of complaints to the Prison Service and the authorities supervising detention facilities.

Article 41

The Court awarded Mr Orchowski €3,000 and Mr Sikorski €3,500 for non-pecuniary damage under Article 41 (just satisfaction). It awarded Mr Orchowski €12 for costs and expenses.

Palushi v Austria

(27900/04)

European Court of Human Rights: Judgment dated 22 December 2009

Prohibition on Torture-Article 3 of the Convention.

Facts

The Applicant, Naser Palushi, was born in 1972. He was previously a national of the former Socialist Federal Republic of Yugoslavia. He is now an Austrian national and lives in Vienna.

On 28 April 1994 he had requested asylum, which was refused. As it was illegal for him to stay, he was detained and held in custody in Vienna Police Prison. He was going to be extradited. Two days later, he went on a hunger strike in order to protest against his extradition.

On 21 May 1994 and three weeks into his hunger strike, the Applicant alleged that he slipped and hit his head while going to the toilet. His cellmate called the prison officers' and they pulled him out of the cell by his feet. He was kicked, beaten and stabbed behind the ears with ballpoint pens by the police officers. He was then dragged down the stairs, which caused him back injuries, before being placed in solitary confinement. He claimed that his requests to see a doctor were refused until 24 May 1994, when a representative of an NGO, a journalist and a friend visited him and, noticing abrasions on his back and hip and small bruises behind his ears, insisted that he be taken to the prison doctor. The doctor's report of the same day noted several abrasions in the middle and lower parts of the Applicant's back; one of the abrasions, being substantial, was treated with a spray and bandaged.

In June 1994 the Applicant filed a complaint to the Vienna Administrative Panel regarding his ill-treatment whilst in detention. He gave evidence together with his former cellmates and the two prison officers' involved. The former cellmates claimed that they had heard screaming and noises of beating coming from the cell where the Applicant had been held. The prison officers' denied the Applicant's allegation and claimed that, on the day in question, he was causing unrest by shouting and banging on the cell door. When he was released into the cell with other inmates, the paramedic prison officer ascertained that the Applicant was pretending to be unconscious. As a disciplinary measure, he was taken into an individual cell and he had to be dragged because he could not be made to walk. The Administrative Panel dismissed the case because it concerned a disciplinary measure, which was a matter for the Police Prison Internal Rules.

The case was remitted back to the Administrative Panel. Even though further evidence was submitted by NGO representatives, journalists and the Applicant's friend, who all testified

that they had seen injuries behind the Applicant's ears and abrasions on his back, the Panel dismissed the case. The additional testimonies were rejected on the grounds that the witnesses could not comment on the origins of the injuries: the witnesses had only seen the injuries after they had occurred and the Applicant's submissions were inconsistent. On the other hand, the police officers' actions were justified by the Applicant's recalcitrant behaviour. The Applicant's claims about being denied medical assistance, both during his hunger strike and whilst in solitary confinement, were also dismissed because he was under the constant supervision of a qualified paramedic.

In the meantime, the Applicant who had been found unfit for detention was released on 28 May 1994. His request for asylum was subsequently granted.

Complaints

The Applicant relied on Article 3 of the Convention and complained about the ill-treatment by the prison officers and the ensuing lack of medical care in solitary confinement.

Held

Article 3

The Court could not establish whether the Applicant had been kicked and beaten by the prison officers. This was due to the fact that there was no medical evidence that corresponded with the Applicant's allegations. Nor had the former cellmates seen the Applicant allegedly being kicked and beaten, they had only heard the occurrence of the beating. However, the Court held that the Applicant was ill treated by the prison officers: the Applicant's allegations with regard to the stabbing with ballpoint pens and the back injuries caused by being dragged down some steps corresponded with medical reports dated the 24 and 26 May 1994. The Applicant's allegations were also corroborated by the testimonies of the NGO representatives, journalists and friends.

The Court did not accept that ill-treatment was necessary in light of the Applicant's behaviour. The Court stressed that it was for the respondent State to ensure that prison staff were properly trained to deal with difficult prisoners and/or supervise detainees held under aliens' legislation without resorting to excessive physical force. The Applicant went on hunger strike for three weeks and was in a physically and mentally weakened state. The respondent State's behaviour had caused the Applicant immense pain and suffering until his physical and moral resistance broke. The Court considered this inhuman and degrading and in violation of Article 3.

The Applicant was placed in solitary confinement because of his hunger strike and due to the assessment of a paramedic. However according to the CPT 1994 report, the paramedic received only basic training and the Applicant had been refused access to a doctor until May 1994. These factors would have caused him further suffering and humiliation, which go beyond conditions that are inevitable in detention. In the Court's view the Applicant had been subjected to degrading treatment on account of the lack of medical care provided to the Applicant in solitary confinement until 24 May 1994, in further violation of Article 3.

Article 41

The Court awarded the Applicant €10,000 in respect of non-pecuniary damages and €20,000 for costs and expenses.

Z.N.S. v Turkey

(21896/08)

European Court of Human Rights: Judgment dated 19 January 2010.

Right to Life, Prohibition of inhuman or degrading treatment, Right to Liberty and Security – Article 2, 3, 5 §§ 1 and 4 of the Convention

Facts

The Applicant, Z.N.S. is an Iranian national who was born in 1967. In February 2005, she entered Turkey illegally and is currently held in the Kırklareli Foreigners' Admission and Accommodation Centre. In Turkey, she became interested in Christianity and converted to Protestantism. In May 2008, she was arrested on suspicion of infringing her visa requirements and for forging official documents. She was placed in the Foreigners' Department of the İstanbul police headquarters with the intention to deport her back to Iran.

The Applicant was opposed to the Iranian Government because it was responsible for her, and her family's oppression. For these reasons, she had requested to be released from detention and given a temporary residence permit pending the outcome of her application for refugee status to the United Nations High Commissioner for Refugees ('UNHCR'). In July 2008, after being transferred to the Kırklareli Centre, she was informed that her case before the Turkish authorities had been suspended and was pending proceedings before the ECtHR. In December 2008 the Applicant and her son were granted refugee status under the UNHCR's mandate on religious grounds. She lodged a request to the administrative court against the decision not to suspend her detention. Her application was rejected and this decision was upheld by the regional court in June 2009.

Complaints

The Applicant relied on Articles 2 and 3 of the Convention and complained that she would be at risk of death or ill-treatment if she was deported back to Iran. Relying upon Articles 5 §§ 1 and 4, she complained that her detention was unlawful and that she was kept in poor conditions.

Held

Article 3

The Court considered it appropriate to examine the complaint under Article 3. The Applicant did not want to return to Iran and she had come to Turkey in order to apply to the UNHCR. The national authorities did not examine her statements and had already planned her deportation. The Court was therefore not convinced that the national authorities had conducted a meaningful assessment of whether the Applicant was at risk of ill-treatment in Iran. Having interviewed the Applicant, the UNHCR had the chance to test her credibility. The UNHCR found that she was at risk of being subjected to persecution in Iran. The Court therefore concluded that there had been a violation of Article 3 because there were substantial grounds for accepting that, on account of her religion, the Applicant would risk being subjected to inhuman treatment if she was returned to her country of origin.

The Court found that the Applicant had failed to prove the poor conditions in the Foreigners' Admission and Accommodation Centre and how it had affected her health. The fact that there were no facilities for physical exercise did not raise an issue under Article 3, given that the Applicant was not continuously kept indoors. In terms of hygiene, the only criticism was the state of the toilets and the presence of cleaning products whose expiry dates had passed several years ago. Although the Applicant's detention might continue for an indeterminate period in the absence of clear time limits set under national law, it had not been established that the conditions were so severe as to bring them within the scope of Article 3. The Court therefore held unanimously that there had been no violation of that Article on account of the Applicant's detention conditions.

Article 5

In the absence of clear legal provisions in Turkey about the procedure for ordering and extending detention with a view to deportation, the Court found that the Applicant's placement in the Centre constituted a deprivation of liberty which was not 'lawful' for the purposes of Article 5. In the Applicant's case, the Court did not find any circumstances requiring it to depart from those findings and found that there has been a violation of Article 5 § 1.

The Court observed that the Applicant's request, seeking the annulment of the decision against her release, had been refused and dismissed even on appeal. The review by the administrative courts had lasted two months and ten days and the proceedings had not raised any complex issues. In assessing the Applicant's case, the Court should have been in a position to observe the lack of a sufficient legal basis for her detention. The Court therefore unanimously concluded that the Turkish legal system had not provided the Applicant with a remedy allowing her to obtain a speedy judicial review of her detention and that there had also been a violation of Article 5 § 4.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court awarded the Applicant €20,000 in respect of non-pecuniary damages.

Commentary

The European Court examined the placement of detainees in the Kırklareli Foreigners' Admission and Accommodation Centre in the case of *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, 22 September 2009), which resulted in a similar finding.

Right to liberty and security of person

Abay v Turkey

(19332/04)

European Court of Human Rights: Judgment dated 1 March 2010

No remedy to challenge the lawfulness of detention – Article 5.

Facts

The Applicant is a Turkish national and was born in 1956. He lives in İstanbul and is a journalist. On 13 April 2003, the police raided the Applicant's residence and arrested Necati Abay. According to police records, the Applicant's name had been given to them in an earlier arrest and was made in connection with an illegal armed organisation, which the Applicant denied.

When the Applicant was medically examined at the police station he informed the medics that he is diabetic and complained of fatigue, dizziness and dry lips. The following day the Applicant was taken to the Haseki hospital where he saw a specialist.

On 17 April 2003, the Applicant further complained that he had been abused and sleep deprived whilst he was held in custody. He mentioned that on one occasion a hot tea glass was placed on his bare hand. This was also noted by a doctor's examination.

The Applicant denied the charge against him. When he was brought before the Judge at the Court of State Security he claimed that he was the victim of a conspiracy. The Applicant also mentioned that he had been subjected to threats and psychological pressure. The Judge ordered Abay's release.

However, on the prosecutor's request, and due to the nature of the crime, the Applicant was re-arrested on the same day and held on remand.

On 21 April the Applicant's lawyer lodged a complaint against his continued detention. The Court of State Security dismissed the claim the next day. The Court examined the Applicant's detention on three further occasions, on the 3 June, on the 14 July and finally on 19 August. On each of these dates the Court held that there was a risk of Abay absconding because of the nature of the crime and, as a result, he continued to be held on remand. The first hearing took place on the 3 October 2003 and the procedure is still pending before the Court.

Complaint

The Applicant complained that he did not have an effective remedy to challenge his detention. In doing so the Applicant relied on Article 5 § 4. The Applicant further claimed violations of Articles 3, 6, 13 and 14.

Held

Article 5 § 4

When considering whether the Applicant had an effective remedy to challenge his detention, the Court looked at its case law and held that objecting the detention itself was not an effective remedy. It therefore rejected the Government's argument. The Court found no reason to depart

from its previous findings. Therefore the Court held the Applicant had not been provided with an effective remedy through which he could complain about his placement in pre-trial detention which violated his rights under Article 5. The Court held that Article 5 § 4 had been violated.

Article 14

The Court considered the remaining complaints in accordance with the evidence it was provided with. It found that there was no evidence of a violation of any further rights covered by the Convention.

The Court ordered the State to pay the Applicant 1,000 EUR in respect of pecuniary damage and 1,000 EUR for costs and expenses.

M v Germany

(19359/04)

European Court of Human Rights: Judgment dated 17 December 2009.

Retroactive extension of a prisoner's preventive detention and no punishment without law – Articles 5 and 7.

Facts

Mr M. was born in 1957 and is a German citizen who is currently being held in Schwalmstadt Prison. In November 1986, he was found guilty of attempted murder and robbery and was sentenced to five years imprisonment. A neurological and psychiatric report showed that he was a violent person and had a strong tendency to commit offences, which would seriously harm his victims' physical integrity. Mr M. was put in preventive detention (Sicherungsverwahrung).

Mr M. had requested to have his preventive detention suspended on probation on several occasions between 1992 and 1998, at which point he had fully served his prison sentence. In October 2001, however, relying on the Criminal Code 1998, the Frankfurt am Main Court of Appeal upheld the decision to extend the preventive detention beyond September 2001. By that time, the Applicant had served ten years in preventive detention. Under Article 67 of the Criminal Code 1998, preventive detention could be extended to an unlimited period of time. This was also applicable to those who had been convicted before the amendments had come into force.

In February 2004, the Federal Constitutional Court held that measures of correction and prevention, such as the preventive detention, was to be distinguished from the Criminal Code's twin-track system of penalties and therefore the prohibition of retrospective punishment under German Basic Law did not apply.

Complaints

Mr M. argued that his right to liberty under Article 5 had been violated when he was kept in preventive detention despite having served his full ten-year sentence. As the extension from ten years to an unlimited period of time had been ordered retrospectively, Mr M. complained that the punishment was without law and in breach of Article 7.

Held

Article 5

The Court held that there was no causal link between Mr M.'s original conviction and his continued detention beyond the ten-year period. The national courts that were responsible for the execution of his sentences did not have the jurisdiction to order an extension as the amendments to the Criminal Code had not been implemented at the time the offence was committed. Furthermore, there was no justification for the continued detention as Mr M. was not likely to commit further offences under Article 5 § 1(c) and was no longer a 'person of unsound mind' under Article 5 § 1(e). Therefore, there had been a violation of Article 5 § 1 as a result of Mr M.'s continued preventive detention beyond ten years.

Article 7

In determining whether preventive detention could be defined as a penalty under Article 7, the Court found that there were no significant differences between the implementation of a preventive detention order and the serving of a prison sentence, particularly as they both involved detention in ordinary prisons and had the purposes of protecting the public and rehabilitating the detainee. Furthermore, there was also no adequate psychological assistance for those in preventive detention as compared to those serving long-term sentences.

In addition, the Court found preventive detention qualified as a penalty and that it was amongst the harshest punishments as following the amendment to the Criminal Code, it could be for an unlimited duration. As the amendment to the Criminal Code was implemented after Mr M.'s offence, application of it would be retrospective and therefore without law. Moreover, the only condition to suspend preventive detention on probation is if there is a risk that the detainee would re-offend.

The Court therefore held that there had been a violation of Article 7 § 1 of the European Convention on Human Rights and Mr M. was awarded €50,000 for non-pecuniary damages.

Right to a fair trial

Adalımsı and Kılıç v Turkey

(25301/04)

European Court of Human Rights: Judgment dated 1 March 2010

Denied legal assistance during police interrogation – Article 6.

Facts

Adalımsı and Kılıç, the Applicants, are both Turkish nationals and were born respectively in 1976 and 1974. Both live in İstanbul.

On 11 July 1999, Adalımsı was arrested and held in police custody. Two days later Kılıç was also arrested and detained. On 17 July 1999, the Applicants were brought before the judge who

ordered that they be remanded in custody. During this time they were interrogated on several occasions by the police, each time without the assistance from a lawyer.

On 18 August 2000, the Applicants were charged with being members of an armed gang and were brought before the Court of State Security. During their trial the Court relied on the statements they had given without the assistance of a lawyer and sentenced them on 23 October 2003. Both Applicants were sentenced to 17 years and six months imprisonment. On 19 November 2003, the Court of Cassation upheld that decision. On 23 January 2004, the decision of the Court of Cassation was finalised.

Complaint

Relying on Article 6 § 3 the Applicants complained that they were not assisted by a lawyer during their time spent in custody. Further, they stated that the evidence relied on in the Court of State Security was during the time when they had not received legal assistance.

