

THE
KURDISH
Human
Rights

PROJECT

Legal Review



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The Kurdish Human Rights Project

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

AIMS

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

METHODS

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

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KHRP LEGAL REVIEW

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Abbreviations

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

Relevant Articles of the European Convention on Human Rights

Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law

Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, Non-Governmental Organisations or groups of individuals (formerly Article 25)
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Section 1: Legal Developments in the Kurdish Regions

Armenia and Azerbaijan: Ratification of Outline Convention on Trans-Frontier Cooperation Between Territorial Communities or Authorities

Armenia and Azerbaijan ratified the Council of Europe Outline Convention on Trans-Frontier Cooperation Between Territorial Communities or Authorities (1980) along with its two Additional Protocols (1995 and 1998) on 31 October 2003 and 30 March 2004 respectively. The Convention and Protocols entered into force in relation to Armenia on 1 February 2004, and will do so in relation to Azerbaijan on 1 July 2004.

Under Article 1 Contracting Parties undertake to facilitate and foster trans-frontier co-operation between territorial communities or authorities within their jurisdictions and 'territorial communities or authorities' within the jurisdiction of other Contracting Parties. Territorial communities or authorities are defined in Article 2 as communities, authorities or bodies that perform local and regional functions which are both *de facto* and *de lege* according to domestic law. Under Article 3(1) Parties undertake to encourage initiatives by territorial communities and authorities based upon the outline arrangements, included in Section 2 of the Outline Convention, between territorial communities and authorities drawn up in the Council of Europe. A Party may take into consideration the bilateral or multilateral inter-state model agreements, included in Section 1, which are designed to facilitate co-operation between territorial communities and authorities. Under Article 8 Parties are obliged to deliver to the Secretary General of the Council of Europe all relevant information concerning the agreements and arrangements provided for in Article 3.

The Convention contains a system of model agreements which aim to harmonise the context, forms and limits used by States in relation to territorial authority and to eliminate legal uncertainties such as differing definitions of the applicable law, judicial authorities and possible avenues of appeal. Section 1 presents general clauses to be used in model inter-state agreements concerning the promotion of various aspects of trans-frontier co-operation at local and regional levels, while Section 2 provides outline agreements, statutes and contracts prescribing the cooperation of local authorities.

Protocol 1 seeks to harmonise the fundamental principles of trans-frontier co-operation among territorial communities or authorities, and to suggest appropriate solutions to differences in the domestic laws of Contracting Parties who seek to create bilateral treaties based upon the model

agreements proposed therein.

The Outline Convention and its First Additional Protocol are concerned with relations between adjacent communities which are geographically connected, either directly via a common border, or indirectly via membership of a group of territorial communities which join to form a bloc with common borders. Agreements have however been concluded between geographically remote authorities. Protocol 2 addresses such co-operation with reference to the Outline Convention and Protocol 1.

Armenia Accedes to GRECO

In January 2004 Armenia acceded to the Council of Europe's 'Group of States Against Corruption' (GRECO). This regional monitoring system seeks to monitor **member states' observance of the Council of Europe's Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Program of Action against Corruption.** The Armenian authorities officially notified the **Executive Secretary of GRECO of its accession at the seminar on Council of Europe Anti-Corruption Instruments** which took place in Yerevan on 19 and 20 January 2004.

Armenia Ratifies European Social Charter

On 21 January 2004 Armenia ratified the revised European Social Charter (1996). The Charter entered into force in relation to Armenia on 1 March 2004.

This instrument is a revision of the original European Social Charter of 1961. Not only does it contain all the rights guaranteed in that instrument, it makes some significant positive amendments to several of them including those concerning the principle of non-discrimination, gender equality, maternity and the social protection of mothers, employed children and handicapped people. It also includes those rights enshrined in additional Protocol 1 of 1988. Finally it adds a number of new rights: these concern poverty and social exclusion, housing, termination of employment, workers and forms of harassment in the workplace.

The new Charter is subject to the same system of control established by the original Charter and developed by Protocols 2 and 3 of 1991 and 1995. Protocol 3 created a system of collective complaints which may be lodged with the European Committee of Social Rights. Crucially however, Armenia did not sign this Protocol, which undermines its commitment to a comprehensive system of protection for the bearers of these rights.

Armenia and Azerbaijan Considered by PACE

On 2 January 2004 the Parliamentary Assembly of the Council of Europe (PACE) discussed the report on the Functioning of Democratic Institutions in Azerbaijan which was produced by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. The Assembly concluded that Azerbaijan failed to meet international standards during the presidential elections of October 2003; that freedom of expression and freedom of association are still subject to severe restrictions; and that constitutional protection of the separation of powers is inadequate and allows the executive to exercise far too much power.

PACE consequently called upon Azerbaijan to establish - with the assistance of the Council of Europe - a commission to investigate and, where justified, prosecute all alleged human rights violations. It also decided that it should not cease to monitor Azerbaijan until the state makes further substantial progress towards meeting the obligations undertaken as a member state of the Council of Europe and, particularly, demonstrates the ability to organise free and fair elections.

On 27 January 2004 PACE discussed the report on the Honouring of Obligations and Commitments by Armenia submitted to it on 12 January 2004 by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. PACE stressed that the ongoing efforts by Armenian authorities are evidence of real political will to make progress towards honouring obligations and commitments undertaken in relation to accession to the Council of Europe. Parliamentarians did however call for further substantial progress regarding the functioning of the judicial system and the independence of the judiciary; conditions in detention; the prison system; impunity of law enforcement officials; freedom of demonstration; and media pluralism.

Azerbaijan: Situation of Political Prisoners Criticised by Council of Europe and PACE

On 12 January 2004 the Council of Europe's Committee on Legal Affairs and Human Rights published a report on the situation of political prisoners in Azerbaijan. The report asserts that many political prisoners are still held in Azerbaijan and deplores the fact that the domestic authorities have not found a lasting solution to this problem despite being urged to do so by PACE Resolution 1272 (2002). It concludes that this situation critically affects Azerbaijan's relationship with the Council of Europe since it is wholly incompatible with the obligations undertaken upon accession.

After acceding to the Council on 25 January 2001 Azerbaijan signed the European Convention on Human Rights, which entered into force on 15 April 2002. Although human rights violations

which occurred before this date cannot be brought before the European Court of Human Rights, PACE Opinion No. 222 (2000) obliges Azerbaijan to re-try or release those individuals who are considered to be political prisoners. According to the independent experts appointed by the Secretary General of the Council of Europe, a political prisoner is one whose detention has been imposed in violation of the fundamental guarantee of his or her political freedom, or one who has been imposed for purely political reasons. In these cases, a new trial should be granted where the proceedings leading to the detention were clearly unfair, and an immediate release is necessary when political motives have rendered the detention or its conditions clearly disproportionate to the offence of which the person is suspected or has been found guilty.

PACE had previously recognised the existence of seventeen political prisoners in Azerbaijan based on the conclusions of the independent experts. As of January 2004, eleven of these prisoners had been released. Of the six who remained in prison two have had to face the initiation of new proceedings against them: Azerbaijan has refused to accept that these detainees are political prisoners despite the opinion of the Secretary General's experts and PACE Opinion No. 222 (2000).

The report notes that on 1 January 2001 the Yerevan-based non-governmental organisation (NGO) the Human Rights Centre published a list of 716 political prisoners. This number was reduced to 212 because prisoners were either released following official pardons or the expiry of their sentences or died while still in prison. The accuracy of the resulting figure is further qualified by the fact that NGOs have difficulty in supplying evidence which confirms that individuals who have 'disappeared' are indeed prisoners in the face of official denial that they are being detained. The report confirms that the Azerbaijani authorities have agreed to provide the Secretary General's experts with the necessary documentation so that they may investigate whether or not the remaining 212 prisoners on that list also deserve to be recognised as political prisoners. Azerbaijan has also accepted the validity of criteria drawn up by the Secretary General's experts and approved by PACE in January 2002 to assist in the determination of whether an individual is a political prisoner.

The report claims that a number of possible political prisoners who were discovered after the Human Rights Centre's initial list was published must be added to the remaining 212 prisoners from the initial list so that their circumstances can also be properly examined. The report urges Azerbaijan to release all the political prisoners identified as such by the Council of Europe experts, to release all the other presumed political prisoners appearing on the list submitted to the experts and to allow them to defend themselves freely in new trials. This however can only be done when a fair trial can be guaranteed and once the judicial system operates in a way commensurate with a state governed by the rule of law.

The report emphasises that various political figures are prevented from standing as candidates

in elections, due to their continued imprisonment and that they should be released immediately through an ad hoc amnesty. Due to threats of arrest, two political exiles, A. Mutallibov and R. Guliyev, have also been prevented from standing as candidates in the presidential election of 15 October 2003. The report states that, since they should be able to benefit from the presumption of innocence, their arrest warrants should be lifted and their freedom of movement in Azerbaijan guaranteed.

On 26 January 2004 the Political Affairs Committee of PACE issued Opinion No. 1 (2004) on Political Prisoners in Azerbaijan. This concurred with the January report by stating that the existence of political prisoners in a member state of the Council of Europe is a serious violation of human rights and is incompatible with the obligations which are undertaken upon accession. Although the Committee noted that progress had been made since the State's accession to the Council on 25 January 2001, it recognised that the political situation in Azerbaijan is characterised by negative external factors which combine to produce a climate in which free and democratic political discourse 'might sometimes be compromised by political extremism.' Nevertheless, it insisted that individuals must never be imprisoned for political reasons.

Turkey Signs Protocol No. 13 to European Convention on Human Rights

On 9 January 2004 Numan Hazar, the Permanent Representative of Turkey to the Council of Europe, signed Protocol No. 13 to the European Convention on Human Rights, which concerns the abolition of the death penalty in all circumstances. This constitutes an essential part of Turkey's ongoing attempts to fulfil the Copenhagen political criteria for accession to the European Union, providing confirmation of Turkey's willingness to implement repeated recommendations made within the annual reports on Turkey's Progress Towards Accession.

Turkey Publishes Report of the European Committee for the Prevention of Torture

On 25 February 2004 the Turkish Government authorised the publication of the report prepared by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) after its visit to the Turkish prison island of İmralı. This is situated in a restricted military zone, all access to which is controlled by the Gendarmerie. The ECPT visit, from 16 to 17 February 2003, followed reports that relatives and lawyers of Abdullah Öcalan, the PKK leader imprisoned on the island, had been prevented from visiting him. The Turkish Government also made available its official response to the report on the same date.

On 27 January 2003 the UN Committee for the Prevention of Torture (UNCPT) had requested that the Turkish authorities provide detailed documentation of every visit made to the island by Abdullah Öcalan's relatives and lawyers within the preceding three months. On 6 February 2003 the Turkish authorities alleged that weather conditions had prevented access since the last of such visits was made to the island on 27 November 2002. The President of the ECPT discussed this matter with the Committee's Turkish liaison officer and was told that Öcalan's relatives and lawyers would be able to visit him on 12 February 2003. The ECPT subsequently learned that permission was refused them on this date, again on the basis of poor weather conditions. The ECPT was concerned by the lack of visits, which can have a serious impact on a prisoner who is held in isolation. Öcalan's lawyers were unable to communicate with him regarding three sets of legal proceedings pending against him, and repeatedly appealed in vain to the Ministry of Justice, the Prison Directorate and the Bursa Chief Prosecutor's Office to take steps to remedy the situation.

When the ECPT visited İmralı it interviewed Abdullah Öcalan at length and met with prison management personnel to discuss the means of ensuring that Abdullah Öcalan's right to receive visits from his relatives and lawyers was being honoured. Although the management personnel were co-operative, the Gendarmerie staff responsible for external security of İmralı had been instructed not to speak to the delegation and did not allow it to examine the register of persons searched upon arrival on İmralı Island. The Gemlik Gendarmerie Communications Officer refused at one point to provide further information concerning transportation to the island and asked the delegation to leave the premises. This contravenes several Articles of the European Convention for the Prevention of Torture: Article 3 mandates co-operation between ECPT and the competent national authorities in the application of this Convention; and Article 8 provides for access to various relevant places by the ECPT. The Bursa Regional Gendarmerie Commander did however enable the delegation to continue its work.

The ECPT recommended that Turkish authorities take immediate steps to find means of ensuring that Öcalan could enjoy his right to receive visits from his relatives and lawyers. It declared that a degree of flexibility should be introduced so that another visit could be made on a different day if there is inclement weather on the day of the scheduled visit. The ECPT also encouraged Turkish authorities to allow the visits to Öcalan by his relatives to take place under those conditions under which he received his lawyers.

The report made by the Turkish Government in response to the report by ECPT was overtly bureaucratic and did not encourage faith in its will to remedy the situation. After the ECPT visit, visits to the prison were cancelled three more times. It was not until 12 March 2003 that a visit by Öcalan's family and legal representatives finally took place.

Turkey Reported to Accept the Statute of the International Criminal Court

On 18 April 2004 the daily Turkish newspaper *Cumhuriyet* reported that Turkey was to accept the authority of the International Criminal Court. Until that date, Turkey had remained the only member of the Council of Europe not to have ratified the Rome Statute.

The Coalition for an International Criminal Court, the network of NGOs which advocates an independent and effective international criminal court, had met with the Turkish Parliamentary Human Rights Committee in January 2004 to press for accession to the Rome Statute. KHRP, a member of the Coalition, supported the petition, drafted by Amnesty International, which urged Turkey to accede to the Rome Statute.

Iraq: Adoption of the Transitional Administrative Law

On 8 March 2004 the twenty-five members of the Iraqi Governing Council signed the Transitional Administrative Law which established the legal framework for the governance of Iraq during the transitional period from the handover of sovereignty from the Coalition Provisional to the Interim Government on 30 June 2004 when the new interim constitution was adopted¹.

The Law is the strongest evidence to date of the will to create a stable federal democracy based upon human rights and fundamental freedoms. All citizens of Iraq are guaranteed the rights of freedom of religion and expression as well as significant cultural rights. Article 9 represents a major achievement on the part of the Kurds as it provides that the Arabic language and the Kurdish language are the two official languages of Iraq. That Article also provides that all Iraqis are guaranteed the right to educate their children in their mother tongue in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions.

Articles 53 and 54 are of the greatest significance to the Kurds as they establish the status and functions of the Kurdistan Regional Government as the administrative authority for the areas of Dohuk, Suleimaniya, Kirkuk, Diyala and Neneveh. It will exercise legislative jurisdiction over matters not retained by the Iraqi Transitional Government under Articles 25 and 43. Article 53 also guarantees the administrative, political and cultural rights of all minorities in the Kurdistan regions, including the Turcomans and Chaldo Assyrians.

Article 55 provides that groups of governates elsewhere in Iraq will be permitted to form regional authorities in addition to the federal authorities. Elections for both the Kurdistan Regional

Government and these Governate Councils will be held no later than 31 January 2005, according to Article 56.

Syria: Concluding Observations of the Human Rights Committee

On 26 October 2001 the Syrian Arab Republic submitted its first report to the Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights (the Covenant). This represented the resumption of Syrian dialogue with the UN after a period of twenty-four years. Although the report contained detailed accounts of Syrian legislation in the areas of civil and political rights it lacked information regarding the human rights situation in Syria, making it difficult for the Committee to determine whether those in Syria are able to exercise the rights guaranteed under the Covenant.

The Committee responded to the report on 5 April 2001. It found notable improvements in two particular respects. First, a large number of political prisoners have been released since the early 1990s. Secondly, some developments within Syrian reflect a relaxation of political restraints that have raised concern of a gross violation of rights protected by the Covenant.

The Committee remained concerned about the situation of both Kurds born in Syria, and those who had entered from neighbouring countries whom Syrian authorities treat as aliens or unregistered persons. This is in conflict with Article 27 (minority rights), Article 24 (non-discrimination with regards to children) and Article 26 (equality before the law and entitlement without any discrimination to the equal protection of the law) of the Covenant. The Committee recommended that Syria should seek a solution to the statelessness of numerous Kurds in Syria and allow Kurdish children born in Syria to acquire Syrian nationality.

The Committee was also concerned by the fact that Legislative Decree No. 51, declaring a state of emergency, has been in effect since 9 March 1963. The Decree, which is vague and imprecise, is incompatible with Article 4 (which defines public emergency as a situation which threatens the life of the nation) and provides no remedies against the restrictions upon citizens' fundamental rights and freedoms which can be imposed under the state of emergency. The Committee not only recommended that that Syria should bring the relevant legislation into line with the requirements of Article 4 of the Convention, but that the state of emergency should be lifted as soon as possible.

Noting Syria's insistence that the death penalty is rarely imposed and even more rarely carried out, the Committee voiced concern regarding the number of offences which are punishable by death, the absence of any information regarding the number of death sentences imposed and the number of executions in the last ten years. It also drew attention to reports which indicate that death sentences have been handed down and executions carried out following unfair trials in

which the accused was sentenced by evidence obtained through confessions made under torture. The Committee recommended that Syria should reduce the number of offences punishable by death and called upon it to ensure respect for Articles 6 (the right to life), 7 (the prohibition of torture and cruel, inhuman or degrading treatment or punishment) and 14(3)(g) (the prohibition of compelling and individual to testify against himself or to confess guilt in the determination of any criminal charge against him or her).

The Committee was concerned about constant allegations that torture is practised in Syrian prisons in violation of Article 7. The Committee recommended that Syria should combat impunity by ensuring that complaints of torture and other abuses committed by agents of the state are investigated by an independent body.

The Committee remained concerned about gender equality in Syria and in relation to this noted that the Personal Status Act No. 34 of 1975 contains provisions which are incompatible with Articles 2 (non-distinction between individuals), 3 (equality between men and women) and 26 (equality before the law and entitlement without any discrimination to the equal protection of the law). The Committee expressed particular concern regarding gender based discrimination in relation to marriage rights, minimum age for marriage and employment.

Committee of Ministers' Declaration on the Protection of Human Rights During Armed Conflict, Internal Disturbances and Tensions

Early in 2004 the Committee of Ministers of the Council of Europe adopted a Declaration on the Protection of Human Rights During Armed Conflict, Internal Disturbances and Tensions. Therein, the Committee stated that it shared the concerns expressed Resolution No. II, adopted by the European Ministerial Conference on Human Rights 2000, entitled 'Respect for Human Rights, a Key Factor for Democratic Stability and Cohesion in Europe: Current Issues.' The Committee voiced approval of the various activities undertaken in pursuit of that Resolution. It welcomed the evident interest of PACE in increasing the effective protection of human rights, as recently expressed in Recommendation 1606 (2003) on 'Areas where the European Convention on Human Rights cannot be implemented'.

The Declaration underlined the importance of using appropriate preventive measures of a political and educational nature in order to promote respect for human rights, and noted that these should be implemented not only before but during such situations. It noted that the main problem with regard to the protection of human rights in such situations is not the lack of human rights norms but rather the lack of implementation of, and compliance with, such standards. The Committee therefore urged all member states to ensure compliance with applicable human rights standards in all circumstances but in particular during periods of armed conflict, internal disturbances and

tensions. It took the opportunity to call upon member states to take measures to combat impunity and urged them once again to ratify the Rome Statute of the International Criminal Court. It also invited all Council of Europe bodies and institutions active in the field of human rights to pay special attention to human rights concerns within their field of competence in the context of all existing and newly emerging situations of tension or conflict. It concluded by agreeing to help raise awareness of human rights standards, as established by relevant Council of Europe instruments, amongst all relevant civil and military authorities of the member states as well as those persons protected by such standards.

Protocol No. 14 to the European Convention on Human Rights is Opened for Signature

On 12 May 2004, Protocol No. 14 to the European Convention on Human Rights was adopted by the Council of Europe's Committee of Ministers. The Protocol aims to reinforce the effectiveness of the European Court of Human Rights in the context of an ever-increasing number of individual complaints.

The Protocol introduces measures to improve implementation of the Convention at the national level, and amends the Convention to increase the effectiveness of the processing of individual complaints submitted to the Court. It also strengthens the Committee of Minister's control of the execution of the Court's judgments. Other changes introduced concern the term of office for judges and accession to the European Union.

On 13 May 2004 seventeen member states of the Council of Europe signed the Protocol when they convened in Strasbourg for the 114th Session of the Organisation's Committee of Ministers. That day the Secretary General of the Council of Europe, Walter Schwimmer, expressed satisfaction that this number of countries had signed the instrument so soon after its adoption. The signatories on that date were Armenia, Croatia, Estonia, Denmark, France, Georgia, Greece, Iceland, Ireland, Italy, Latvia, Luxembourg, Netherlands, Norway, Romania, Slovenia, Switzerland.

Inter-American Court faces Landmark Criminal Defamation Case

The Inter-American Court of Human Rights faces an historic opportunity to advance freedom of expression by outlawing criminal defamation. There is a growing worldwide consensus that criminal defamation statutes hinder free expression. It is due to hear a case concerning a journalist, Mauricio Herrera Ulloa, and publisher of the daily Costa Rican newspaper *La Nacion*, Fernan Vargas Rohmoser. Articles written by Herrera and published in *La Nacion* implicated a

Costa Rican diplomat in a Belgian arms scandal. The diplomat pressed for charges and Herrera and his publisher were found guilty of defamation under Costa Rican law. The defendants were ordered to pay a criminal fine to the state and damages to the diplomat, and Mr. Herrera's name was entered in the register of criminals. Herrera took his case to the Inter-American Court of Human Rights on the basis that Costa Rican law violates the American Convention on Human Rights by criminalising publications concerning matters of public interest, such as the conduct of public officials. The Inter-American Commission, an adjunct to the Court, has declared the case admissible, upheld Herrera's complaint.

Footnotes

¹ No reference to the TAL was included in the interim constitution adopted by the UN Security Council on 8 June 2004.

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Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights

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This article summarises the key elements of a report compiled by eminent European jurists, on judicial independence within the appointment system of the European Court of Human Rights. The article analyses how judicial appointments are made and gives a general overview of present procedures, before proceeding to assess this against international standards relating to judicial independence and against standards considered by the Strasbourg Court itself. The article moves to review in detail appointments to the European Court including criteria, nomination, election, the role of the Committee of Ministers and the Sub-Committee of the Parliamentary Assembly, highlighting the weakness of such mechanisms and concluding with a clear set of recommendations.

Introduction

The Group comprised:

- Professor Dr Jutta Limbach, former President of the Federal Constitutional Court of Germany (Chair of the Group);
- Professor Dr Pedro Cruz Villalon, former President of the Constitutional Court of Spain;
- Mr Roger Errera, former member of the Conseil d'Etat and of the Conseil supérieure de la magistrature in France;
- The Rt Hon. Lord Lester of Herne Hill QC, President of INTERIGHTS;
- Professor Dr Tamara Morschtschakowa, former Vice President (now Consultant) of the Constitutional High Court of the Russian Federation;
- The Rt Hon. Lord Justice Sedley, judge in the English Court of Appeal; and
- Professor Dr Andrzej Zoll, former President of the Constitutional High Court of Poland.

Members of the Group met on February 14, 2003 in London to examine appointment procedures in

Strasbourg. Their discussions were informed by Council of Europe documentation concerning judicial appointments, and by research, analysis and private interviews with interested individuals conducted by the International Centre for the Legal Protection of Human Rights (INTERIGHTS), which acted as rapporteur for the Group. In May 2003, the Group's report entitled *Judicial independence: law and practice of appointments to the European Court of Human Rights* was released. This article summarises the key elements of the report.²

Context

Over the past 50 years, the Court has been critical in strengthening and promoting human rights protection in Europe. The Court has also assumed a pioneering role in developing international human rights jurisprudence more generally. However, while the continued expansion of the Council of Europe has resulted in consideration of ways of improving the working methods of the Court,³ little focus has been directed to the method by which the Council of Europe appoints judges. An evaluation of the practice and procedure for judicial appointments to the Court is long overdue.

The issue of how judges are appointed is important in two respects. First, the independence and impartiality of the judiciary is directly linked to appointment procedures. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its independence, it is imperative that appointment procedures for judicial office conform to—and are seen to conform to—international standards on judicial independence. It would be anomalous and unacceptable if the Court failed to meet the international human rights standards that it is charged with implementing, including the requirement that cases are heard by an independent and impartial court of law.

Secondly, without the effective implementation of “objective and transparent criteria based on proper professional qualification,”⁴ there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate. Declining standards will ultimately have a negative effect on the standing of the Court, as well as on the application and development of human rights law at the international and (ultimately) national levels.

A number of factors make consideration of judicial appointments to the Court increasingly necessary, and particularly timely. First, the number of Member States of the Council of Europe has greatly increased the reach of the Court's jurisdiction and necessitated new appointments to the Court. The next partial renewal of the Court will take place in 2004. Secondly, the Court's law and practice has increasing influence on that of Member States, assuming a quasi-constitutional nature that underlines the importance of the standards maintained by the Court itself.⁵ Thirdly, since 1998, the Court has been composed of full-time judges with a shorter term of office (six years instead of nine), who can be re-elected. Finally, the Council of Europe's current evaluation of the Court's operations provides the opportunity for wider reflection upon the institution, and the potential for

reform of it.

While the report focuses on the practice and procedures of the European Court of Human Rights, it has been informed by appointment procedures in other international judicial bodies.⁶ In places, appointments to these bodies—and perhaps to some domestic courts—may highlight elements of better practice from which the Court can learn. At the same time, it is hoped that the principles that emerge from the report might be of relevance to the practice and procedure of other international judicial bodies.

Overview of the current procedures

The current procedure for judicial appointments to the Court is complex. In summary, the process is as follows:

In the case of a vacancy, the Directorate General of Human Rights of the Council of Europe asks each Contracting State to submit a list of three candidates. Each State is provided with information on the criteria set out in the European Convention on Human Rights (ECHR) and the recommendations of the Parliamentary Assembly concerning criteria and the format of lists. The Council of Europe provides no guidance to the States on the procedures by which they should arrive at their lists of nominees.

While State nomination procedures vary between countries, with very few exceptions, they are politicised and lack transparency. Following a decision—usually of the government, taken without consultation—the State submits a list of three candidates, along with each candidate’s model curriculum vitae. In most cases, States rank candidates in order of preference, although the Parliamentary Assembly has recommended that they submit them in alphabetical order.⁷

Upon receipt of the list, the Directorate General of Human Rights undertakes a superficial review of the curriculum vitae, apparently to check for candidates’ compliance with formal requirements such as language ability, and in practice forwards the lists, as submitted, to the Committee of Ministers. A small group from the Committee of Ministers considers the applications, in theory with the power to review and reject unacceptable lists, either on the basis of the national procedures or because the candidates do not meet the Convention criteria. In practice, the group is reluctant to look behind the “sovereign veil” and the Committee of Ministers sends the lists unchanged to the Parliamentary Assembly.

Within the Parliamentary Assembly, the Committee on Legal Affairs and Human Rights’ Sub-Committee on the election of judges to the European Court of Human Rights (“the Sub-Committee”) then considers the lists. On the basis of the model curricula vitae and brief interviews of candidates,

the Sub-Committee ranks candidates in its order of preference. The Sub-Committee's deliberations are *in camera* and it does not give reasons for its ranking. It may reverse the expressed preferences of governments without explanation, and even without noting its re-ranking.

Finally, the Parliamentary Assembly votes on the three names submitted by each State. Lobbying by government, on occasion together with the candidates and other institutions and individuals, accompanies this process. While the Sub-Committee's report is available to voters, it provides members of the Parliamentary Assembly with negligible information on the candidates beyond the model curricula vitae. Members appear to be instructed on how to vote by their political groupings. Some of the weaknesses in the system have been recognised by the Parliamentary Assembly, resulting in efforts at reform.⁸ While most of these steps have led to improvements in the system, they have not addressed the problems of transparency and accountability. Most importantly, they have had little effect on State practice.