Held

Admissibility

The Government argued that the Applicants had not complied with the six-month rule and the case should therefore be inadmissible. When considering this argument the Court looked at their case law. It has held that where there is no notification of the annulment, the Court must take into account the date from which the parties can fully acquaint themselves with the decision. The Court held that there was no evidence that the Applicants or their lawyers knew about the decision on 18 November 2003, as they were not required to attend court. Therefore, the Court held that 23 January 2003 was the date at which the Applicants could have had knowledge of the decision. The argument submitted by the Government was therefore rejected. As the Court did not find the complaint manifestly ill-founded, and there was no other grounds of inadmissibility, the case was declared admissible.

Article 6 § 3

The Court rejected the Governments argument that there had been no violation because the Applicants were legally represented throughout the trial. It was re-enforced that the Applicants' right to legal assistance covered the time when they were held in custody. Relying on previous case law the Court held that there had been a violation of Article 6 § 3.

Article 6 § 1

The Court did not consider it necessary to examine the complaint under Article 6 § 1.

Article 41

The Court awarded 1,000 EUR for each Applicant in respect of pecuniary damages. Further, the Court stated that the most appropriate remedy for the breach of Article 6 would be to order a new trial for the Applicants, which is what the Court did. The Applicants were awarded 1,000 EUR jointly for costs and expenses.

Kart v Turkey

(8917/05)

European Court of Human Rights: Judgment dated 3 December 2009

Right to a fair trial-Article 6 § 1 of the Convention.

Facts

The Applicant, Atilla Kart is a Turkish national who was born in 1954 and lives in Ankara. He is a member of the People's Republican Party and in the parliamentary elections of 3 November 2002 he was elected to the Turkish Parliament.

Previously the Applicant was a practising lawyer. In the course of his professional activities, the authorities brought two cases against him, one for insulting a lawyer and the other for insulting a public official.

Under Article 83 of the Turkish Constitution a Member of Parliament enjoys parliamentary immunity. The same applied to the Applicant. This meant that such a Member would be immune from criminal proceedings, and if such proceedings were issued, they would automatically be suspended. The effect of immunity is that an MP, who is alleged to have committed an offence before or after the election, shall not be arrested, questioned, detained or tried unless the National Assembly decides to lift his immunity.

Two requests to have his immunity lifted were transmitted via the Prime Minister's Office to the competent parliamentary authorities. Nevertheless criminal proceedings were suspended for the duration of the Applicant's term of parliamentary office.

The Applicant challenged that decision before the Plenary Assembly of the Turkish Parliament. He relied on his right to a fair trial. The files concerning that the requests to have his immunity lifted remained on the Plenary Assembly's agenda for over two years until the next parliamentary elections without being examined.

On 22 July 2007, the Applicant was re-elected at the general elections. In January 2008, he was informed by the Speaker of the National Assembly that the requests concerning the lifting of his immunity were still pending.

Complaints

The Applicant relied on Article 6 § 1 of the Convention and alleged that he had been deprived of his right to a fair trial and of the opportunity to clear his name due to the restrictions on the rights of the defence.

Held

The Court held that there had been no violation of Article 6 § 1 of the Convention. The right of access to a court secured by Article 6 § 1 is not absolute, but may be subject to limitations. These are permitted by implication since the right of access calls for regulations by the State.

In this particular case, the Court determined how the Applicant's parliamentary immunity had affected his right of access to a court. The only issue the Court had to determine was to what extent parliamentary inviolability might be considered to amount to a legitimate and

proportionate limitation of the Applicant's right to have his case heard by a court as secured under Article 6 § 1. It was not for the Court to rule on the scope of the protection the State accords with its MPs.

The failure to lift his immunity had not deprived him of the possibility of having his case tried on its merits but had only constituted a temporary procedural obstacle to the determination of the criminal proceedings. It had not been disproportionate to the legitimate aim pursued by the authorities, which was to protect the parliamentary institution.

Commentary

This was the first time for the Court to examine a case in which a beneficiary of parliamentary immunity complained that his immunity was preventing him from having a fair trial.

Koottummel v Austria

(49616/06)

European Court of Human Rights: Judgment dated 10 December 2009

No hearing before an administrative tribunal - right to a fair hearing- Article 6 § 1.

Facts

The Applicant, Ms Geethakumari Koottummel, who is an Austrian national, was born in India and lives in Lustenau where she runs an Indian restaurant with Ayurvedic cuisine.

The Applicant wanted to hire a specific person from the South of India to be a cook (Ayurvedic chef) in her restaurant. Therefore, she requested an employment permit, which was subsequently refused by the Dornbirn Labour Market Service because the chef fell below the legal requirements to be a key worker in Austria. The Applicant appealed to the administrative court and requested an oral hearing, claiming that the authorities had failed to review the evidence adequately and to give appropriate reasons for their decision. The administrative court dismissed her complaint on the merits and denied her request for an oral hearing, stating that it was not likely to help clarify her case. In June 2006, the court's decision was brought to the knowledge of Ms Koottummel's lawyer.

Complaints

The Applicant complained about the lack of an oral hearing before the administrative court on the basis of Article 6 of the Convention.

Held

The administrative court had been the first and only tribunal dealing with the Applicant's case. Accordingly, unless the proceedings had concerned exclusively legal or highly technical questions, the Applicant had been entitled to a public oral hearing. Taking into account the nature of the proceedings brought by the Applicant, the Court held that the administrative court had been obliged to hold a hearing yet had failed to do so in contravention of Article 6 §1. The Applicant was therefore awarded €2,000 for costs and expenses under Article 41.

Musa Karataş v Turkey

(63315/00)

European Court of Human Rights: Judgment dated 5 January 2010

Beating in police station – Right to prohibition from torture – Article 3 - Right to a fair trial – Article 6.

Facts

The Applicant was born in 1956 and is currently serving a life sentence in Kocaeli prison. The Applicant and several members of his family, including his 11-year-old son, were arrested on 24 October 1997 on suspicion of being members of the illegal organisation Türkiye Komünist Emek Partisi/Leninist ((‘the TKEP-L’), the Communist Labour Party of Turkey/Leninist). Whilst at the İstanbul police headquarters, the Applicant alleges that he was tortured and forced into signing statements by police officers. A doctor observed swelling in the Applicant’s wrists, problems with the functioning of his right wrist and sensitivity in his left wrist on 27 October 1997.

On 31 October 1997, at the İstanbul State Security Court, the Applicant detailed the treatment he had suffered at the hands of the police officers and denied the reliability of the statements he had signed under duress. He then requested an investigation against those police officers that had abused him. On the same day a forensic expert examination found restrictions in the functioning of the Applicant’s wrists.

On 3 February 1998, following an investigation, the public prosecutor decided not to prosecute the police officers due to a lack of evidence against them. The Applicant then lodged a complaint against the decision, which was rejected on 17 May 2000. The Applicant was subsequently transferred to Kandıra prison on 16 February 2001 where he was allegedly subjected to further ill-treatment by military officers.

On 16 February 2001, the Applicant’s lawyer refused to allow the prison authorities to inspect appeal documents and was subsequently prevented from giving them to the Applicant.

Complaints

The Applicant relied on Article 3, as well as Article 6, complaining that he had been denied access to a lawyer whilst in police custody and during his hearings and that his conviction was based on unreliable statements he had made under torture. He further complained that he had not been given sufficient time and facilities to prepare his defence as prison authorities had prevented his lawyer from giving him important documentation.

Held

Article 3

The Applicant had failed to give precise information about the alleged ill-treatment he had suffered and had also failed to argue that the medical records were not accurate with regard to his injuries. The Court accepted the Government’s explanation that the injuries were caused by the use of force, which had been made necessary when the Applicant had resisted arrest. The Applicant’s complaints were held to be manifestly ill-founded and therefore inadmissible.

Article 6

The Court held that there had been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) as the Applicant's conviction was based on inadmissible evidence, namely his confession to being the TKEP/L leader in the absence of his lawyer. Furthermore, due to the applicable law at the time, the Applicant had no access to legal advice when the prosecutor and the judge questioned him. The Court awarded €2,000 for non-pecuniary damages and €2,000 for costs and expenses.

Narin v Turkey

(18907/02)

European Court of Human Rights: Judgment dated 15 December 2009

Right to a fair hearing within a reasonable time – Article 6.

Facts

The Applicants are ten Turkish nationals living in Diyarbakır and are all relatives of the deceased Abdulvahit Narin.

The Applicants allege that on 3 October 1992 the security forces killed their relative during a raid on his hotel following clashes with the PKK in Kulp. Security forces had entered the hotel at about 4 p.m. and took Abdulvahit Narin to the hotel director's office. His son, the Applicant Hakan Narin, then heard gunshots coming from the office. The security forces subsequently poured petrol in the hotel and set it on fire.

Gendarme officers who participated in the clashes prepared incident reports on 4 October 1992 stating that PKK soldiers had shot at security forces from within the Narin hotel and had then set many buildings including the hotel on fire. On 4 October 1992 the Kulp Public Prosecutor conducted an on-site investigation and a doctor conducted an autopsy.

Statements were taken on 12 May 1994 and 10 June 1994 from two expert sergeants who were allegedly responsible for the death of Abdulvahit Narin. A report dated 14 November 1994 from the Gendarmerie Command in Kulp stated that the location and duties of these sergeants were unknown. No further steps appear to have been taken to identify those responsible for Abdulvahit Narin's death. According to a report dated 28 October 2008 by the Diyarbakır Chief Public Prosecutor the Abdulvahit Narin investigation is still pending.

The Applicants also alleged that the authorities had failed to carry out an effective investigation into their relative's death. Relying in particular on Article 6 § 1 (right to a fair hearing within a reasonable time), the Applicants complained about the excessive length of the compensation proceedings they brought with regard to their relative's death.

Complaints

The Applicants alleged that the security forces had unlawfully killed Mr Abdulvahit Narin and that the national authorities had failed to conduct an effective investigation into the circumstances surrounding the killing within a reasonable time in violation of Articles 2, 6

and 13 of the Convention. They further complained under Article 1 of Protocol No. 1 to the Convention about the damage to their hotel.

Held

Articles 2 and 13

The Government argued that the case was inadmissible because the Applicants had not referred the case to the ECtHR within the required time-limit. By doing so the lawyers referred to previous cases that had established that if no remedy was available or if the remedy was ineffective, then an application should be made within six months of the date of the act from which the complaint arose. The Court held that the six-month rule was established in order that cases would be dealt with within a reasonable time and to promote the security of law. The Court further stated that the Applicants should have taken steps to keep track of the investigation and where there was a lack of it, an application should be lodged with the Court. The Court held that the six-month rule was important and should be enforced; therefore the Applicants claim under Article 2 and 13 was rejected.

Article 1 of Protocol No. 1

In relation to the damage to the Applicants' hotel, the Court also rejected the complaints as the Applicants had not complied with the six-month rule.

Article 6

The Applicants stated that the administrative proceedings had exceeded the reasonable time requirement under Article 6. The Government argued to the contrary, stating that there had been no extraordinary delay. The Applicants further submitted that because of the delay the amount that they were awarded in damages was not sufficient to compensate them for their loss. The Court noted that before a person who has sustained damage can lodge a compensation claim they have to apply to the administrative entity. The Court noted that the Applicants had complied with this requirement and therefore started compensation proceedings on 28 September 1993. The procedure ended when the Supreme Administrative Court upheld the previous decision on 21 December 2001. The overall assessment of the domestic courts had therefore taken more than eight years. The Court consequently held that there had been a violation of Article 6 § 1, as the reasonable time requirement of Art 6 § 1 had not been satisfied.

In just satisfaction the Applicants were awarded €8,500, jointly for non-pecuniary damages and €1,500 jointly for costs and expenses.

Sabri Aslan and Others v Turkey

(37952/04)

European Court of Human Rights: Judgment dated 15 December 2009

Denial of legal aid – rejection of case – Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1.

Facts

The Applicants were as follows: Saim Aslan, Harun Aslan, Mansur Aslan, Fatma Abi, Esmer Çoğaç, Hatice Demir et Meryem Aslan. The Applicants were also petitioners in this case. Sabri Aslan and Kadriye Aslan, who are the parents of Naim Aslan, were born in 1978. Naim's siblings are Zeki Aslan, Hakkı Aslan, Hüsnu Aslan,

On 19 May 1993, Naim Aslan died from gunshot wounds in Yüksekova-Esendere during the course of police shooting. At the time Naim was shepherding his herd towards the Iranian border.

On 2 June 2003, the Applicants made an application to the Van Administrative Court for damages due to the death of Naim. The Applicants requested damages of 420,000,000,000 Turkish Lira (TRL) which is about 253,995 EUR. The Applicants made a further application for legal aid based on their financial situation. Sabri and Kadriye Aslan submitted certificates of impoverishment. The first document stated that there was a plot of land of 591.09 square meters and a pension. The second one stated that there was no financial income and no property was owned. The other Applicants did not support their application with documentation.

On 11 July 2003, the Applicants were notified that they had court costs of 5,680,000,000 TRL (3,615 EUR) to pay. A reminder was sent to the Applicants on 10 October 2003 requesting the payment of their fees.

On 13 November 2003, the Administrative Court dismissed the application for legal aid. No reasons were given for the Court's decision.

On 10 February 2004, the Court sent out a final warning to the Applicants to pay the court fees. The letter stated that if the payment was not made within 30 days that their application would be treated as not submitted. On 9 April 2004 the Court continued as if the application had never been submitted.

According to Turkish Administrative Law, each Applicant is required to pay their fees. If this requirement is not complied with, the Court will send out two letters requesting payment of the costs. If, after the second request, no action has been taken by an Applicant, the Court can regard the claim as not filed. The only exemption from paying court fees is if the Applicant qualifies for legal aid. In order for an Applicant to be granted legal aid, they need to be in a situation where the payment of part or all the costs would compromise their livelihood. A decision for legal aid is final and cannot be appealed.

Complaint

The Applicants relied on Articles 6 and 13 and Article 1 of Protocol No. 1, complaining that they were denied the right to bring an application on the grounds that they were refused legal aid.

Held

Article 6 § 1

The European Court rejected the Government's argument of inadmissibility on grounds of non-exhaustion of domestic remedy as there is no possibility of appealing a decision on legal aid according to Turkish Administrative Law.

The Court held that with regard to the Applicants, who had not supported their application for legal aid with further documentation, i.e. every Applicant except for Sabri and Kadriye Aslan, there had been no breach of their rights under Article 6. In respect of these persons, their application was manifestly ill founded and inadmissible.

With regard to Sabri and Kadriye Aslan, the Court held that the complaint was not manifestly ill founded as they had submitted supporting documentation of their financial needs. When examining their complaint, the Court considered their economic situation and held that the court costs amounted to an excessive burden for the Applicants. The Court further held that the fact that the Applicants were legally represented did not mean that they had sufficient funds to pay the Court's costs. Therefore, the Court rejected the Government's claim.

The Court concluded that the rejection of the Applicants' application for legal aid deprived them of an opportunity to have their case heard. Therefore, the Court found that the Applicants' rights had been violated.

Article 41

The Court held that the most appropriate remedy for a violation of Article 6 rights would be to try the case. This is what was ordered by the Court. Further, the Court granted Mr and Mrs Aslan jointly 7,500 EUR as pecuniary damages and a total of 1,000 EUR awarded to them jointly for costs and expenses.

Vera Fernández-Huidobro v Spain

(74181/01)

European Court of Human Rights: Judgment dated 6 January 2010

Right to a Fair Trial and Presumption of Innocence – Articles 6 § 1 and § 2 of the Convention.

Facts

The Applicant, Rafael Vera Fernández-Huidobro, is a Spanish national who was born in 1945 and lives in Madrid. He held the post of State Secretary during the time of the events regarding this case. In January 1988, the central investigating Judge No. 5 instituted criminal proceedings at the *Audiencia Nacional* against the Anti-Terrorist Liberation Groups (*Grupos Antiterroristas de Liberación* – 'the GAL'). This group was suspected of being behind an illegal large-scale anti-terrorism action plan. In April 1993, Judge No. 5 took leave of absence for personal reasons in order to stand in the June 1993 general election and to work in various legal departments. No significant investigative steps had been taken, either before his leave of absence (besides the

issuing of a letter of request for judicial assistance), or during his replacement by a temporary judge.

During his leave, Judge No. 5 occupied the post of the State Secretary at the Ministry of the Interior. He had the responsibility of coordinating the national security forces' efforts in combating drug trafficking and related money laundering by criminal organisations and other connected offences. He held a post of equal rank to the Applicant's post. According to the Applicant, there were manifest feelings of animosity between him and Judge No.5 due to their background of rivalry as to their political responsibilities. The situation went so far that the Applicant resigned, but the Judge denied that there was any hostility.

Judge No. 5 resumed his previous duties as a judge at the *Audiencia nacional* and also took over the investigation of the GAL case. In 1995, he undertook a formal investigation regarding the Applicant for presumed offences of misappropriation of public funds and false imprisonment. He was also accused of having played a role in the organisation of the GAL through financial and other means. The Applicant was unsuccessful in challenging Judge No.5 for being biased, citing both their hostile relations and the link between the subject matter of the proceedings and the Judge's activities at the Ministry of the Interior. The Applicant was held in pre-trial detention. When he was released he paid approximately €1.2 million as a condition of bail.

The Supreme Court conducted a fresh investigation; the newly assigned judge conducted further examination of witnesses who had given evidence to Judge No. 5 implicating the Applicant. At the end of the investigation, the Applicant was charged with the further offence of membership of an armed organisation. In May 1998, a hearing took place in the Supreme Court and a preliminary objection by the Applicant alleging bias on the part of the central investigating Judge No. 5 was dismissed because the Criminal Division found no proof of the animosity that was alleged. On 25 July 1998 the Applicant was sentenced to ten years' imprisonment for misappropriation of public funds and false imprisonment. The judgment was based on the testimonies of co-defendants and the Supreme Court found that the evidence in question had not been guided by any feelings of revenge or animosity.

Complaints

The Applicant relied on Articles 6 § 1 and 2. He complained about a lack of independence and impartiality on the part of the central investigating Judge No. 5 and that the new investigating judge had been biased in the statements made by co-defendants with a view to securing personal advantages.

On 2 May 2007 the Court declared inadmissible the Applicant's complaint concerning the length of the proceedings against him. His other complaints were declared admissible.

Held

Article 6 § 1

The Court examined this complaint by applying two approaches, a subjective approach to determine a judge's personal conviction or interest in a particular case, and an objective approach, to decide whether he offered sufficient guarantees to exclude any legitimate doubt.

In applying the objective test, the Court examined whether Judge No.5 could have raised an issue as to his impartiality (where he would have had to deal with the persons involved in the GAL case) after leaving the post as the Ministry of the Interior. When he returned to the investigation in the present case, he did not satisfy the impartiality requirement of Article 6. In applying the subjective test, the Court reiterated that unless there was proof to the contrary, the Judge's personal impartiality was to be presumed. The Court did not hold it as sufficient evidence that the judge had any personal bias against the Applicant and did not find it necessary to examine the issue any further.

The Court reiterated that a breach of the requirements of Article 6 § 1 was attributable to a judicial body that could redress at a subsequent stage of the proceedings. By conducting a fresh investigation and appointing the investigating judge from the court's Criminal Division, this seemed to have cured the defect in question. Necessary steps were taken including further measures and the parties had had the opportunity, both before the designated investigating judge and at the trial in the Supreme Court, to confirm or contradict the statements previously taken from them. For these reasons, the Court concluded, by four votes to three, that there had been no violation of Article 6 § 1.

Article 6 § 2

The Court noted that the Supreme Court had based its finding on all the evidence produced against the Applicant during the investigation (not only before the central investigating judge but also before the designated judge of the Criminal Division of the Supreme Court).

In particular, the Court observed that the Supreme Court's ruling had been a fully reasoned decision. The Court could not revise the domestic courts' interpretation or replace it with its own opinion because it did not have jurisdiction to re-examine the evidence. Therefore, it found that the Court concerned had not been responsible for any infringement of the Applicant's defence rights. The Court concluded, by four votes to three, that there had been no violation of Article 6 § 2.

Right to respect for private and family life

Gillan and Quinton v The United Kingdom

(4158/05)

European Court of Human Rights: Judgment dated 12 January 2010

Right to respect for private and family life – Article 8.

Facts

The Applicants, Kevin Gillan and Pennie Quinton, are both British nationals born in 1977 and 1971 respectively. On 9 September 2003 police stopped and searched the Applicants under sections 44-47 of the Terrorism Act 2000. The Act allows police to do so without reasonable suspicion of wrong-doing, however the procedure may only be carried out for 'for articles of a kind which could be used in connection with terrorism'. The search may be carried out in public and refusal is punishable by imprisonment or a fine or both.

The Applicants were stopped on their way to a demonstration near an arms-fair and journalist, Ms Quinton, was prevented from filming despite showing her press cards. Their applications for judicial review were dismissed on 31 October 2003 by the High Court, as were their appeals on 8 March 2006 by the House of Lords. According to the Law Lords, the searches did not breach their Article 8 right and were in accordance with the law and proportionate with regards to the legitimate aim of protecting national security against terrorism.

Complaints

The Applicants argued that section 44 powers to stop and search were in violation of Articles 5 (right to liberty and security), 8 (right to respect for private and family life), 10 (freedom of expression) and 11 (freedom of assembly and association).

Held

Article 8

The Court considered that police stop and search powers under the anti-terrorism legislation were too wide as searches were not required to be *necessary* but only *expedient*. Although authorisation had to be confirmed within 48 hours by the Secretary of State, powers were subject to the individual officer's discretion as there was no requirement to show reasonable suspicion. Therefore, domestic law provided no adequate safeguard against abuse and subjected individuals to arbitrary interference.

As the powers were not in accordance with the law, the Court unanimously held that there had been a violation of Article 8.

Articles 5, 10 and 11

Given the finding above, the Court held that it was not necessary to examine the Applicants' complaints under Articles 5, 10 and 11.

Article 41

The Court held that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damages suffered by the Applicants. They were awarded €33,850 for costs and expenses.

Kemal Taşkın and others v Turkey

(30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05, 45609/05)

European Court of Human Rights: Judgment dated 2 February 2010

Ban on spelling of names containing letters 'q', 'w' or 'x' – interference with family life – prohibition of discrimination – Articles 8 and 14 of the Convention.

Facts

The Applicants, all ethnic Kurds, are Turkish nationals. Each of them brought a claim before the national courts to have their names changed. Mr Taşkın, who was born in 1971, requested to

have his surname, which is 'Kemal', replaced by 'Dilxwaz', which is a Kurdish name used by his friends and relatives. Mr Alpakaya, who was born in 1971, wanted his surname to be changed to 'Xoşewist'. Fırat (born in 1958), Anıĝ (born in 1969) and Şimşek (born in 1966) wanted their names to be changed to 'Bexwedan'. All Applicants based their reasoning on the fact that they were called these names by their entourage. Between 25 February 2004 and 20 May the Court rejected all their applications on the ground that the names chosen all included the letters 'q', 'w' or 'x', which were not part of the 29 letters of the Turkish alphabet. The appeal was upheld.

In September 2003, Mr Genç who was born in 1963 went through tribunal proceedings to change his name from 'Doĝan' to 'Ciwan'. Mr Yöyler who was born in 1941 also sought an action before the tribunal to change his name in October 2003. He stated that at birth his parents wanted to call him 'Xweşbin Yekta', however, because of the legislative restrictions in place at the time they were forced to call him 'Celalettin'. Both their claims were rejected because their names included the letters 'q' and 'w', which were not part of the 29 letters of the Turkish alphabet.

Mr Sanbul, who was born in 1956, also requested the changing of his name to 'Bawer'. The Court rejected the Applicant's claim on the same grounds. However, they did agree to change his name to 'Baver,' which sounded the same though had a different meaning in Kurdish. His appeal was also upheld.

Complaints

The Applicants alleged that the ban on any letters, apart from those within the Turkish alphabet, amounts to a violation of their right to private and family life under Articles 8 of the Convention. They further complained that in conjunction with Article 8 there had been a violation of Article 14, which discriminated against them. This argument was based on the fact that Turkish nationals with dual nationality were treated differently, in that such letters were allowed.

Held

Article 8

The Court found that the case was admissible and considered the claims brought under Articles 8 and 14. The Court held that legal restrictions on the changing of a name can be justified if it is in the public interest. The example used by the Court was that of safeguarding personal identification. The Court assumed that the refusal to use letters which were not in the Turkish alphabet was an interference with the Applicant's right to Article 8. However, the Court noted that the interference will not violate the Convention if it is prescribed by law, is one of the legitimate aims set out under paragraph 2 of Article 8, and is necessary in a democratic society. The Court held that the Government was not denying the Applicants their names due to their origin, but because such letters were not within the Turkish alphabet. Further, the Court stated that the Applicants were not being denied the use of those names; rather their official registration was not possible. Therefore, the Court unanimously held that because the State had acted within its powers there had been no violation of Article 8.

Article 14

When looking at the claim brought under Article 14, the Court made it clear that any difference in treatment did not automatically violate Article 14. For there to be a violation it must be established that people in similar situations are treated differently for a reason that is not objective or reasonable. The Court pointed out that there was no legal restriction in choosing a Kurdish name as such. Furthermore, non-Kurdish persons would also be prohibited from changing their name to include the letters 'q', 'w' or 'x'. The Court was not convinced by the Applicants' submissions and unanimously held that there was no violation of Article 14.

Comment

The issue in this case was not the changing of the names itself, but the entry of banned letters onto the civil registry. This case also highlights the problems people of Kurdish origin have faced in the past. Although it seems clear that states cannot be expected to allow the use of different alphabets, it is striking that letters of the Latin alphabet are excluded from a Latin alphabet.

Mustafa and Armağan Akın v Turkey

(4694/03)

European Court of Human Rights: Judgment dated 6 April 2010

Denied right to see both children – denied right to see sibling – Article 8.

Facts

The First Applicant is Mustafa Akın and the Second Applicant is his son, Armağan Akın. Both Applicants are Turkish nationals who were born in 1957 and 1988 respectively.

In 2000, Mustafa and his wife obtained a divorce. The Civil Court awarded custody of Armağan to his father, Mustafa, and the custody over the daughter to the mother. The Judge further ordered that the parents exchange the children between the 1st and 15th of February every year, as well as during the two religious holidays in July for a period of four days.

On 30 November 2000, the First Applicant made an application for an interim measure at the Ödemiş Court. He requested that he have both the children one weekend and his ex-wife have them the other weekend. He submitted that the children would otherwise lose contact with each other. On 19 December 2000, the Court rejected his request. On 23 June 2000, the Applicant appealed the Court's decision. His appeal was rejected on 18 December 2000. The Applicant also requested that his ex-wife pay him maintenance in respect of Armağan. On 1 February 2002 a request to rectify the order made by the first Applicant was also rejected. The reasoning for this was that if the daughter were to spend every other weekend with her father the constant change of circumstances would not be good for her.

The Applicants appealed this decision to the Court of Cassation. In their application they relied on previous case law from the Court of Cassation in which the Court had held that children from divorced parents should not be prevented from seeing each other.

On 29 April 2002, the appeal was rejected by the Court of Cassation stating that the Ödemiş Court had examined the case and the evidence adequately and in accordance with the relevant law.

Complaint

The Applicants complained that Article 8 had been violated in preventing the siblings from seeking each other.

Held

Article 8

When considering the evidence, the ECtHR highlighted that it was the domestic court that had decided on the custody rights, neither of the parents had requested these arrangements. Furthermore, the mother had made an application for custody of both children. The Court was particularly surprised by the lack of reasoning for the separation of the children. The Turkish Government submitted that the children weren't actually prohibited from seeing each other. The Court, however, rejected this argument; particularly as the mother had prevented the children from speaking to each other when they met in the street.

The Court did not agree with the domestic court's decision that spending time with the First Applicant would have an effect of 'variations in discipline' on the daughter. Therefore, the Court held that the domestic court's decisions on the case before it violated their right to family life as held under Article 8.

Article 41

The Court awarded the Applicants a joint sum of 15,000 EUR in respect of non –pecuniary damages. Further the Court awarded the sum of 2,500 EUR for costs and expenses.

Simeonov v Bulgaria

(30122/03)

European Court of Human Rights: Judgment dated 28 January 2010

Right to Liberty and Security, Right to Respect for Private and Family Life – Articles 3, 5 § 3 and 8 of the Convention.

Facts

The Applicant, Mr Tihomir Kolev Simeonov, is a Bulgarian national who was born in 1970 and lives in Dobrich.

In November 2002 and April 2003, the Applicant was charged with burglary of a private home and several criminal investigations were opened in respect of several persons. On 1 October 2002 the police arrested the Applicant and he was detained prior to the trial. There was sufficient evidence to suspect him of the offence on the basis that he had six previous convictions and other criminal proceedings still pending. The District Court feared he might re-offend or run away. He made a number of applications for his release, which were all refused.

In this case 13 hearings were held, most of which were adjourned due to unforeseen circumstances. However, on 20 December 2004 the Applicant was sentenced to 15 years' imprisonment for burglary. In February 2006, his sentence was reduced to seven years.

From October 2002 to February 2003, during his pre-trial detention, the Applicant was held in three centres where he complained that he was kept in poor conditions, such as no window and toilets in the cell and overcrowding.

In July 2003, during his criminal trial, the Applicant was prohibited from seeing his wife (who was also one of the co-accused) and his daughter. Between 2003 and 2006 the Applicant unsuccessfully sought to have the ban lifted on several occasions. It was eventually lifted on 31 March 2006 after the reporting judge of the regional court found that the ban contravened the relevant legislation.

The Applicant brought an action for damages against the State in 2007, seeking compensation for non-pecuniary damages he had sustained during his detention. However the administrative court discontinued the proceedings.

Complaints

The Applicant relied on Articles 3, 5 § 3 and 8 of the Convention. He complained about the conditions of his pre-trial detention and that he had been prohibited from meeting his wife and daughter.

Held

Article 3

The Applicant referred to the cases of *Iovtchev v Bulgaria* (41211/98) and *Stankov v Bulgaria*, (68490/01), in support of the claim for damages. The ECtHR had found violations in these cases with regard to actions for damages against the State. In this case, however, the Court pointed out that in the submitted case law it had not ruled *in abstracto* on the effectiveness of the remedy afforded by domestic legislation, but rather had had regard to the specific circumstances of the case.