International standards

Many international treaties and declarations relating to judicial independence touch upon the appointment of judges. It is against these standards that the procedure of appointments and its implications for judicial independence should be assessed.

Article 6(1) ECHR expressly recognises the importance of judicial independence and impartiality. The Court's credibility in determining human rights cases brought by individuals of Member States—often on the basis of their Art.6 rights—depends on its ability to meet the same standards of independence and impartiality imposed on national courts.

The standards contained in Article 6, and their implications for judicial independence and impartiality and appointment processes, have been considered by the Court itself. In *Bryan v United Kingdom*, the Court set out several principles in establishing the independence of the judiciary, including the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and whether the body presents the appearance of independence.⁹

Over the years, the Council of Europe has issued numerous guidelines on the appointment of judges in Member States. Specifically, the Committee of Ministers has noted that:

“All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for

instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.”¹⁰

The Committee of Ministers notes that where “constitutional or legal provisions or tradition allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice”. Guarantees suggested by the Committee of Ministers include a “special independent and competent body to give the government advice which it follows in practice”.¹¹

A number of United Nations instruments also recognise the right to have one’s rights and obligations heard before and determined by an independent and impartial tribunal.¹²

The independence of the judiciary is one of the cornerstones of the rule of law. Rather than being elected by the people, judges derive their authority and legitimacy from their independence from political or other influence. It is clear from the existing international standards that the selection and appointment of judges plays a key role in safeguarding judicial independence and ensuring the most competent individuals are selected. While international courts monitor and enforce national court compliance with these standards, paradoxically they may themselves fail to meet the same standards.

Criteria for nominations and appointments to the Court

Article 21(1) ECHR establishes the formal criteria for appointments to the Court:

“The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.”

These terms are commonly used in respect of international courts and tribunals.¹³ Accordingly, it is often suggested that States “know what they mean”. That said, the terms are undefined and aspects of their scope remain unclear, possibly laying the foundation for the nomination or election of unqualified or otherwise unsuitable candidates.

The level of qualification required for appointment to judicial office varies greatly within the Member States of the Council of Europe. What is meant by “high judicial office” is undefined. Similarly, the meaning of “jurisconsults of recognised competence” leaves ample room for interpretation. It would appear in some cases that candidates’ competence is recognised only by their governments. There have been instances where States have proposed recent law graduates.

The criterion of “high moral character” is vague and general. In a recent case, a State justified the omission of its sitting judge from its list of candidates on the basis that it was upholding its obligations under

the Convention because the judge was not of “high moral character”. The allegations made against the judge were widely considered to be baseless.

Within the criteria for appointment, there is no mention of relevant judicial or human rights experience. The Parliamentary Assembly has, however, urged States to nominate candidates who have a range of human rights experience either as practitioners or as NGO activists.¹⁴ In its opinion on this recommendation, the Court stressed the importance of appointing judges who are—and are seen to be—non-partisan.¹⁵

To command public confidence, the Court should be diverse in its composition. This includes ensuring equality of opportunity for the nomination and election of women. Certain other treaties mention gender not as a criterion, but as a factor to be taken into account in the selection of judges.¹⁶ Perhaps as a function of its time, the Convention does not do so. The Parliamentary Assembly has urged States to nominate candidates of both sexes.¹⁷

Attention to appropriate criteria could help better identify judges with the requisite skills and experience. A dominant view in Strasbourg is that while a balance of professional backgrounds is desirable, there should be an emphasis on individuals with judicial experience on the bench. The long-term constitutional impact of the Court’s jurisprudence may also suggest the need for judges with constitutional law and human rights expertise. There was however also some wariness among those interviewed by INTERIGHTS that with prescription comes a degree of inflexibility that could serve to narrow further the field of potentially capable candidates. Perhaps most importantly, suggestions for more rigorous criteria are belied by the fact that a large number of States currently fail to nominate candidates who satisfy the existing standards.

The predominant view appears to be that the problem lies not only with the vagueness of criteria, but with the nomination procedure and the absence of oversight thereof and with the procedures for the review of candidates and ultimately the election of judges.

Nomination procedures

The Convention is silent on the procedural steps that Member States should take when drafting their nomination lists. There are no comprehensive guidelines on national nomination procedures.

In a number of States, the absence of transparent and consistent nomination procedures is largely a function of domestic custom and practice: judges have always been appointed through informal “networks”. Although it may be true that non-transparent nomination procedures in some States lead to good candidates, the principle—and perception—of judicial independence is jeopardised by the fact that procedures are, with *very* limited exceptions, neither open nor accountable.

While most Member States have accepted in theory the need for an independent judiciary, in a number of them notions of judicial independence remain novel and are weak in practice. As all of the respondents before the Court are States, there is a particular danger that governments will favour a political ally on the bench. Additionally, the amount of remuneration provided to judges of the Court, in some States amounts to an individual's life savings. Appointments to the Court therefore become a favoured method of rewarding political loyalty.

Openness and transparency on a national level

In the vast majority of cases, the national processes adopted are unclear, apparently politicised and unaccountable. While in Recommendation 1429 the Parliamentary Assembly called on States to advertise in the specialised press for candidates, during the 2001 round of nominations, only a small number of States complied. In some of these cases, the transparency ended with the advertisement and governments still arrived at the list themselves, occasionally upon consultation with Parliament. Only a small number of States followed any pre-established national procedures in selecting their candidate.¹⁸

States rarely confer in this process with civil society, such as human rights organisations, Bar associations and, perhaps most critically, judicial bodies. In cases where they do, the effect of such consultations is unclear due to the opaque nature of the procedures.

Independent nomination bodies

Historically, all Member States have employed unsatisfactory nomination procedures. The United Kingdom has been cited as the first to adopt a largely independent, transparent process, in 1998. The procedure involved public advertisement and five candidates being interviewed for over an hour by a government-appointed panel, which consisted of two senior judges, two government officials with legal backgrounds and one lay member (who in this case was a former chair of the Equal Opportunities Commission). The panel then ranked its top three candidates which the United Kingdom sent to Strasbourg as its list. In another case, a government appointed an independent body for the purpose of devising the list of candidates, and then failed to follow its recommendations.

Candidates nominated as a result of these procedures

Perhaps as a result of the lack of transparency and accountability in the current nomination procedures, questions have been raised as to the quality of the candidates proposed by some States, and their suitability to hold office.

It is not unusual for States to propose former government ministers, senior diplomats and in some instances the relatives of key political figures. States have also proposed one candidate who has some of the required qualifications, along with two manifestly unsuitable candidates. In devising such lists and offering only one 'real' candidate, States try to guide the hand of the Parliamentary Assembly at the time of the election.

The level of expertise of proposed candidates is often manifestly inadequate. In 1998, for example, around one third of candidates failed to mention any worthwhile human rights activities on their curricula vitae.¹⁹ The 2001 elections similarly revealed a large number of candidates devoid of meaningful expertise in human rights or international law.²⁰

In other cases, States have favoured candidates where the information provided on their curricula vitae was allegedly inaccurate in significant respects, and allegedly included references to judicial or legal experience they did not possess. In relation to the 1998 election, Flauss notes that "numerous candidates were able to lay claim to several qualifications and professional activities simultaneously".²¹

International selection procedures

Article 22 ECHR provides, that the Parliamentary Assembly elects one of three candidates nominated by each Member State. The Convention does not provide for the Committee of Ministers to have a role in this process. However, on paper both the Directorate General for Human Rights and the Committee of Ministers of the Council of Europe would appear to scrutinise these nominations prior to the election, although in practice there is little meaningful review.

Committee of Ministers

In 1997, the Council of Europe established a system whereby the Committee of Ministers—in practice the Committee of Deputies—would engage in an "informal exchange of views on such candidates before the lists are formally submitted to the Committee of Ministers for transmission to the Parliamentary Assembly".²² In creating this system, it was noted that, "this exchange of views would neither bind governments, who would retain the right to present candidates of their choosing, nor interfere with the Parliamentary Assembly's function of electing judges from the lists provided".²³

The Committee of Ministers seldom calls States to account for their nominations, rarely expressing any reservations with respect to the candidates proposed. As a body representing governments, the Committee appears in this respect mainly inclined to safeguard State interests and is rarely prepared to lift the "sovereign veil" to investigate the domestic nomination processes or to criticise the outcome. At best, it considers only whether the candidates appear to comply with the formal requirements provided

in the Convention.

Sub-Committee of the Parliamentary Assembly

Currently, the only review mechanism that has any real effect on the appointment processes is the Parliamentary Assembly's *ad hoc* Sub-Committee on the election of judges. As noted, the Sub-Committee was introduced in 1998 to facilitate a more informed election of candidates by the Parliamentary Assembly.

Prior to the establishment of the Sub-Committee, members of the Parliamentary Assembly had virtually no information about candidates. As one former member of the Parliamentary Assembly described:

“We would be presented with the names of three people. We would be told to vote for one of them but, usually, no one told us anything about the three people. One could sometimes obtain a little information from the delegation of the country whose judges we were about to select. However, sometimes we would have been better off sticking a pin in the piece of paper to determine our choice of vote. Indeed, on a number of occasions I flatly refused to exercise the vote because I knew nothing about the candidates.”²⁴

The Sub-Committee appears to represent an improvement on the previous system, as it guards against the Parliamentary Assembly simply rubber-stamping the rankings emanating from generally unsatisfactory national nomination procedures. However, the operations of the Sub-Committee may mean that not only is it an ineffective filter of candidates, but that it risks adding an additional level of arbitrariness to the appointments' procedure.

Role of the Sub-Committee. The terms of reference of the Sub-Committee are unclear. When it was established, it was thought that the Sub-Committee “in most cases, would limit itself to giving its opinion on [candidates'] eligibility, leaving it to the Assembly to elect such of the candidates as it desires.”²⁵ As such it would provide a filter to eliminate clearly unqualified candidates. However, in practice, the Sub-Committee makes recommendations on the suitability of candidates by expressing a preference for a particular candidates.

The inadequacies of the Sub-Committee interview process are largely a function of its composition and working methods.

The Sub-Committee is comprised of approximately 27 members of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights. Members are appointed by the five political groups of the Parliamentary Assembly, with consideration as to their region, but not their State of origin.

There is no requirement of legal expertise, although some members of the Sub-Committee are

lawyers. Others are qualified in other disciplines. Very few have any knowledge or experience of international human rights law.²⁶ The Sub-Committee's composition significantly inhibits its ability to provide a competent, independent assessment of candidates' legal professional capability, even though the questions it asks include such matters.

Working methods of the Sub-Committee. In 1998, all judicial positions at the Court needed to be filled, meaning that the Sub-Committee had to interview over 100 individuals. Time restraints resulted in 15 minutes being allocated to each candidate. However, in 2001—when there were half as many candidates to interview—the Sub-Committee continued the practice of 15-minute interviews. This is thought by at least some members to be an adequate, if not an ideal, amount of time to assess candidates, and in Resolution 1200 (1999) the Parliamentary Assembly expressed its opinion that the “interviews were most helpful in order to obtain a better insight into the qualities of the candidates and thus facilitate a better-informed choice.” However, the interview format and brevity are widely criticised by others.

Like the role of the Sub-Committee, the precise purpose of the interviews is not entirely clear. While the Sub-Committee appears to focus on assessing the personality and sociability of candidates, it also poses questions regarding international human rights law.²⁷ The Sub-Committee has been criticised for the lack of legal intelligibility of its questions and, in particular, for its lack of professional competence to assess the quality of the answers given.

The dearth of legal knowledge aside, the composition of the Sub-Committee means that political considerations may affect its decisions. In the past, it has been claimed on several occasions that members of the Sub-Committee have held very firm views about the suitability of candidates from their own States based on the prospective judge's perceived political persuasion. There has been criticism that, as a result, a number of exceptional candidates have been passed over in favour of less qualified individuals.

Finally, the Sub-Committee is not informed of, and does not inquire into the domestic nomination processes. Nor does it look beyond the curricula vitae and interview the candidates to gain a better understanding of them.

Recommendations of the Sub-Committee. Following the three interviews, the Sub-Committee decides—by consensus or a vote, if necessary—on its preferred candidate. In light of poor nomination procedures and States giving preference to “favoured sons”, the Parliamentary Assembly has recommended that States no longer rank the three candidates on their lists.²⁸ However, in practice, some States continue to do so. Recently, the Sub-Committee has arranged for its Secretariat to place the names in alphabetical order, even if they are submitted with a ranking. In practice however, the preferred “government” candidate is generally known to the Sub-Committee due to State lobbying.

Where States rank candidates and (as until recently) this information is made available to the Sub-Committee, there are cases where the Sub-Committee agrees with the State's preference. In others, it inverts the ranking. It would appear that the Sub-Committee does not have any concern for the quality of the State nomination process when taking these decisions.

In a few cases, the Sub-Committee has recommended that the Parliamentary Assembly reject the list entirely and call on the capital for a new set of candidates.²⁹ There are no public guidelines for the circumstances in which lists should be rejected.³⁰ In some cases, lists comprising only one barely qualified candidate or overtly politicised nominees have been transmitted to the Parliamentary Assembly.³¹

Just as there are no guidelines for rejecting lists, there is no procedure for stopping States withdrawing their lists. It is reported that, in the past, governments have withdrawn their-list of candidates in response to an unwelcome ranking by the Sub-Committee.

The Sub-Committee's deliberations are not recorded, although it transmits a brief report to the Committee on Legal Affairs and Human Rights, noting whether the candidates were qualified—sometimes noting that only one was qualified; generally stating that all were qualified. It then recommends the election of one individual without giving reasons for its preference.

Election by the Parliamentary Assembly

The election of judges is one of the few powers that the Parliamentary Assembly enjoys and this role is therefore jealously guarded. At the same time, its members seem to lack interest in the process and not infrequently relatively few attend to vote.³²

Although there are exceptions, voting in the Parliamentary Assembly tends to follow the recommendations of the Sub-Committee, which reflects the political composition of its parent body. While the Sub-Committee report is made available to the members of the Parliamentary Assembly prior to elections, neither the curricula vitae of candidates, nor the report is distributed to voters. It is provided to the political groups however, which generally advise their members how to vote, often on the basis of the actual or perceived, formal or informal affiliation of potential judges with a political party.

Finally, the election at the Parliamentary Assembly is commonly characterised by lobbying where governments frequently “parade” preferred candidates around Strasbourg. On occasion, candidates themselves electioneer, to secure votes. While such lobbying is far from unique to the European context, it has a detrimental effect on the independence, and the perception of independence, of the judge ultimately elected.

Re-election of judges

While States alike generally embrace the principle that their judges in the Court must be independent, there is concern that the current system of six-year, renewable term gives States political leverage over their sitting judges.

Given the problems with the transparency, consistency and accountability of State nomination procedures, judges may risk their re-nomination by demonstrating independence from their governments. Accordingly, there is a danger that some judges will spend the final years of their term trying not to upset their nominating government rather than fulfilling their obligations to the Court. There have been instances where, allegedly as *de facto* punishment for unacceptable levels of independence, sitting judges have not been nominated by their governments.³³

Judicial independence may require that, so far as judges have renewable terms of office, sitting judges should be automatically nominated by their States. The intervention by the Parliamentary Assembly and its Sub-Committee risk the prejudicial treatment of sitting judges who have been involved in judgments perceived to be unfavourable to a particular political point of view. The re-nomination and re-election process destabilises the judges personally, and the Court as a whole.

The recent Evaluation Group report recommended a single, fixed nine-year term for judges as “a further guarantee of the Court’s independence”.³⁴ While the Evaluation Group’s report does not speak of procedures for appointment to the Court more generally, it underlines the high standards of independence expected from it.³⁵

Gender imbalance in the Court

Due to its focus on procedures for appointment to the Court, the report does not specifically address gender imbalance in the Court. The under-representation of women is however a significant problem in Strasbourg, which—at least in part—is a function of flawed appointment processes. There are currently 10 female judges and 31 male judges in the Court. Women therefore make up approximately a third of the Court’s composition, which is better than in the case of other international courts.³⁶ If States and the Council of Europe were to adopt more independent and transparent appointment processes, one likely effect would be the redressing—at least in part—of the gender imbalance in the Court.

Recommendations

The Group concludes in its report that significant weaknesses in the current system lie at both the State nomination and the international review and election stages. It makes the following recommendations:

Nominations

(1) While accepting the diversity of legal systems in Europe, States should be required to adopt essential procedural steps and safeguards in the judicial nomination processes. To this end, the Council of Europe should devise and distribute a template for national nomination procedures. The minimum standards would require States to:

- *Advertise* in the specialised press—where it exists—or in the national press for candidates (pursuant to Parliamentary Assembly Recommendation 1429).
- Establish an *independent* body to devise the State's list.
 - The independent body would consist of independent persons including judges and individuals with academic and other experience of international law and human rights.
 - It would *consult* with interested civil society such as judicial and other State bodies and where possible human rights organisations and national Bar associations. It would then shortlist and interview candidates, and forward the names of three nominees to the national government, for transmission to the Council of Europe.
 - Where, as a result of a thorough procedure, three suitable candidates emerge but there is a hierarchy between them, the independent body should be free to rank the candidates.
- As a general rule, the government should *follow the recommendation* of the independent body.
- The State should submit an *account of its nominations procedure* with its list of three candidates, to facilitate transparency and oversight. Where the government departs from the recommendation of the independent body, this too should be noted and explained.

(2) To ensure fair and effective interviewing of candidates, the Council of Europe should provide States with an interview *template*, which would require interview panels to:

- Abide by the criteria for judicial appointments in the Convention and Council of Europe recommendations concerning candidates.
- Agree in advance what areas should be covered in the questions.
- Ensure that these are relevant to the criteria and do not carry built-in advantages for some candidates (especially in relation to gender, for example family commitments).
- Cover the same areas with each candidate.
- Mark the candidates' performances on an agreed scale under agreed (and relevant) heads.

(3) The interview panel should be the same for all candidates, and as far as possible, all candidates should be interviewed on the same day.

International procedures

(1) The accuracy of information provided in candidates' curricula vitae should be verified before lists are forwarded to the Committee of Ministers.

(2) The lists of nominees submitted by States as well as the description of the nomination procedure should be scrutinised. Where appropriate, States should be asked to provide details of their nomination procedures. Where procedures do not meet the minimum standards outlined by the Council of Europe, as recommended above, or otherwise do not reflect the principles of judicial independence, the lists should be returned to States.

(3) The body making recommendations on the eligibility or suitability of candidates to the Parliamentary Assembly should itself be independent, follow a fair and open procedure and possess the requisite expertise to fulfil its role.

This could be done by engaging a *body of independent persons* with relevant expertise, including persons with judicial experience, to provide reasoned advice to the Assembly on the candidates submitted to it. It would review the submitted curricula vitae and interview candidates thoroughly, with a view to identifying the most suitable professional judge. The independent body would provide reasons for its views.

In the alternative, the existing Sub-Committee should be strengthened by having available to it a group of independent *judicial assessors*. The judicial assessors would be involved in the interviewing of candidates and would provide reasoned advice to the Sub-Committee with a view to identifying the most qualified candidate.

(4) In either case, the interview panel should, reflecting the standards that should apply on the national level, ensure that it adheres to minimum standards with respect to:

- certainty of criteria;
- certainty, consistency and fairness of questions asked; and
- the objective assessment of candidates' performances.

To this end, the interview template set out in relation to nominations above could be followed at the international, as well as the national level.

(5) In the interests of consistency, the interview panel should be the same for all candidates, and as far as possible, all three candidates should be interviewed on the same day.

(6) In addition to its current practice of exploring the suitability of candidates, the Sub-Committee, or the other independent body established, should give more detailed reports, including *reasons for its views*, including the ranking of candidates. Where States propose rankings and these are changed, this should be noted, together with the reasons for the change.

(7) Guidance should be provided and procedures should be established for the circumstances in which the Parliamentary Assembly can or should reject lists in their entirety, including where States fail to provide three sufficiently qualified candidates.

(8) Once a State has submitted a list, it should not, in principle, be empowered to withdraw it, absent compelling reasons (such as the non-availability of candidates).

(9) All members of the Parliamentary Assembly should be provided with a copy of the Sub-Committee's report, along with the *curricula vitae*.

Footnotes

¹ Andrea Coomber is the Legal Officer at INTERIGHTS involved in this project. The project was funded by the Open Society Institute. This article is a summary of the views of the Group.

² The full Report is available from INTERIGHTS in English and French. It is also posted on the INTERIGHTS' website (www.interights.org).

³ Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court(2001)], September 27, 2001; *Guaranteeing the long-term effectiveness of the European Court of Human Rights: Final report containing proposals of the CDDH*, Steering Committee for Human Rights, CDDH(2003)006 Final, 4 April 2003.

⁴ Universal Charter of the Judge, Art.9.

⁵ L. Wildhaber, "Un avenir constitutionnel pour la Cour européenne des droits de l'homme?" (2002) 14(1-4) *Revue universelle des droits de l'homme*. Luzius Wildhaber is President of the European Court of Human Rights.

⁶ Detailed information on comparative practice is provided in Annex 1 to the full report.

⁷ Recommendation 1429 (1999), adopted by Order 558 (1999).

⁸ Resolution 1082 (1996); Recommendation 1295 (1996); Resolution 1200 (1999); Recommendation 1429 (1999).

⁹ *Bryan v United Kingdom* (1995) 21 E.H.R.R. 272 at [37]. The Court distilled these elements from previous judgments in *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1 at [55] and [57]; *Piersack v Belgium* (1983) 5 E.H.R.R. 169 at [27]; *Delcourt v Belgium* (1970) 1 E.H.KR. 355 at [31]. Although in *Campbell and Fell v United Kingdom* (1984) 7 E.H.R.R. 165, the Court held that appointment by the executive is permissible, even normal.

¹⁰ Recommendation R(94)12, adopted by the Committee of Ministers on October 13, 1994, para.2(c).

¹¹ *ibid.* para.2(c)(i).

¹² International Covenant on Civil and Political Rights, Art.14(1); Universal Declaration on Human Rights, Art.10; UN Basic Principles on the Independence of the Judiciary, Principle 10, endorsed by the UN General Assembly in 1985. Principle 10 acknowledges that the methods and standards for judicial selection and promotion are essential both for protecting the independence of the judiciary and for ensuring the quality of judges.

¹³ The requirements of "high moral character" and "recognised competence" appear across the board. Bodies such as the European Court of Justice, the International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia (ICTY) share the ECHR's "qualification for high judicial office" requirement. A number of bodies also explicitly require qualities such as "integrity" and "impartiality" in judges. African Charter on Human and Peoples' Rights, Article 31 and Statute of the ICTY, Article 13.

¹⁴ Parliamentary Assembly Recommendation 1429 (1999). The Court also expressed its concern at the appointment of lawyers with activist backgrounds to the bench; Opinion of the European Court of Human Rights on Parliamentary Assembly Recommendation 1429 (1999), adopted March 6, 2000, para.C(3).

¹⁵ Opinion of the European Court of Human Rights on Parliamentary Assembly Recommendation 1429 (1999), adopted March 6, 2000.

¹⁶ While there are no quotas, in the appointment of *ad litem* judges to the ICTY and judges to the (yet to be established) African Court on Human and People's Rights and the International Criminal Court, provision is made for the need to ensure fair gender representation. (Statute of the ICTY, Art.13(l)(b); Protocol to the African Court on Human and People's Rights, Art.12(2); Rome Statute, Art.36(8)(a)(iii)).

¹⁷ Recommendation 1429 (1999).

¹⁸ e.g. *Slovenia and Lithuania*. Flauss, "Analysis of the election of the new European Court of Human Rights" (1999) 3 AS/Jur 2, January 20, 1999. This study has been published in the *Revue trimestrielle des droits de l'homme*, No.35, 1 July 1998.

¹⁹ *Ibid.* p.9

²⁰ See Appendix Five to Kevin McNamara MP (Rapporteur), "Election of judges to the European Court of Human Rights following the expiry of the terms office of one half of the judges" (2001) 23 AS/Jur/cdh, 18 April 2001.

²¹ Flauss, n.18 above, p.8.

²² CM/Del/Dec/Act(96)547/1.3.

²³ *ibid.*

²⁴ *Hansard*, HL .Vol.592, col.81 (July 13, 1998) Lord Hardy of Wath.

²⁵ “Memorandum, Election of judges to the European Court of Human Rights”, submitted by Lord Kirkhill, Rapporteur, (1997) 29 AS/JUR, 7 July 1997, para.17.

²⁶ Biographical information on members of the Parliamentary Assembly is available at the Council of Europe’s website: <http://assembly.coe.int/>

²⁷ Kirkhill, n.25 above, para. 13.

²⁸ Parliamentary Assembly Recommendation 1429 (1999).

²⁹ In 1998, the first lists of Bulgaria, San Marino and Croatia were rejected. In the first two cases this ‘was because the candidates were not of equivalent quality. In the case of Croatia, the rejection was in light of political considerations.

³⁰ In 2001, the Sub-Committee did however indicate that in future it would not consider lists that did not include candidates of both sexes; n.20 above, p.3.

³¹ For a list of candidates’ qualifications as evaluated by the Sub-Committee see n.20 above.

³² The low voter turn-out at the election of the Polish judge in June 2002 is a case in point. While in the morning session 238 parliamentarians voted for the Deputy General Secretary of the Council of Europe, that afternoon only 127 votes were cast in respect of the appointment of the Polish judge.

³³ The Sub-Committee merely noted that a number of sitting judges were not renominated “for reasons which remain unknown to the Sub-Committee”. See n.20 above, p.3.

³⁴ See n.3 above, para.89.

³⁵ The Report notes that the principles contained in the Committee of Ministers’ Recommendation R(94)12 on judicial independence hold true for judges of the Strasbourg Court; *ibid.*

³⁶ **Women are traditionally unrepresented or underrepresented on international judicial bodies. Gender imbalance has been identified as a threat to the legitimacy and authority of international bodies and UN bodies have urged greater representation of women in international courts and tribunal;** Report of the Fourth World Conference on Women, Beijing, September 4 – 15, 1995, UN Doc.A/CONF.177/20, October 17, 1995, para.142(b). Resolution adopted by the General Assembly, *Improvement of the status of women in the United Nations System*, UN Doc.A/RES/56/127, January 30, 2002; Security Council Resolution 1325(2000), October 31, 2000. See also H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (London, 2000)

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Lawyers on trial for representing Kurdish villagers

Last year, four Turkish lawyers, including the President of the Diyarbakir Bar Association, faced criminal proceedings before the Diyarbakir Heavy Penal Court for seeking compensation on behalf of Kurdish villagers whose homes were destroyed by Turkish security forces. The lawyers were acquitted on 24 December 2003 following hearings, which commenced in October. This article is based on a trial observation conducted on behalf of the International Commission of Jurists (ICJ)³⁷ and sets out some of the key findings of the reports.³⁸ The trial was significant for a number of reasons. Firstly, there appears to have been political motivation behind the charges brought against the lawyers. Secondly, the charges and subsequent criminal proceedings amounted to a form of harassment of the lawyers, hindering them in the performance of their professional functions. Thirdly, the trial illustrates Turkey's continued failure to meet international fair trial standards.

Politically motivated charges

The four lawyers, Mr Sezgin Tanrikulu, (President of the Diyarbakir Bar Association) and Mr Sabahattin Korkmaz, Mr Burhan Deyar and Mrs Habibe Deyar (all members of the Diyarbakir Bar Association) have been active for some years in defending and representing Kurdish villagers forcibly evicted from their homes. In 2002, they filed petitions for losses that their clients suffered as a result of forced evictions from the villages of Caglayan, Lice Ziyaret and Ulucoka, South-East Turkey during 1993 and 1994. All lawyers were subsequently accused of dishonestly earning an income. The prosecution case was that the villages were not destroyed and evacuated but the lawyers had nonetheless persuaded their clients to give them power of attorney. All lawyers were charged with "professional misconduct" pursuant to Article 240 of the Turkish Penal Code, which provides:

"Apart from situations written in the Act, whatever the reason may be, if a public servant abuses or misuses their duty/responsibility, depending on the degree of the offence, they shall be imprisoned for three years. In the event of any mitigating circumstances, the penalty shall be between six months to one year imprisonment and in both circumstances, there shall be a heavy financial penalty as punishment. Furthermore,

there shall also be suspension or dismissal from being a public employee.”

Lawyers are considered to be performing a public function and therefore fall within Article 240. In contrast to most countries, the Turkish Bar Association has no jurisdiction with regards to professional conduct issues, which instead is dealt with through criminal law.

The significance of the nature of Article 240 to the legal profession in Turkey will be considered further below. However, firstly, the context within which the lawyers were charged suggests politically motivated charges. The lawyers were charged against a background of forced evictions and village destructions by Security Forces in South-East Turkey, which have displaced approximately 400,000 villagers since 1984.³⁹ This pattern of violation has been corroborated by judgments of the European Court of Human Rights (“ECtHR”), condemning the practice of forced evictions and internal displacement of villagers by Security Forces.⁴⁰ Most recently, the ECtHR found the Turkish Government responsible for the destruction of villages in the case of Ipek v Turkey and in violation of the rights to peaceful enjoyment of property (Article 1, Protocol 1) and to an effective remedy (Article 13) under the European Convention on Human Rights (ECHR).⁴¹

More specifically, the charges brought against the lawyers relate to petitions filed on behalf of villagers, including those from the village of Caglayan in South-East Turkey. In *Orhan v. Turkey*, the ECtHR found, amongst other things, that a large military operation took place in Caglayan village where soldiers burnt houses and that the applicants’ homes had been deliberately destroyed by Turkish Security Forces, in April 1994.⁴² It further held that no effective remedy, which included thorough and effective investigations, had been available to the villagers.

There is no doubt that the villages were destroyed. Considering that the practice of forced evictions in South-East Turkey is well known, it is surprising that when the lawyers presented petitions to the Diyarbakir Governor’s office on behalf of their clients and the Governor’s office requested the Gendarme Commander to provide a report on the allegations, instead of investigating the matter further, the Gendarme Commander filed a complaint against the lawyers. It is also difficult to understand how the Ministry of Justice (of course a political body), could have authorised investigations to proceed against the lawyers when no such investigations had been conducted into the original petitions.⁴³ In addition, it materialised during the trial that the evidence upon which the charges were based was clearly insufficient. There had only been six prosecution witnesses. One of the witnesses was withdrawn due to his traumatised state and required psychiatric treatment due to depression following signs of coercion in giving a pre-trial statement. Others had either given evidence, which was different from their earlier statements or were in line with defence testimonies. Meanwhile, approximately 70 defence witnesses came to consistently testify that they had instructed the lawyers and that their homes were destroyed by security forces. The lack of prosecution evidence even led the Public Prosecutor on 24 December to request an acquittal himself. The background and context within which the charges against

the lawyers were brought, combined with the lack of evidence against them, therefore suggests politically motivated charges. In particular, it is arguable that the charges against the lawyers were brought to deny compensation to victims of forced evictions in violation of the rights to an effective remedy (Article 13) and peaceful enjoyment of property (Article 1, Protocol 1) under the ECHR.

The practice of criminal proceedings against lawyers

Despite Turkey's efforts to introduce a number of reforms in line with European Union standards, its Penal Code continues to provide extensive scope for criminal proceedings particularly against lawyers, especially as penal law is left to deal with professional conduct issues which should instead fall within the jurisdiction of the Bar Association or Law Society of a country to ensure independence of the legal profession. For example, Ms Filiz Kalayci, a lawyer who was tried before the Ankara Heavy Penal Court, was acquitted last year of charges under Article 159⁴⁴ and 240 following an article she wrote on Turkish prisons. Although the outcome of some proceedings is frequently an acquittal, they prevent lawyers from performing their professional functions which goes against international standards such as those set out in the UN Basic Principles on the Role of Lawyers.⁴⁵ In particular, paragraphs 16 and 20 provide:

16. *Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, or improper interference; ... (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards or ethics.*

20. *Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a Court, tribunal or other legal or administrative authority.*

However, the trial of the four lawyers in Diyarbakir demonstrates that the broad nature of the offence under Article 240 of the Turkish Penal Code can result in criminal proceedings against lawyers who take cases of a political nature. Such proceedings, even where they often result in acquittal, amount to a form of harassment. Not only do they hinder lawyers in performing their professional functions but can also be extremely traumatic. In accordance with paragraph 20 of the UN Basic Principles on the Role of Lawyers, issues of professional conduct should not be dealt with through penal law if lawyers are to be able to act for their clients without fear or prosecution.

Failure to meet international fair trial standards

Turkey recently ratified the International Covenant on Civil and Political Rights (ICCPR)⁴⁶ although, significantly, made a reservation to Article 27 relating to minority rights. Under Article 90 of the Turkish Constitution, international treaties ratified by Government and approved by the Grand National Assembly, have the force of law. In addition, Turkey of course is obliged to fulfil its obligations under the ECHR. It must therefore comply with the right to a fair trial by an independent and impartial tribunal – a right, which is, “an absolute right that may suffer no exception.”⁴⁷ Article 6(1) of the ECHR guarantees the right to a fair and public hearing by an independent and impartial tribunal established by law. The trial of the four lawyers was an example of how Turkey must work harder to ensure compliance with these international standards.

Firstly, the right to a fair and public hearing by an independent and impartial tribunal of course also requires that justice must be seen to be done. The appearance of independence and impartiality is fundamental to maintaining respect for the administration of justice. Connected to this is the important principle of “equality of arms” which includes equal treatment by the courts. The trial of the four lawyers highlighted some of the aspects of Turkish criminal proceedings, which undermine these principles. The most obvious is the continued close identification of the Court with the Prosecution, which demands reform. The judges and the Public Prosecutor are not easily distinguishable as they sit on the same elevated bench, wear the same red robes, and enter from the same door. The defence lawyers are on ground level with the public and enter through the same door as the public. The appearance of the Court’s independence from the Prosecution is therefore undermined.

Moreover, the procedure for recording evidence favours the prosecution. Whilst defence submissions and evidence are summarised by the Presiding Judge and then recorded by the court, prosecution submissions and evidence are recorded directly. Such procedure goes against the principle of “equality of arms” and risks creating the impression that defence submissions are not as important as those made by the prosecutor, and may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial.⁴⁸

The appearance of the Court’s independence and impartiality during the trial of the four lawyers was further undermined by the Presiding Judge’s conduct. During the first hearing on 17 October, the Presiding Judge requested the office of the Gendarme Commander to provide a report on whether the villages had been destroyed. The report was received by the Court on 5 December, the date of the second hearing. However, such a report was irrelevant. Firstly, it could not have the status of an independent report, as it was being provided by the office which filed the complaint against the lawyers. Secondly, it was a report on whether villages were destroyed almost ten years ago. The report of course found that villages existed in the said places and showed photographs of inhabitants but could not be considered reliable evidence of whether or not the villages were

in fact destroyed as it was so long after the events took place. Finally and most importantly, the issue before the Court was not whether the villages had in fact been destroyed but whether the defendant lawyers had misused their profession by dishonestly persuading the villagers to instruct them. In relation to the latter issue, no evidence was put before the Court. As was argued by the defence, requesting the irrelevant report unnecessarily prolonged proceedings, which was an added burden for the four lawyers.

Another important aspect of the right to a fair trial, namely, the presumption of innocence, was also undermined. Rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout the trial. However, in this case, the burden shifted to the defence during proceedings because there was clearly a lack of prosecution evidence, as illustrated above. Despite insufficient prosecution evidence, the defendants were required to prove their innocence.

In addition, the trial observation of these proceedings highlighted that Turkey's judiciary and prosecution remains vulnerable to political influence as a result of being under resourced and overworked. The *2003 Regular Report on Turkey's Progress Towards Accession* identified the large backlog faced by both judges and prosecutors and that:

“The overwhelming caseload for Courts does not allow enough time for the hearings and results in inadequate reading of case files, which has implications for the rights of the defence.”⁴⁹

This serious problem was confirmed through interviews with the Presiding Judge and the Public Prosecutor.⁵⁰ The Public Prosecutor, who had approximately 3000 dossiers to deal with every year, acknowledged that it is not possible to provide supervision over investigations. This defect results in the lack of independent investigations or at least independent supervision of investigations and goes against UN Guidelines of the Role of Prosecutors. In particular, paragraph 11 requires prosecutors to perform an active role in criminal proceedings, including investigations and paragraph 14 provides that:

*Prosecutors shall not initiate or continue prosecutions, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.*⁵¹

In this case, the charges were clearly unfounded. However, the lack of prosecutorial supervision in Turkey leaves the police or as in this case, the office of the Gendarme Commander, to investigate matters (that often may even relate to complaints against themselves) with a free reign. The result can be prosecutions based on insufficient evidence and motivated by political factors, as in this case.

One final point is that the Presiding Judge explained at an interview that promotion is dependant

upon 40 percent of their judgments being upheld by the Court of Appeal. During the trial, he stated that he wished to ensure his decision would not be overturned by the Court of Appeal. However, this arguably goes against a fundamental principle that judges should feel entirely free to decide matters before the court solely on the basis of facts and in accordance with the law without any pressures, direct or indirect.⁵²

The need for further change

The above is a brief summary of some of the key aspects of the criminal proceedings against the four lawyers. Criminal prosecution in this case is another example of Turkey's harassment and intimidation of lawyers to deny a remedy to victims of human rights abuses. The trial adds to the case for further reform of Turkey's legal system, in particular, of Article 240, to ensure that lawyers can perform their professional functions without fear of prosecution. The proceedings further demonstrated that Turkey's judiciary and prosecution also requires reform, as well as further resources, to ensure that defendants are afforded a fair trial in accordance with international standards.

Footnotes

³⁷ For the Centre for the Independence of Judges and Lawyers (CIJL) of The International Commission of Jurists (ICJ), Geneva, Switzerland.

³⁸ Report on the Trial of the President of the Bar Association and Three Other Lawyers, Diyarbakir, Turkey, January 2004 (First Report) and Final Report, February 2004 (Final Report), published by the CIJL, ICJ and available at www.icg.org

³⁹ Turkey, Human Rights and the European Union, Accession Partnership, September 2000, Vol 12, No. 10 (D), Human Rights Watch.

⁴⁰ *Akdivar v Turkey* (Application No 21893/93) 16 September 1996, *Mentes v Turkey* (Application No 23186/94) 28 November 1997, *Selcuk v Turkey* (Application No 23184/94) 24 April 1998, *Asker v Turkey* (Application 23185) 24 April 1998, *Bilgin v Turkey* (Application No 23819/94) 16 November 2000, *Dulas v Turkey* (Application No 25801/94) 30 January 2001, *Orhan v Turkey* (Application No 25656/94) 18 June 2002, *Akdeniz v Turkey* (Application No 2395/94) 31 May 2001, *Kurt v Turkey* (Application No 24276/94) 25 May 1998, *Yöyler v. Turkey* (Application No 26973/959) 24 July 2003

⁴¹ Application No. 25760/94, February 2004

⁴² Application No. 25656/94, June 2002

⁴³ Articles 58 and 59 of the Turkish Law on Lawyers provide that investigations and filing of the indictment must be done with authorisation of the Ministry of Justice where the offence is said to be committed by a lawyer.

⁴⁴ Article 159 makes it a criminal offence to insult the “*Turkishness, the Republic, the Grand National Assembly, the spiritual personality of the government, ministries, the military, security forces or the judiciary.*”

⁴⁵ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 Dec. 14 1990. G.A/ res, 45/121, 45th sess.

⁴⁶ Turkey ratified the ICCPR in June 2003.

⁴⁷ *Gonzalez des Rio v Peru* 263/1987 29 October 1992, Report of HRC, Vol 11 (a/48/40) 1993

⁴⁸ Page 6 of the Final Report published by the CIJL, ICJ and available at www.icg.org

⁴⁹ page 20

⁵⁰ page 16 of the First Report published by the CIJL, ICJ and available at www.icg.org

⁵¹ UN Doc. A/CONF.144/28/Rev.1 at 189 (1990)

⁵² Principle 2 UN Basic Principles on the Independence of the Judiciary.

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The Re-Trial of Leyla Zana and Other Kurdish Former Parliamentarians⁵³

I Executive Summary

The re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan, all Kurdish former parliamentary deputies, was held before No.1 Ankara State Security Court on 21 February 2003, 28 March 2003, 25 April 2003, 23 May 2003, 20 June 2003, 18 July 2003, 15 August 2003, 15 September 2003, 17 October 2003, 21 November 2004, 16 January 2004, 21 February 2004, 12 March 2004, 2 April 2004 and 21 April 2004.

Leyla Zana and her co-defendants had been convicted on 8 December 1994 by the Ankara State Security Court of "membership of an armed gang" contrary to Article 168 of the Turkish Penal Code and were sentenced each to a term of 15 years imprisonment. However, on 17 July 2001, the European Court of Human Rights ruled that the said four former parliamentarians had not received a fair trial at the Ankara State Security Court which at the time of the trial included a military judge.⁵⁴ The Court held that the Ankara State Security Court, as composed then, was not "an independent and impartial tribunal within the meaning of Article 6 of the Convention."⁵⁵ Following this ruling, Leyla Zana and her three co-defendants were re-tried. On 21 April 2004, a verdict of guilty was announced. The original prison sentences were upheld by Court.

The trials were observed by a number of international observers including the International Commission of Jurists of the Centre for Independence of Judges and Lawyers, Kurdish Human Rights Project, embassy staff, politicians from the European Parliament, and journalists⁵⁶. On the basis of the observation of the hearings by the above-mentioned trial observers, it was evident that certain aspects of the right to a fair trial were being respected. For example, during each of the hearings, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal arguments and the testimony of witnesses in full. No limitations were placed on any of the lawyers making up the defence team of the defendants in the exercise of their professional duties, led by main defence lawyer, Mr. Yusuf Alatas of the Ankara Bar.

Nevertheless, in so far as the principles of *equality of arms* between the prosecution and the defence, the *independence and impartiality of the tribunal* and the *presumption of innocence* are concerned, significant defects emerged⁵⁷. In summary, it was evident that the layout of the Court, the Court's

disparity of approach to defence and prosecution witnesses, lawyers and evidence, the failure to require the prosecution to disclose relevant evidence, the lack of continuity of the composition of the judges' panel and serious indications that the fundamental principle of the presumption of innocence were not respected. In addition, there were concerns that the guarantee of a trial within a reasonable time was violated and that the right to a public hearing was unnecessarily limited. These were factors which have led to a conclusion that the defendants have not been afforded a fair trial.

Furthermore, there have been grave concerns that the defendants continued to be detained in circumstances wherein: (1) the Court maintains its belief that the 1994 conviction was still valid despite the decision of the Court, (2) the Presiding Judge allegedly commented that the defendants are guilty of the offences for which they are being tried, and (3) the trial has proceeded at a rate of only one day per month, violating the Court's obligation to proceed with expedition where bail is refused. Therefore, it is concluded that the defendants' right to *liberty and security* has also been violated.

Moreover, during the hearing of 15 August, in protest at the continued violations of the right to a fair trial, the defence chose to withdraw from active participation in the proceedings, Unlike previous hearings, no procedural applications were made to the Court, no evidence or witnesses for the defence were called, nor were any applications made for the defendants to be released on bail. In contrast to the previous hearings, the defendants themselves elected not to participate in the proceedings and did not make any statements to the Court. On 12 March, the four defendants elected not to attend any further hearings in protest at remarks made by the Minister for Justice, Mr. Cicek, about the conduct of the defendants. However, the court has been entitled to proceed with the trial in the absence of the accused. Ms. Zana and Mr. Dogan communicated by letters to the court on behalf of all four of the accused a clear and unequivocal waiver of the right to be present at their trial. In fact, on 2 April 2004 the court quite properly adjourned the trial one further time in order to provide the defendants an opportunity to be present in court to hear the verdict.

There were further concerns arising out of an allegation made by two of the defendants, Orhan Dogan and Hatip Dicle, at the hearing on 15 September 2003 that they had been subject to inhuman and degrading treatment by security officers when they were being transferred from their place of detention to the Court. Although the Presiding Judge noted the complaint for the Court record, it was apparent that there was no effort by the prosecution to investigate the allegations, nor did the judges call for any such inquiry into the incident, thereby complying with the Turkish State's positive obligation under Article 3 of the European Convention on Human Rights (the ECHR).⁵⁸ If these allegations were true, this demonstrated a significant and undesirable effort on the part of the security forces to intimidate the defendants thereby limiting their ability to participate effectively in the proceedings.

II Introduction

The charge of “membership of an armed gang” against Leyla Zana and her co-defendants is pursuant to Article 168 of the Turkish Penal Code. Article 168 provides as follows:

“Any person who, with the intention of committing the offences defined in Article 125⁵⁹ ... forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years’ imprisonment.

The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years’ imprisonment.”

The prosecution case is based firstly, on the activities that Leyla Zana and her co-defendants are alleged to have engaged in on behalf of the PKK (harbouring militants, negotiating with local leaders and threatening them as a way of forcing them to help the PKK establish itself in their regions). Secondly, the prosecution bases its case on the content of oral and written statements made by the defendants in defence of Kurdish rights in which they allegedly express support for PKK activities.

The defence case is that Leyla Zana and her co-defendants have never advocated the formation of a separate Kurdish state through armed action. Rather, through their speeches and writings they have sought to forge a peaceful, democratic resolution to the conflict between the Turkish government and its minority Kurdish population, a resolution in which the basic rights and distinct cultural identity of Turkey’s Kurds are recognised by the Turkish state authorities. The defence maintains that the political leaders associated with the Kurdish issue are being prosecuted solely in order to silence persons who have sought to criticise the Turkish government.

In hearings which took place on 21 February 2003, 28 March 2003 and 25 April 2003, the Court heard a total of 21 witnesses on behalf of the prosecution. However, various human rights groups have expressed concern that the trial may not be conducted in accordance with international fair trial guarantees. According to the Kurdish Human Rights Project, at the hearing on 28 March 2003, “The Court denied requests from defence lawyers that the jailed parliamentarians be released pending the conclusion of the retrial; and that a member of the judiciary be removed due to his previous involvement in the case, raising concerns about impartiality.”⁶⁰ The International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), after observing the hearing on 25 April 2003 commented that they were, “alarmed to witness repeated delays in this trial, as well as obvious violations of the rights of defence, which give evidence of continuing malfunctioning of the judicial system in Turkey despite recent legal reforms adopted by Turkey in the framework of EU accession. The observer indeed noticed restrictions placed

upon the lawyers' ability to question the witnesses during the hearing."⁶¹

Based on its observation of all subsequent hearings in the re-trial, namely from May 2003 to April 2004, this author finds that concerns relating to the right to a fair trial by an independent and impartial tribunal remain outstanding.

III Legal Framework

The European Convention on Human Rights (the Convention) is the primary binding regional instrument to have been ratified by Turkey. In addition, relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948 (UDHR), the UN Basic Principles on the Independence of the Judiciary of 1985⁶² and the UN Basic Principles on the Role of Lawyers of 1990.⁶³ In November 2003, the Republic of Turkey also ratified the International Covenant of Civil and Political Rights (ICCPR).

Under the terms of Article 90 of the Turkish Constitution, the above instruments form an integral part of Turkish domestic law.

Article 6 of the Convention guarantees the *right to a fair trial* in criminal proceedings. The object and purpose of the provision is "to enshrine the fundamental principle of the rule of law"⁶⁴ The principle that there should be *equality of arms* between the parties before the European Court of Human Rights is of fundamental importance to the notion of a fair trial under this Article. Each party in a case is to have a reasonable opportunity of presenting its case to the European Court of Human Rights under conditions which do not place that party at substantial disadvantage vis-à-vis its opponent.⁶⁵

The equality of arms principle necessitates that there be parity of conditions for the examination of witnesses. Article 6 further provides that everyone is entitled to a fair and public hearing by "an independent and impartial tribunal established by law".

Article 5 of the ECHR guarantees the *right to liberty and security of the person*. Where a person is detained for the purposes of bringing him or her before a Court for trial on a criminal charge, that person should be brought promptly before a judge or a competent officer authorised to exercise judicial power in deciding to release that person on bail or to continue detention⁶⁶.

IV Violation of the Right to a Fair Trial

Several irregularities noted during the course of the hearing evidence the fact that the parties

were not treated in a manner that ensured their procedurally equal position during the course of the trial, that the presumption of innocence has not been respected and that several minimum standards of a fair trial recognised international law has not been respected:

(1) Presumption of Innocence

This author is deeply troubled at allegations that the Presiding Judge in the case of Leyla Zana and her co-defendants may not be impartial. According to Mr. Yusuf Alatas, the defence lawyer, in accordance with domestic law, the defence had to make a formal request to the Court for a re-trial⁶⁷. On this occasion, the two wing members of the bench agreed to grant a re-trial, however, the president of the Court refused. According to Mr. Alatas, in refusing the application for a re-trial the president of the Court commented in open Court to the effect that, “the deficiencies and mistakes identified by the European Court of Human Rights will not change the guilt of the accused.” This alleged public pre-trial comment seriously impugned the impartiality of the Presiding Judge. If true, it demonstrated that prior to the commencement of the trial, the Presiding Judge held a pre-formed opinion as to the guilt of the accused and that that opinion was likely to weigh on his ultimate decision regardless of the evidence that was placed before him. In light of this prejudicial comment, the defence did apply for the Presiding Judge to be replaced, however, that application has been refused.

In addition, the prosecution and the judges have frequently referred to the defendants as the “convicted” (“*hukumlu*”). At the hearing on 2 April 2004, a large screen connected to the court computer was erected in court in order that the defence and those seated in the public gallery were able to read what was being entered into the court log. It was possible to read that the word *hukumlu* was in fact employed to describe the accused. The use of such terminology provided further evidence that the judges have actually formed or at least gave the impression that they have formed a prejudicial view of the defendants’ guilt.

Moreover, at the conclusion of the hearing on 20 June 2003, counsel for the defence made an application for each of the defendants to be released. The prosecution objected to the release and the application was refused. The reason given for refusing the application was that the Court maintained its belief that the conviction reached in 1994 was still valid despite the fact that the European Court of Human Rights had ruled to the contrary.

This reasoning, read in conjunction with the use of the word “convicted” to refer to the defendants and the allegation that the Presiding Judge, Judge Mehmet Orhan Karadeniz, had commented on the guilt of the defendants in a pre-trial application⁶⁸, led to the conclusion that there has been a violation of the presumption of innocence enshrined by Article 6(2) ECHR.⁶⁹ Where a judge expresses an opinion suggesting that he has formed an untimely impression of guilt, this has been

held to violate the presumption of innocence doctrine.⁷⁰

(2) The Layout of the Court

In each of the hearings in the re-trial of Leyla Zana and her co-defendants, at the start of the hearing, and after every adjournment, the prosecutor and the judges simultaneously entered the Courtroom from the same door whilst the defence team entered the Courtroom from a side door along with the public. When the judges rose to consider in chambers the request made by the defence for the release of the four defendants, the prosecutor also retired with the judges and left the Courtroom along with them through the same exit door.

Furthermore, during the hearing, the prosecutor sat on an elevated platform, on the same level with the judges and adjacent to them, and quite close to the judge sitting on the prosecutor's left. On the other hand, the defence lawyers sat at a table at ground floor level, the same level as the public and the defendants. The defence lawyers were also placed at quite a distance from the defendants in a way that no communication between them was possible during the hearing. In fact, no communication can take place between the defence lawyers and the defendants either during the trial or during the breaks when the session is adjourned.

Regarding the seating arrangement of the defendants, they sat in a place expressly reserved for them as in all criminal trials, facing the Court and between the public and the Court. During the whole hearing, defendants were surrounded by at least six machine-gun armed military personnel. Also, armed policemen were placed in various positions around the Courtroom.

The layout of the Court and the proximity of the judges and the prosecutor who are all physically removed from the defence team, provided legitimate grounds for fearing that the tribunal was submitted to external influence and pressure and, consequently, was not independent or impartial. Moreover, the fact that the prosecutor sat so close to the judges and on the same level with them undoubtedly indicated that the prosecutor was given more importance and was held in higher esteem than the defence lawyer. To prove this further, the prosecutor, like the judges, was provided with a computer and a terminal which enabled him to see the record of proceedings as they were being entered by the Court stenographer or registrar. The fact that the defence was not provided likewise with such technological facilities and was placed on ground floor level beneath the judges and the prosecutor, on the same level as the public and at a distance from the defendants and the judges led to the conclusion that there was, once again, a clear violation of the principle of the equality of arms between the prosecution and the defence as the latter was placed at a substantial disadvantage. However, it was recognised that on 2 April 2004, a large screen connected to the court computer had been erected, so that the defence lawyers and the public could benefit from reading what had been written by the court stenographer. This measure was welcomed, albeit that

it had been tardily taken.

One can, therefore, reasonably suspect that the layout at No. 1 Ankara State Security Court, and the fact that the judges and prosecutor entered and exited the Court room simultaneously and through the same door, facilitating communication between them about the proceedings, both in chambers as well as in the Court room to the absolute exclusion of the defence, gives a picture of an absence of fairness and a feeling that the Court is certainly not independent or impartial. On 20 June, when the judges rose to consider a defence application that had been opposed by the prosecutor, it was possible from the public gallery to see the prosecutor conversing with one of the panel of judges, during deliberations. On another occasion, two judges entered the Courtroom while the prosecutor and the Presiding Judge stayed behind and entered a few minutes later. On 15 August the Presiding Judge began proceedings by informing the Court that one of the witnesses for the prosecution who was due to attend to give evidence was not in attendance to give evidence. This information came directly from the Presiding Judge, and not, as the observer would have expected, from the prosecutor. The inference drawn was that the judge had been provided with this information directly from the prosecutor outside Court.

Read in conjunction with earlier observations it was apparent that (1) the layout of the Court and (2) the practice of the prosecutor and the judges of retiring to the same anti-chamber to consider any applications, made it clear that the prosecutor had access to and the opportunity to communicate with the panel of judges outside the Court to the absolute exclusion of the defence lawyers.

In the Courtroom itself, it was noted on 20 June that the prosecutor sat sufficiently close enough to the wing member of the judge's panel such that a file could be passed between them - again without reference to the defence.

Furthermore, the large Court room was not equipped with a public address system so that everything that was being said in this open and public trial could be easily heard and followed by all attending, the general public included. It was quite difficult sometimes to hear and understand what witnesses were stating, and in particular, what the Presiding Judge was saying or dictating as very often he spoke in a very low and subdued voice. Not having a public address system is of a matter of great concern when one recalls that the trial, in accordance with the standards enunciated in the ECHR, has to be an open and public hearing, and consequently, has to be a transparent trial which cannot give rise to doubts and suspicions. The trial must be one where anyone attending can clearly see, hear and follow all that is happening without any hindrance whatsoever. As mentioned earlier, this concern was in part remedied on 2 April by the erection of a screen connected to the court computer, which enabled the public and the defence lawyers to read what was being entered into the court log. However, there had been thirteen previous hearings where this screen had not been provided.