The Court noticed that the Bulgarian courts made it possible to obtain compensation for damage resulting from poor detention conditions. In accordance with the relevant procedural requirements, the Applicant had not shown that he had exhausted domestic remedies.

Since the Applicant had not shown that an action for damages against the State would have been inappropriate or ineffective in his case, his complaint was dismissed for failure to exhaust domestic remedies.

Article 5 § 3

The Applicant was suspected of committing a criminal offence and he did not dispute this. For this reason, he had been detained for two years and one month. Whilst other criminal proceedings were pending against him, the Bulgarian authorities could not be criticised for having concluded that there was a genuine and serious risk of his committing further offences or absconding. The grounds given for his continued detention had therefore been relevant and sufficient.

The Court held that the criminal proceedings against the Applicant had been conducted with special diligence and that there had been no violation of Article 5 § 3.

Article 8

The Court found that there had been a violation of Article 8 because the Applicant had been prohibited from receiving visits from his wife for two years and ten months; this constituted an interference with his right to respect for his family life. The reporting judge of the Regional Court had found that the interference had not been in accordance with law and the measure imposed on the Applicant had not complied with domestic legislation.

Article 41

Under Article 41, the Applicant was awarded €1,500 for non-pecuniary damages and €1,500 for costs and expenses.

Freedom of thought, conscience and religion

Sinan Işık v Turkey

(21924/05)

European Court of Human Rights Chamber: Judgment dated 2 February 2010

Freedom of thought, conscience and religion - Right to a Fair Hearing - Prohibition of Discrimination - Articles 6, 9 and 14 of the Convention.

Facts

The Applicant, Sinan Işık, is a Turkish national who was born in 1962 and lives in İzmir, Turkey. He is a member of the Alevi religious community, which is deeply rooted in Turkish society and history. Their faith is influenced by Sufism and pre-Islamic beliefs. Some Alevi scholars regard it as a separate religion and others as a branch of Islam.

In 2004 the Applicant applied to the District Court requesting that his identity card state the religion 'Alevi' instead of 'Islam'. Until 2006 it was obligatory for the holder's religion to be indicated on an identity card but since 2006 the entry box could be left blank.

After having sought an opinion from the Religious Affairs Directorate about the definition of 'Alevi', the District Court in Izmir dismissed the application. The Religious Affairs Directorate held that 'Alevi' was a sub-group of Islam and the indication 'Islam' on the identity card was correct.

In his appeal, the Applicant complained that he was under an obligation to disclose his beliefs due to the obligatory indication on his identity card. He argued that this obligation contravened both the Convention (freedom of religion and conscience) and the Constitution ('no one shall be compelled [...] to disclose his or her religious beliefs and convictions'). On 21 December 2004 the Court of Cassation upheld the judgment without any further reasoning.

Complaint

The Applicant alleged violations of Articles 6, 9 and 14 of the Convention and complained that he was obliged to disclose his beliefs on his identity card, a public document that was used frequently in everyday life. He also complained about the denial of his request to have 'Islam' on his identity card replaced by his own faith 'Alevi'. He argued that the existing indication did not represent the truth and that the proceedings leading to the denial of his request were objectionable, as they involved an assessment of his religion by the State.

Held

Article 9

The Court held that the Government's indication of religion on identity cards (obligatory until 2006) compelled Turkish citizens to disclose their religious convictions and beliefs. The Court took the view that when the Applicant had unsuccessfully attempted to obtain the rectification of his identity card in 2004, the State was assessing the Applicant's faith. It was held that the State had, therefore, breached its duty of neutrality and impartiality in such matter.

Since 2006, the law had changed with regard to the information provided on religion on the identity card. All Turkish citizens were entitled to request that the information on religion be changed or removed. The Government argued that since 2006, the Applicant could no longer claim a violation of Article 9. The Court, however, found that the change of law was not sufficient, as religion was still an issue on identity cards. Having to apply to the authorities in writing to have the religious status deleted on the civil register and on identity cards requires individuals to disclose their religious beliefs. Furthermore, the mere fact of having the religion box left on an identity card obliged the citizen to disclose information with regards to their religion. This was undoubtedly contrary to the principle of freedom of disclosure of one's religion or belief.

The Court noted that the breach resulted from the very fact that the identity card contained an indication of religion, regardless of whether it was obligatory or optional and not from the refusal to indicate the Applicant's faith on his identity card. By six votes to one, the Court found that there had been a violation of Article 9.

Article 6 and 14

The Court held that because there was a breach of Article 9 above there was no need to further examine whether there had been a violation of Articles 6 and 14.

Article 41

The Court did not make any award, as the Applicant had not submitted a claim under Article 41 (just satisfaction) of the Convention in time.

Article 46

Referring to Article 46 (binding force and execution of judgments), the Court indicated that the deletion of the 'religion' box on identity cards could be an appropriate form of reparation to put an end to the breach in question.

Freedom of expression

Akdaş v Turkey

(41056/04)

European Court of Human Rights: Judgment dated 16 February 2010

Freedom of Expression-Article 10 of the Convention.

Facts

The Applicant, Mr Rahmi Akdaş, was born in 1958 and lives in Bandırma, Turkey. In 1999 he published the Turkish translation of the erotic novel *Les onze mille verges* by the French writer Guillaume Apollinaire ('The Eleven Thousand Rods' – *On Bir Bin Kırbaç* in Turkish). It contained graphic descriptions of sexual scenes and included various practises such as sadomasochism.

Under the Criminal Code, the Applicant was convicted for publishing obscene material that would exploit sexual desire among the population. All copies of the book were seized and destroyed and he was a heavy fine was imposed on him, approximately €1,100.

Although in the final judgment the Court of Cassation quashed the destruction of the books due to a legislative amendment, the Applicant argued that the book was a work of fiction and written by specialists in literary analysis. It did not contain any violent overtones and the humorous and exaggerated nature of the text was intended to extinguish sexual desire. The Applicant paid the fine in full in November 2004.

Complaints

The Applicant relied on Article 10 of the Convention and he complained about his conviction as publisher of the translated novel and about the seizure of the book.

Held

The Court stated that those who promoted artistic works had 'duties and responsibilities' depending on the situation in which they were displaying it. It was noted that the interference had been prescribed by law and it pursued a legitimate aim to protect public morality.

The Court found that the book had first been published in France (in 1907), more than a century before the publication in question and it had been published in various languages in a large number of countries. It had also gained recognition through the prestigious 'La Pléiade' series. Acknowledgment of the cultural, historical and religious particularities of the CoE's Member States could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage.

The Court held that the heavy fine imposed and the seizure of copies of the book had not been proportionate to the legitimate aim pursued and had not been necessary in a democratic society, within the meaning of Article 10. There had therefore been a violation of that provision.

The Applicant did not submit a claim for just satisfaction under Article 41 within the time allowed; therefore the Court did not make any award on that account.

Financial Times Ltd and Others v The United Kingdom

(821/03)

European Court of Human Rights: Judgment dated 15 December 2009

Right to freedom of expression – Article 10.

Facts

The Applicants were four news organisations, Financial Times Ltd, Guardian Newspapers Ltd, Independent News & Media Ltd, Times Newspapers Ltd and Reuters Group plc.

On 27 November 2001 documents were leaked by X to the newspaper organisations concerning a possible takeover bid by Interbrew (a brewing company) of South African Breweries. The press coverage on the matter caused a significant impact on the market shares of both companies. Interbrew went on to allege that the leaked documents were forged in order to aid a share-price fraud.

In December 2001, Interbrew brought proceedings against the Applicants in pursuance of access to the leaked documents in order to identify X. The UK domestic court found in favour of Interbrew, ordering the Applicants to disclose the documents, in the interests of justice and for the prevention of crime. The court found that X. had deliberately intended to do harm, compromising the integrity of the share market by leaking false and confidential information. The House of Lords refused the Applicants leave to appeal in July 2002.

Complaints

The Applicants complained that the court order to disclose the leaked documents could lead to the identification of journalistic sources, hampering investigative journalism, under Articles 8 (right to respect for private and family life) and 10 (freedom of expression).

The Applicants further complained that the civil proceedings through which Interbrew sought damages and to prevent further leaks had been unfair, in breach of Article 6 § 1 (right to a fair hearing).

Held

Article 10

The Court held that the UK was in breach of Article 10 of the ECHR. The disclosure order against the Applicants interfered with their freedom of expression. This interference was prescribed by law through section 10 of the Contempt of Court Act 1981 and through the common law, namely the Norwich Pharmacal case which established the principle that where a person becomes inadvertently involved in another's wrongdoing, an obligation will subsequently be invoked to assist the person wronged by disclosing the identity of the wrongdoer and by providing full information.

The interference also pursued the legitimate aims of preventing the disclosure of information received in confidence and of protecting the rights of others.

However the Court found that the interference was not proportionate to the legitimate aims pursued, as the threat of damage through further dissemination of confidential information

and Interbrew's interest in obtaining damages for breaches of confidence were outweighed by the public interest in the protection of journalist's sources. Furthermore Interbrew had made no attempt to obtain an injunction to prevent the publication of the Financial Times' article despite receiving prior warnings about the contents of the article.

Article 6 and 8

The Court found it unnecessary to examine the other Articles due to the above findings.

Article 41

The Court ordered the UK government to pay the Applicants £143,000 (€160,000) in respect of costs and expenses.

Görkan v Turkey

(13002/05)

European Court of Human Rights: Judgment dated 16 March 2010

Freedom of expression-Article 10.

Facts

The Applicant, Adnan Görkan is a Turkish national who was born in 1960 and lives in Aydın.

In June 2004, he was selling copies of the daily newspaper *Evrensel* in a café and when the police entered he was asked for his identity. Although he was not on the 'wanted persons' list and there was no order to seize the newspapers, the police confiscated 10 copies of the newspaper. According to the police, only one copy was taken and that the Applicant was invited by the superintendent to the police station for inquiries and an interview, having previously been alerted by telephone that the newspaper was being sold in the café and fearing that this might cause an incident. The police escorted the Applicant to the police station and he subsequently lodged a criminal complaint stating that his three hours in detention in police custody had been unlawful and arbitrary. The superintendent denied that the Applicant had not been held in police custody.

On the 9 September 2004, the public prosecutor discontinued the proceedings on the grounds that the essential elements of the alleged offence had not been made out as the Applicant had complied with the invitation to an interview and that he was released once the checks were completed. The Applicant's appeal was dismissed.

Complaints

The Applicant relied on Article 10 and complained that he had been unable to distribute the daily newspaper, which was his responsibility for selling as he had been deprived of his liberty.

Held

Article 10

The Court noted that Evrensel was a newspaper that was published, distributed and sold legally and that the parties' versions of the events differed. The Court also held that the checks that the police wanted to carry out on the Applicant had not been justified as the need to perform such checks on distributors selling legally published newspapers were obligatory.

Furthermore, the Applicant was invited to the police station which could be regarded as a restriction of liberty due to its coercive nature and not being based on any reasonable grounds. The Government argued that there had been a suspicion of an offence, since on previous occasions the distribution of the newspaper had been prohibited and this justified the check that was made. The Court reiterated that a slight interference with freedom of expression could create the risk of a damaging effect on the exercise of that freedom.

The Court held that since the interference had not been justified by any legitimate aims or pressing need, by five votes to two, that there had been a violation of Article 10.

Article 6

The Court dismissed as ill-founded the Applicant's complaint that the Turkish Courts were neither independent nor impartial, finding that complaint to be general and imprecise.

Article 41

Under Article 41, the Court held that Turkey was to pay the Applicant €1,800 in respect of non-pecuniary damage.

Karsai v Hungary

(5380/07)

European Court of Human Rights: Judgment dated 1 December 2009.

Right to freedom of expression breached by obligation to publish rectification – Article 10.

Facts

The Applicant, who lives in Budapest, is a historian, published author and university professor. He specialises in the Second World War, and, in particular, the extermination of Jews and Romas. In 2004 a public debate escalated in Hungary surrounding the proposed erection of a statue to commemorate Pál Teleki, a former Hungarian Prime Minister. In this debate, the Applicant had vocalised his belief that Teleki had been one of the most reprehensible figures of Hungarian history, owing to his responsibility for substantial anti-Semitic legislation as well as for dragging Hungary into World War II. The Applicant published an article in a weekly paper, which criticised the right-wing media and, in particular a Mr B.T., for embellishing Teleki's role

and, for what he described as, 'Jew-bashing'. The article refuted his portrayal of Teleki in the following terms:

'In B.T.'s charming words, two anti-Semitic laws 'fell' within Teleki's two premierships... If we are counting, let us be accurate: not two, but 12 (twelve) anti-Semitic laws are linked to Teleki's name...'

Mr B.T brought an action against the Applicant, claiming that his reputation had been harmed by a statement in the Applicant's article, which reads as follows:

'In the Parliamentary Library's PRESSDOC database, there are hundreds of articles and studies praising Pál Teleki, written in a sometimes uninhibited, sometimes more moderate style. In 1994-95, the extremely anti-Semitic and irredentist Hunnia Brochures devoted a 15-episode series to the ex-PM. The amateur historian [B.T.] wrote several articles trumpeting the praise of Pál Teleki – of the devout Catholic, the enthusiastic Scouts officer – who in his view was an anti-Nazi 'Realpolitiker'.

These articles and studies remained largely without reaction. We are only a few who take in our hands, at least from time to time, the products of the right-wing press, which, perhaps encouraged by this [indifference], keep lying, keep slandering, keep inciting against and bashing the Jews, in a more and more uninhibited way.'

The plaintiff claimed that the last sentence of the quotation could be aimed at him and was detrimental to his reputation.

The Budapest Court of Appeal, reversing the decision of the Regional Court, found for the plaintiff. It held that, in the context of the article as a whole, the impugned expression could be interpreted as relating to the plaintiff and that the Applicant had failed to prove that it was true. The Appeal Court ordered the Applicant to arrange for the publication of a rectification at his expense and to pay the legal costs to the sum of 69 000 Hungarian forints (HUF). The Supreme Court affirmed the Court of Appeal's decision and imposed another HUF 46 000 in legal fees.

Complaints

The Applicant complained that the Hungarian court decisions amounted to a violation of his right to freedom of expression as provided in Article 10 of the Convention.

Held

The issue was whether interference with the complainant's Article 10 rights was 'necessary in a democratic society'. The Court considered that the statement was not excessive or devoid of factual basis. Nor was it a pure statement of fact, but rather a value-laden one. Moreover, it was published in the context of a public debate of the utmost public interest. For this reason especially the publication was worthy of the highest protection. Another factor advanced in favour of the complainant was the fact that the plaintiff was also the author of articles widely published in the press as part of the debate. It follows that he had voluntarily exposed himself to public criticism. Lastly, the Applicant's criticism of Mr B.T. was formulated in only indirect terms.

In regards to the nature and severity of the sanction, the Court found that the measure imposed on the Applicant, namely, the duty to retract in a manner which affects his professional credibility as a historian, is capable of producing a ‘chilling effect’. The court emphasised, however, that the rectification of a statement of fact ordered by a national court is sufficient in itself to attract Article 10 protection.

In view of the preceding considerations, the Court found that ‘the Court of Appeal and the Supreme Court had not established any pressing social need for putting the protection of the personality rights of a participant in a public debate above the Applicant’s right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned’. Accordingly, the interference complained of was not ‘necessary in a democratic society’ within the ambit of Article 10§2 of the Convention. A violation of Article 10 of the ECHR could therefore be established.