For all these reasons, it concluded that the lay-out of the Court, the disparity in the treatment of the defence and the prosecution, and the actual and perceived ability of the prosecutor to have contact with the judges gave rise to a significant fear that the principle of equality of arms is not being respected and that the tribunal is neither impartial nor independent.

(3) Examination of Defence Witnesses

At the conclusion of the prosecution case on 23 May, the defence lawyers applied to the Court to call witnesses on behalf of the defence.⁷¹ The prosecutor resisted the application on the grounds that a long period of time had elapsed since the facts which gave rise to the alleged offence took place and that the witnesses would therefore not be able to assist the Court in disclosing any relevant evidence. The judges thereafter refused the defence application to call and examine defence witnesses, citing in support of their decision the reasons advanced by the prosecutor.

Whilst it is recognised that equality of treatment between the prosecution and the defence does not necessarily require the attendance and examination of every witness the defence wishes to call,⁷² in the opinion of this author, it must be questionable whether the decision of the State Security Court was compatible with Article 6 of the ECHR given that 1) the decision applied to *all* potential defence witnesses without exception, 2) the defendants face a sentence of 15 years imprisonment for a serious offence and 3) the testimony of the witnesses will provide the defence with their only means of proving various disputed points. Moreover, reasons advanced for not permitting the attendance and examination of the defence witnesses (i.e. that a long period of time has elapsed since the facts which gave rise to the alleged offence took place and the witnesses would not therefore be able to assist the Court in disclosing any relevant evidence) apply equally to the prosecution witnesses as to the proposed defence witnesses. Yet, the Court was prepared to hear oral testimony from no fewer than 26 prosecution witnesses. The decision of the State Security Court not to permit the defence to call and examine witnesses in support of its case subjected the defence to a procedurally inferior position vis-à-vis the prosecution in contravention of the principle of the equality of arms.

However, at the hearing on 20 June, contrary to the previous ruling where the defence was not allowed to call any witness, 4 witnesses for the defence were allowed to be called to give live evidence. During the 18 July hearing, the defence was allowed to call 6 additional witnesses to support its case.

Nevertheless, despite the fact that defence witnesses were allowed to testify, it was a matter of great concern that normal procedure in criminal trials in Turkey precludes the defence from examining the witnesses. Rather, as in the instant case, it was the Presiding Judge who examines the witnesses. In the present case, after putting questions to the witnesses, the Presiding Judge

simply summarised what he felt each of the witnesses said and thereafter dictated his summary to the Court stenographer, after the defence and prosecution clarified some points as summarised by the judge or indicated that they had nothing to add to what the judge had asked.

The fact that defence witnesses were examined solely by the Presiding Judge, and not directly by the defence who called them, is worrying. Nothing can be more fundamental to ensure a fair trial than to have everything a witness states recorded verbatim into the Court record. This is the only way of examining witnesses which would not give rise to doubts and suspicions as to what a witness had actually stated. Hardly any notes were taken during the evidence given by each of the defence witnesses and the Presiding Judge seemed largely to rely upon his memory of what each witness had said in reply to his questions. This system of examining witnesses inevitably leaves room for doubt as to the veracity or accuracy of the Court record as it is based solely upon recollections and summaries by the Presiding Judge of statements of defence witnesses.

The examination of prosecution witnesses was, however, radically different in that all testimony given by these witnesses was taken down directly by the Court stenographer and kept in the records of the case.

At the hearing on 17 October, the defence applied to the judges to call a further defence witness, Ahmet Turk, to give evidence. The Judges refused the application, adopting the prosecution's objection as their reasons. It was said that it would be wrong for Mr. Turk to give evidence since he had originally been a defendant in the initial trial in 1994.

It is concluded that this ruling to refuse the defence's application to call Mr. Turk to give evidence may well have violated article 6(3)(d) of the ECHR, in that the defence was prevented from securing the attendance and examination of a witness on behalf of the defendants under the same conditions as witnesses against them. There is no provision in domestic legislation which supports the Judges' ruling. Moreover, the reason given for disallowing the testimony of Mr. Turk appeared to be deficient, given that several witnesses on whom the prosecution rely were convicted felons, who were serving terms of imprisonment at the time of these proceedings.

Therefore, the defence have been placed in a procedurally inferior position vis-à-vis the prosecution as the procedure for examining witnesses varied substantially between witnesses for the prosecution and witnesses for the defence.

(4) Cross-examination of Prosecution Witnesses

(a) Equal conditions for Cross-Examination

It was most apparent during each hearing that there lacked parity of conditions for the examination of witnesses by the prosecution and defence. Whereas the prosecutor was able to ask questions directly of the witnesses called in support of the prosecution case, when the defence sought to cross-examine a prosecution witness, it was first required to put its questions to the judge. Furthermore defence questions were repeatedly met with objections from the prosecution and then the judge would proceed to decide whether or not he would put the question to the witness. If the judge decided to ask a question, he would rephrase it and put it in terms which he deemed appropriate.

This procedure for cross-examination of prosecution witnesses by the defence, which is common to all criminal trials in Turkey, prevents the defence from effectively challenging the witnesses brought by the prosecution. The requirement of having to ask questions through a judge puts a potentially unreliable witness on notice of the challenges to his/her evidence and provides him/her with the opportunity to manufacture a suitable but incorrect answer. Furthermore, defence counsel is prevented from examining witnesses in terms which accord with defence counsel's trial strategy. For example, in the hearing on 23 May the defence sought to question a Kurdish-speaking prosecution witness as to the identity of the interpreter who had translated his oral testimony into Turkish for the purposes of his witness statement. The prosecution objected to this question and the Presiding Judge ruled that the witness need not answer the question because it was not relevant. The defence line of questioning was highly relevant in so far as the defence sought to adduce evidence to the effect that the interpreter was in fact a gendarme officer and therefore not impartial.

The defence also sought to question another prosecution witness as to his political allegiance. The prosecution objected to this question and the Presiding Judge again ruled that the witness need not answer the question because it was not relevant. In the opinion of the observer, the question was relevant in so far as the defence sought to adduce evidence to the effect that the witness is actively involved with the Nationalist Action Party (MHP), an ultra-nationalist party whose primary concern is to fight Kurdish separatism and Kurdish political aspirations in Turkey, and therefore not impartial. The defence question was therefore highly relevant to the issue of the credibility of the prosecution witness.

Furthermore, a witness for the prosecution, whose first language was Kurdish, was not provided with an interpreter in the Courtroom. This witness had, with the assistance of an interpreter, prepared a statement written in Turkish. At the hearing on 23 May, he adopted this statement as his evidence-in-chief at the re-trial. The witness was then tendered for examination by counsel for the defence, however, no interpreter was provided. Due to the witness's extremely limited understanding of the

Turkish language (the language in which all Court proceedings are conducted in Turkey), he was unable to fully understand many of the questions put to him by the defence, remarking on several occasions, "I speak very little Turkish", "My Turkish is not very good", "I don't understand".

Concerns arose at this apparent inequality of arms in so far as the prosecution was able to benefit from the witness giving his evidence-in-chief (the written statement) in his first language, Kurdish, but the defence was required to cross-examine the witness in Turkish, a language of which he had only an extremely limited understanding. In order for the prosecution and defence to be afforded a procedurally equal position, a Kurdish-Turkish interpreter ought properly to have been provided for the cross-examination of the witness. In the absence of an interpreter, the Court ought properly to have adjourned the testimony of the witness until a later date with a direction that an interpreter attend on that occasion.

(b) Anonymous Witness

Most alarmingly, at the hearing of 17 October, in furtherance of the prosecution case, written testimony of a prosecution witness, Ejder Pagal, was adduced. The testimony was read by the Judges, as Mr. Pagal was not in attendance at court. He is a serving prisoner. The testimony of this witness was particularly crucial because he alleged that he saw Leyla Zana conversing with Abdullah Ocalan, the former leader of the PKK, at a PKK camp. His testimony also indicated that it was not possible for him to be recognised as he had undergone facial surgery to alter his appearance. It was said that a lawyer from the defence team was present when the witness statement was taken but that she was not allowed to ask any questions of the witness.

Serious concerns emanated from the manner in which the testimony of Mr. Pagal has been introduced as evidence. No reasons were provided by the Judges for reading the statement in his absence, or why it was not possible or desirable to have the witness produced at court, especially given that live testimony of serving prisoners has been adduced in the course of the trial and susceptible to cross-examination.

Moreover, serious concerns surround the reliability of the evidence, given that the identity of the witness was open to question. While it is recognised that the anonymity of witnesses may be justifiable in order to ensure their safety, it was apparent that the Judges took no or no satisfactory steps to ensure the reliability of the evidence, either in content or its source, in order to counterbalance the significant disadvantage under which the defence were accordingly placed in not being allowed to test the evidence of Mr. Pagal⁷³. The defence were provided no opportunity of examining the witness, or shown that any safeguards that the identity of the witness had been verified. Further, no reasons were provided as to why this witness was entitled to the protection of anonymity, when no other witnesses, including other serving prisoners and former associates of the defendants, have. Therefore, grave concerns about the handling of this evidence remained, and

significantly detracted from the actual and perceived fairness of the proceedings.

(c) Hearings in Satellite Courts

At the hearing on 16 January, the Judge read testimony from a witness, Abdulrehab Kandemir. Mr. Kandemir is a serving prisoner. His evidence was heard at a local court, and the transcript of his evidence was read at the Ankara State Security Court to be included in the trial. At the hearing on 12 March 2004, the judge read testimony from a witness, Ali Dursun, who is a serving prisoner. His testimony was taken at a local court in Bursa, and the transcript of his testimony was also read at the Ankara State Security Court in the same way. None of the defendants were permitted to attend or participate in either of these hearing or other hearings which have taken place in local State Security Courts.

The evidence of Mr. Dursun and Mr. Kandemir, prosecution witnesses, were both exculpatory in nature, and therefore it was welcomed that this evidence was adduced despite the fact it did not assist the prosecution case.

Nevertheless, concerns remained about the practice of hearing the testimony of prosecution witnesses in local State Security Courts. Those concerns are summarised in the following way: different judges from those in Ankara hear the testimony which inevitably impacts on the consistency of approach to the evidence. The defence are restricted in their ability to question the witness effectively. No reasons have been given for not bringing those witnesses to give live evidence in Ankara.

Furthermore, it is alarming that the hearings in which the testimony of imprisoned witnesses took place were in the absence of the accused. The right to a fair trial enshrined in Article 6(1) of the ECHR includes the right to hearings in the presence of the accused⁷⁴. The defence lawyers requested that the defendants be allowed to attend these hearings, but this application had been refused. There was no suggestion that the defendants had at this stage had waived their right to be present or that the Turkish authorities have acted with any diligence to secure the defendants' attendance. Their absence prevented the defendants from fully participating in the trial. In particular they were prevented from effectively examining witnesses against them, as they were unable to consult with their lawyers and provide instructions during the hearings. The exclusion of the accused from these hearings is completely unjustifiable and violates the right to a fair trial. No explanation has been provided why the witnesses who are imprisoned cannot be brought from their place of detention to give live evidence in the main court.

(5) The Defence was Prevented from Adducing Relevant Evidence

Both in the hearing observed on 23 May and at previous hearings, several prosecution witnesses gave evidence as to the distance between a coffee shop where the defendants were alleged to have held a meeting in support of the PKK and a gendarme station. The evidence of the prosecution witnesses ranged from 60 metres to 700 metres. In that hearing, counsel for the defence applied to the Court to have an independent examiner appointed in order to undertake an official measurement of the distance between the coffee house and the gendarme station. The prosecution objected to the application and the Court refused to grant the defence request.

The decision of the Court to refuse to grant the defence application provides a further instance of the defence having been substantially disadvantaged vis-à-vis the prosecution. The measurement evidence, which according to Turkish law could only have been obtained by an independent Court appointed examiner, would have been highly probative of the credibility or otherwise of the prosecution witnesses. The failure of the Court to request that such evidence be obtained denies the defence an effective opportunity to challenge the prosecution case and effectively advance its own case and casts doubt upon the willingness of the Court to subject the evidence of the prosecution witnesses to any detailed scrutiny. The equality of arms principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself.

(6) The Prosecution Failed to Disclose Material Evidence Against the Accused

During the course of the hearing observed on 23 May, a prosecution witness produced an audio-cassette which he alleged contained a recording of a conversation he had had with the defendants in which they expressed support for the PKK. This cassette was not disclosed to the defence prior to the trial and therefore the defence was denied the opportunity of having knowledge of and commenting on material evidence filed by the prosecution.

It transpired that the original audio-cassette contained a recording of a conversation held in Kurdish, but that this had subsequently been translated into Turkish and the cassette produced by the prosecution witness in fact contained the Turkish translation. Upon a request from the defence, the prosecution agreed to disclose the Turkish version of the recording but not the original Kurdish version. A defence application for the original Kurdish recording to be disclosed was refused by the Presiding Judge.

The failure of the prosecution to disclose either the Turkish or Kurdish version of the audio-cassette prior to trial must have inevitably affected the conditions under which the defence cross-examination took place. The defence was denied the opportunity of familiarising itself with the

evidence before the Court and commenting on its existence, contents and authenticity. Perhaps even more concerning, however, is the decision of the judge not to order disclosure of the cassette alleged to contain a recording of the original conversation in Kurdish. Without a copy of the original Kurdish conversation, the defence is fundamentally prejudiced in two key respects. First, it has no means of testing the prosecution witness's claim that the voices on the cassette are in fact those of the defendants; and second, no means exist for testing whether the translation of the Kurdish conversation into Turkish that has been admitted into evidence is in fact an accurate translation.

(7) The Recording of Legal Submissions of the Defence and Statements of the Defendants

Significant concerns that the principle of equality of arms was not fully respected in so far as the prosecutor's submissions to the Court were entered directly into the Court record in his own words, whilst the defence lawyers and defendant were barred from dictating defence submissions and speeches directly into the record. Instead, the defence had to rely upon the judge to summarise (rather than repeat verbatim) the defence submissions before they were entered into the Court record. This procedure, which is common to all criminal trials in Turkey, fails to comply with the principle of equality of arms in so far as it places the defence at a substantial disadvantage vis-à-vis the prosecution.

Furthermore, the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed could be said to deprive appellate Courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower Court. These matters thus serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

Although, during the hearing the defence can object to the judge's summary, acceptance of this objection is within the judge's discretion. After the hearing is over, the defence lawyer has no right to object to how his or her argument is summarised in the record. In the hearings observed, the defence counsel did seek to challenge the judge's summary on at least two occasions. On both occasions the judge amended his summary.

Further, at each hearing, each of the defendants was afforded the opportunity of making a statement in support of his or her defence. However, as with the defence lawyers' submissions, statements by the defendants to the Court, were neither recorded verbatim in the Court record by the Court stenographer, nor were summarised by the judge for inclusion in the Court record.

On some occasions the defendants provided copies of their statements to the Court but on 20 June Orhan Dogan made his statement from notes and subsequently did not provide a copy of his statement to the Court. No record of his statement was included in the Court record by the stenographer either in full or in summary form, through the judge. This procedure gives the impression that submissions by defence counsel as well as those by the defendants themselves are not afforded the appropriate weight.

Thus, the unequal manner in which evidence and submissions are taken leads to a violation of the right to a fair trial and is another clear example of inequality of arms between the prosecution and the defence, the former being afforded a more advantageous position than the latter.

(8) Continuity of the Judges' Panel

At the 15 August hearing, the panel of judges was differently composed from the proceedings on 20 June. One wing member of the panel in June presided on 15 August and the wing members were, as far as the observer was able to ascertain, entirely new to the proceedings.

Further, on 15 September, the observer noted that the panel of judges was yet further re-composed. The Presiding Judge from 15 August returned to his role as a wing member, while another wing member from 20 June presided in September.

Read in conjunction with the earlier observations that, (1) the submissions of the defence lawyers are summarised for the Court record, (2) the testimony of defence witnesses is summarised by the judge for the Court record, and (3) the witnesses for the prosecution are not directly cross-examined but are questioned via the judge who then summarises a line of questioning, the lack of continuity of the panel of judges exacerbates the problems already referred to earlier. In particular, the potential margin of inconsistency further gives rise to the impression that defence arguments and evidence are not important.

The change in judicial personnel impacts severely upon the ability of the Court to give a fair verdict based on the totality of the evidence. It is considered that it is an impossible task to reach a verdict when the Judges making the decision will not have heard all of the evidence, and will therefore have to rely on the record of proceedings, which, it has already been noted, is a source of concern itself, given the manner in which proceedings are recorded. It is concluded, therefore, that the lack of continuity in the panel of judges significantly impacts on the fairness of the trial.

(9) Alleged Mistreatment of Defendants

At the hearing on 15 September, an allegation was made by two of the defendants, Orhan Dogan and Hatip Dicle, that security forces had treated them in an inhumane and degrading manner while they were being transferred to Court. Mr. Dogan and Mr. Dicle informed the Court of the alleged treatment when they made their statements to the Court. Details of the alleged mistreatment were, however, not given. When the judge came to summarise the speeches for the Court record, he had to be reminded by the defence lawyers to include in his summary, reference to the allegation. However, the Court did not request an investigation into the allegation, nor did the prosecutor indicate that he would undertake any effort to investigate the said allegation, nor did he request that the security forces deter from such behaviour. The author was informed by defence counsel that failure to undertake any investigation into the said mistreatment so that the alleged perpetrators could at least be warned about their conduct is not normal procedure.

While it is welcomed that the Presiding Judge noted the complaint for the Court record, concerns still remain as to whether any further action will be taken by either the judge or the prosecutor. If defendants' allegations are true, this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants prior to the trial, thereby limiting their ability to participate effectively in the proceedings. The failure to investigate the incident at the very least leads to a perception of complicity between the Court and the security forces which further taints the proceedings. Further, the Turkish authorities have a positive obligation under the ECHR to ensure those under its jurisdiction are not subjected to inhuman and degrading treatment, and if there are such allegations, then the authorities are obliged to undertake a rigorous, independent investigation. Such a failure to investigate allegations of inhuman and degrading treatment amounts to a breach of Article 3 of the ECHR.⁷⁵

(10) The Right to a Public Hearing

At the conclusion of the hearing on 16 January 2004, Judge Karadeniz ruled that the defendants would remain in detention and adjourned the trial until 20 February 2004. As the defendants were being led from the courtroom, a large section of the public who were seated in the public gallery applauded the defendants. As a consequence, Judge Karadeniz ruled that no member of the public who was in attendance at the hearing on 16 January would be permitted entry to the court on the 20 February. No investigation was undertaken to ascertain which members of the public had applauded, but nevertheless, the sanction applied universally to all members of the public.

On 20 February 2004, police were stationed at the boundary of the court precinct in order to check the identity of those who wished to enter the court building. Additional police were stationed inside the court building to monitor those who passed the security checks into the building. The

police were furnished with a list of individuals said to have attended the trial on 16 January.

There were dozens of members of the public who were prevented from entering the court precinct, and others including one lawyer who were partially impeded. The observer was ordered not to watch what was happening by a member of the police and was thereafter hindered in observing the access of the public to the court precinct. Inside the court building, police checked the identity of those who had been permitted to proceed against a list of names. Concerns about the accuracy of the list arose from the fact that the name of one member of the delegation from the European Parliament appeared on the list although in fact this individual had not attended the trial on 16 January 2004.

The number of members of the public who attended the hearing on 20 February was significantly reduced, from approximately 400 for each of the previous hearings observed to approximately 75. It is considered that such a numerical discrepancy is explained in part by the effectiveness of the police at the precinct to the court, and in part by the fact that many, deterred by the Judge's remarks in January, stayed away from the hearing. A newspaper reported that twelve people had been refused entry into the court.⁷⁶

On 12 March, police were again stationed at the entry of the court precinct in order to prevent members of the public from attending the hearing. As at 20 February, the numbers of those who succeeded in gaining access to the court was significantly reduced. Again, only approximately 75 members of the public were able to observe the trial.

Article 6(1) of the ECHR provides that everyone is entitled to a public hearing. The "press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society..."

Article 23 of Turkish Law 2845 concerning the establishment and duties of the State Security Courts provides authority to the judge to exclude or have arrested any person who disrupts the public order in a hearing. Article 378 of the Turkish Criminal Procedures Code provides a similar power to the judge.

The public character of criminal proceedings is a crucial means by which confidence in the justice system can be maintained. However, while it is recognised that the judge has the discretion to exclude members of the public where it is considered that public order may be disrupted. It is further recognised that there was no ruling preventing other members of the public from attending, nor indeed members of the international community who have been observing the trial (including MEPs, observers from ICJ/CIJL, FIDH and staff from various embassies). The trial remained to a certain extent public, and therefore susceptible to scrutiny, (including expert scrutiny).

However, for the following reasons, concerns remained about the exclusion of members of the public who attended the hearing in January. First, the applause to which Judge Karadeniz objected did not in fact interfere with the proceedings, as it was conducted *after* the conclusion of the hearing. Second, the members of the public who had attended not only the hearing in January but also all previous hearings, had in the main behaved impeccably, demonstrating deference and respect to the court proceedings. Third, no investigation was undertaken to ascertain who in fact had applauded. Consequently, there was a real risk that those who had not applauded were excluded, including the families of the accused. Fourth, given the extreme measure proposed, no warning had been issued to the public to modify its behaviour accordingly. A warning about future conduct may well have been a sufficient measure to achieve the desired order. Fifth, there was no indication from the judge that the exclusion sanction that he imposed would continue at future hearings beyond the hearing of 20 February.

The unfettered right to a public hearing is a fundamental principle enshrined in the ECHR and the International Covenant on Civil and Political Rights. Judge Karadeniz's exclusion of a large number of members of the public from the hearing may have constituted a disproportionate response to any pressing social need, and therefore was not justified. Further, because of the high profile of this trial, the public character of these proceedings assumes a greater importance. While members of the international community and official observers were not prevented from attending the trial, it is also noted that the right to a public hearing primarily affects and benefits the local community. Public confidence in the justice system emanates first from those whom it affects, namely the people of Turkey. Therefore, the right to a public hearing may well have been violated.

(11) The Guarantee to be Tried Within a Reasonable Time

At the hearing on 21 November, the prosecution had not succeeded in securing the attendance of any of the four witnesses who were due to attend to give evidence. No satisfactory reasons were provided for the failure of the prosecution to have secured the attendance of the witnesses, especially given the fact that two of the witnesses were well-known professionals who could be easily located at their places of work. After speeches from the defendants and submissions from the lawyers for the defence, the trial was adjourned until 16 January 2004. No reasons were given for such a lengthy adjournment.

At the hearing on 20 February, the court was due to hear a deposition from a prosecution witness who is detained in prison in Bursa. However, no deposition had been taken, and therefore the trial was not able to proceed as planned. No satisfactory reasons were provided for the failure of the prosecution to have secured the testimony of the witness. After speeches from the lawyers for the defence, the trial was adjourned until 12 March 2004.

These delays in the proceedings were typical examples of a number of delays that have hindered an expeditious resolution of the trial. The trial has thus far been heard at the rate of one day per month yet no adequate justification has been provided for proceeding in such a slow manner, particularly given that the defendants continue to be held in detention.

The protracted nature of the proceedings must be considered in conjunction with the fact that between July 2001 (when European Court of Human Rights ruled that Turkey had breached the defendants' right to a fair trial in the initial trial) and February 2003 (when President Sezer ratified the second "Harmonization Law" that granted the right to re-trial for those whom the European Court of Human Rights had ruled had not received a fair trial), there was no domestic remedy available to the defendants. Therefore, there was a delay of 19 months before the re-trial could even begin.

While Turkey's ratification of the second Harmonization Law is welcomed, the protracted proceedings that have been encountered during this re-trial have compounded an initial unacceptable delay. As a State party to the ECHR, Turkey must organise its legal system such that its courts fully comply with the provisions the ECHR as well as other treaties to which Turkey is a State party. The author considers that hearing a trial over a period of 15 months to date in addition to the delay of 19 months before the re-trial commenced demonstrates the inability of Turkey's legal system to comply with the reasonable time guarantee provisions of Article 6(1) of the ECHR⁷⁷.

Furthermore, having regard to the lack of legal and factual complexity of the case as well as the conduct of the accused and the judicial and prosecuting authorities, there are no factors that could justify such protracted proceedings⁷⁸. There is no significant factual complexity to the case as the defendants face only one charge each. Moreover, there has been no impediment to the Court's collection of evidence as all the evidence which the prosecution needed to have compiled to present its case to the court would have been available for the initial trial in 1994.

Where fresh evidence has been obtained from witnesses who had given evidence in the 1994 trial, the collection of such evidence has been conducted extremely inefficiently and has caused the trial process to be further delayed. In addition, there has been no indication that any of the defendants have employed dilatory tactics which could be said to have hindered the progress of the trial. Furthermore, given the fact that the defendants have been detained for ten years and that the present re-trial is to be considered as, and in actual fact is, a completely new process with the aim of remedying the defects that existed in the first trial, the author finds that the delay in the proceedings is unreasonable and that the court has failed to act with the special diligence required of it.

The court had indicated in 12 March 2004 that a verdict would be reached at the hearing on 2

April 2004. However, at that hearing, the judges heard lengthy and complicated legal and factual argument pertaining to the evidence of the trial and the fairness of the proceedings. The hearing was adjourned until 21 April for consideration of the arguments presented and to provide the defendants one further opportunity to attend the court so that the verdict could be announced to them in person. Despite previous repeated delays in the trial, on this occasion, it is believed that the appropriate decision was made by the court.

(12) Trial by an Independent and Impartial Tribunal

There continue to be misgivings relating to the extent of the independence of the judiciary. Although the Turkish Constitution prohibits state authorities from issuing orders or recommendations concerning the exercise of judicial power, it is widely reported that in practice, the Government and the National Security Council (NSC), a powerful advisory body to the Government composed of civilian government leaders and senior military officers, periodically issues announcements or directives about threats to the State, which can be interpreted as instructions to the judiciary. Furthermore, the ruling body of the judiciary, the High Council of Judges and Prosecutors has the potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The High Council is chaired by the Minister of Justice, a Minister of Justice Under-Secretary and five judges selected by the President. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council and therefore there is direct executive influence in the process of judicial appointment, promotion, transfer and discipline. Furthermore, decisions of the Council are not open to judicial review.⁷⁹ The NSC, an omnipotent group within the Government, can be likely to influence the High Council which, in turn, can exert pressure on the judges of the State Security Court in the instant highly politicised case.⁸⁰

There was some evidence that the theoretical concerns that the independence of the Judges may have actually been compromised by external executive pressure. In between the hearings of the trial in October and November, it was widely reported in the Turkish press⁸¹ that a government official had said that if the European Union were to proscribe KADEK as a terrorist organisation then the “DEP trial (ie. this trial) may take a different course”. Although the source of this remark remains unidentified, naturally there were concerns that the course of this trial may have been susceptible to executive influence motivated in turn by political considerations unconnected with the issues of this trial.

V Violation of the Right to Liberty

The defendants have been in detention since their arrest in 1994 and subsequent trial by the State Security Court that year. The State Security Court granted the defendants a re-trial in February 2003 pursuant to legislative changes (the second “Harmonization package”) that granted the right to automatic re-trial for those whom the European Court of Human Rights had ruled had not received a fair trial.⁸² Despite this re-trial, the defendants continue to remain in detention and repeated applications by defence counsel for their release are denied. Therefore the continued detention of the defendants may have constituted an infringement on their right to liberty and security pursuant to Article 5 of the ECHR.

As had already transpired in earlier sittings, at the conclusion of the hearing on 18 July, all members of the defence team made verbal submissions for each of the four defendants to be released. Whilst the defence lawyers brought various submissions and legal arguments to substantiate their request for the defendants’ release, these submissions, however, were not taken down verbatim by the Court stenographer, but merely and very briefly summarized by the Presiding Judge. The prosecution simply objected to the release of the defendants without giving any reasons to substantiate its objection. Unlike the defence submissions, the objection of the prosecution was recorded verbatim by the Court stenographer.

Following a short ten minute break intended for the panel of three judges, along with the prosecutor, to discuss in chambers the request for the release of the defendants submitted by the defence team, the Court then reconvened and the Presiding Judge read out the Court’s decision refusing the defence request for the defendants’ release. The observer was informed by the interpreter that the reason given by the Court for refusing this request was that there were still other witnesses to be heard in future sittings of this case. It is recognised that this may constitute a valid reason for refusing an application for bail, in order to prevent the defendants from interfering with the course of justice (i.e., committing an offense or fleeing after having done so). However, it was not argued by the prosecution that there was a fear or suspicion that the defendants would in fact interfere with the course of justice, nor did the Presiding Judge rule that a fear or suspicion of interference with the course of justice was the reason that detention should continue. Therefore, the reasons given for the continued detention of the defendants - namely that they are to remain in detention as more witnesses remain to be heard - were deficient.

On 15 September, the defence made a further application for the release of the defendants, following the same procedure as in the July hearing. The Presiding Judge informed the Court that the application had been refused but gave no reasons for his decision. In each of the subsequent hearings, the defence made an application to the court for the defendants to be released. No applications were successful. No reasons were provided for the defendants’ continued detention.

The trial was heard on fifteen days, at the rate of one day per month. The protracted proceedings in the trial give rise to a violation of Article 5 of the ECHR.

Where a person is held in detention pending the determination of a criminal charge, that person can expect special diligence on the part of the competent authorities to reach such determination of guilt or innocence with expedition. The periods of inactivity in the trial were unacceptable and therefore, the obligation to proceed expeditiously was violated⁸³.

Therefore, the delay in reaching a conclusion to the trial, read in conjunction with the fact that: (1) the defendants have already been in prison for almost nine years, (2) no rationale is given for the continued detention of the defendants, (2) there is a presumption by the Court that the 1994 conviction was valid in spite of the decision of the ECtHR to the contrary, and (3) the Presiding Judge had allegedly earlier commented on the guilt of the defendants in a pre-trial application⁸⁴ are factors which do not constitute sufficiently valid legal grounds to continue the detention of the defendants.

VI Conclusion

It is regrettable that the State Security Court has not remedied the defects identified by the European Court of Human Rights in 2001. Despite some positive rulings by the State Security Court, the in the main, the fundamental principle and the right to a fair trial were not fully respected and implemented as required by the ECHR. In particular, the *violation of the principle of equality of arms* between the prosecution and the defence, the *violation of the right to liberty* because of the continued detention of the four defendants, the *violation of the presumption of innocence* due to the insufficiently valid legal reasons given for such a state of affairs, and the reasonable suspicion that the *Court is not an independent or impartial tribunal* for the reasons stated above, still prevail today. These deficiencies, coupled with the fact that the National Security Council, through the High Council, is in a position to exert pressure on the judges indicate that No. 1 Ankara State Security Court was neither independent nor impartial when hearing the case of Leyla Zana and three other Kurdish former parliamentary deputies.

VI Background Information

Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak were former members of the Turkish National Assembly and the Democracy Party (DEP).⁸⁵ On the basis of repeated applications over the course of nearly three years by the public prosecutor to the Ankara State Security Court, on 2 March 1994, the National Assembly lifted the applicants' parliamentary immunity. Shortly thereafter, the defendants were taken into police custody. On 16 June 1994, the Constitutional

Court dissolved the DEP and ordered the party's MPs to vacate their parliamentary seats.

The defendants were initially charged with "treason against the integrity of the state" a capital offence under Article 125 of the Penal Code. That charge was later changed to "membership in an armed gang" within the meaning of Article 168 of the Penal Code.

In its judgement of 8 December 1994, the Ankara State Security Court sentenced the defendants to 15 years imprisonment within the meaning of Article 168. The Court rejected the charge under Art. 125. It found, in sum, that defendants had engaged in intensive "separatist" activity under instructions from the PKK – a separatist armed group seeking to fund a Turkish state in south-eastern and eastern Turkey.

On 17 January 1996, the former parliamentarians lodged an application with the then European Commission on Human Rights alleging, by reference to Articles 6 and 10 of the ECHR that they had not been afforded a fair hearing by an independent and impartial tribunal and that their freedom of expression had been infringed.

On 17 July 2001, the European Court of Human Rights ruled that the former members of the Turkish Parliament had not received a fair trial. The Court ruled that there had been a violation of Article 6 because the Ankara State Security Court, which at the time of the trial included a military judge, was not "an independent and impartial tribunal". The Court further unanimously held that the applicant's rights under Article 6(3)(a) and (b) had been violated in so far as there had been a change in the characterisation of the offence during the last hearing of the trial and the applicant's had not been allowed additional time to prepare their defence against the new charge and furthermore, the applicant's had been denied an opportunity to examine or have examined key witnesses for the prosecution.⁸⁶

On 3 February 2003, Turkey's President, Ahmet Necdet Sezer, ratified the most recent 'Harmonisation Law' aimed at bringing the country closer to meeting European Union membership requirements pertaining to human rights. According to the new law, when the European Court has ruled that a person has been denied a fair hearing in accordance with Article 6, that person shall have the right to a re-trial. On 4 February 2003, the ex-parliamentarians officially lodged an application for a re-trial pursuant to the new law adopted by the Turkish Parliament.

Footnotes

⁵³ At the time of writing, Leyla Zana was still in prison. She and the other former parliamentary deputies were released on 9 June 2004.

⁵⁴ KHRP case of *Sadak and Others v. Turkey* (No.1) (Nos. 29900/96, 29901/96, 29902/96 and 29903/96), para.40.

⁵⁵ *Ibid.*

⁵⁶ The author was appointed by the International Commission of Jurists of the Centre for Independence of Judges and Lawyers to observe ten of the fifteen hearings.

⁵⁷ For a full discussion of each issue, please see Section IV of this report.

⁵⁸ *Jordan v UK*, No. 24746/94, 4 May 2001

⁵⁹ Article 125 of the Turkish Penal Code provides:

“It shall be an offence punishable by death to commit any act aimed at subjecting the State or part of the State to domination by a foreign State, diminishing the State’s independence, breaking its unity or removing part of the national territory from the State’s control.”

⁶⁰ *European Court Orders Turkey to Grant Retrial for Leyla Zana and Others*, KHRP Newline Issue 21 Spring 2003 p.10.

⁶¹ Joint FIDH and OMCT Press Release: Turkey: Release jailed Kurdish deputies 29 April 2003.

⁶² Basic Principles on the Independence of the Judiciary, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, endorsed by General Assembly Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985. See G.A. Res. 40/32, UN GAOR, 40th Sess., Supp. No. 53, at 204, UN Doc. A/40/53 (1985); Res. 40/146, UN GAOR, 40th Sess., Supp. No. 53, at 254, UN Doc. A/40/53 (1985).

⁶³ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 1990. G.A. Res. 45/121, 45th Sess.

⁶⁴ *Salabiaku v. France* (1991) 13 EHRR 379

⁶⁵ *Kaufman v. Belgium* (1986) 50 DR 98, EcmHR 15.

⁶⁶ *Abdoella v The Netherlands* (1992)20 EHRR 585.

⁶⁷ Amnesty International, *Concerns in Europe and Central Asia, Turkey, January – June 2003* states, “A second ‘adjustment package’ that came into effect on 4 February [2003] granted the right to automatic retrial for those who the European Court of Human Rights (ECHR) had ruled had suffered a violation of the European Convention on Human Rights as a result of a Court judgment in Turkey. This opened the way for a retrial of the four imprisoned Democracy Party (DEP) deputies - Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak - who, according to an ECHR ruling, had been found not to have received a fair trial in 1994.” p.2.

⁶⁸ See, ICJ/CIJL *Report of the Re-Trial of Leyla Zana and Three Other Kurdish Former Parliamentarians before No. 1 Ankara State Security Court on 23 May 2003*.

⁶⁹ Article 6(2) of the ECHR states, “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

⁷⁰ *Ferantelli and Santangelo v. Italy* (1996) 23 EHRR 288, paragraphs 59-60.

⁷¹ Defence counsel, informed the ICJ observer that defence witnesses would include new witnesses whose testimony had not been heard at the first trial.

⁷² *Engel and Others v. Netherlands* (1979-80) 1 EHRR 647 at para 91; *Bricmont v Belgium* (1990) 12 EHRR 217 at para 89

⁷³ *Doorson v Netherlands* 22 EHRR 330

⁷⁴ *Ekbatani v Sweden* (1988) 13 EHRR 504

⁷⁵ *Jordan v UK*, No. 24746/94, 4 May 2001

⁷⁶ *Turkish Daily News*, 21 February 2004.

⁷⁷ See *Bunkate v The Netherlands* Ser.A. no248-B, p.31, para 23, where 15 1/2 months of inactivity and unjustified slowness violated article 6. See also *Matwiejczuk v Poland* (App No 37641/97) 2nd December

2003, where 13 months without a hearing demonstrated that no “special diligence” had been displayed by the authorities.

⁷⁸ *Zana v Turkey* (1999) 27 EHRR 667.

⁷⁹ For a detailed discussion see Chapter VII of *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission*, 1999, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.

⁸⁰ At the hearing on 15 September, Orhan Dogan alleged that the NSC had in fact named the four defendants (and others) as people “harmful to the state”, in a document which had been distributed to the main institutions, including the Ministry of Justice.

⁸¹ *Hurriyet* (23rd October 2003), *Radikal*.

⁸² See footnote 13.

⁸³ *Abdoella v The Netherlands*(1992)20 EHRR 585, paragraph 24

⁸⁴ See, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three other Kurdish Former Parliamentarians before the No.1 Ankara State Security Court on the 23 May 2003*.

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Recent Developments in Cases Before the Immigration Appeal Tribunal Involving Turkish Kurds Seeking Political Asylum in the United Kingdom⁸⁷

Lawyers regularly representing Kurdish asylum seekers from Turkey are already familiar with the following case law developments over the last eighteen months. These case notes discuss the key Immigration Appeal Tribunal (IAT) decisions of *Polat v SSHD* [2002] UKIAT T04332, *Hayser* [2002] UKIAT 07083, *A(Turkey)* [2003] UKIAT 00034 (also referred to as *ACDOG*), and *O (Turkey)* [2004] UKIAT 00038.

These cases have had an important impact on the evaluation of Kurdish asylum appeals before the IAT and adjudicators. However none of these decisions has laid down any new principles of law; they have simply applied settled law on the Refugee Convention and Article 3 of the European Convention on Human Rights. In addition they are not starred decisions and do not have a binding effect on adjudicators or differently constituted tribunals.

They therefore amount to no more than guidance on the evaluation of risk on hypothetical return to Turkey for Kurds from Turkey who have sought asylum in the UK. That guidance promulgated by differently constituted Tribunals is founded on evidence from Country Experts and Non Governmental Organisations. The Home Office Country Information Policy Unit (CIPU) reports play a central role in the process of risk assessment by the IAT. The CIPU reports are produced twice yearly and their proper function is to present a balanced summary of the available background country evidence.

The term “separatists” is used here in the same sense that it was used by the IAT in *Hayser* (para 68 x.), namely, “... suspected ... membership of the PKK (now KADEK), HADEP, left-wing radical organisations such as the DHKP/C or TKP/ML, militant Islamic groups, or of giving support to one of those organisations ... is likely to be regarded as ... separatist ...”

The majority of Kurds seeking asylum in the UK have been involved in low level support for separatist organisations such as HADEP (now DEHAP) and suffered detention and torture as a result. Most of these claimants travel to the UK overland with the assistance of smuggling networks

known as Sebeke and therefore do not usually have valid Turkish passports or identity documents in their possession. The fact that low level activists seek asylum abroad is unsurprising when the views of respected country experts are taken into account. For example David McDowall said in a report dated 18 October 2002:

“Opposition parties in Turkey, ... were subject to persistent and severe repression. The pro Kurdish party, HADEP, had been subjected to easily the most repression such as arrests and detention. Such repression, aimed to silence critics of the regime, has also been directed at civilian and democratic organisations such as associations, foundations, professional associations and trade unions. Statistics specifically relating to HADEP and other political parties put beyond doubt the fact that HADEP is uniquely targeted by the security forces, despite its formal legality. According to TIHV, out of 3468 known members of political parties detained in 2001, 3245 (ie 94%) were members of HADEP. HADEP is uniquely targeted because it represents the Kurdish interest. Children have also been the victims of arbitrary repression by the security forces. One cannot argue that they are anything but “low level”. Nor can one realistically suppose that even a majority of the 3245 persons detained were senior level, unless one conceives as (sic) this party as “all chiefs and no indians”.”

Polat v SSHD, 20 September 2002

In *Polat v SSHD* [2002] UKIAT T04332, 20/ 9/2002, the IAT chaired by Dr. Storey took the view that only prominent separatist activity or prominent family connections would give rise to a real risk of persecution. It was accepted that even when there was a record of separatist activity then unless it was high profile it would not create a real risk of persecution.

The tribunal considered the available background evidence on Turkey and produced a non-exhaustive list of ‘factors likely to be relevant in deciding whether an appellant will face a real risk of persecution’ (para .30). Those factors were expressed in the following terms:

‘whether or not the authorities will ill-treat a returnee with some record of involvement in a separatist organisation must now be dependent on a number of factors, including but not confined to the following nine: a) the level of the appellant’s involvement in that organisation (whether he would be considered as a prominent member or supporter); b) how long ago the appellant was last arrested or detained; c) whether the circumstances of the appellant’s past arrests and detention (if any) indicate that they did in fact view him as a suspected separatist; d) whether the appellant was charged or placed on reporting conditions or now faces charges; e) the degree of ill treatment he received in the past; f) whether he or she has family connections with a prominent member

of a separatist organisation such as the PKK or HADEP; g) how long a period elapsed between the appellant's last arrest and detention and his departure from Turkey; h) whether in the period after the appellant's last arrest there is any evidence that he was kept under surveillance or monitored by the authorities. (i) whether the appellant's home area is in one of the four remaining state of emergency provinces: Diyarbakir, Tunceli, Sirnak and Hakkari'. (para.29)

In the process of formulating this guidance the IAT were careful to point out they were not creating an exhaustive list and did no more than identify factors likely to be relevant to whether an appellant will face a real risk.(para 20). This approach was re-emphasised by the IAT in the subsequent cases of *Hayser* and *A(Turkey)* and before that by the Court of Appeal in *Ozcan* [2002] EWCA Civ 1133. At para.22 of *Ozcan* Potter LJ said, when considering the case of a Kurdish asylum seeker from Turkey, each case must be considered on an individual basis and not on the basis of categorisation.

When the IAT applied these nine risk elements to the facts of *Polat* they found that, in the absence of outstanding criminal charges, insufficiently prominent family connections with the PKK, avoiding military service by payment of a bribe during the last arrest, and an interval of two years between this last arrest and departure from Turkey there would be no risk of persecution on return to Turkey.

The IAT justified this somewhat sanguine view of the risks to a low level 'separatist' by reference to the reduction of the armed conflict involving the PKK in Southeast Turkey in recent years (see para. 28)

The appeal of *Polat* was accordingly dismissed but has subsequently been overturned by the Court of Appeal and remitted back to the IAT for rehearing.

The overall effect of the *Polat* guidance was that low level separatists albeit with recorded past detentions would be unable to satisfy the UK courts that they qualified for protection under the Refugee Convention and ECHR.

Hayser, 6 March 2003

There then followed a more favourable decision for asylum seekers in the form of *Hayser* [2002] UKIAT 07083, chaired by Mr.Moulden on 15 January 2003 and promulgated on 6 March 2003. In that case the IAT was compelled to formulate more extensive risk factors than *Polat* following the emergence of new background evidence on Turkey. The guidance which emerged from *Hayser* was capable of allowing a low level separatist with a recent history of detention without charge to be

recognised as needing international protection.

In *Hayser* the IAT paid very close attention to the November 2002 CIPU. In particular it was noted (para. 21) that there was a GBTS computer system in Turkey reported in CIPU November 2002 at 5.61:

“Turkey has a central information system known as the Genel Bilgi Toplama Sistemi (General Information Gathering System) ... GBTS. The system stores various personal data. ... it contains information on outstanding arrest warrants, previous arrests, restrictions on travel abroad, possible draft evasion or refusal to perform military service and tax arrears. Sentences which have been served are in principle removed from the system and entered into the nationally accessible Judicial Records (Adli Sicil).”

When considering the implications for returning failed asylum seekers the IAT noted (para. 28) that CIPU at 6.91 stated:

“Anyone suspected of having committed criminal offences is transferred to the relevant investigative authority. In Istanbul this is generally the Police headquarters, ... in Bakirkoy, Persons suspected of membership of the PKK, left-wing radical organisations such as the DHKP/C or TKP/ML, militant Islamic groups, or ... support ... of those organisations is handed over to the Anti Terror Branch, which is housed in the police HQ mentioned above. Torture or ill-treatment of suspects at the Police Anti Terror Branch cannot be ruled out.”

The views of David McDowall in relation to low level political activity were cited with approval by the tribunal. The then recently emerging evidence drove the IAT to the following conclusions in para. 68:

- i. Torture is still endemic in Turkey. The only recent improvement was an indication that methods of torture were less likely to leave visible marks.
- ii. The GBTS system stores various personal data. This includes information on criminal convictions, criminal records, outstanding arrest warrants, previous arrests, official judicial preliminary inquiries or investigations by the police or gendarmerie etc.
- iii. On return to Turkey and at the point of entry all Turkish nationals, including returning failed asylum seekers, are checked against the GBTS computer records.
- iv. Returnees with no documents or temporary travel documents, will be perceived as a failed asylum seeker.

v. If a returnee is thought to be a failed asylum seeker or if the GBTSS computer records reveal information which is regarded as suspicious he or she is likely to be detained for interrogation at the point of entry.

vi. Interrogation is intended to establish or check personal particulars, reasons for and time of departure from Turkey, grounds for seeking asylum, reasons why the application was rejected, any criminal records at home and abroad, and possible contacts with illegal organisations abroad. These were only examples and the questioning was likely to concentrate on the factor(s) which excited suspicion in the first place.

vii. Interrogation at the airport was unlikely to amount to persecution, although there is a risk of ill-treatment if an individual upon transfer to the Police HQ in Bakirkoy or the Political (or Anti-terror) Department headquarters on Vatan Caddesi.

viii. If as a result of interrogation and further inquiries there is no continuing suspicion the person is likely to be released after an average of 6 to 9 hours.

ix. When individuals are held for interrogation, police at the point of entry are likely to seek further information from police or gendarmerie stations in the birthplace and other places of residence in Turkey. If they hold any information about the individual it will be more detailed than that shown on the central computer records.

x. If it is discovered during the initial computer check, interrogation, or inquiries in the home that area an individual is suspected of membership of 'separatist' organisations they are likely to be handed over to the Anti Terror Branch. Once transferred to the Anti Terror Branch there is a real risk of torture.

xi. Depending on the individual circumstances the security forces can view HADEP activists as supporters of the PKK (now KADEK) and as separatists.

xii. Anyone suspected of having committed serious outstanding criminal offences is transferred to the relevant investigative authority. In Istanbul this is generally the Police headquarters, which is located in Bakirkoy, not far from the airport.

xiii. Persons suspected of politically related crimes are likely to be handed over to the Anti Terror Branch rather than the ordinary Police or gendarmerie.

xiv. Risk on return is not necessarily the same as the risk faced by an individual already living in Turkey. On return the authorities have to make an assessment and act accordingly.'

The IAT then set out its own list of 15 factors at (para. 70) some of which overlapped with, but were less stringent, than those in *Polat*:

“a) The level of the Appellant’s known or suspected involvement with a separatist organisation; b) Whether the Appellant has ever been arrested or detained and if so how long ago; c) Whether the circumstances of the Appellant’s past arrest(s) and detention(s) (if any) indicate that the authorities did in fact view him or her as a suspected separatist; d) Whether the Appellant was charged or placed on reporting conditions or now faces charges; e) The degree of ill-treatment which the Appellant was subjected to in the past; f) Whether he or she has family connections with a separatist organisation such as the PKK (now KADEK) or HADEP; g) How long a period elapsed between the Appellant’s last arrest and detention and his or her departure from Turkey; h) Whether in the period after the Appellant’s last arrest there is any evidence that he was kept under surveillance or monitored by the authorities; i) Whether the Appellant’s home area is in one of the two remaining state of emergency provinces: Diyarbakir and Sirnak. (The National Security Council has recommended the lifting of the state of emergency in these two provinces by the end of 2002. Up-to-date country information may, in due course, show that there are no longer any state of emergency provinces); j) Kurdish ethnicity; k) Alevi faith; l) Lack of a current up-to-date Turkish passport; m) Whether there is any evidence that the authorities have been pursuing the Appellant since he or she left Turkey; n) Whether the Appellant became an informer or was asked to become one; o) Actual or perceived political activities abroad in connection with a separatist organisation.”

These factors enabled a low level separatist to achieve refugee recognition and Article 3 protection if they had an accepted history of past detention for separatist activity. This was largely because it was found that past detentions would show on the GBTS system even if there had been no formal charges.

A(Turkey), 28 July 2003 (aka ACDOG)

In *A(Turkey)* [2003] UKIAT 00034, heard on 12 May 2003, promulgated on 28 July 2003 and chaired by Mr. D. K. Allen the IAT were compelled by the available background evidence to reaffirm the guidance in *Hayser* with one or two minor modifications to the fifteen risk factors (see para. 46).

Thus the effect of *A(Turkey)* emerging at the beginning of August 2003 was to reassert the risk for low level separatists with a history of detention without charge. This decision appears to have

spurred the CIPU to obtain more information about the GBTS system from Turkey.

CIPU October 2003

On 21 August 2003 the CIPU wrote to the British embassy in Ankara. This resulted in a letter, dated 3 September 2003, from Omer Aydin, 2, Class Police Commissioner, pp Head of the Department Deputy for Anti Smuggling and Organised Crime.

In that letter Omer Aydin identified the information that would be recorded on the GBTS system which then appeared in the October 2003 CIPU report at 5.40, as follows:

- i) Persons who committed a crime who remain at large;
- ii) Persons who have committed organised crime, smuggling, narcotics terrorism, murder and fraud;
- iii) Persons who are sought in respect of in absentia warrants;
- iv) Persons convicted of crimes defined by Political Parties Law No.2908, art 4/4.
- v) Records of stolen or lost vehicles, firearms, identification documents.

O(Turkey), 5 March 2004

Following the October 2003 CIPU, the IAT in the case of *O(Turkey)* [2004] UKIAT 00038, heard on 4 February 2004, promulgated on 5 March 2004, made the following findings:

- a) GBTS was the only system used at the airport (para. 51).
- b) The GBTS only contained information on formal arrests it did not contain records of detentions without formal arrest (paras.50-51).
- c) Local checks on persons detained for questioning as per 6.104 CIPU only applied to people with criminal records on the GBTS (paras.57 -58).
- d) A person who had been detained in the past but not arrested could pass through Istanbul Airport but might have difficulties in his home area in which case internal relocation within Turkey became a viable alternative to seeking asylum abroad (para. 63).

At the time of writing the case of *O(Turkey)* is in the process of appeal from the IAT to the Court of Appeal. From a sensible reading of the available background information any persuasive effect of this decision is undermined by:

- a) The failure to take proper account of certain available objective evidence.
- b) New evidence emerging since the case was heard on 5 March 2004 which shows there is a risk emanating from past detentions other than formal arrests.

The objective evidence tending to cast doubt on the reasoning in *O(Turkey)* is as follows:

- a) 5.39 of the October 2003 CIPU adopts a Netherlands Ministry of Foreign Affairs Report on Turkey 15 April 2002, which stated:

‘... criminal records ... are checked on entry ... The records may concern criminal convictions but can also be related to ... preliminary enquiries by the police or Jandarma. ... Anyone suspected of having committed criminal offences is transferred to the relevant investigative authority ...’

- b) The letter from Omer Aydin, of the Smuggling Organised Crime Department, as adopted in 5.40 CIPU, differentiates formal arrests from detentions. At paragraph 6 the letter says that law enforcement agents can detain but a court decision is needed to arrest somebody.

- c) A report by David McDowall on behalf of Asylum Aid (UK), entitled, ‘Asylum Seekers from Turkey II’, dated 1 November 2002 indicates that sources additional to the GBTS system are checked. That report states:

“Undocumented returned asylum seekers are undoubtedly at greater risk. They are held for 24 hours at the airport. The police send ID information to the Political (or Anti Terror) Department headquarters at Vatan Cadessi. A check is then run with police or gendarmerie stations in the birth place and other places of residence in Turkey.”

The combined effect of the Netherlands and the Asylum Aid reports is that either more information is stored on the GBTS, than is indicated by Police Commissioner Aydin, or reference is also made to sources additional to the GBTS. The Asylum Aid report indicates that it is highly likely that a wider enquiry is made than simply confining enquiries to the GBTS after ID information is sent to the Anti Terror branch at Vattan Caddessi.

The IAT in *O(Turkey)* made the following findings which are briefly discussed in turn:

a) Information emanating from the Netherlands report (at 6.93 and 6.95 CIPU October 2003) must be read in the light of the more detailed information on the GBTSS obtained from Omer Aydin (para. 41). This drove the IAT to the conclusion at para. 44 that only GBTSS records would be checked and brief detentions without charge would not be recorded on the system.

It is difficult to see why this would be the case given the findings of the Asylum Aid report which says ID information is sent to the Anti Terror Branch at Vatan Cadessi where a check is then run.

b) At para. 51 the IAT appears to imply that it had been conceded by Counsel in *A(Turkey)* that the GBTS was the only system referred to at the airport. Reading *A(Turkey)* as a whole reveals that no such concession was made. Any such concession would be surprising when the Asylum Aid report, relied upon by the appellants in *A(Turkey)*, says that ID information is sent to Vatan Cadessi to make further enquiries.

c) The checks referred to in 6.96 and 6.104 October 2003 CIPU were essentially the same (para 56).

i) 6.96 CIPU said that if a person is found to have a criminal record, incorrect border crossing documents, illegal departure from Turkey, or expulsion from another country then he or she is often interrogated.

ii) 6.104 CIPU said that in some cases inquiries will be made via other offices, e.g. the prosecutor's office, at the last residence of the returnee to see if there are outstanding criminal liabilities.

In concluding that these two types of checks were the same the IAT stated that they were only done in cases that were not 'run of the mill' (para 56).

Again this analysis fails to take account of the report of Asylum Aid which indicates that such checks were routine.

d) The IAT said it recognised that statements as to the attitudes or intentions of a state towards those who claim to be in fear of persecution by that state should be approached with caution. However the information concerning what was recorded on the GBTS was purely of a factual nature and it was difficult to see how the information contained in the Omer Aydin letter was placed there in an effort to secure the return of Kurdish asylum seekers (para. 54).