Savgin v Turkey

(13304/03)

European Court of Human Rights: Judgment dated 2 February 2010

Chanting of PKK songs – right to freedom of expression – right to fair trial – Articles 6 and 10.

Facts

The Applicant, Esmer Savgin, is a Turkish national who was born in 1977. His brother, the second Applicant, is also a Turkish national and born in 1981. Both live in Bitlis, Turkey.

On 21 March 2001, a group of people gathered to celebrate the festival of Newroz, which is a traditional Kurdish New Year celebration. There was dancing and singing in Kurdish. The Applicants also took part in these celebrations. Police filmed the incident and arrested them. At the police station the Applicants were informed that they had been arrested because they shouted slogans in support of the Kurdistan Workers’ Party (PKK).

On 23 March, both Applicants were interviewed separately, during which they were denied legal representation. They both admitted to having chanted such songs though stated that they were unaware that this was illegal. Later both Applicants were interviewed by the prosecutor, again without legal representation.

On 25 December 2001, the Court of State Security convicted the Applicants of aiding and abetting the PKK. They were sentenced to three years and nine months’ imprisonment.

On 20 February 2002 the Applicants appealed to the Court of Cassation. They argued that the evidence was not clear and that it was impossible to identify who was chanting what songs. Further, they stated that their statements in custody were obtained under duress and they did not have any legal representation present. The appeal was rejected and the Court of Cassation upheld the Court of State Security’s ruling. The Applicants were not allowed to view the Attorney General’s comments on the points of law.

On 30 July 2003 Article 196 of the Turkish Penal Code was amended. The words ‘facilitate his actions in any way whatsoever’ were deleted. The effect of this was that on 13 August 2003 the

Court of State Security ruled that the charges against the Applicants ceased to exist and they were released.

Complaint

The Applicants relied on Article 6 arguing that they were not given a chance to reply to the Attorney General on points of law with regard to their appeal. Further, they were not provided with legal representation when questioned by the police and the prosecutor. The Applicants also claimed that their detention had been excessive. The reason the Applicants were arrested was because they chanted songs and slogans in Kurdish, they claimed that this was a violation of their rights under Article 10. The Applicants further complained that their rights under Article 11 had been violated. Pecuniary damages were claimed by the Applicants of €5,000 and €10,000 for non-pecuniary damages.

Held

Article 10

The Court held that the conviction did amount to an interference of their rights under Article 10. However, it had to be assessed whether the interference was ‘prescribed by law’ and ‘necessary in a democratic society’. As the conviction was based on Article 169 of the Turkish Penal Code, the requirement that it be prescribed by law was fulfilled. The Court also held that it pursued a legitimate aim, namely the prevention of terrorism. When considering whether the conviction was ‘necessary in a democratic society’ the Court looked at the slogans themselves and whether they would encourage hatred. It further noted that it had already ruled on similar cases involving a violation of Article 10. The Court held that the conviction was disproportionate and therefore there was a violation of Article 10.

Article 6

The Court recalled previous rulings, such as *Gök and Güler v Turkey* (74307/01) which established similar issues under Article 6. It further held that it had previously found that the lack of communication from the Attorney General, as well as the lack of legal aid in police custody, both constituted violations of Article 6. Therefore, the Court held that this case was no exception and that Article 6 had been violated.

Article 41

The Court rejected the request for pecuniary damages. In relation to the violations of Article 6 and 10 the Court awarded non-pecuniary damages of €10,000. Further, the Applicants were awarded €3,687 for costs incurred before the domestic courts and €3,160 for the cost incurred during their current application.

Ürper and Others v Turkey

(55036/07, 55564/07, 1228/08, 1478/08, 4086/08, 6302/08 and 7200/08)

European Court of Human Rights: Judgment dated 26 January 2010

Freedom of Expression – Article 10 of the Convention.

Facts

The Applicants are 20 Turkish nationals, who were journalists, editors, senior executives or proprietors of newspapers that are published in Turkey. In 2001 and 2007, they had criminal proceedings brought against them (personally and through their newspapers) on account of their publications. Towards the end of 2007 the İstanbul Assize Court suspended the publications

of all the following five newspapers: *Gündem*, *Yedinci Gün*, *Haftaya Bakış*, *Yaşamda Demokrasi* and *Gerçek Demokrasi*. The reasoning for their suspension was that, under the Prevention of Terrorism Act, the publications in newspapers were instruments of propaganda of a terrorist organisation, the PKK that was illegal.

The Applicant Lütfi Ürper, the owner of *Gündem*, was prosecuted for disseminating propaganda in favour of the PKK. Ali Turgay, Hüseyin Aykol and Hüseyin Bektaş were also prosecuted for similar offences. Four of the Applicants have criminal proceedings (still pending) against them concerning the dissemination of propaganda for that organisation.

Complaints

The Applicants' relied on Article 10 of the Convention. They also complained about the measures taken against them, alleging that those measures had entailed violations of Articles 6 (right to a fair trial), 7 (no punishment without law) and 13 (right to an effective remedy) and of Article 1 of Protocol No. 1 (protection of property).

Held

Article 10

The Court held that the banning of future publication of the entire periodical went beyond the necessary restraint and amounted to censorship. The Court found that there had been a violation of Article 10. The other complaints were not examined separately because they were submitted under Article 10.

Article 41

Under Article 41 (just satisfaction), the Court awarded €1,800 in respect of non-pecuniary damages to each of the Applicants, together with €2,000 jointly for costs and expenses

Right to marry and found a family

Frasik and Jaremicz v Poland

(22933/02 and 24023/03)

European Court of Human Rights: Judgment dated 5 January 2010.

Right to marry, right to an effective remedy and right to liberty and security – Articles 5, 12 and 13 of the Convention.

Facts

The Applicants, two Polish nationals Rafal Frasik and Pawel Jaremicz, were both in prison when they requested permission in April 2001 and June 2003, respectively, to marry in prison. Mr Frasik was imprisoned for raping and threatening his partner I.K., whereas Mr Jaremicz served his sentence for attempted burglary. Both requests were rejected.

From December 2000 and following the couple's reconciliation, Mr Frasik and I.K. repeatedly requested that Mr Frasik be released under police supervision. After Mr Frasik's requests to marry in prison were refused, he was sentenced in November 2001. In 2003 the Supreme Court held that Mr Frasik's Article 12 rights had been violated by the refusal to allow him to marry in prison, but that that would not affect his conviction, which was to be upheld.

Mr Jaremicz had been refused the right to marry in prison on the ground that he and his partner had become 'acquainted illegally in prison' and that their relationship was superficial. Despite this, in November 2003, the prison governor confirmed that Mr Jaremicz had leave to marry in prison and issued him with a certificate to this effect.

Complaints

Both the Applicants argued that the refusals of marriage were unjustified and arbitrary and therefore in breach of Article 12 (right to marry) and 13 (right to an effective remedy). In relation to Article 5 § 3 and 4 (right to liberty and security), Mr Frasik further complained that he had been detained awaiting trial for too long and that the related appeals were not examined within a reasonable time.

Held

Article 5

The Court noted that the right to a fair trial within a reasonable time or to release pending trial, as is guaranteed in Article 5§3, had been considered in several previous cases, such as *Kudła v. Poland* [GC], (30210/96) and *Mc Kay v. the United Kingdom* [GC], (543/03). On the facts, the Applicant's detention had lasted one year, two months and 14 days. Having considered the facts and having found that the evidence against the Applicant was convincing, the Court held that his detention had not been excessive. Therefore, the Court held that the Applicant's complaint under Article 5§3 was manifestly ill-founded.

The Court further noted that there had been a violation of Article 5 § 4. The Applicant's appeal against the decision prolonging his detention had been examined by the domestic court 46 days after it had been lodged and 11 days after the contested decision had expired, which rendered its

examination purposeless. This delayed examination could not be considered sufficiently speedy as required by Article 5 § 4.

Article 12

The Court held that there had been no justifiable reason for refusing the requests to marry and that prison authorities were not entitled to interfere with an individual's right to choose or to marry another person, except for overriding security reasons. The arguments that the Applicants were free to marry after their release and that Mr Jaremowicz had been given permission to marry five months after his request were rejected by the Court. The refusals and delays impaired the fundamental nature of the Applicants' Article 12 rights, both of whom fulfilled the national law's conditions for marriage.

Article 13

The Applicant complained that there had been no effective remedy for him once his request to marry was rejected. The Court held that since Article 12 had been violated, the same was true in relation to Article 13.

Article 41

Mr Frasik was awarded €5,000 for non-pecuniary damages, whilst Mr Jaremowicz was awarded €1,000. Both Applicants received €1,500 for costs and expenses.

Prohibition of discrimination

Kozak v Poland

(13102/02)

European Court of Human Rights: Judgment dated 2 March 2010

Discrimination – Sexual orientation – succession of tenancy – Article 14 in conjunction with Article 8.

Facts

The Applicant, Piotr Kozak, is a Polish national who was born in 1951. He lives in Szczecin, Poland. The Applicant lived with his partner, T.B., in a homosexual relationship in a flat at K. Street. The couple shared the expenses of the flat. In May 1989, the Applicant was registered as a permanent resident. In April 1998, the Applicant's partner died. The Applicant applied for a lease agreement in his name. On June 1998, the municipal office replied, stating that the Applicant had not been living there since November 1992, as was required, but had only moved into the flat in April 1998. Therefore, the municipal office denied his request and issued an eviction order against the Applicant. The Applicant appealed against the order, although his appeal was dismissed.

In 2000, the Applicant issued proceedings against the Szczecin municipality. The Applicant argued that he lived in a de facto marital relationship. The District Court dismissed the claim on the basis that in accordance with Polish law, a de facto marital relationship had to be between a

woman and a man. Same sex couples were not included. The Applicant appealed to the Szczecin Regional Court. The appeal was dismissed. The Regional Court refused to refer the question of whether the statement 'de facto marital cohabitation' included homosexual relationships to the Supreme Court or the Constitutional Court.

Complaints

The Applicant complained that the Polish courts had discriminated against him on the basis of his sexual orientation, by denying him the right to succeed tenancy after the death of his partner. The Applicant relied on Article 8 and 14 of the ECHR.

Held

There had been some inconsistency in the Applicant's statements before the national courts. The Court pointed this out and agreed with the Polish Government for having raised this issue. However, it further held that it was not for the Court to establish which of the facts found by the national courts was correct but to deal with the issue before this Court.

The Court held that both domestic courts considered the nature of the Applicant's relationship when determining whether he would qualify for de facto marital cohabitation. Further, both courts rejected his claim on the basis of Polish Law only considering relationships between men and women to come within de facto marital cohabitation.

The Court held that states had to take into consideration the development of society when balancing the protection of the family life and the Convention rights of sexual minorities. Further, the Court held that there was not just one way of leading a private life. In conclusion, the Court held that excluding a homosexual from the succession of tenancy was not necessary in order to protect family life. It held unanimously that there had been a violation of Article 14 in conjunction with Article 8.

Paraskeva Todorova v Bulgaria

(37193/07)

European Court of Human Rights: Judgment dated 25 March 2010

Refusal to grant suspended sentence because of Roma origin – Articles 6 and 14.

Facts

The Applicant, Paraskeva Todorova, who was born in 1952, is a Bulgarian national of Roma origin.

In 2005 she was charged with appropriation by fraud of money and jewellery. It was recommended by the prosecutor that she be given a suspended sentence due to her health condition as well as other extenuating circumstances.

In May 2006, the Applicant was convicted by the Plovdiv District Court. She was sentenced to three years' imprisonment. In its judgment the District Court made reference to the Applicant's ethnic background. The Court refused to suspend her sentence and stated that there was an impression of impunity, which is a common finding in relation to members of minority

groups. The Court said that for people of such minority groups a suspended sentence was not a punishment and gave this as the reasoning for sentencing her to three years' imprisonment.

In June 2007, the Supreme Court of Cassation refused to order a re-examination of her sentence and upheld the decision. The Court stated that the prison sentence was justified in order to discourage a sense of impunity. Again particular reference was made to impunity amongst groups of ethnic minority. One month later the Applicant submitted her case to the ECtHR.

Complaint

The Applicant complained that she had been discriminated against by the Bulgarian courts for reasons of her ethnic background. She therefore, relied on Article 6 in conjunction with Article 14.

Held

The Court relied on its case law, which holds that if a national court treats someone differently on basis of their ethnic background then the government needs to justify this different treatment. Considering the present case, the Court found that the Applicant had been treated differently. This was not only clear from the reference the District Court had made to her ethnic background, but also from the court's failure to mention her medical condition. The Court held that the Bulgarian authorities did not try and justify treating the Applicant differently; moreover, they argued that she was not treated differently at all. It is held in the Bulgarian Constitution that everyone be treated equally before the law, in this case the Court held the national courts had not complied with this requirement.

Concluding, the Court held that the Bulgarian courts had treated the Applicant unjustly different on the grounds of her ethnic background and therefore violated Article 14 in conjunction with Article 6(1).

The Court awarded the Applicant €5,000 as pecuniary damages and €2,2180 for costs and expenses.

Sejdić and Finci v Bosnia and Herzegovina

(27996/06 and 34836/06)

European Court of Human Rights: Judgment dated 22 December 2009.

Prohibition of discrimination and general prohibition of discrimination – Article 14 and Article 1 of Protocol No. 12.

Facts

The Applicants, Dervo Sejdić and Jakob Finci, citizens of Bosnia and Herzegovina are respectively of Roma and Jewish origin and live in Sarajevo.

Bosnia's power sharing system, in pursuance of peace and in accordance with the Dayton Peace Accords of 1995, distributes power amongst the so-called 'constituent peoples', which constitutes the Bosnians, Croats and Serbs. Therefore the Jews, Roma, and other national minorities, including those who do not declare affiliation with any ethnic group, are effectively

excluded from running for office. In 2006, the Constitutional Court of Bosnia and Herzegovina examined whether the discriminating provisions of the Constitution and the Electoral Code of Bosnia and Herzegovina were still valid and it held that they were.

On 3 January 2007 and pursuant to an earlier inquiry Mr Finci received written confirmation from the Central Election Assembly that he was ineligible to stand for election to the Presidency and the House of People of the Parliamentary Assembly, on the ground of his Jewish origin.

Complaints

The Applicants argued that the Election Act 2001 and the Constitution of Bosnia and Herzegovina prevented them on the ground of their ethnic origin from becoming candidates, despite having equivalent experience to the elected officials. They relied on Articles 3 (prohibition of inhuman and degrading treatment), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the ECHR, Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination).

Held

With regard to admissibility, the Applicants were able to claim to be victims of the alleged discrimination seeing as, given their active participation in public life, it was probable that they would subsequently consider running for candidacy. Furthermore despite the fact that the Constitution was annexed to the Dayton Peace Agreement (an international treaty), the Parliamentary Assembly of Bosnia-Herzegovina had the power to amend it and the disputed provisions did come under the responsibility of the State.

Article 3

Although the Court has held previously that racial discrimination could amount to degrading treatment under Article 3, in this case the difference in treatment did not indicate contempt or a lack of respect for the Applicants' racial or ethnic backgrounds and was not designed to humiliate or debase, but to achieve peace between the people. Therefore the complaint was held to be manifestly ill-founded and hence was rejected.