The IAT appear to be erecting an artificial and implausible motive for the Turkish authorities not providing the fullest information as to what goes onto the GBTS system. If the views of David McDowall are accepted, namely, that 'opposition parties in Turkey, ... were subject to persistent and severe repression' then it is not beyond the bounds of possibility that computer systems like

the GBTS could be employed in the monitoring of low level separatists. Against that background a degree of scepticism is permissible when Turkish state officials answer questions about what sort of details are entered on a computer data base. Omer Aydin, a Police Commissioner, is hardly likely to admit to a foreign embassy that the criminal detection infrastructure is used in the monitoring and suppression of political opposition. That being the case the Omer Aydin letter should not be unquestioningly relied upon without some form of independent corroboration since there are clearly possible motives for being selective about the information provided.

e) The conclusions of the IAT concerning the availability of internal relocation at paras.63 - 69 fail to take account of the Home Office Fact Finding Mission in March 2001 which said (para 4.5) if a person comes under suspicion in one part of Turkey the police or Jandarma pass the information to the other part were the individual subsequently moves. The IAT also fail, in this regard, to take on board the views of the UNHCR 1 September 2001 (para. 198) which states that if persecution emanates from the state authorities then there is no internal flight alternative or relocation.

New Evidence

Evidence has now emerged in the UK since the IAT heard the case of *O(Turkey)* on 4 February 2004 indicating that there are indeed wider sources of information about past detention than that recorded on the GBTS and that the system also records informal detentions and denunciations by unknown informants. This evidence includes:

- i) Two Articles in the *ZAMAN* newspaper dated 2 January 2004.
- ii) A note from David McDowall dated 19 March 2003

The articles in the newspaper *Zaman* indicate that:

- a) Records of wanted people have been held not only on the GBTS system but on other restrictive records.
- b) There is now a new computer system called POLNET which has links all over Turkey and that the GBTS appears to be but one of a number of systems holding information relating to past activities or detentions.
- c) All those who are wanted are recorded in a third computing system held by each individual security headquarters in each province in addition to the GBTS.

David McDowall's report discloses that:

- a) People named by unknown informants can find their way onto the GBTS system;
- b) According to information obtained from Turkey by the KHRP:
 - i) Detentions (as contrasted with formal arrests) of politically active people perceived as opponents of the state are recorded on GBTS.
 - ii) The Gendarme Central Security Command and Coastal Security Command are attached to the Ministry of the Interior and can access each others records.

The accumulation of this new evidence puts a very different complexion on the information supplied by Omer Aydin concerning the GBTS and accordingly the views of the IAT in *O(Turkey)*.

CIPU Report April 2004

This very recent report records at 5.48 that an NGO, the Swiss Organisation for Refugees, published a report in June 2003 which said there were a number of different information systems in Turkey including the GBTS. The report goes on to say (5.56 - 5.57)

“... security forces have their own information systems ... They include the registers of the police, anti terrorist department, the gendarmerie, JITEM, the military service etc. It is therefore possible for someone not to be listed on the central system but to be sought by the anti terrorist unit.”

“Neither the absence of a data entry or current investigation or the lack of a passport can be taken as evidence that an individual is not in danger. Despite the absence of entries in the central information system, the individual concerned might be listed on one of the other information systems. This must certainly be assumed in the case of individuals who have already been taken into custody by the police gendarmerie or some other branch of the security forces in the past.”

This information which has clearly been in existence before the October 2003 CIPU gives clear support to the case that low level separatists with a history of detention by the police or gendarmerie are exposed to being recorded as such on one or other of the information gathering systems. This in turn leads to them being exposed to a real risk of torture in detention which clearly remains a widespread practice in Turkey.⁸⁸ It follows that the guidance of the IAT in the cases of *Hayser* and *A(Turkey)* remain highly relevant to proper risk assessment in these cases. Likewise considerable doubt has now been shed on the conclusions of the IAT in *O(Turkey)*.

Footnotes

⁸⁷ The author wishes to thank Simon Harding and Rima Baruah, Barristers at 10-11 Grays Inn Square, London, for drawing my attention to and providing recent background evidence including the April 2004 CIPU.

⁸⁸ According to the Human Rights Association Turkey (IHD) reported cases of torture in detention increased from 632 in 2002 to 818 in 2003.

Section 2: Case Summaries and Commentaries

A. Case News – Admissibility Decisions and Communicated Cases

Right to Life

Adelaide v France

(78/02)

European Court of Human Rights: Communicated in November 2003

Death of unborn child – Right to life - Articles 2, 8 and 13 of the Convention and Article 13 in conjunction with Article 2 of the Convention

Facts

In 1995 the applicants were injured in a road traffic accident. The female applicant, who was six months pregnant at the time, gave birth prematurely four days later. Her child was stillborn and criminal proceedings were initiated against the person responsible for the accident.

In 1997 the accused was convicted of manslaughter. The Court held that the female applicant's foetus was 'viable' at the time of the accident and that his death was a direct cause of the shock sustained by his mother as a result of the accident.

The accused lodged an appeal against his conviction and in 1998 the Court of Appeal set aside the guilty verdict delivered in 1997. Although the Court concurred with the original judgment by finding that the death of the foetus was the consequence of the accident, it observed that criminal law only protects a baby whose heart is beating and who is breathing at the time of his or her birth. Because the applicant's baby was stillborn the Court could not sustain a charge of manslaughter.

The accused appealed against this decision, but in 2001 the Court of Cassation upheld the 1998 verdict of the Court of Appeal by declaring that there was no offence of manslaughter in relation to an individual not protected by the criminal law.

Communicated under Articles 2, 8 of the Convention and under Article 13 in conjunction with Article 2 of the Convention. The applicant complains primarily under Article 2 of the Convention in relation to the fact that French criminal law only offers protection to a baby who is breathing

and whose heart is beating at the time of birth.

The Court decided to give priority to the case under Rule 41 of the Rules of Court.

Vo v France

(53924/00)

European Court of Human Rights: Grand Chamber Hearing of 10 December 2003

Death of unborn child - Right to life - Article 2 of the Convention

Facts

The applicant, Thi-Nho Vo, is a French national who was born in 1967. She resides in Bourg-en-Besse in France.

On 27 November 1991 the applicant, who was six months pregnant, attended an appointment at the Hotel Dieu Hospital in Lyons. The doctor examining her mistakenly believed that she was Mrs Thanh Van Vo, who was attending the hospital that day for the removal of a contraceptive coil. The doctor acted upon the misapprehension that the applicant sought the removal of a contraceptive coil. In performing the necessary operation he pierced the applicant's amniotic sac. The applicant was consequently forced to undergo a therapeutic abortion.

Later in 1991, the applicant lodged a criminal complaint against the doctor, who was charged initially with causing unintentional injury and subsequently with unintentional homicide.

On 3 June 1996, Lyon's Criminal Court acquitted the doctor of the charges. On 13 March 1997, the applicant appealed to Lyon Court of Appeal which overturned the decision of the Criminal Court and convicted the doctor of unintentional homicide. He was sentenced to six months' suspended imprisonment and a fine of 10,000 French Francs.

The doctor appealed against the decision of the Court of Appeal on points of law. On 30 June 1999 the Court of Cassation reversed the decision delivered by the Court of Appeal: the decision was based upon the Court of Cassation's refusal to consider the foetus as a human being entitled to the protection of the criminal law.

On 20 December 1999 the application was lodged with the European Court of Human Rights. On 22 May 2003 the chamber of the court dealing with the case relinquished jurisdiction to the Grand Chamber under Article 30 of the Convention. On 25 November 2003 the president of the Grand Chamber granted two non-governmental organisations, the Family Planning Association (London) and the Centre for Reproductive Rights (New York), leave to intervene as third parties

in the proceedings under Article 36 of the Convention.

Complaints

The applicant complains under Article 2 of the Convention that the authorities' refusal to classify the unintentional killing of her unborn baby as involuntary homicide violated his right to life.

Commentary

Under Article 30 of the Convention a Chamber may relinquish jurisdiction to the Grand Chamber over a case pending before it involving a serious question affecting the interpretation of either the Convention or its Protocols. A Chamber may also relinquish jurisdiction to the Grand Chamber where it appears that it may deliver a decision inconsistent with established jurisprudence. In all cases, jurisdiction may only be relinquished to the Grand Chamber where the parties to the case do not object.

Torture and ill-treatment

Menteşe and Others v Turkey

(36217/97)

European Court of Human Rights: Admissibility decision of 23 March 2004

Destruction of homes - Prohibition of torture - Private and family life - Extrajudicial killing - Right to life - Articles 2, 3,5, 6, 18, Article 1 of Protocol 1 to Convention

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The six applicants, Abdullah Menteşe, Zora Bozkuş, Hatun Demirhan, Mustafa Demirhan, Ayşe Harman and Süleyman Maço, are residents of the village of Yolçatı in Turkey.

On the night of 12 May 1994, all applicants were in their homes with their families when they all heard gun shots which continued throughout the night. In the early hours of 13 May 1994, Kamil Menteşe, the son of the applicant Abdullah Menteşe, left the house to take the livestock out of the village. On his way he was stopped by soldiers who checked his identity but let him go. While Kamil Menteşe was away soldiers entered the village. They gathered all the villagers near the mosque where they interrogated them about members and activities of the Kurdistan Workers Party (PKK). The soldiers then set the village on fire. When Kamil Menteşe returned to the village he was taken away by the soldiers along with two other villagers. Abdullah Menteşe made inquiries to the Public Prosecutor of Lice regarding his son's whereabouts but could obtain no information. On 17 May 1994, his son's body was found near the village with 26 other corpses.

The second applicant Zora Bozkuş was in his home in the hamlet of Beğendik (Henyat) at the material time. After the gun fire ceased in the morning of 13 May 1994 his brother-in-law Yusuf Bozkuş took the livestock to Yolçati, while the applicant himself fled the hamlet together with his children and went to stay in the forest. From a distance he saw his house catch fire and smoke rising from the surrounding settlements. On 14 May 1994, the applicant and his children went to Lice. On 15 May 1994, the applicant learned that his brother in-law had been arrested near Yolçati. Upon receiving this information he tried unsuccessfully to search for Yusuf Bozkus. When he returned to Lice his children told him that Yusuf's corpse had been found. The relative who had identified the body told the applicant that it bore severe injuries. The applicant returned to his village one month later to find that his house had been burnt down.

The third applicant Hatun Demirhan and her children were in their home at the material time. In the early hours of 13 May 1994, the soldiers ordered the villagers to gather near the mosque. There, she and her children witnessed the burning of the village and the taking away of all men under 60 years of age. Among these men were Kamil Menteşe, Reşit Demirhan and Vahap Maço. Subsequently, the villagers heard gun shots from the direction in which the men had been taken. Shortly afterwards the villagers saw the soldiers returning from that direction.

The fourth applicant Mustafa Demirhan was one of the villagers who had been gathered near the mosque and as such he was subjected to interrogation by the soldiers about PKK activities. He too witnessed how the soldiers burnt the village and abducted all men under 60 years of age, including his son Reşit Demirhan. The applicant was sent to Lice with the rest of the villagers. He attempted to search for his son but was not allowed to do so. Upon his return to the village two days later he joined other villagers in making enquiries to the Public Prosecutor of Lice regarding the missing villagers. His son's body was subsequently found near the village with corpses of another 26 villagers.

The fifth applicant Ayşe Harman fled from the village at 5.00am on 13 May 1994, when the gun fire ceased. While running away she saw a helicopter land in the village and, later, smoke rising above the village. She did not return to the village until two weeks later. When she did so she found that her house had been burnt down.

The sixth applicant Süleyman Maço and his family attempted to leave the village for Lice after the gun fire ceased in the early hours of 13 May 1994. On the way from their village to Lice they passed by Yolçati village where they were stopped by the soldiers, who took Süleyman Maço's son Vahap Maço away. The family continued their journey to Lice. After two days the applicant was informed by some villagers of his son's death together with others from their village. He received permission to collect his son's body and returned to Yolçati. He found that the village had been burned down. He also discovered his son's corpse, bearing several bullet wounds, behind some rocks.

The Turkish Government disputed the facts submitted by the applicants and maintained that their allegations were unfounded.

Complaints

Abdullah Menteşe, Zora Bozkuş, Mustafa Demirhan and Süleyman Maço complain under Article 2 of the Convention in relation to the intentional killing of their relatives by security forces and the Government's failure to carry out effective investigation and to prosecute the perpetrators.

Invoking Article 3 of the Convention the applicants complain that they were subjected to inhuman and degrading treatment on account of their forced eviction from the village, the killing of their relatives and the destruction of their homes.

The applicants complain under Article 5 that they were deprived of their right to liberty and security due to their forced eviction from their village by the security forces.

The applicants complain under Article 6 that the impossibility of challenging the destruction of their homes and possessions before the court constituted a denial of their right to access to a court for the determination of their civil rights.

The applicants complain under Article 8 of the Convention that their right to respect for their family life and home was violated by the intentional killings of their relatives and the unjustified destruction of their homes and possessions.

The applicants complain under Article 13 of the Convention that they did not have an effective domestic remedy to challenge the killings of their relatives and the destruction of their homes.

They complain under Article 18 of the Convention in relation to interferences with the exercise of their Convention rights were not designed to secure permitted Convention purposes.

Under Article 1 of Protocol No. 1 to the Convention the applicants complain that they were deprived of their right to peaceful enjoyment of their possessions.

Finally the applicants complained Article 14 of the Convention that they were subjected to discriminatory treatment on the basis of their Kurdish origin in relation to their enjoyment of the rights guaranteed under the aforementioned Articles.

Held

The Court unanimously declared the application admissible, without prejudging the merits. It stated that under Article 35 of the Convention the applicants are required to exhaust only those domestic remedies which are available and sufficient, which allow them to obtain redress for their

alleged grievances and which are sufficiently certain both in theory and in practice. The Court found that the relevant remedies provided by Turkish law do not meet these requirements of effectiveness, adequacy, and certainty. Therefore the Government's objection that the applicants had failed to fulfil this requirement did not stand.

In relation to the Government's objection that the applicants had failed to await the results of the investigation still pending, the Court found that the investigation had proved to be ineffective and there was accordingly no requirement to await the results. Finally the Court maintained that there was no need for the applicants to file a criminal complaint as the Government had maintained, because an investigation had already been initiated by the Public Prosecutor.

Right to Fair Trial

Yakurin v Russia

(65735/01)

European Court of Human Rights: Communicated in November 2003

Independence and impartiality of a military court – Fair trial - Article 6 of the Convention

Facts

The applicant was a member of a Moscow-based army patrol. He was arrested and detained on charges of having committed theft and murder while in service.

The applicant's case was tried by a military court composed of a presiding military judge and two lay judges. It was held in the territory of the applicant's military unit. The applicant objected to this as it would violate his right to a fair trial by denying him a public hearing. His objection was rejected, along with his request for trial by jury.

The applicant was convicted of murder and theft and appealed against the verdict. The Supreme Court heard his appeal without the presence of his lawyer. It upheld the decision and the applicant was placed in a remand centre. The staff repeatedly refused to send his application to the Court. Eventually the applicant succeeded in delivering it via his representative in St. Petersburg

Communicated under Articles 6(1), 6(3)(c) and 34 of the Convention.

Right to Respect for Private and Family Life

Ünal Tekeli v Turkey

(29865/96)

European Court of Human Rights: Hearing of 13 January 2004

Refusal to use maiden name after marriage - Private and family life - Prohibition of discrimination - Articles 8 and 14 of the Convention

Facts

The applicant, Ayten Ünal Tekeli, is a Turkish national, who lives in İzmir, Turkey. After she married in 1990 the applicant, who was a trainee lawyer at the relevant time, took her husband's name according to Article 153 of the Turkish Civil Code. Because she was known in her professional life by her maiden name of Ünal, she continued to use this before and in addition to her husband's surname. She could not however use her new double-barrelled surname on official documents.

In 1995 the applicant applied to Karsiyaka Court of First Instance for permission to use only her maiden name, stating that in her professional life she was known only by her maiden name. On 4 April 1995, the Court of First Instance dismissed her application, arguing under Article 153 of the Turkish Civil Code that a married woman must adopt her husband's surname for the duration of her time as his spouse. She appealed to the Court of Cassation, which dismissed her appeal on 6 June 1995.

Ünal Tekeli lodged her application with the European Commission of Human Rights on 20 December 1995. This was transmitted to the Court on 1 November 1998 and was declared admissible on 1 July 2003.

Complaints

The applicant complains under Article 8 of the Convention that the domestic courts' refusal to allow her to use only her maiden name amounted to an unjustifiable interference with her right to protection of her private life.

She also complains under Article 14 of the Convention in conjunction with Article 8 that she suffered discrimination as married men can continue to use their own family name after they marry.

Commentary

In *Niemietz v Germany*, (No.13710/88, 16.12.1992) the Court recognised that Article 8 of the Convention does not contain any explicit provisions on names, distinguishing it from the provisions of other major international instruments such as Article 24(2) of the International

Covenant on Civil and Political Rights and Articles 7 and 8 of the Convention on the Rights of the Child. It stated that, as a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her "private and family life". The Court observed that the fact that society and the State have an interest in regulating the use of names does not exclude this, since these public law aspects of the concept are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in the professional or business contexts currently under consideration as in others. (para. 29)

This jurisprudence concerning the meaning of "private and family life" was developed in the case of *Burghartz v Switzerland* (No.16213/90, 22.2.1994). In this case, Mr and Mrs Burghartz complained of the fact that the authorities had withheld from Mr Burghartz the right to put his own surname, Schnyder, before their adopted family name, which was his wife's maiden name: Swiss law afforded that possibility to married women who had chosen their husbands' surname as their family name. They claimed that this resulted in discrimination on the ground of sex, contrary to Articles 14 and 8 of the Convention taken together. The Court found that this difference of treatment lacked an objective and reasonable justification and accordingly held by the narrow majority of five votes to four that there had been a violation of Article 14 taken together with Article 8 of the Convention.

Freedom of Expression

Arslan v Turkey

(42571/98)

European Court of Human Rights: Admissibility decision of 13 November 2003

Freedom of expression - Conviction for insulting a religion – Article 10 of the Convention

Facts

In 1993 the applicant published a novel dealing with philosophical and theological issues. On the basis of this book he was later prosecuted under the Turkish Criminal Code for the offence of injuring, by means of publication, "Allah, the Religion, the Prophet and the Holy Book". In 1996 a regional court found him guilty as charged and was ordered to pay a fine. His appeal to the Court of Cassation in 1997 was unsuccessful.

Complaints

The applicant complained under Article 10 of the Convention that his right to freedom of expression had been breached by the relevant provisions of the Turkish Criminal Code and the fact that his conviction was based solely upon the expert opinion of a theology professor.

Held

The Court declared the case admissible under Article 10 of the Convention. The Court dismissed the Turkish Government's objections that the applicant had failed to exhaust domestic remedies and had exceeded the six-month limitation period.

Gündüz v Turkey

(59745/00)

European Court of Human Rights: Admissibility decision of 13 November 2003

Conviction for hate speech - Freedom of expression – Article 10 of the Convention

Facts

The applicant is a retired Turkish national who was born in 1941. He is a leader of Tarikat Aczmeni, a radical Islamic sect with a high profile in Turkey.

In 1994 the applicant wrote an article which was reproduced in a weekly publication with radical Islamic tendencies. Criminal proceedings were instituted against him, and he was charged with inciting the public to crime, an offence under the Turkish Penal Code, on the basis of opinions expressed within the article. In particular the charge was founded on other statements made therein concerning *I.N.*, a famous Islamic scholar known for his moderate views. In 1998 the applicant was found guilty as charged.

Complaints

The applicant complains under Article 10 of the Convention that his right to freedom of expression was violated.

Held

The Court held that the case was inadmissible under Article 10 of the Convention. The restriction imposed upon the applicant's right to freedom of expression fulfilled the requirements of Article 10(2) because it was prescribed by law and pursued the legitimate aim of preventing crime. *I.N.* was exposed to a significant risk following the publication of the applicant's comments which were, due to their nature, capable of being characterised as hate speech and were as such were incompatible with the Convention. The applicant's conviction consequently constituted a justified interference with his right guaranteed under Article 10 of the Convention.

Freedom of Association

Mkrtchyan v Armenia

(6562/03)

European Court of Human Rights: Communicated in October 2003

Participation in purportedly illegal demonstration – freedom of association – Article 11

Facts

The applicant, a member of the Republican Party, participated in a public demonstration organised by several parties in the centre of Yerevan. After the demonstration ended the applicant was arrested and held in custody on grounds of having violated regulations concerning demonstrations. The District Court found that he had participated in an unauthorised demonstration and breached the rules for holding street processions. It accordingly sentenced the applicant to a fine. The applicant appealed to the Civil Court of Appeal on the ground that the interference with his right to freedom of assembly had no legal basis as no law prescribed the rules which he had allegedly violated. The Court of Appeal upheld the decision of the District Court, delivering a virtually identical judgment.

Communicated under Article 11 of the Convention.

Çınar v Turkey

(28602/95)

European Court of Human Rights: Admissibility decision of 13 November 2003

Dissolution of trade union – Right of association – Article 11 of the Convention

Facts

The applicant is a Turkish national who was president of Tüm Haber-Sen, a trade union for civil servants, between 1992 and 1995.

In 1992, the State Prosecutor requested judicial dissolution of the union because public officials had not been permitted to form unions since the repeal of the law which had provided authorisation to do so. The relevant court allowed the State Prosecutor's application and affirmed its judgment following a new trial after the case had been remitted to it by the Court of Cassation.

The applicant lodged a petition with the Court of Cassation requesting the review of this decision, but this was dismissed. Consequently, all branches and sections of Tüm Haber-Sen were dissolved between 26 June 1995 and 2 August 1995.

Complaints

The applicant complains under Article 11 of the Convention that his right to freedom of association violated. He also complains under Articles 13 of the Convention that the dismissal of his application by the Court of Cassation violated his right to an effective remedy.

Held

The case was declared admissible under Article 13 in conjunction with Article 11 of the Convention. The Court dismissed the Government's objection that the applicant had failed to exhaust domestic remedies. It stated that applying for review of the judgment of the Court of Cassation, which concerns an error in the judgment and entails a second examination of the case without there being any fresh evidence, is not a remedy which must be exhausted for the purposes of Article 35(1) of the Convention.

Asylum / Extradition

Mamatkulov and Abdurasulovic v Turkey⁸⁹

(46827/99 and 46951/99)

European Court of Human Rights: Grand Chamber Hearing of 17 March 2004

Extradition - Right to life - torture - Articles 2, 3, 6 and 34 of the Convention

Facts

The two applicants, Rustam Mamatkulov and Askarov Z. Abdurasulovic, are two Uzbek nationals who were born in 1959 and 1971 respectively.

They are members of the ERK Freedom Party, a political opposition party in Uzbekistan. On 27 March the applicants were extradited from Turkey to Uzbekistan and are understood to currently be in custody there.

The applicants were suspects in relation to a bombing in Uzbekistan and were also accused of an attempted terrorist attack on the President of the Republic of Uzbekistan. On 13 December 1998, the second applicant arrived in Turkey bearing a false passport. On 3 March 1999, the first applicant, Mamatkulov, arrived at Ataturk airport in Istanbul on a tourist visa from Kazakhstan. There he was arrested by the Turkish police and placed in custody. On 5 March, the second applicant, Abdurasulovic, was arrested and placed in custody. The applicants appeared before a Turkish judge who ordered them to be remanded in custody.

Uzbekistan requested their extradition under the terms of a bilateral treaty with Turkey. The first

applicant was questioned at Bakiroy Criminal Court Istanbul while the second applicant was brought before Faith Criminal Court Istanbul. Both Courts stated that the offences with which the applicants were charged were criminal rather than political or military and that accordingly there existed per se no bar to the applicants' extradition. The applicants were detained pending extradition.

On 18 March 1999, the Court contacted the Turkish Government to state that, in relation to Rule 39 of the Rules of the Court (interim measures),

“It was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had an opportunity to examine the application further at its forthcoming session on 23 March”.

Nevertheless, on 19 March 1999, the Turkish Cabinet issued a decree authorising the applicants' extradition. On 23 March 1999, the Court extended the interim measure until further notice.

On 27 March 1999, the applicants were returned to the Uzbek authorities. On 28 June 1999, the High Court of the Republic of Uzbekistan found the applicants guilty of the offences with which they were charged and sentenced them to twenty and eleven years' imprisonment respectively.

Complaints

The applicants complained under Articles 2 and 3 of the Convention that by facilitating their extradition to Uzbekistan Turkey had effectively put their lives at risk and put them in danger of being subjected to torture or inhuman and degrading treatment.

The applicants complained under Article 6(1) of the Convention in two respects. They alleged that the unfairness of the extradition procedure in Turkey was in breach of Article 6 of the Convention and that they also claimed that Turkey had failed to comply with its obligations under Article 3 of the Convention in contravening the Court's indications made under Rule 39 of the Rules of Court.

Procedure

In a procedure judgment of 6 February 2003 the Court unanimously held that there had been no violation of Article 3 of the Convention.

The Court held that Article 6(1) was inapplicable to the extradition procedure within Turkey and that no issue arose under this Article regarding the criminal proceedings initiated in Uzbekistan.

The Court held by six votes to one that Turkey had breached Article 34 of the Convention by

failing to implement the interim measures recommended by the Court under Rule 39 of the Rules of Court.

On 28 April 2003, the Turkish Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention. This request was granted on 21 May 2003. On 18 December 2003 the President of the Grand Chamber granted leave to three non-governmental organisations, the Aire Centre (London), Human Rights Watch (New York) and The International Commission of Jurists (Geneva), to act as third parties in the proceedings under Article 36 of the Convention.⁹⁰

Discrimination

Zarb Adami v Malta

(17209/02)

European Court of Human Rights: Communicated on 11 December 2003

Discrimination – de facto exemption of women from jury service – Article 14 of the Convention

Facts

In 1971 the applicant Mr Zarb Adami was placed on a list of jurors and undertook jury service on three occasions following this registration. In 1997 he failed to appear as a juror in a new set of proceedings and was fined approximately 240 EUR. He failed to pay this fine and was summoned to Court where he claimed that the fine imposed was discriminatory as it subjected him to burdens and duties to which other persons in the same position were not subjected. The applicant submitted statistics to support his claim that law and practice *de facto* exempted women from carrying out jury service in certain circumstances. He stated that removal from the list was for reasons of disqualification. He claimed that in practice only 3.05 % of women served as jurors, compared to 96.95% of men who fulfilled this social duty.

The Constitutional Court accepted the applicant's complaint. It agreed that the method in which the lists were compiled appeared punitive towards those on the list and recommended that the system be amended. It stated however that the present applicant had not been subjected to burdensome treatment and that he could have used ordinary remedies to seek redemption from jury service.

Communicated under Articles 4 (3) (d), 6, 14 and 35 of the Convention.

Commentary

For discussion of Article 14 of the Convention see the Commentary to *Nachova and Others v Bulgaria* (Nos. 43577/98 and 43579/98, 26.2.04), below.

Protection of Property

Kovačić and Others v Slovenia

(44574/98, 45133/98 and 48316/99)

European Court of Human Rights: Admissibility decision of 8 April 2004

Withdrawal of foreign currency from the bank – Protection of property - Discrimination - Article 14 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

The applicants are three Croatian nationals. Prior to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991 the applicants or their relatives deposited hard foreign currencies in saving accounts within the branch of Ljubljanska Bank, a Slovenian bank, located in Zagreb, Croatia.