Article 13

The complaint that there were no available effective domestic remedies for the Applicants was rejected. The Court stated that Article 13 does not guarantee a remedy allowing challenges to legislation before national authorities where legislation diverges from the Convention.

Article 1 of Protocol No. 12

Court held by 16 votes to 1 that there had been a violation of Article 1 of Protocol No. 12, as to the Applicant's ineligibility to stand for the election to the House of Peoples of Bosnia and Herzegovina. The Court also held that the impugned pre-condition for eligibility for the Presidential elections constituted a breach of Article 1 of Protocol 12. The Court further held that it would be unnecessary to assess Article 3 of Protocol No. 1 alone or in conjunction with Article 1 of Protocol No. 12.

Article 14 with Article 3 of Protocol No. 1

With regard to the House of Peoples of the Parliamentary Assembly the Court held that although it was not necessarily time to completely abandon the power sharing system, the current system in place could no longer be reasonably or objectively justified, as mechanisms of power-sharing existed which did not automatically exclude those who did not belong to the 'constituent peoples'. Hence the system as it stood was disproportionate to the legitimate aim of establishing peace and dialogue. The Court therefore held by 14 votes to 3 that there had been a breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1.

The Applicants, Sejdić and Finčić, were awarded €1,000 and €20,000 respectively for costs and expenses and the Court considered the finding of a violation sufficient just satisfaction for any non-pecuniary damage suffered.

Commentary

In 2002 Bosnia and Herzegovina committed to reviewing electoral legislation within a year of joining the CoE and to ensuring full compliance with the ECHR within one to two years. However dissenting Judge Bonello expressed his concerns that the above decision served to 'divorce' Bosnia and Herzegovina from its past, disregarding the importance of the Dayton agreements in establishing checks and balances between the three ethnicities. He questioned the role of the Court, suggesting that the decision intruded upon the peace-keeping exercises and treaties that were protracted laboriously and ultimately signed, ratified and executed. He further questioned whether the rights of the Applicants to stand for election were important enough to nullify the peace, security and public order established for the whole population. He added that rather than bringing peace, the enforcement of human rights in this case could threaten security and public order and even become the trigger for war. He concluded by pointing out that the Dayton Peace Accord was partly responsible for saving Bosnia's and that in a situation such as this no State should be 'placed under any legal or ethical obligation to sabotage the very system that saved its democratic existence.' He was also keen to stress that human rights can be restricted in a case of national emergency, and that when making any changed the court must consider historical factors that may affect the state's population in the aftermath.

This was the first ruling under Protocol 12 to the ECHR which prohibits discrimination in enjoyment of all rights 'set forth by law'. Protocol 12 extends the scope of Article 14, introducing a general prohibition on discrimination, whilst retaining the manner in which discrimination is to be interpreted. This interpretation provides that an act is discriminatory when people are distinguished, without objective or reasonable justification, in similar circumstances. It therefore also applies to the right to stand for elections and to the restrictions on eligibility and exclusion of 'Others' from the elections to the Presidency and to the House of Peoples of Bosnia-Herzegovina.

Whilst the ramifications of this decision in Bosnia have been explained and have led to the removal of discriminatory language distinguishing between 'constituent people' and 'others' this decision is set to have a huge impact outside of Bosnia. States that encourage and welcome the participation of minority groups in the electoral process tend to be both more stable and more prosperous. As this decision will impact on other ECHR states with similar election rules

to Bosnia it can be viewed as a positive thing that minority groups in a number of countries may now get the opportunity to fully compete in the electoral process.

Right to peaceful enjoyment of property

Guiso-Gallisay v Italy

(58858/00)

European Court of Human Rights Grand Chamber: Judgment dated 22 December 2009.

Right to enjoy property, just satisfaction – Article 1 of Protocol 1 and Article 41.

Facts

The Applicants, Gian Francesco Guiso-Gallisay, Antonella Guiso-Gallisay and Stefano Guiso-Gallisay, were born in 1948, 1952, and 1959 respectively and are all Italian nationals.

The Italian Administration unlawfully expropriated the Applicants' property in 1977 and started to develop it despite not having compensated the Applicants. Subsequently the Applicants brought proceedings for damages. On 8 December 2005, the ECtHR held that Article 1 of Protocol 1 had been violated, as there had been a breach of the principle of legality. However it held that the question on the application of Article 41 (just satisfaction) was not yet ready for decision.

On 8 December 2005, the Court varied the case law on the application of Article 41 in cases of indirect expropriation. It decided that to assess losses incurred by the Applicants it would have to consider the date from which the Applicants had definitively lost legal ownership of the property concerned. The date used was the date the Nuoro District Council had declared that the expropriation had been unlawful, namely 14 July 1997. The market value of the property on that date was to be adjusted in consideration of inflation and then increased by the interest due on the date of the Court's judgment. The Applicants had been jointly awarded €1,803,374 for pecuniary damages, €45,000 for non-pecuniary damages and €30,000 for costs and expenses. This case was referred to the Grand Chamber.

Complaints

The Applicants complained to the Grand Chamber that the unlawful occupation of their land violated Article 1 of Protocol 1 as they had been denied the right to peaceful enjoyment of their possessions.

Held

Article 41

The Grand Chamber held that the date to be used in assessing the amount of just satisfaction to be awarded was not when the Nuoro District Court had declared the unlawfulness of the expropriation, as this was not the date the Applicants were made certain that they had lost legal ownership. The Grand Chamber found that the Nuoro District Court had held that the Applicants had lost parts of their property in 1982 and 1983 and therefore used these dates,

jointly awarding the Applicants €2,145,000 for pecuniary damages, €45,000 for non-pecuniary damages and €35,000 for costs and expenses.

Yuriy Nikolayevich Ivanov v Ukraine

(40450/04)

European Court of Human Rights: Judgment dated 15 January 2009

Right to a fair trial, Protection of property, Right to an effective remedy - Article 6 §1, Article 1 of Protocol No. 1 and Article 13.

Facts

The Applicant, Yuriy Ivanov, is a Russian national who was born in 1957 and lives in Moscow, Russia.

In October 2000, the Applicant retired from the Ukrainian army. He was entitled to a lump-sum retirement payment and compensation for his uniform but these payments were not paid to him on his retirement.

In July 2001 he brought proceedings in court seeking recovery of the debt. In August 2001 the Court decided in his favour and ordered the military unit to pay him approximately €819 including the court fees incurred.

On an unspecified date, the debt in retirement payment arrears was paid to him but not the rest. In April 2004 the bailiffs wrote to the Applicant informing him that the military unit had no money to pay the rest and that the law prohibited forcing sales of its assets. The August 2001 judgment remained partially unenforced.

In 2002 the Applicant brought proceedings against the bailiffs claiming that they were at fault for the non-enforcement of the August 2001 judgment. The Court found in his favour and ordered the bailiffs to identify and freeze the military unit accounts in order to seize the money available there. They did not comply.

He brought new proceedings seeking compensation for pecuniary and non-pecuniary damages. The Court granted his claim, partly, in July 2003. This judgment remained unenforced.

Complaints

The Applicant relied on Article 6 § 1, on Article 1 of protocol 1 and Article 13 of the Convention. He complained about the non-enforcement of the judgments of August 2001 and July 2003 and that he could not effectively challenge that at domestic level.

Held

Article 6 and Article 1 of Protocol 1

The Court held that Ukraine had been fully responsible for the non-enforcement and found unanimously that there had been a violation of Article 6 § 1 of the Convention and Article 1 of

Protocol No. 1 on account of the prolonged non-enforcement of the August 2001 and July 2003 judgments.

The Court observed that the August 2001 judgment had not been fully enforced and that the delay in its enforcement totalled seven years and ten months. Likewise, the July 2003 judgment had remained unenforced for about five years and 11 months. The Court noted that the delays had been caused by a combination of factors, including the lack of budgetary funds, the bailiffs' omissions and shortcomings in the national legislation, as a result of which the Applicant could not have the judgments enforced. The Court considered that all those factors had been within the control of the Ukrainian authorities and that the Ukrainian Government had not presented any arguments capable of persuading it to reach a different conclusion in the present case.

Article 13

The Court also held that there had been a violation of Article 13 of the Convention. A remedy had not existed at national level satisfying the requirements of Article 13 in respect of the Applicant's complaints about the non-enforcement of the judgments in his favour.

Kiladze v Georgia (7975/06)

European Court of Human Rights: Judgment dated 2 February 2010

Compensation- failure to provide an effective remedy- Article 1 of Protocol 1.

Facts

The Applicants, Klaus and Yuri Kiladze, are brothers aged 83 and 81 respectively, living in Tbilisi, Georgia. The Applicants' father was shot in 1937 for allegedly being a saboteur and a terrorist. Their mother was sentenced to eight years in prison for propaganda and for campaigning to overthrow the Soviet regime. She was deported to a corrective labour camp, in the extreme north of the USSR. Immediately after the arrest of their mother, the family apartment in Tbilisi and all their belongings were confiscated.

The Applicants, then aged 12 and 10 years respectively, were kept for a month and a half in a detention centre in Tbilisi, where they became malnourished and contracted typhoid. The Applicants were subsequently sent to an orphanage in Russia, where they lived in abusive and unsanitary conditions for two years, before returning to Georgia in 1940 to live with their grandmother. Back in Georgia the Applicants were forced as children to undertake physical work. Throughout their lives thereafter, they were subject to verbal abuse for being 'traitors of the motherland'.

Having been recognised as victims of political repression in 1998, in 2005 the Applicants applied to the Georgian courts seeking compensation under a 1997 law on the recognition of citizens of Georgia as victims of political repression and the welfare of the repressed ('Act of December 11, 1997'). The Applicants relied upon Article 8 of the 1997 Act, which provides for the restoration of property rights, and Article 9, which compensates victims for non-pecuniary damage resulting from detention or exile. The domestic courts rejected their claims as the 'laws'

referred to in the relevant provisions, which were necessary to determine the sum of damages due and how to pay the damages, had not been adopted. In 2006 they applied to the European Court.

Complaints

The Applicants argued that Georgia's failure to adopt the laws referred to in the relevant provisions of the Act of December 11, 1997, which are necessary to give effect to their right to property under those provisions, constitutes a violation of their rights guaranteed by Article 1 of Protocol No. 1 (the right to property). Furthermore, the Applicants contended that the domestic courts, which were induced to reject their appeal because of the legislative vacuum, did not offer them an effective remedy as required under Article 13 of the Convention.

Relying on Article 3 the Applicants complained that by failing to give effect to their rights guaranteed by provisions of the Act of 11th December 1997, Georgia subjects them to such levels of uncertainty and anxiety that it amounts to degrading treatment.

Held

Article 8

The Court started by looking at the admissibility of the case. It rejected the Applicants' claim based upon Article 8 of the 1997 Act as inadmissible. In the Court's view, the adoption of a subsequent law was necessary in order to determine whether the Applicants were eligible for the restoration of rights pursuant to Article 8. Hence, at the time of referral to the domestic courts in 2005 the Applicants had not established any proprietary interest that could be enforced. Since there was no 'arguable claim' so far as that part of the application was concerned, the Applicants' complaint based on Article 13 of the Convention was likewise rejected.

The claim was admissible, however, on the basis of Article 9 of the 1997 Act. It was clear from Article 9 that every citizen of Georgia declared a victim of political repression that occurred on the territory of the former USSR between February 1921 and October 1990 may receive monetary compensation provided that it is demonstrated that he or she was detained, exiled, placed in a special place to live or died as a result of such a measure. The heirs to the victim also have that right. Both Applicants met the above conditions. The only outstanding issue, therefore, concerned the 'amount' of compensation. Given the foregoing, the Court considered that at the time of referral to the domestic courts, the complainants had, under Article 9 of the Act of December 11 1997, a claim sufficiently established in domestic law and that they could legitimately claim recovery against the State.

Article 1 of Protocol No. 1

The European Court found a violation of Article 1 of Protocol 1 to the ECHR. By not adopting the law, Georgia was found to have placed a disproportionate and excessive burden on the Applicants that could not be justified by any possible financial and political interests that would accrue by not adopting the law. Its reasoning was stated in the following terms:

'... the Court does not see any reason why the State has failed, after more than 11 years, to take even the smallest step to starting the process of adopting the law [...]. Furthermore, the State is apparently not ready to start this task, thus denying the elderly Applicants

any hope of enjoying, during their lifetime, the rights envisaged in Article 9 of the law of 11 December 1997.’

In the eyes of the Court, Georgia was under an obligation when it decided to offer moral and financial support to its nationals who had been persecuted by the Soviet regime, and at least from the entry into force of Protocol No. 1, to conduct a process of reflection and action and to not maintain the Applicants in uncertainty for an indefinite period, against which they have no effective internal appeal. By failing to comply with this obligation, Georgia had denied the Applicants their right to property enshrined in Article 1 of Protocol 1 to the Convention.

The Applicants were awarded €4,000 each for moral damages. Since the Applicants had not suffered material losses themselves as a result of the violation, they were not awarded damages in respect of this matter. The Court awarded the Applicants €1,950 and €1,050 for their representation before the Court by Ms S. Japaridze and M. Phil. Leach respectively and €537 for other costs.

Commentary

In this landmark judgment the European Court has paved the way for Georgian victims of Soviet political repression to be compensated. The judgment requires the Georgian authorities to rapidly introduce the necessary legislative, administrative and budgetary measures to ensure that those entitled to do so can benefit from their rights under the 1997 law. Its significance lies in its ramifications for thousands of others in a similar position.

Right to education

Oršuš and Others v Croatia

(15766/03)

European Court of Human Rights: Judgment dated 16 March 2010

Racial discrimination against Roma children – right to education – language skills – right to fair trial – Article 14 in conjunction with Article 2 of Protocol No 1 – Article 6.

Facts

The 15 Applicants were all born between 1988 and 1994 and are Croatian nationals of Roma origin. They all live respectively in Orehovica, Podturen and Trnovec. The Applicants attended primary school based in Macinec and Podutren. They attended the school at different times between 1996 and 2000. The Applicants would often be segregated into classes which consisted of only Roma students. The school said that the reason for separating the children was because they had not acquired the required command of the Croatian language.

In April 2002 proceedings were issued against the school by the Applicants. They claimed that the Roma-only classes were not taught to the same standard, in that they were based on a curriculum which contained up to thirty per cent less material than the national curriculum. The Applicants complained that this was based on racial discrimination and denied their right to education. Further, they submitted a psychological report stating that segregated education

had exposed the Roma students to mental and physical harm and therefore violated their right to freedom of inhumane and degrading treatment.

In September 2002 the Applicants' claim was dismissed by the Municipal Court. Their reasoning was that most Roma children were segregated because they required extra tuition. The Municipal Court further held that the curriculum of the primary schools were the same as other schools. In November 2003, the Applicants lodged a constitutional complaint. This was also dismissed in February 2007. The grounds for the dismissal were similar to what the Municipal Court stated.

Complaint

Relying on Articles 3, 14 and 2 of Protocol 1, the Applicants complained that being segregated into classes of only Roma students violated their right to education and discriminated against them. Further, they claimed that the segregation subjected them to educational, psychological and emotional harm. Furthermore, they complained that their complaints had taken a long time and therefore violated their right under Article 6 § 1 to a fair hearing within a reasonable time.

Held

Article 6

The Court held that because primary education is a civil right under Article 6 it would apply in this case. When considering the length of the trial the Court held that four years before the Constitutional Court was excessive, particularly as it involved such an important issue. Therefore, the Court held that there had been a violation of the Applicants' right to a fair trial within a reasonable time.