In accordance with legislation in force at the time, such deposits made to commercial banks in SFRY were transferred to the National Bank of Yugoslavia (NBY). The SFRY guaranteed accounts in hard foreign currency. Legislation enacted throughout the 1980s and early 1990s placed withdrawals from such accounts were under increasingly tight restrictions, due to the monetary crisis which affected the country during that period. Accordingly, the applicants or relatives were unable to gain access to the money deposited in to their accounts.

After Slovenia and Croatia became independent in 1991 Croatia decreed that liabilities owed to customers of the Croatian branch of the aforementioned Slovenian bank were to be met by either Ljubljanska Bank or the Slovenian state. Slovenia disagreed with Croatia's decision and instead contended that monetary liabilities should be divided in accordance with the secession arrangements concluded between the five states created from the dissolution of the SFRY. An estimated 150,000,000 EUR in savings had been deposited in the form of strong foreign currencies within the Zagreb branch of Ljubljanska Bank, affecting approximately 140,000 investors.

Complaints

The applicants complain under Article 1 of Protocol No.1 to the Convention that their inability to withdraw savings and accrued interest from their accounts violated their right to the peaceful enjoyment of their possessions.

The first applicant, Ivo Kovačić, complained under Article 14 of the Convention in conjunction with Article 1 of Protocol No.1 to the Convention of discrimination on the grounds of nationality, maintaining that Slovenian nationals were able to withdraw savings from their accounts from the bank's branch in Zagreb.

Held

The Court unanimously declared the applications admissible, rejecting the Government's objections.

Commentary

For a discussion of Article 14 of the Convention, see the Commentary to *Nachova and Others v Bulgaria* (Nos. 43577/98 and 43579/98, 26.2.2004), below.

B. Substantive

Disappearance

Tosun v Turkey

(31731/96)

European Court of Human Rights: Judgment of 6 November 2003

Disappearance – Right to Life - Articles 2, 3, 5 in conjunction with Article 14 and 13 of the Convention – Friendly Settlement

Facts

The applicant, Hanim Tosun, is a Turkish national and was born in 1966. She resides in Avcılar, a district of Istanbul, in Turkey.

On 19 November 1995, the applicant's husband, Fehmi Tosun, was kidnapped by two persons in civilian clothing. The applicant was informed of the abduction by the Avcılar police on the same day.

On 2 November 1995, the applicant contacted the state prosecutor to inquire about the whereabouts of her husband. A preliminary investigation was initiated by the Küçükçekmece state prosecutor. The state prosecutor contacted the Avcılar police on five occasions between 2 November 1995 and 24 January 1997, requesting information about the kidnapping of Fehmi Tosun. When he received no response the prosecutor brought an action for negligence against the chief police officer of the Avcılar police.

On 4 April 1997, the applicant gave a statement to the Küçükçekmece security police and requested information regarding her husband. In letters dated 25 March and 5 June 1998 the state prosecutor requested the examination of the case of the applicant's husband. The inquiry is still pending before the judicial authorities and the applicant has not received any information regarding her

husband.

Complaints

The applicant contended that the disappearance of her husband and the subsequent lack of investigation amounted to a violation of Articles 2, 3, 5 in conjunction with 14 and 13 of the Convention.

Held

On 17 September 2003, the Turkish Government submitted a statement to the Court expressing regret in relation to the events which had led to the present application and affirming its determination to prevent the recurrence of disappearances such as that of the applicant's husband. The statement admitted that the inadequacy of an investigation into a death, such as in the instant case, constitutes a violation of Article 2 of the Convention.

The Government offered the applicant a settlement offer of EUR 40 000, which she accepted and the Court accordingly struck the case off the list pursuant to Article 37(1) of the Convention and Rule 62(3) of the Rules of the Court.

Commentary

For a discussion of friendly settlements made in relation to cases in which a violation of the right to life is alleged, see the Joint Commentary with *Kara and Others v Turkey* (No. 37446/97, 25.11.2003), below.

Kara and Others v Turkey

(37446/97)

European Court of Human Rights: Judgment of 25 November 2003

Killing by State agents - Inadequacy of investigation – Article 2 of the Convention – Friendly Settlement

Facts

The applicants, twenty-two Turkish nationals, are relatives of Yakup Kara, Mehmet Ürün, Ali Benek, Hamit Kara and Hüseyin Babat.

On 28 June 1991, the taxi driven by Mehmet Ürün and carrying Yakup Kara, Ali Benek, Mehmet Kara, Hamit Kara and Hüseyin Babat was stopped on the Uludere-Sirnak road by persons wearing camouflage clothing and with their faces hidden. The men forced the passengers out of the taxi and opened fire with a machine gun. Yakup Kara, Mehmet Ürün, Ali Benek, Hamit Kara and Hüseyin Babat died at the scene whilst Mehmet Kara escaped.

Later on 28 June 1991, police officials filed an official report and investigated the scene. The state prosecutor registered the statement supplied by Mehmet Kara and visited the scene of the crime. Autopsies were carried out in the presence of the state prosecutor, whose office commenced an investigation into the deaths.

On 1 July 1991, an expert report on the arms and munitions used in the incident was published. On 10 July 1991 the Sırnak prosecutor, estimating that the crime had been committed by the PKK, declared himself incapable of investigating the murders and relinquished jurisdiction in favour of the State Security Court in Diyarbakır.

On 7 April 1992, Hüsna Kara petitioned Diyarbakır Administrative Court, seeking compensation. On 25 January 1994, the Kara family were awarded 350,000,000 Turkish Lira in compensation by Diyarbakır Administrative Court. The applicants repeatedly sought an investigation into the deaths of their relatives. In particular, the brother of Yakup Kara sent a letter to the applicants' representatives giving the names of seven members of the village guards who were suspected of having carried out the murders.

In a letter dated 25 April 1997, one of the applicants, Hamit Kara, was informed that the prosecutor had concluded that the perpetrators of the murders were members of the PKK. The letter further noted that there was no evidence to suggest that any of the names mentioned in the letter were involved. The criminal investigation is still pending before the authorities.

Complaints

The applicants complained under Article 2 that the Turkish authorities had failed to carry out an adequate and effective investigation into the deaths of their relatives to the standard required by Article 2 of the Convention.

The Turkish Government submitted a statement to the Court regretting the occurrence of the facts leading to this application and affirming its determination to prevent such events recurring. The statement admitted that the inadequacy of an investigation into a death, such as in the instant case, constitutes a violation of Article 2 of the Convention. The applicants accepted the Government's offer of a settlement of EUR 93,000.

Held

The cases were struck off the list following the friendly settlements, pursuant to articles 37(1) of the Convention and article 62(3) of the Rules of the Court.

Joint Commentary with *Hanim Tosun v Turkey* (No.31731/96, 6.11.2003)

The cases of *Hanim Tosun v Turkey* and *Kara & Others v Turkey* did not culminate in a Court decision but were struck off the list when the applicants agreed to friendly settlements proposed

by the Government. At the end of 2003, 18 per cent of the cases pending before the Court related to Turkey, ranking it as the country against which the highest number of applications had been made. Whilst the Court promotes friendly settlements, the procedure can arguably be abused by governments as a means of preventing the Court from rendering a judgment on a particular issue.

The Government explicitly undertook to “adopt all necessary measures to ensure that the right to life – including the obligation to provide effective investigations – will be respected in the future” in the friendly settlement statements issued to the Court in relation to both of the present cases. However, given the fact that a very high proportion of cases arising under the Convention have been brought against Turkey, it is imperative that compliance with the Convention is monitored and the obligations undertaken by Turkey in friendly settlement statements are honoured.

Tekdağ v Turkey

(27699/95)

European Court of Human Rights: Judgment of 15 January 2004

Disappearance - Killing by state officials - Lack of effective investigation - Discrimination - Articles 2, 3, 5, 13, 18 and 34 of the Convention and Article 14 read in conjunction with Articles 2, 3, 5, 10, 13 and 18 of the Convention.

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The applicant, Hatice Tekdağ, is a Turkish national of Kurdish origin and lives in Diyarbakır.

The applicant and her husband went shopping in the village of Küçükkadı on 13 November 1994. When they got off the bus in Dağkapı her husband told her that he had to attend to something and asked her to wait for him for a few moments. When he returned shortly afterwards he pretended not to recognise her. He told her not to come near him and disappeared into a nearby street, followed by armed men carrying walkie-talkies. Shots were fired and plain-clothes policemen subsequently arrived on the scene and took the applicant’s husband away in a white minibus. The applicant’s husband had previously been arrested by the security forces nineteen times and had been taken into custody on seventeen of those occasions. The applicant maintains that she has had no news of her husband since that day. She petitioned the Diyarbakır Public Prosecutor and the Provincial Governor for news of her husband and provided them with witness statements which averred that her husband had been seen at the headquarters of the Diyarbakır Rapid Intervention Force and in prison. According to the applicant, the police raided her house several months after her husband’s disappearance.

The Turkish Government contested the applicant's version of events. It cited a letter from the Diyarbakır Public Prosecutor to the Ministry of Justice as evidence that the applicant's husband was never taken into custody. Regarding official investigations into his disappearance, the Turkish authorities pointed out that the dossier contains about a hundred documents including instructions by the judicial authorities and the security forces, information supplied to the prosecuting authorities and judicial decisions given in the case. The Government offered the alternative explanation that the applicant's husband might have joined the PKK.

In Ankara on 13 and 14 October 2000 the Court took oral evidence from nine witnesses on the subject of the disappearance in question.

Complaints

Relying upon Article 2 of the Convention the applicant complained that her husband had been abducted and killed by agents of the State and that the authorities had failed to carry out an effective and adequate investigation into the matter.

The applicant submitted that having to live without knowing what had happened to her husband constituted inhuman treatment in violation Article 3 of the Convention.

The applicant complained under Article 5 of the Convention that she had not been informed of the reasons for her husband's detention, that he had not been brought promptly before a judge after his arrest and that she had been unable to bring proceedings to determine the lawfulness of his detention.

The applicant complained under Article 13 of the Convention of being denied an effective remedy.

The applicant also complained that her husband had been killed because of his Kurdish origins, in breach of Article 14 read in conjunction with Articles 2, 3, 5, 10, 13 and 18 of the Convention.

Relying upon Article 18 of the Convention the applicant complained that the restrictions imposed upon her rights and freedoms under the Convention had been applied for purposes not permitted under the Convention.

Finally the applicant alleged a violation of Article 34 of the Convention in relation to the Government's conduct during the course of the proceedings and in particular during the fact-finding mission.

Held

The Court held unanimously that there had been no violation of Article 2 of the Convention

because there was insufficient evidence to enable it to conclude beyond all reasonable doubt that the applicant's husband was abducted and killed by any person acting on behalf of the State authorities.

The Court held unanimously that there had been a violation of Article 2 of the Convention in its procedural aspect due to the national authorities' failure to carry out an adequate and effective investigation into the circumstances surrounding the death of the applicant's husband.

The Court unanimously held that there had been no violation of Article 3 of the Convention. In reaching this conclusion it referred to its decision that the applicant had failed to prove the allegation made under this Article beyond all reasonable doubt. Furthermore it stated that the lack of coordination between the Public Prosecutors involved in the case, and their failure to broaden the investigation, did not constitute special features which would justify a finding a violation of Article 3 of the Convention in relation to the applicant herself.

The Court held unanimously that there was no factual basis upon which to conclude that there had been a violation of Article 5 of the Convention.

The Court held by six votes to one that there had been a violation of Article 13 of the Convention.

The Court held unanimously that there had been a violation of Article 14 of the Convention, read in conjunction with Articles 2, 3, 5, 10, 13 and 18 of the Convention.

The Court held unanimously that there had been a violation of Article 18 of the Convention.

The Court found that the Government had failed to fulfil its obligations under Article 38 of the Convention, which stipulates that the Court shall pursue the examination of the case together with the representatives of the parties, and if need be, undertake an investigation, for effective conduct of which the States concerned shall furnish all necessary facilities. The Court therefore held unanimously that it was not necessary to examine separately the complaint under Article 34 of the Convention.

The Court dismissed the applicant's claim in relation to pecuniary damage. It awarded the applicant EUR 14,000 for non-pecuniary damage and EUR 14,000 for costs and expenses less EUR 1,513 already received from the Council of Europe in legal aid.

Commentary

This case is considered in the General Commentary on Disappearances, below.

İpek v Turkey

(25760/94)

European Court of Human Rights: Judgment of 17 February 2004

Disappearance – Destruction of homes and possessions – Lack of effective investigation – Discrimination – Prohibition of torture and inhumane treatment – Articles 2, 3, 5, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The applicant, Abdurrazek İpek, is a Turkish national who was born in 1942. He currently resides in the city of Diyarbakır. At the material time he resided in the hamlet of Dahlezeri, outside the village of Türelî, near Lice, in Diyarbakır province.

On 18 May 1994, a military convoy arrived near the hamlet of Dahlezeri. Armed soldiers entered the village and ordered all of the inhabitants to leave their homes and to gather by the school located just outside the hamlet. There the soldiers separated the men from the women and children and took the identity cards of all adult males, including those of the applicant and his sons, Servet and İkrâm İpek. Meanwhile the other soldiers set fire to the houses. The inhabitants congregated at the school could see the flames, but were prevented from returning to their homes at this stage.

Before noon, the soldiers ostensibly selected at random six young males, including the applicant's two sons, from the group gathered at the school to help carry equipment back to the meeting point outside the hamlet. Before departing the soldiers gave assurances that the six men would be allowed to return once this task was completed, and returned the identity cards of all inhabitants except those of the six men.

The applicant returned to the village with the other inhabitants to find that his home, possessions and livestock had been completely destroyed. Most of the houses had been either badly damaged or destroyed. In the afternoon of 18 May 1994, there was a second military raid on the hamlet. Soldiers set fire to the houses which had escaped destruction and released the inhabitants.

The six men who had been taken away during the first military raid were driven to a military establishment in Lice. On the morning of 19 May 1994, three of the men were allowed to leave. The other three, including the applicant's two sons, were not however released.

About 15 days after his two sons disappeared (around 3 May 1994), the applicant had still heard nothing about their whereabouts. He applied to the Public Prosecutor of Diyarbakır State Security Court, the Public Prosecutor of Lice and the Lice gendarmerie command. He was however unable to obtain any information about his sons from any of these authorities.

On 27 October 1994, the applicant filed another petition with the Public Prosecutor of Diyarbakır State Security Court, asking him to investigate the circumstances of his sons' disappearance. He was not permitted to meet the Prosecutor but a plain-clothes policeman consulted the records and informed the applicant that his sons were not there.

The applicant's other son, Hakim İpek, sent two or three petitions to the Governor of the State of Emergency, and received two replies which denied that his brothers had ever been detained.

Complaints

The applicants complain under Articles 2, 3, 5, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

The applicant argues that, given the high incidence of deaths in custody, there was a substantial risk that his two sons had died whilst in unacknowledged detention in violation of Article 2 of the Convention. He also complained of the lack of any effective State system for ensuring protection of the right to life.

He also complains that his inability to discover what had happened to his sons violated Article 3 of the Convention.

He complains under Article 5 of the Convention in respect of the unlawful detention of his sons and the failure of the authorities to inform his sons of the reasons for their detention and to bring them before a judicial authority within a reasonable time. He also claimed that his right under this Article was violated due to his inability to bring proceedings before which the lawfulness of his sons' detention could be determined.

He further alleges a lack of any independent national authority before which his complaints could be brought with any prospect of success, as required by Article 13 of the Convention.

Finally the applicant alleges that he had suffered discriminatory treatment due to his Kurdish origin which violated Article 14 of the Convention in conjunction with the aforementioned Articles.

Relying upon Article 18 of the Convention the applicant complained that the restrictions to which his rights under the Convention had been subjected were not those permissible according to the Convention.

The applicant complains under Article 1 of Protocol No. 1 to the Convention of the destruction of his home and possessions.

Held

The Court found that there was a violation of Article 2 of the Convention on account of the fact that no information had come to light concerning the whereabouts of the applicant's sons for almost nine-and-a-half years. It was satisfied that accordingly Servet and İkrâm İpek had to be presumed dead following their unacknowledged detention by the security forces and that Turkey was therefore responsible for their deaths.

The Court also found that Article 2 of the Convention had been violated in terms of its procedural aspect because the investigations into disappearances of the applicant's two sons were seriously inadequate and deficient.

The Court held that there had been a violation of Article 3 of the Convention on the basis of the anguish and distress that the applicant had suffered and continued to suffer as a result of the disappearance of his two sons and of his inability to find out what had happened to them.

The Court found that the İpek brothers had been held in unacknowledged detention in complete absence of the safeguards provided for within Article 5 of the Convention, and that that there had accordingly been a violation of their rights to liberty and security guaranteed by that provision.

The Court held that there had been a violation of Article 13 of the Convention in conjunction with Articles 2, 3 and 5 and Article 1 of Protocol No. 1 to the Convention, both in relation to the presumed death of the applicant's sons and the destruction of the applicant's property.

The Court found that there was insufficient evidence to uphold the applicant's complaint of violations of Articles 14 and 18 of the Convention.

The Court concluded that there had been a violation of Article 1 of Protocol No. 1 to the Convention., stating that the security forces' deliberate destruction of the applicant's family home and possessions constituted a grave and unjustified interference with his right.

The Court also held that Turkey had failed to provide the Court with all facilities necessary to its task of establishing the facts of the case in accordance with Article 38(1)(a) of the Convention.

Commentary

This case is considered in the General Commentary on Disappearances, below.

Şen v Turkey (No. 2)

(25354/94)

European Court of Human Rights: Judgment of 30 March 2004

Disappearance - Right to life - Prohibition of torture - Prohibition of discrimination - Articles 2, 3, 6, 13, 14 and 25 of the Convention.

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The applicant, Nuray Şen, is a Turkish national of Kurdish origin. At the time of her application she was living in Nizip, in Gaziantep, Turkey.

The applicant's husband, Mehmet Şen, was a leading member of DEP and had been the party's candidate for the post of Mayor of Ayran. On 26 March 1994, he was playing cards in the café he co-owned. That evening he was allegedly taken away from the café by plain-clothed police officials to an unknown location. Upon learning of the abduction, the applicant contacted several relevant offices, including Nizip Anti-terrorism Department and the Gaziantep Security Directorate, to either inform them of her husband's abduction or to make inquiries, but they did not have information regarding the whereabouts of her husband.

On 29 March 1994, Mehmet Şen's body was found near the quarry of Karpuzkaya on the Kahramanmaraş-Gaziantep highway construction site. An autopsy was carried out on the same day and concluded that death had resulted from a fractured skull, the destruction of the cellular tissues of the brain and an internal haemorrhage due to a bullet wound. No signs of torture were mentioned in the resultant report.

On 30 March 1994 the applicant learned that her husband's body was in the Gaziantep State Hospital. She positively identified the body as that of her husband and concluded that he had died as a result of torture. There had been many killings by unknown perpetrators of those holding the same political activities and views as the applicant's husband, and the deceased had expressed fears in relation to this prior to his alleged abduction. These facts, along with her own examination of the corpse, lead the applicant to conclude that her husband had been abducted, tortured and killed by security forces.

The deceased's father, Necip Şen, also went to the hospital to identify his son's body that day. There, he did not meet the applicant and could not bear to look at his son's 'tortured corpse'. In contrast to his daughter-in-law, Necip Şen was aware neither of his son's fears for his life, nor of his difficulties as a politician, as these issues had never been discussed between them.

The applicant informed the Public Prosecutor that her husband had been tortured. A murder

investigation was initiated and the resultant reports concluded by stating that, although the perpetrators had not been found, attempts would be made to bring those responsible to justice. No progress has however been made.

Complaints

The applicant complained under Article 2 of the Convention that her husband had been abducted and killed by State agents or persons acting on behalf of the State authorities.

Relying upon Article 2 of the Convention the applicant also complained that the national authorities had failed to carry out an adequate investigation into the circumstances surrounding the death of her husband.

The applicant complained under Article 3 of the Convention that her husband had been tortured before being killed.

The applicant also complained that acute anguish suffered by the applicant and her daughter as a result of the events in question constituted a violation of Article 3 of the Convention.

The applicant complained that the State's failure to carry out an adequate and effective investigation into the circumstances surrounding the death of Mr Şen violated Articles 6 and 13 of the Convention.

Relying upon Article 14 of the Convention in conjunction with Article 2 the applicant complained that her husband's death had been a result of the discriminatory attitudes towards Turkish citizens of Kurdish origin, who were frequently victims of unlawful killings.

Finally, the applicant alleged that the State had interfered with her right of petition to the Convention organs under former Article 25 of the Convention (now replaced by Article 34).

Held

The Court held that the applicant had failed to prove that there had been a violation of Article 2 of the Convention in relation to her husband's alleged abduction and murder by State agents or persons acting on behalf of the state authorities.

The Court found that there had been a violation of Article 2 of the Convention on account of the national authorities' failure to carry out an adequate and effective investigation into the case.

The Court held that there was no factual basis for the applicant's complaint that her husband had been tortured, and that accordingly there had been no violation of Article 3 of the Convention in this respect.

The Court considered that the applicant's complaint that the acute anguish which she and her daughter had suffered constituted a violation of Article 3 should more appropriately be dealt with under Article 41.

In relation to the complaint submitted by the applicant under Article 6 of the Convention the Court held that, because she did not attempt to bring any civil proceedings and that her complaints were entirely directed against the Public Prosecutor, it was appropriate to examine this complain under Article 13 alone.

The Court held that Article 13 of the Convention had been violated as the authorities failed to discharge their duty to carry out an effective criminal investigation, noting that the requirements under this Article are broader than those under Article 2.

The Court considered unsubstantiated the applicant's allegations of discrimination in breach of Article 14 in conjunction with Article 2, and consequently held that there had been no violation of that Article.

The Court held it unnecessary to examine separately the complain made under Article 25 as it had not been specified or elaborated at an early enough stage in the proceedings.

Commentary

This case is considered in the General Commentary on Disappearances, below.

Acar v Turkey⁹¹

(26307/95)

European Court of Human Rights: Judgment 8 April 2004

Disappearance - Killing by state officials - Lack of effective investigation - Articles 2, 3, 5, 6, 8, 13, 14, 18, 34 and 38 of the Convention

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The applicant, Tashin Acar, is the brother of Mehmet Acar, who disappeared on 20 August 1994 when he was abducted in Ambar, Turkey, by two unidentified person alleged to be plain-clothed police officers. The applicant was born in 1970 and lives in Sollentuna (Sweden). Mehmet Acar, born in 1963, was a farmer in Ambar, a village in the Bismil district in south-east Turkey.

On 20 August 1994 the applicant's brother was working in a cotton field near Ambar when an unregistered car pulled up and two armed plain-clothed police officers got out. They asked the

applicant's brother to get into the car and when he refused they tied his hands, blindfolded him and punched him in the head and stomach before forcing him into their car and driving away.

These events were witnessed by İlhan Ezer, a local farmer, and İhsan Acar, Mehmet Acar's son, who ran home and told his mother, Halise Açar, what he had seen. Halise Açar relayed this information to the mukhtar. Abide Acar, Mehmet Acar's daughter, had seen her father sitting in a car which had driven through the village. Another villager also claimed to have seen Mehmet Acar being taken to the riverbank where five other people were waiting in another car. There Mehmet Acar's feet and hands were tied, he was blindfolded and his mouth was taped. The two cars drove away in the direction of Bismil. Nothing has been heard from Mehmet Acar since then.

The applicant and Mehmet Acar's family filed a series of petitions and complaints regarding the disappearance with the local authorities, including the Deputy Governor and the Bismil gendarmerie, in order to investigate the circumstances of Mehmet Acar's detention. In July 1995 the applicant provided the Bismil Public Prosecutor with the names of two gendarmes and a village guard whom he suspected of being responsible for his brother's abduction. The Public Prosecutor however declined jurisdiction and in January 1997 the Administrative Council decided not to prosecute the two officials in question on the basis that there was insufficient evidence against them. This decision was upheld by the Supreme Administrative Court on 14 January 2000.

In February 2000 Mehmet Acar's mother, wife and sister maintained that they had seen him in a news broadcast on the NTV television channel, during which a newsreader had announced the arrest of a man with his name. These three relatives informed the prosecuting authorities of this development but the Diyarbakır public prosecutor declined to open an investigation into the matter.

Complaints

Relying on Article 2 of the Convention the applicant complained that his brother had been abducted, tortured and killed by undercover agents of the State.

The applicant also complained under Article 2 that the Turkish authorities had failed to carry out an effective and adequate investigation into his brother's killing.

The applicant complained of a violation of Article 3 of the Convention both in relation to the treatment to which his brother was subjected whilst held in detention and in relation to himself on account of his own suffering resulting from the authorities' failure to conduct an effective investigation.

The applicant complained under Article 5 of the Convention regarding the unlawfulness and excessive length of his brother's detention.

Relying upon Article 6 of the Convention the applicant complained that his brother had been deprived of the services of a lawyer.

The applicant complained under Article 8 of the Convention that his brother had been deprived of any contact with his family.

Relying upon Article 13 to the Convention the applicant complained that he had been denied an effective remedy in relation to his brother's disappearance.

Relying upon Article 18 of the Convention the applicant complained that the restrictions imposed upon her rights and freedoms under the Convention had been applied for purposes not permitted under the Convention.

The applicant also submitted complaints under Articles 34 and 38 of the Convention.

Held

The Court held that there had been no substantive violation of Article 2 of the Convention. It held that the allegation that Mehmet Acar had been abducted was based upon hypothesis and speculation rather than upon reliable evidence and that, accordingly, the applicant had failed to establish beyond reasonable doubt that the responsibility of the Government had been engaged.

It did hold that there had been a violation of the procedural obligation of Article 2 of the Convention because the investigation by the domestic authorities into the disappearance of Mehmet Acar had not been complete or satisfactory for a number of reasons.

The Court held that there had been no violation of Article 3 of the Convention. Referring to its finding that the applicant had failed to prove beyond all reasonable doubt the allegation made under Article 2, the Court declared that neither was there sufficient evidence to allow it to conclude that the applicant's brother was subjected to ill-treatment or torture. In reply to the second complaint made under this Article, the Court held that it had not been established that there were special factors which would justify finding a violation of Article 3 of the Convention in relation to the applicant himself.

The Court held that, due to its determination of the complaints made under Article 2 of the Convention, there was no factual basis upon which to conclude that there had been a violation of Articles 5, 6 and 8 of the Convention.

The Court declared that it had no jurisdiction to consider the applicant's complaints made under Articles 13 and 14 of the Convention.

The Court further held that, on the basis of the facts as established in this case, there had been no violation of Article 18 of the Convention.

The Court held that there had been a violation of Article 38 of the Convention due to the Government's failure to act with due diligence in complying with requests made by the Commission and the Court to make available evidence considered necessary for the examination of the application.

The Court declared that, in relation to its finding in relation to the complaint made under Article 38 of the Convention, no separate issue arose under Article 34 of the Convention.

The Court dismissed the applicant's claim for compensation for pecuniary damage which he suffered as a result of his brother's disappearance.

The Court awarded the applicant EUR 10,000 for non-pecuniary damage.

It also awarded the applicant EUR 10,000 in respect of legal costs and expenses minus EUR 2,299.77 which had already been received from the Council of Europe in the form of legal aid.

Commentary

This case is considered in the General Commentary on Disappearances, below.

Özalp and Others v Turkey

(32457/96)

European Court of Human Rights: Judgment of 8 April 2004

Disappearance - Killing by state officials - Lack of effective investigation - Articles 2, 3, 6 and 13 of the Convention

Facts

The applicants, seven Turkish nationals, are the wife and children of Cavit Özalp, who was killed in 1995 while held in custody.