Article 14 in conjunction with Article 2 of Protocol 1

When considering the issue of discrimination, the Court referred to the earlier case of *Chapman v the United Kingdom* [GC] (27238/95), in which it was held that people of Roma origin were often disadvantaged and were a vulnerable minority that required special protection. Although the Court acknowledged that placing Roma students was clearly not a general policy it also noted that only Roma children had been placed in separate classes. The Court held that therefore differential treatment was being applied.

After considering the Government's argument, the Court stated that placing children in a different class for reasons of language deficiency would not automatically constitute a violation of Article 14.

The Court considered that the classes of Roma only students had not been provided with a programme to assist the children with their language difficulties. Although some of the Applicants had been offered extra Croatian classes the Court held that this was not sufficient. Furthermore, the Court noted that the Government had failed to show any reports on the individual Applicants concerning their progress of studying the Croatian language.

The Applicants submitted researched statistics which the Government admitted. These highlighted the fact that 84 per cent of Roma pupils dropped out before having completed

primary education. All the Applicants left school at the age of 15 and had not completed their primary education. Furthermore, they all had very poor attendance records.

The Court held that although the Croatian authorities had made some effort to provide Roma children with schooling, not enough safeguards had been put in place in order to provide the Applicants' with sufficient care in order to address their special needs. Therefore, the Court held that the placement of the Applicants into Roma only classes had not been justified and violated Article 14 in conjunction with Article 2 of Protocol 1.

Article 41

The Court held that non-pecuniary damages of € 4,500 were to be paid to each Applicant and €10,000 to be paid to the Applicants jointly for cost and expenses.

Right to liberty of movement

Gochev v Bulgaria

(34383/03)

European Court of Human Rights: Judgment dated 26 November 2009

Freedom of Movement, Just Satisfaction – Articles 2 of Protocol no. 4 and 41 of the Convention.

Facts

The Applicant, Mr Georgi Stefanov Gochev, is a Bulgarian national who was born in 1958 and lives in Varna (Bulgaria).

In October 1999 and April 2001 the Applicant had enforcement orders issued against him on the basis of a promissory note. This was at the request of private companies to which he owed money. The debt amounted to 55,331.03 Bulgarian leva (about €28,230), plus statutory interest.

On 2 October 2001 one of the private companies contacted the bailiffs' service, requesting that the Applicant be subjected to an order prohibiting him from leaving the territory due to his failure to repay his debt.

On 2 November 2001 the bailiffs' service suggested to the director of the Department for Identity Documents that his passport to be withdrawn. That request was based on section 76 (3) of the Bulgarian Identity Documents Act 1998 that provided the possibility of prohibiting natural persons who had debts towards other natural or legal persons amounting to more than BGN 5,000 (about €2,550) from leaving the territory. On 21 December 2001, referring to section 76 (3) of the Bulgarian Identity Documents Act 1998 and the request by the bailiffs' service, a decision was made by the director of the Department for Identity Documents to impose the proposed measure for an indefinite period. He ordered that the Applicant's passport be withdrawn and instructed the relevant authorities not to issue him with a new passport.

Complaints

The Applicant alleged that there had been a violation of his right to leave the country, guaranteed by Article 2 of Protocol No. 4 to the Convention.

He had been prevented from leaving the country for more than six years and four months, without any judicial review of the measures concerned. When the measure was imposed the authorities did not seek relevant information on his personal situation or the circumstances of his failure to pay his debts. The Courts also failed to effectively review the need for the measure. The Applicant believes he had been subjected to measure of an automatic nature with no limitation as to their scope or duration.

Held

Article 2 of Protocol no. 4

The Court held that there had been a violation of Article 2 of Protocol no. 4 because the Court found that the Bulgarian authorities had failed in their duty to ensure that the interference with the Applicant's right to leave the country was justifiable and proportionate in the light of the circumstances, from the outset and throughout its duration of the measure taken.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court awarded the Applicant €5,000 in respect of non-pecuniary damage and €1,500 for costs and expenses.

C. International Cases

International Criminal Court

The Prosecutor v Omar Hassan Ahmad Al Bashir

ICC-02/05-01/09-OA

International Criminal Court, Appeals Chamber: Judgment dated 3 February 2010

Crime of genocide - Arrest warrant on the grounds of crime of genocide – correct test for arrest warrant.

Facts

Omar Hassan Ahma Al Bashir, the President of Sudan, was born on 1 January 1944. He had an arrest warrant issued against him by the prosecutor of the International Criminal Court on the 4 March 2009. The warrant listed seven different counts, five for crimes against humanity and two for war crimes. The judgment authorizing the arrest warrant took place on the 4 March 2009. In addition to the two grounds mentioned above, the prosecution had requested that a

further ground be added to the arrest warrant, that of crimes of genocide. This application was, however, rejected.

The Appeals Chamber considered the test that was applied by the Pre-Trial Chamber when they concluded that there was not enough evidence to include crimes of genocide on the arrest warrant.

Complaints

This is an appeal brought by the prosecution on the grounds that the Pre-Trial Chamber acted in an erroneous manner because it rejected to issue an arrest warrant for crimes of genocide. The argument was based on Article 58(1) of the Statute of Rome, which states that ‘the existence of [...] genocidal intent is only one of several reasonable conclusions available on the materials provided by the prosecution.’

Held

The Appeals Chamber held that there are three different tests for the three different stages: ‘reasonable grounds to believe’ is the threshold for the issuance of an arrest warrant; ‘substantial grounds to believe’ is the threshold for the confirmation of charges; and the threshold of ‘beyond reasonable doubt’ for a conviction. The test applied by the Pre-Trial Chamber was that the existence of genocidal intent must be the only reasonable conclusion. The Appeals Chamber held that if ‘the only reasonable conclusion’ were to be applied this would require the prosecutor to eliminate any other reasonable conclusion or doubt. If such a test is applied the Appeals Chamber concluded that this would establish genocidal intent beyond reasonable doubt which is not required at this stage.

In March 2009, the Pre-Trial Chamber held that the evidence provided by the prosecutor failed to show reasonable grounds that Al-Bashir acted with genocidal intent. Therefore, no warrant could be issued on the basis of crimes of genocide. The Appeals Chambers held that although the correct standard had been used, that of reasonable grounds to believe, the Pre-Trial Chamber had applied it in an erroneous manner. What the Pre-Trial Chamber applied was higher and more demanding than what was held under Article 58(1)(a). The Appeals Chamber held that this resulted in an error of law. Therefore, it was held by the Appeals Chamber that the case should be sent back to the Pre-Trial Chamber so that a new decision could be taken applying the correct test.

Federal Court of Australia

Habib v Commonwealth of Australia
(FCAFC 12)

Federal Court of Australia: Judgment dated 25 February 2010

Torture- customary international law- act of State doctrine.

Facts

The Applicant, Mr Habib, a plaintiff remitted to the Federal Court of Australia by the High Court of Australia, is an Australian citizen. On 4 October 2001 Mr Habib was detained by Pakistani authorities. During his detention he alleged that he was mistreated by Pakistani officials with the knowledge or assistance of US officials. The catalogue of mistreatments included, for example, the administration of electric shocks, beating, suspension from chains, being assaulted with a gun, being punched and kicked in the head and being made to stand on an electrified drum whilst being shackled to a wall. He alleged that he was moved to a prison in Egypt where Egyptian officials, with the knowledge or assistance of US officials, interrogated him using similar torture techniques. In April or May 2002 Mr Habib claimed to have been flown to Bagram airfield in Afghanistan, from which point onwards he was undisputedly under US control. On 6 May 2002 he was flown to Guantánamo Bay and remained there until his eventual release (without charge) on 28 January 2005. Whilst in US custody Mr Habib again alleged that he suffered a series of abuses, including sleep deprivation, threats of sexual assault, the use of electrical prods, water boarding, exposure to loud music in a dark cell with flashing lights and smearing with menstrual blood. As a result of his torture Mr Habib claimed to have suffered a number of serious ailments including post traumatic stress disorder, major depression, mental distress, bruising and lacerations, burns, loss of memory, nightmares and scarring.

Pertinently, Mr Habib alleged that Australian officials were implicated in his mistreatment. During his detention in Pakistan, Egypt and Guantánamo Mr Habib alleged that he was interrogated by officers of the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal police (the AFP) and *inter alia* that they would have known, by looking at him, of the mistreatment he had suffered.

Complaints

Mr Habib's complaint was that the alleged acts of torture and other inhumane treatment were committed by persons who were, or were acting at the instigation of or with the consent and acquiescence of, public officials or persons acting in an official capacity outside Australia in breach of, *inter alia*, s6 of the Crimes (Torture) Act 1988 or by or at the behest of agents of foreign states in breach of s7 of the Geneva Convention Act 1957. The Commonwealth contended that to determine whether agents of the US, Egypt and Pakistan committed offences against the relevant Acts is to require the Court to sit in judgment on the acts of the governments of those States done within their own territories, contrary to the act of State doctrine. In reliance upon this doctrine, the Commonwealth sought an order under s. 25(6) of the Federal Court of Australia Act 1976 that the Court should dismiss the Applicants claims.

Held

All three judges agreed unanimously with the Applicant, though each of them had a different reasoning. Perram J held that the act of State doctrine has no application where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law. This principle derives from the doctrine that the judiciary have the capacity to review the legality of administrative action. This doctrine remains an important guarantee of judicial process. Consequently, no law of the Parliament may bar the right to proceed against the Commonwealth in respect of the scope of its constitutional power. The effect of this principle

is to ensure that whenever a question as to the limits of Commonwealth power arises it is justiciable.

Perram J also considered *obiter* whether the act of State doctrine was subject to an exception in the case of gross breaches of human rights. He was of the opinion that the act of State doctrine is likely to be a choice of law rule. As such, a human rights exception to the act of State doctrine could be carved out 'since there are no especial difficulties in declining to give effect to particular foreign laws which are repellent to the public policy of this country'.

Jagot J found, after analysing the relevant jurisprudence, that Courts are obliged to give effect to clearly established principles of international law, including the crime of torture which has the status of a *jus cogen* violation. As such, the act of State doctrine could not prevent an Australian court from scrutinising the alleged acts of Australian officials overseas in breach of peremptory norms of international law. In other words, the act of State doctrine was subject to an exception in the case of gross breaches of human rights.

Supreme Court of Canada

Canada (Prime Minister) v Khadr
(33289)

Supreme Court of Canada: Judgment dated 29 January 2010

Rights to International Human Rights, right to life, liberty and security of person, right to remedy-Canadian Charter of Rights and Freedoms, s. 7 and s. 24(1).

Facts

The Applicant is a Canadian citizen. From 2002 the U.S. military at Guantanamo Bay, Cuba had detained him, when he still was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, the Applicant was questioned by two Canadian intelligence services CSIS and DFAIT on matters connected to the charges pending against him. These interviews were shared with the U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the 'frequent flyer program', to make him less resistant to interrogation. In 2008, the European Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations and a violation of s. 7 of the Canadian Charter of Rights and Freedoms. It ordered the Canadian Government to disclose the Applicants interview transcripts, which it did. The Applicant repeatedly requested that the Canadian Government seek his repatriation; however, the Prime Minister announced his decision not to do this.

Complaints

The Applicant then applied to the Federal Court for judicial review, alleging that this decision violated his rights under s. 7 of the Canadian Charter of Rights and Freedoms.

Held

s. 7 of the Canadian Charter of Rights and Freedoms

The Federal Court held that in the special circumstances of this case Canada had a duty to protect the Applicant under s. 7 of the Charter and ordered the Government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the 'frequent flyer program'. The right to liberty and security of a person is guaranteed by s. 7 of the Charter and Canada actively participated in a process, which is contrary to its international human rights obligations and contributed to the Applicants ongoing detention that deprived him of his rights.

There is sufficient connection between the Government's participation in the illegal process and the deprivation of the Applicant's liberty and security. The deprivation of his right to liberty and security is not in accordance with the principles of fundamental justice. The interrogation of a youth detained, without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and that the information of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

s. 24 (1) of the Canadian Charter of Rights and Freedoms

Under s. 24(1) of the Charter the Applicant is entitled to a remedy. The remedy sought by the Applicant is an order that Canada request his repatriation. As the Government can decide how the duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. The Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists and if it does, whether its exercise infringes the Charter and where necessary, to give specific direction to the executive branch of the Government. The trial judge had misdirected himself by ordering the Government to request the Applicant's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs. The appropriate remedy in this case is to declare that the Applicant's Charter rights were violated, leaving it to the Government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the Charter.

Supreme Court of the United Kingdom

Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R(on the application of Hani El Sayed SAabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)

[2010] UKSC 1.

Supreme Court: Judgment dated 27 January 2010

Anonymity of defendants whose assets are frozen due to suspicion of supporting terrorist activities – balancing Article 8 and Article 10 of the ECHR

Facts

On August 2007 the appellants A, K and M were informed by the Treasury that they had reasonable grounds for suspecting that each three of them were, or might be, a person who facilitated the commission of acts of terrorism. Because of these findings, all three had been designated under article 4 of the Terrorism (United Nations Measures) Order 2006. Further, there had been allegations that A and M were facilitators of Al-Qaida, a group of which M was the leader. It was also suggested that M and K were involved in the funding of Al-Qaida contacts in Pakistan. A, K and M maintained that they are of good character and denied the allegations against them.

In December 2006, G received a letter which stated that the Treasury had made similar directions under article 4 of the Terrorism Order 2006. In the letter G was informed that the Bank of England was acting as an agent for the Treasury and that they had issued a notice and press release. On 13 December 2006 the Bank of England's News Release mentioned G as Mr Mohammed al-Ghabra who is living in east London. The Foreign and Commonwealth Office also sent G a letter informing him that he had been designated. As a result G's economic resources, funds and assets were frozen.

On 6 October 2005 the Foreign and Commonwealth Office sent HAY a letter informing him that he had been added to the consolidated list. As a result of this HAY's economic resources, funds and assets were frozen. Further, the Bank of England named HAY as being one of seven people whose names had been added to the list, which meant that they were under a financial sanctions regime under the Al-Qaida and Taliban Order 2006. In the press release HAY was mentioned as Mr Hani al-Sayyid Al-Sebai.

The Treasury agreed that the appellants would have their identities treated as confidential.

Complaint

The Guardian News, Medial Ltd and others (the Applicants), complained that it was contrary to Article 10 ECHR not to identify the five men and requested that the anonymity orders be reversed. The appellants argued that setting aside their anonymity order would violate their Article 8 rights.

Held

When considering the arguments, the Court had to balance Article 10 against Article 8. It held that in cases such as this, the decision on which interest should prevail would depend on the circumstances of each case.

When considering the case of G the Court held that his identity had already been made public in the Bank of England's press release. The article mentioned his name and the fact that he was subjected to a freezing order. Therefore, the Court ordered that the anonymity order be set aside.

The situation with HAY is the same as with G. HAY's name was also published in the Bank of England's press release in October 2005. Further, since 1999, there have been several articles in the press about him, some even mentioning his wife and children. Therefore, the Court rejected HAY's argument that the Egyptian authorities would take retributive action against him or his

family if their names would be made public, and ordered the setting aside of the anonymity order.

M submitted that the loss of his anonymity could lead to the loss of contact with his children as he was heavily involved in their activities. Further, he submitted that it could lead to the loss of community ties as the Muslim community would not want to be associated with him. The Court considered whether publicising his name would therefore violate his Article 8 rights. The Court, when weighing up M's Article 8 and Article 10 rights held that there was a powerful general public interest in identifying M. The Court held that this was so great that it justified the curtailment of M's Article 8 rights and ordered that the anonymity order be set aside.

A and K are currently outside of the country and their whereabouts are unknown. Therefore, the Court decided to consider their position once they had dealt with M. Having concluded that M's anonymity order be set aside the Court ordered that the same be done for A and K.

Comment

When the Court reviewed the history of anonymity orders being issued in the UK and European courts, it held that lower courts were granting anonymity orders without any prolonged consideration and not specifically explaining their reasoning behind it.

The Supreme Court stated that the above proceedings did not relate to control orders and, therefore, it would not be possible to take this case as a precedent with regard to control orders.

Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmen & ors (Applicants): Her Majesty's Treasury v Mohammed al-Ghabra: R(on the application of Hani El Sayed Youssef) v Her Majesty's Treasury (2010)

[2010] UKSC 2

Supreme Court: Judgment dated 27 January 2010

UK obligations under the Charter of the United Nations to implement Security Council Resolutions – whether fundamental rights prevail – Section 6 Human Rights Act 1998

Facts

On 13 December 2006, a direction was made against Mohammed al-Ghabra under Article 4 of the Terrorism Order 2006. According to the Order, Mohammed was a designated person. The reason for the direction being made was that the Treasury had reasonable grounds for suspecting that he was, or might be, facilitating acts of terrorism. Because the information gathered on al-Ghabra was very sensitive he was not provided with any further details or information.

On 2 August 2007 the same principle was applied to three further men: Mohammed Jabar Ahmed, Mohammed Azmir Khan and Mohammed Tunveer Ahmed. Once again it was stated that the authorities were unable to give further information.

All four men were on the consolidated list under the Terrorism Order 2006. Because they were listed they were declared designated persons under Article 3(1)(b) of the Al-Qaida and Taliban

Order 2006. The effect of these orders was to deprive the designated persons of all means. It allowed the freezing of their funds, economic resources and financial services without any limit of time. These measures did not only lead to severe restrictions in their movement, but also to the breaking down of their family relations.

Complaints

The Applicants claimed that their rights had been violated, in particular Articles 6 and 8 of the ECHR as well as Article 1 of Protocol I. This was clear through the fact that they were basically State prisoners and were not provided with full information as to why they were put on the list as designated persons. Furthermore, every transaction made by the Applicants was criminalised, which made it very difficult for them to live.

This case is based on conjoined appeals of the Administrative Court and the Court of Appeal. The Supreme Court had to assess the lawfulness of the Terrorism Order 2006 and the Al-Qaida Order 2006 Article 3(1)(b). In order to do so it addressed three different issues. Firstly, the vires of the Terrorism Order; secondly, the vires of Article 3(1)(b) of the Al-Qaida Order; and finally, whether the Al-Qaida Order was unlawful by virtue of Section 1 of the Human Rights Act 1998.

Held

Article 1 of the United Nations Act 1946 was created so that the UK could comply with its obligations under the UN Charter by implementing Security Council Resolutions. Lord Brown held that it was unacceptable to confer discretion on the executive in determining how the resolutions are to be implemented. By using the 'reasonable suspicion' test giving effect to the resolution, the Treasury had exceeded its powers. The Court further held that this was a good example of an attempt to adversely affect the citizens' rights without Parliamentary authority.

The Court considered the fundamental rights under the ECHR and decided that they could not just be overridden. It was held that, due to the clear absence of Parliament indicating the restriction of fundamental freedoms when it implemented the UN Charter Act 1946, it was impossible to conclude that Parliament considered such possible effects. The Court therefore held that the Terrorism Order was *ultra vires* s.1(1) of the United Nations Charter Act 1946.

A reason for being a designated person under the Al-Qaida Order could be simply because he had been designated by the Sanctions Committee. This was the sole ground for the Applicants to be declared designated persons. However, it was highlighted by the Court that any such person did not have a means of judicial review and would therefore be denied an effective remedy. Therefore, the Court held that Article 3(1)(b) was *ultra vires*.

The Court had to consider whether the European Convention rights came within the category of obligations in international agreements over which obligations under the Charter would prevail. However, the Court determined that it was for the ECtHR to provide authoritative guidance on this issue. This would make it possible for all Member States to adopt an equal position about whether the Convention rights could prevail, if at all, over the States' obligations under the Charter.

Comment

This decision highlights the difficulty of implementing international obligations and how compatible they are with each other. It is particularly interesting to see that there are issues arising between two fundamental documents under International Law, namely between the ECHR and the UN Charter. Therefore, a decision by the ECtHR would be interesting and might give some indication of which rights prevail.

The UN Charter is one of the most ratified international documents. It is therefore of concern that similar cases concerning the violations of fundamental rights might be occurring around the globe. A further issue is that Security Council Resolutions seem to have a wide scope for interpretation. Clearly this should be more narrowly defined in order to support a unanimous application.

High Court of Justice of England and Wales

The Queen (on the application of Ahmed) v Secretary of State for the Home Department
[2010] EWHC 625 (Admin)

High Court of Justice: Ex tempore judgment delivered on 19 February 2010 by Mr Justice Langstaff

Unlawful deportation- refusal of Iraq to accept Kurdish immigrant from outside KRG.

Facts

This case concerned the lawfulness of subjecting an Iraqi of Kurdish descent to on-going immigration detention in circumstances where it was not clear when he could be returned to Iraq.

Mr Ahmed is a 22-year-old Kurdish man, from Kirkuk. As at the judgment date, he had been held in detention since 26 September 2006 having arrived in the United Kingdom in January 2005 at the age of 17. At that time, he claimed asylum but his claim was rejected. He was subsequently convicted of two sets of offences for which he was sentenced to imprisonment. At the conclusion of the custodial portions of both sentences he was re-detained under immigration powers. In between these sentences the Secretary of State determined that Mr Ahmed's deportation would be conducive to the public good.

In April 2009 (almost one year after the expiration of the custodial portion of his second sentence), Mr Ahmed indicated that he was happy to be returned to Iraq if he could be sent to Kirkuk, as he believed he would be killed in Baghdad. However, the UK government had signed a memorandum of understanding with the Iraqi government pursuant to which charter flights containing returnees were accepted in areas administered by the Kurdistan Regional Government (KRG) but not elsewhere.

In June 2009, Mr Ahmed heard that his immediate family had been killed. As a result, he accepted to be returned to a city within KRG, rather than Kirkuk. In September 2009, he was sent on a flight to KRG, but was refused entry as he was not from KRG. Following this, it was

determined that he should be included as an involuntary passenger on a flight to Baghdad which left the United Kingdom on 15 October 2009.

When the plane landed in Baghdad, ten passengers were permitted entry, while the remaining 34 (largely Kurds) including Mr Ahmed, were forced to leave Iraq and be flown back to the United Kingdom where they were returned to immigration detention.

Complaint

In the High Court, Mr Ahmed argued that both periods of his detention were unlawful. Central to determination of this question was the fact that the flight carrying Mr Ahmed was the first flight to Baghdad for five years since the signing of the memorandum of understanding. This raised the question of whether any future flight to Baghdad was likely to be successful in returning failed Kurdish asylum-seekers within a reasonable timescale.

Held

The Court held that the starting point for a decision on the merits was that detention is unlawful unless it is justified, but detention for the purpose of deportation is lawful as it is authorised by statute. However, an individual may only be detained by the State with good reason within the law, and for no longer than is necessary and proportionate to the object sought to be achieved.

The Court further held that where the object of detention is deportation and it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention.

The Court posed two questions, namely, by when does the Secretary of State expect to be able to deport Mr Ahmed? and What is the basis for that expectation? It held that it could not have any reasonable assurance that a further return flight to Baghdad would occur before the end of 2010 and even that is not certain and would likely be later. The length of the detention was thus uncertain and very close to arbitrary.

The Court took into account a number of factors in favour of and against declaring that Mr Ahmed's continuing detention would be unlawful. In particular it had regard to the following:

- (i) the prospects there had been and remained of voluntary return (which militated against declaring that continued detention would be unlawful);
- (ii) the fact that it could not be said that in no circumstances could detention of 21 months and continuing be justified;
- (iii) the fact that the Court made no decision as to the lawfulness of the 21 months' detention Mr Ahmed had already served;
- (iv) the fact that Mr Ahmed's detention had already been long and was likely to become very long upon the Court's best estimate, imperfect though it may have been, of when it may be that forcible return would become available;
- (v) the fact that, though available, prospects of voluntary return were limited;
- (vi) the fact that release would not expose the British public to a grave risk of harm, despite Mr Ahmed's criminality;

- (vii) the fact that the risk of Mr Ahmed absconding, given him being 'rootless' in the United Kingdom, could be met by appropriately restrictive conditions, such as daily reporting to Police, electronic tagging, the acceptance of a proposed surety and residence at a nominated address.

On the basis of its consideration of each of these factors, the Court held that it would be proportionate to release Mr Ahmed (subject to the conditions referred to at (vii)) and would be disproportionate, unreasonable and therefore unlawful for his detention to continue.

Scottish Court of Appeal

Mohammed Atif Siddique v Her Majesty's Advocate

[2010] HCJAC 7, Appeal Number XC878/07

Scottish Court of Appeal: Judgment dated 29 January 2010

Convicted on terrorist charges - Appeal on conviction and sentence - misdirection of jury

Facts

Mohammed Atif Siddique was convicted on the 17 September 2007. He was found guilty on account of five different charges. The first charge against him was the possession of articles which gave rise to a reasonable suspicion that the possession was for the purpose or in connection with an act of terrorism, contrary to Section 57(1) of the Terrorism Act 2000. The second charge was an alternative to the first charge, with a lower burden of proof. The third charge was that he showed images of terrorist bombers to fellow students and threatened to become a terrorist bomber and carry out such acts which resulted in a breach of the peace. The fourth charge was that he provided instructions on how to make use of an explosive or firearm through the internet. He had set up his own websites and it was alleged that these websites contained links to instructions on how to make a bomb contrary to section 54(1) of the Terrorism Act 2000. The last charge against him was that of distributing and circulating terrorist publication via the websites he had set up. He was sentenced to a total of eight years' imprisonment.

On the 17 April the appellant lodged an appeal against conviction and sentence.

Complaint

The appellant based his appeal on three grounds. The first ground was that the trial judge had misdirected the jury. The second ground was that the trial judge misdirected the jury as to what the meaning of 'reasonable excuse' was. The final ground of appeal was based on the unbalanced charge. When rehearsing the evidence, the judge failed to strike a balance. The Crown's evidence was rehearsed in detail whereas that of the defence did not get as much attention.

Held

The Court first considered the way the trial judge treated the expert witness and how he mentioned the expert in his directions to the jury. However, the Court found that there had been no misdirection on the references to the expert evidence. The Court further held that

under the circumstances present in the case the trial judge had been under no duty to conduct a specific direction.

The next point the Court focused on was the direction given to the jury explaining the charge against Mohammad. Any trial judge is required to give the jury directions of any crime the defendant is charged with. This includes definitions and meanings of the specific charge as well as the elements the prosecution are required to prove. The Court referred to the decision in *R v Zafar and others* where it was held that section 57 (Possession offences) of the Terrorist Act 2000 had to be interpreted so that a direct connection could be drawn between the object in possession and the terrorist act. The Court observed that the trial judge seemed to keep away from the statutory definition of section 57(1) covering the requirement for reasonable suspicion. Further the trial judge treated section 57(1) as if it did not state the words 'circumstances, which give rise to a reasonable suspicion'. For this reason, the Court held that there had been a material misdirection.

A further point, which was raised by the defence, was section 57(2) of the Terrorism Act 2000. This section provides that there is a defence to section 57(1) if it can be proved that the articles were not for the purpose connected with an act of terrorism but for something else. The Court held that as there was a mis-direction on section 57(1) there was a likelihood of confusion for the jury when considering a defence under section 57(2). Therefore, the Court came to the conclusion that this did not only amount to a misdirection but a miscarriage of justice. This was strengthened by the fact that Mohammed had the defence of curiosity in order to explain the possession of the articles.

Because of the Court's findings above they did not consider it relevant to address the issue of propaganda material. A further point the Court did not find necessary to consider was the allegation of the trial judge having used speculation. The Court held that that Mohammed's conviction on charge one would be quashed.

High Court of Zimbabwe

Gramara (Pty) Ltd & Anor v Government of the Republic of Zimbabwe

[2010] ZWHHC 1

High Court of Zimbabwe: Judgment dated 26 January 2010

Facts

On 11 October 2007 Mike Campbell Limited and William Michael Campbell filed an application at the Southern African Development Community (SADC) Tribunal. The grounds of the application were based on the respondent, the Government of Zimbabwe, having acquired agricultural land. The application was granted and 77 further people applied to intervene in the proceedings. The Tribunal granted the applications and issued an interim order that the Applicants not be removed by the respondent from their land. The Tribunal found in favour of the Applicants and held that they were discriminated against on grounds of race, that compensation should be paid by the Government for having acquired their land compulsorily and that no action is taken to evict the respondents and to protect their possession.

Complaint

The High Court was considering whether the Tribunal judgment, being a foreign court, could be implemented and enforced in Zimbabwe.

Held

The Court considered two issues. The first was whether the SADC Tribunal had competent jurisdiction to have heard the case before it. The second was whether the recognition and enforcement of the Tribunal case would be contrary to Zimbabwean public policy.

The argument that the SADC Treaty never entered into force because it was not ratified by Zimbabwe was dismissed by the Court. It held that Article 11 of the Vienna Convention on the Law of Treaties on the amendment of a treaty. Further, the SADC Treaty was clearly enforceable because 13 out of 14 Heads of States, including Zimbabwe, had signed the treaty in August 2001. The Court therefore held that the Tribunal did have jurisdiction.

The Court held that a foreign judgment can only be enforced and recognised if it is not contrary to public policy. It held that it would be contrary to public policy for any State to violate its international obligations. When considering the obligations imposed by the Tribunal on the Government, the Court held that these were incompatible with the land reform programme which was set up in the year 2000. This was implemented through the Constitution of Zimbabwe Amendment (No 16) Act 2000. The legal effect of this is visible in section 16B(2)(a) through which all agricultural land identified in the notices was to be acquired on a compulsory basis. The Court held that for the Government to comply with the orders imposed by the Tribunal, Zimbabwe would have to change the constitution. Therefore the Court held that for the Government to have to act in a manner which would be manifestly incompatible with the constitution would be contrary to public policy. On that basis the Court held that it cannot enforce the SADC judgment.

Comment

Unfortunately, the Zimbabwean High Court did not enforce the SADC Tribunal's decision which would have brought an end to the disruption the land reform programme has caused since 2000. By prioritising national law and public policy over the Treaty it seems that the Zimbabwean Government has violated the Treaty. It is held under Article 6(4) of the SADC Treaty that 'Member states shall take all steps necessary to ensure the uniform application of this Treaty'. The Treaty goes further; Article 6(5) provides that 'Member states shall take all necessary steps to accord this Treaty the force of national law'. This clearly has not been complied with by Zimbabwe and it would be interesting to see whether further action against the State could be brought the Tribunal.

“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 Dundar, *Journalist in Turkey*

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