Until 1994 the Özalp family resided in Serçeler village in Bismil District in the province of Diyarbakır. In the spring of 1994 the family moved to Diyarbakır because security forces had begun to put members of the family under pressure to become village guards.

On 21 August 1995, Hacı Özalp, a son of Cavit Özalp and one of the applicants, returned to the Bismil district to visit the fields that belonged to the family. Upon his arrival he was stopped and

questioned by soldiers regarding the whereabouts of his father. He was then taken to the gendarme command where he was held in custody for further questioning. During the interrogation, the applicant told the authorities where they could find his father who was consequently taken into custody in Diyarbakır on 24 August 1995. A medical report, dated 24 August 1995, stated that there were no signs that Cavit Özalp had suffered ill-treatment. Hacı Özalp saw his father in custody on that date, but they were not allowed to talk to each other.

On 26 August 1996, Hacı Özalp was released from custody. While he was in Bismil later that day an acquaintance informed Hacı Özalp that an incident concerning his father had occurred in Kamberli village. Hacı Özalp travelled to Kamberli village to investigate the incident. There a villager notified him of his father's death. Later that day two police officers visited the family home in Diyarbakır where Hacı Özalp's uncle was told of Cavit Özalp's death and an investigation commenced.

On 5 February 1996, the applicants filed a petition with the Public Prosecutor of Diyarbakır State Security Court for the prosecution of those responsible for Cavit Özalp's death. They also sought to acquire the arrest and autopsy reports as well as the Public Prosecutor's decision of non-prosecution, delivered on 24 November 1995, which had resulted from the investigation into Cavit Özalp's death. The Public Prosecutor refused their request for documents and transferred the case to Bismil District Administrative Council, declaring a lack of jurisdiction.

Bismil District Administrative Council appointed a rapporteur, who was an army major, to conduct the investigation. On 28 February 1996, the Council adopted the rapporteur's report and declared that there was reason to bring proceedings against the three accused gendarme officers. The case was automatically referred to the Diyarbakır Regional Administrative Court which upheld the decision delivered by the Administrative Council on 2 April 1996.

On 26 August 1995, the Government submitted that the deceased was showing soldiers a shelter where bombs had been planted by the PKK and that he had been killed by a large explosion whilst lifting the cover of the shelter. The Government also submitted that the deceased was a member of the PKK and that he had helped to supply food, weapons, clothes, medicines and had allowed members of the PKK to stay in his house.

Complaints

Relying on Article 2 of the Convention, the applicants complain that Cavit Özalp was killed in custody by security forces.

The applicant also complained under Article 2 that the judicial authorities had failed to carry out an effective investigation into his brother's death.

Relying on Article 3 of the Convention the applicants complained that Cavit Özalp was subjected to ill-treatment by the security forces prior to his death.

The applicant complained under Article 6(1) of the Convention that they had been denied access to the courts.

Held

The Court found that a violation of Article 2 of the Convention had occurred in relation to the death of Cavit Özalp whilst in custody. It stated that the authorities had failed to minimise any risk to Cavit Özalp's life despite having taken precautions in relation to their own safety at the material time.

The Court also found that the authorities' failure to carry out an effective investigation into the cause of Cavit Özalp's death constituted a violation of Article 2 of the Convention.

The Court found no violation of Article 3 of the Convention in relation to the alleged ill-treatment of Cavit Özalp prior to his death. This was due to both the lack of supporting evidence and the medical report dated 24 August 1995.

The Court held that it was unnecessary to determine whether there had been a violation of Article 6(1) of the Convention. It stated that it would be more appropriate to consider the applicants' complaint of the failure to investigate the death under Article 13 of the Convention, which imposes a more general obligation to provide a remedy with which beneficiaries may enforce their rights under the Convention. The Court found that, in being denied an effective remedy in relation to the death of Cavit Özalp, the applicants' right under Article 13 of the Convention had been violated.

Commentary

This case is considered in the General Commentary on Disappearances, below.

Buldan v Turkey

(28298/95)

European Court of Human Rights: Judgment of 20 April 2004

Disappearance - Killing by state officials - Lack of effective investigation - Articles 2, 3, 13 and 14 of the Convention.

Facts

The applicant, Nejdet Buldan, is a Turkish national of Kurdish origin. He resides in Gelsenkirchen, Germany, but resided in Turkey at the material time. He introduced the application on his own

behalf and on behalf of the widow and children of his deceased brother, Savaş Buldan.

At around 4.30am on 3 June 1994, Savaş Buldan left a casino at the Çınar Hotel in the Yeşilyurt area of Istanbul with two friends. Seven or eight plain-clothed police officers approached the three men, carrying walkie-talkies, firearms and wearing bullet proof vests. They forced Savaş Buldan and his two companions into cars and drove away.

At around 5.00am on 3 June 1994, the applicant discovered what had happened to his brother. Upon hearing the news the applicant and his friends and family began to search for Savaş Buldan. Later that day a watchman at the national park told Nejdet Buldan's search party that three cars carrying ten or eleven people had entered the area at around 7.30 am on 3 June 1994.

Upon receiving news of his brother's abduction the applicant immediately contacted members of Parliament, the Governor of Istanbul, the office of the Prime Minister and the media. He also made a written application to the Bakırköy Public Prosecutor. Initial enquiries carried out by the authorities found that the three individuals who had been taken away in the early hours of 3 June 1994 had not been taken into custody. Nihat Buldan, another brother of Savaş Buldan, submitted an additional petition to the Bakırköy public prosecutor's office requesting the prosecutor to investigate the abduction of his brother by plain-clothed police officers.

Yesilköy police headquarters exercise jurisdiction over the area in which the incident took place. The local authorities requested that the family members of Savaş Buldan visit these headquarters. When they arrived there as requested no written statements were taken from them. The Yesilköy police headquarters did inform the Bakırköy police headquarters and the anti-terrorist police of those events on 3 June 1994.

At around 9pm on 3 June 1994, an individual contacted the Yığılca gendarmarie station within the district of Bolu, some 270 kilometres from where the three men had been abducted, to report that he had seen three bodies near to a river where he had gone to fish. The gendarmerie visited the scene around fifteen minutes later and found three bodies there as reported. There was however no evidence of the cause of their deaths.

At around 11pm on 3 June 1994, the Public Prosecutor and two doctors arrived at the scene. A preliminary investigation revealed that the three men had been shot at point blank range and the rigor mortis had set in on their bodies.

At 2.45 am on 4 June 1994 the three corpses were taken to the Health Centre in Yığılca where two doctors carried out a post mortem examination in the presence of Yığılca Public Prosecutor. The doctors concluded that the death was caused by cerebral haemorrhage. Thus, it was deemed unnecessary to conduct a classical autopsy. The time of death was estimated to have been at around

4.45 pm on 3 June 1994.

In the early hours of 4 June 1994 the applicant was contacted by the gendarmerie in Bolu, informing him that three bodies had been found in Yığılca. Later that day the applicant attended the Duzce State Hospital where he identified the three bodies as those of his brother and his two friends.

Murder charges were brought against the suspected killer of Savas Buldan following investigations undertaken by the Bakırköy Chief Public Prosecutor's Office, Yığılca Gendermerie and Yığılca Public Prosecutor's Office.

On 18 November 1999 the suspected killer was acquitted due to lack of evidence. The case file was however returned to the Yığılca Public Prosecutor's office to continue the search for the perpetrators.

Complaints

Relying on Article 2 of the Convention the applicant complained that his brother was abducted, tortured and killed by undercover agents of the State.

The applicant also complained under Article 2 that the Turkish authorities had failed to carry out an effective and adequate investigation into his brother's killing.

The applicant further complained under Article 2 of the Convention that he had received death threats from unknown persons and as a result was forced to flee Turkey and seek asylum in Germany.

The applicant complained of a violation of Article 3 of the Convention in relation to his brother.

Relying on Article 13 of the Convention the applicant complained that the lack of effective investigation deprived him of an effective remedy with respect to his complaints.

Relying on Article 14 of the Convention in conjunction with Article 2, the applicant complains that state agents killed his brother because of his Kurdish origins.

Held

The Court found no violation of Article 2 of the Convention in relation to the applicant's allegation that his brother had been killed in circumstances which engaged the responsibility of the state, because the circumstances surrounding the death of the deceased remained a matter of mere speculation and assumption. In arriving at this conclusion, the Court stated that the Susurluk Report and the statement of former head of Istanbul and Diyarbakır Police Intelligence Hanefi Avci - two major pieces of incriminating evidence which were adduced by the applicant - could

not be relied upon for the purposes of establishing to the required standard of proof that State officials were implicated in any particular incident.

The Court held that there had been a violation of Article 2 of the Convention on account of the authorities' failure to conduct an adequate and effective investigation into the death of the applicant's brother.

The Court found no violation of Article 2 of the Convention with respect to the applicant himself.

The Court stated that there was no factual basis upon which to conclude that there had been a violation of Article 3 of the Convention in relation to the applicant's brother.

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

The Court found no substantiated reasons for the applicant's allegations that his brother had been killed because of his Kurdish origins and that consequently there was no violation of Article 14 of the Convention.

Commentary

This case is considered in the General Commentary on Disappearances, below.

General Commentary on Disappearances

Article 2 is one of the cornerstones of the Convention, from which no derogation is permitted. The circumstances in which deprivation of the right to life may be justified must therefore be strictly construed. The Court applies the high standard of proof 'beyond reasonable doubt' when assessing the evidence of these cases. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact (*Ireland v United Kingdom*, No. 5310/71, 18.1.1978). As regards the assessment of evidence, the Court's subsidiary nature means that it must be cautious in assuming the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case (see *McKerr v United Kingdom*, No. 28883/95, 4.4.2000).

This is of critical importance in cases in which the alleged violation of this Article originated in the disappearance of an individual because these are characterised by a lack of information regarding the circumstances in which the event occurred. In some of these cases, the actual fate of the disappeared person is never established, leading the applicants to allege a presumption of death at the hands of the State. The Court has noted that where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (see *Avsar v Turkey*, No. 25657/94, 10.7.2001).

The six cases cited above exemplify the difficulties imposed upon by the applicants by the high standard of proof beyond reasonable doubt, but they also reveal variance in the Court's method of dealing with the unique circumstances which characterise this type of case.

In *Tekdağ v Turkey*, the Court was willing to consider the overall context in which the abduction and killing of the applicant's husband took place. It drew attention to its previous findings in similar cases brought against Turkey in support of the applicant's allegation that contra-guerillas had targeted her husband due to his supposed links to the PKK. It also accepted as undisputed the fact that there were a significant number of killings which had become known as the 'unknown perpetrator killings' phenomenon and which included prominent Kurdish figures. It noted that this context did support the applicant's complaints. (para. 74)

Crucially however, the Court found that the applicant had not proven her allegations beyond reasonable doubt, due to the facts that there were no eye-witnesses to the alleged incidents, that it had not been established that the applicant's husband had been seen with the State security forces, and that the witnesses referred to by the applicant had been either untraceable or unwilling to disclose their identity. (para.76) The latter fact is critical, as in many cases of this nature witnesses may harbour fears, possibly justified, of the repercussions which may follow their testimony against the State.

In *İpek v Turkey*, the Court stated that, in fulfilling its obligation to subject the deprivation of life to the most careful scrutiny, it must take into consideration "all the surrounding circumstances" as well as the actions of the particular State agents allegedly involved. It acknowledged that detained persons are in a position of vulnerability and that the authorities are obliged to protect them and to account for the treatment to which they were subjected while in the custody of the State. The Court declared that this obligation is particularly stringent where the detained individual dies or disappears thereafter (see *Salman v Turkey*, No. 21986/93, 27.6.2000: and *Demiray v Turkey*, No. 27308/95, 21.11.2000), (para. 164). Crucially, the Court proceeded to assert that,

"Where the events in issue lie wholly, or in a large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation." (para 165)

The Court found that the evidence averred by the applicant gave rise to the presumption that the applicant's two sons were dead following their unacknowledged detention by the security forces and that the Government was consequently obliged to account for the treatment to which the two men had been subjected whilst in the custody of the State. This evidence included the facts that the brothers were seen being taken away by soldiers, were last seen in the hands of security forces

in an unidentified military establishment, and that nine-and-a-half years had since elapsed during which no information had come to light regarding the brothers' whereabouts.

Critical to the judgment was the Court's decision that, although it was unable to determine the brothers' fate, the general context of the situation in southeast of Turkey could be considered, and provided compelling support for the belief that the unacknowledged detention of the applicant's two sons would be life-threatening: it recalled earlier judgments in which it had held that defects in protection offered by the criminal law in southeast of Turkey permitted or fostered a lack of accountability of the members of the security forces. (para. 167) In this respect the judgment exceeds *Tekdağ v Turkey*, in which the Court's consideration of the context in which the events had occurred had not detracted from the fact that the applicant had been unable to prove her allegations beyond reasonable doubt. The willingness of the Court in *İpek v Turkey* to take account of the reasons for the applicant's inability to meet the standard of proof is of paramount importance because it renders the State - rather than the applicant - liable for the situation which it has deliberately created.

The Court found that the authorities had not discharged their obligation, because they had not provided any explanation of what followed the brothers' apprehension, and had not relied upon any ground to justify the use of lethal force by their agents. The Court consequently attributed to the Government liability for the brothers' deaths and found that there had been violation of Article 2 of the Convention.

In *Şen v. Turkey* (No. 2), the Court considered that relevant contextual evidence averred by the applicant in support of her complaint under Article 2 might have militated in the applicant's favour. In doing so, it referred to an earlier judgment, or judgments, in which it had acknowledged the undisputed fact that there were a significant number of killings which became known as the "unknown perpetrator killing" phenomenon, and which included prominent Kurdish figures (see *Mahmut Kaya v Turkey*, No. 22535/93, 28.3.2000; *Yasa v Turkey*, No. 22495/93, 2.9.1998; and *Tepe v Turkey*, No. 27244/95, 9.5.2003). Other relevant circumstances referred to by the Court were the deceased's membership of the DEP party and his political ambitions.

Ultimately however, this contextual evidence had no bearing upon the applicant's arguments because the Court found determinative the fact that, lacking sufficient witness statements and failing to prove that State agents had been involved in the events, the applicant's only firm evidence had been her own statements and even these were based only upon hearsay. The Court accordingly concluded that the applicant had not proved beyond reasonable doubt that her husband had been abducted and killed by State agents.

In *Acar v Turkey*, the Grand Chamber noted that, due to the contradiction of the applicant's allegations by eye-witnesses and his failure to produce corroborative evidence, his claim that his

brother was abducted and detained by State agents was based upon hypothesis and speculation rather than reliable evidence. Accordingly, the Court found that the applicant had failed to prove beyond all reasonable doubt that the responsibility of the Government was engaged in relation to the abduction and disappearance of the applicant's brother and that no violation of Article 2 of the Convention had been established. As such, the Court did not take any account of the prevailing situation in southeast of Turkey, which constituted the context of the case, as it had done in both *Tekdağ v Turkey* and *İpek v Turkey*. In doing so, it refused to acknowledge the fact that the State's actions were actually intended to leave the applicant with nothing more concrete than hypothesis and speculation in relation to the fate of his brother.

Judge Bonello, who reluctantly voted with the majority against finding a substantive violation of Article 2, issued a concurring opinion in which he stated that the case should not have turned upon the applicant's failure to demonstrate that the disappearance engaged the State's responsibility. Although he agreed that it was incontestable that the applicant had failed to meet the requisite standard of proof beyond reasonable doubt, he felt it was equally incontestable that the Court had made the applicant liable for the Government's deliberate obstruction of any access potentially relevant evidence. (para. 6) He declared that the Court had failed to follow its jurisprudence according to which it was justified in drawing inferences as to the well-foundedness of the applicant's allegations if the State is found to be at fault gathering, suppressing or secreting evidence, (para.11). He concluded by stating that,

“In my view, the Court ought to have declared, boldly and defiantly, that, when a State defaults in its duties to investigate and to hand over evidence it has under its control, the burden of proof shifts. It is then for the Government to disprove the applicant's allegations. Failure to draw these inferences will only embolden rogue States in their efforts to rig sham investigations, and encourage the suppression of incriminating evidence.” (para. 13)

In *Özalp and Others v Turkey*, the applicants succeeded in establishing beyond reasonable doubt that Cavit Özalp had been killed by State agents because the Court considered that it could be reasonably inferred that the relevant authorities had failed to take preventative measures with requisite care to protect his life. This was due to the Government's averments that the gendarmes had acted upon their awareness of the risk of explosion by hiding to protect their own lives, but had failed to indicate any measures which had been taken to protect the deceased's life. The Court accordingly found that responsibility of the Government was engaged and held that there had been a violation of Article 2 of the Convention.

In *Buldan v Turkey*, the applicant's main pieces of evidence were the Susurluk report, which actually referred to the killing of his brother, and the statement made by Hanefi Avci, former head of Istanbul and Diyarbakır Police Intelligence, which asserted that the applicant's brother

had been kidnapped and assassinated by a specially formed team of State officials and civilians. In view of this evidence, the Court merely conceded that the applicant's allegation that his brother had been killed by or with the connivance of State agents could not be discarded as *prima facie* untenable. (para. 78) However, the Court concluded that the applicant had failed to prove his allegation beyond reasonable doubt because the actual circumstances in which the deceased died remain "a matter of speculation and assumption" in spite of the fact that the applicant's brother was specifically mentioned in the Susurluk Report. (para. 81) Of critical importance was the Court's decision to follow its previous judgments that had held that the Susurluk Report, which provided information on the ongoing conflict between the State and the PKK, could not be relied upon for establishing to the required standard of proof that State agents were implicated in any particular incident (see *Yasa v Turkey*, No. 22495/93, 2.9.1998; and *Özgür Gündem v Turkey*, No. 23144/93, 16.3.2000). This explicit rejection of the possibility of considering the context of the disappearance stands in stark contrast to the Court's approach in *Tekdağ v Turkey* and *İpek v Turkey*. (para. 80)

These judgements, delivered within a period of just over three months, show the Court attempting to balance the subsidiary nature of its role with the need to secure justice in case which are characterised by the State's abuse of power. The high point reached in *İpek v Turkey*, in which the Court made the State liable for intentionally withholding evidence, was shortlived. In *Acar v Turkey*, the Grand Chamber retreated to a position which, in effect, allows the State to benefit from the evidential advantage it has deliberately secured. The case raises the grave concern, expressed by Judge Bonello in his concurring opinion, that from now on the Court will not only unfairly penalise applicants on the very basis of the disadvantage which they have suffered at the hands of the States, but that in doing so it will transmit a signal to States that they are free to act with impunity.

Asylum / Extradition

Venkadajalasarma v The Netherlands

(58510/00)

European Court of Human Rights: Judgment of 17 February 2004

Asylum - Expulsion – Risk of torture or inhuman and degrading treatment - Article 3 of the Convention

Facts

The applicant, Ramachandraiyer Venkadajalasarma, is a Sri Lankan national who belongs to the Tamil population group. He was born in 1958 and currently resides in Heerlen, the Netherlands.

At the material time the applicant lived in Jaffna on the Jaffna peninsula of Sri Lanka, an area

controlled by the LTTE, a Tamil organisation which was engaged in an armed struggle for independence.

The applicant's livelihood was his minibus. From January 1994, the LTTE forced the applicant to transport foodstuffs two or three times a month. The group paid for the petrol used on these trips. In March 1995, the applicant refused to transport bombs for the group which resulted in the confiscation of his minibus. His livelihood gone, he was forced to work in the LTTE kitchens and help them dig trenches.

On 21 September 1995, members of the LTTE visited the applicant's home where they informed the applicant's wife that the applicant was to report to their camp. The applicant was deeply concerned upon learning this, because recently friends of his who had refused to join the ranks of the LTTE had been shot. Consequently the applicant went into hiding and subsequently decided to flee to the national capital of Colombo.

On 1 October 1995, the applicant visited the army camp of Vavuniya to obtain a travel pass. He was detained there for two days on suspicion of being a LTTE supporter. The applicant claims that he was stripped, strung up and beaten with an iron rod, stabbed with a knife and burned with a cigarette on his left arm. He was released on 2 October 1995, after an informant failed to identify him as an LTTE assistant. He was issued with a travel pass on condition that he returned from Colombo within a week.

The applicant stayed in Colombo for a month and did not leave his accommodation for fear of being arrested by the army. During this time a doctor examined his injuries. The applicant decided to leave Sri Lanka as he felt that he could not return to Jaffna and was unable to settle in Colombo. He flew to Amsterdam via Bombay on his own passport. A travel agent in Bombay confiscated the applicant's passport.

On 2 November 1995, the applicant arrived in the Netherlands. On 3 November 1995, he applied for asylum or, alternatively, for a residence permit on humanitarian grounds. On 6 December 1995, the scars found on the applicant's body were much older than two months and a round scar found on his left arm was bigger than the diameter of a cigarette.

On 5 January 1996, the Deputy Minister of Justice rejected the applicant's requests. The applicant was notified that he was not allowed to remain in the country pending any objections filed in relation to the rejection of his applications for asylum or residence.

On 10 January 1996, the applicant filed an objection on the above decision and applied to the President of the Regional Court of the Hague for an interim measure. On 10 May 1996 the applicant's expulsion was suspended whilst this objection was heard. His request for an interim

measure was withdrawn.

On 5 November 1996, the Deputy Minister of Justice rejected the applicant's objection. On 11 December 1996, the applicant lodged an appeal with the Regional Court of the Hague against this rejection, and a request from the President of that Court for an interim measure. He was not permitted to remain in the country pending the consideration of the appeal.

In the final decision, issued on 9 July 1997, the President of the Regional Court of the Hague rejected both the applicant's appeal and his request for an interim measure. On 16 July an expulsion order was issued in relation to the applicant. The applicant did not however leave the country, nor was he forcibly expelled.

On 5 September 1997, the applicant made a new request for asylum which was rejected on 24 April 1998 by the Deputy Minister of Justice. The applicant objected to this rejection on the basis that he was in real fear of persecution and ill-treatment contrary to Article 3 of the Convention if he returned to Sri Lanka because he came from Jaffna, spoke no Sinhalese, was a suspected member of the LTTE and had previously been detained.

On 8 December 1998, the Deputy Minister of Justice rejected the applicant's objection on the ground that his membership within a "risk category" was insufficient to infer that Article 3 of the Convention would be violated were he refused asylum in the Netherlands and was thereby forced to return to Sri Lanka.

On 5 January 1999, the applicant appealed against this decision to the Regional Court of the Hague. He also made a request to the President of the Court for an interim measure. He argued that he was at increased risk of being subjected to torture as he bore scars on his body. The applicant claimed that he was to be examined by a member of Amnesty International's Medical Examination Group and submitted that a review of the decision of 8 December 1998 was required.

On 16 September 1999, this appeal was rejected. The Court stated that the applicant's scars had been accounted for in the determination of his first request. His request for an interim measure was declared inadmissible. On 28 October 1999, an order for his expulsion was issued. On 11 January 2000 his request for revision of the Deputy Minister's decision was dismissed.

Complaints

The applicant complained under Article 3 of the Convention that he would be exposed to a real risk of torture and inhuman or degrading treatment if he was forced him to return to Sri Lanka by the Government. He therefore argued that, in effect, the Netherlands had pre-emptively breached that Article.

Held

The Court held that Article 3 of the Convention would not be violated if the applicant was returned to Sri Lanka. The Court noted that, in the context of the established facts, it was unlikely that the Sri Lankan authorities would identify the applicant as a high profile member of the LTTE and that, accordingly, the applicant would not be exposed to a real risk of being subjected to torture of inhuman or degrading treatment were he returned to Sri Lanka.

Commentary

This case is considered in the Joint Commentary with *Thampibillai v The Netherlands* (No. 61350/00, 17.2.2004), below.

Thampibillai v The Netherlands

(61350/00)

European Court of Human Rights: Judgment of 17 February 2004

Asylum - expulsion leading to possible torture or inhuman and degrading treatment - Article 3 of the Convention

Facts

The applicant, Thampibillai Tharmapalan, is a Sri Lankan national who belongs to the Tamil population group. He was born in 1973 and currently resides in Oosterbeek, the Netherlands.

The applicant came from the town of Vavuniya, located in the north of Sri Lanka and adjacent to an area controlled by the LTTE, a Tamil organisation which was engaged in an armed struggle for independence.

In August 1990 the Sri Lankan army shot dead the applicant's father, who had been suspected of providing material assistance to the LTTE. The following day the applicant's mother sent him away to stay with his uncle in the town of Jaffna, which was controlled by the LTTE.

On 12 January 1991, the applicant was arrested and detained in a military camp for two weeks. He was interrogated regarding the whereabouts of his brother, who was a member of the LTTE, while being beaten and hung from the ceilings by his thumbs. When new detainees arrived the applicant was made to inform on them.

After two weeks the applicant was released on condition that he reported to the camp on a daily basis. The applicant spent the next two weeks in hospital where he received treatment for the internal injuries he had sustained during detention. When the applicant first reported to the camp he was once again ill-treated and interrogated. On later occasions he accompanied soldiers

through the town to identify LTTE members.

Eventually the applicant decided to leave the country because he could no longer cope with his duty to report and with the interrogations and ill-treatment to which he was still being subjected to. On 19 May 1994, the applicant travelled to Colombo by train with his mother. The applicant had an identity card but his mother took it back with her to Vavuniya. On 20 May 1994, the applicant flew to Singapore on his own passport, and then to Moscow the next day. An intermediary in Moscow took the applicant's passport. Whilst in Moscow the applicant received letters from his mother telling him that she had been arrested and detained for two days by the army, which had begun to search for the applicant when he failed to report to the camp. The applicant disposed of the letters.

On 5 January 1995, the applicant began a journey by van to the Netherlands, where he arrived on 9 January 1995. The following day he applied for asylum or, alternatively, a residence permit on humanitarian grounds. The Deputy Minister for Justice rejected his applications on 11 May 1995. The applicant was informed that he could not remain in the country pending the resolution of any appeal made in relation to this decision.

On 9 June 1995, the applicant lodged an objection and requested an interim measure from Zwole Regional Court of The Hague. On 16 August 1995, the application for the interim measure was declared inadmissible. On 8 August 1996, the Deputy Minister for Justice rejected the objection filed by the applicant for the same reason.

On 18 September 1996, the applicant appealed to the Amsterdam Regional Court of the Hague, which dismissed the appeal on 27 June 1997. The applicant did not however leave the country, nor was he forced to leave the country.

On 29 September 1997, the applicant lodged a new request for a residence permit. This was rejected by the Deputy Minister for Justice on 30 October 1997. The applicant was not allowed to remain in the country pending the resolution of any appeal made in relation to the decision. On 27 November 1997 the applicant submitted an objection in relation to this decision and, on 26 January 1998, he requested an interim measure. This was granted on 4 March 1998. On 13 May 1998, the applicant was given the opportunity to comment on his application for a residence permit before an official committee.

On 2 December 1998 the Deputy Minister for Justice rejected the applicant's objection. This was because his alleged ill-treatment took place in 1992 but the applicant remained in Sri Lanka until 1994: his prolonged presence was interpreted as implying that the applicant would not suffer ill-treatment contrary to Article 3 of the Convention on his return to the country. The applicant was informed that any appeals against this decision would be dealt with expeditiously and furthermore

that his departure from the Netherlands would be suspended whilst any appeal was heard.

On 23 December 1998, the applicant appealed against the decision at the Amsterdam Regional Court of the Hague, criticising the quality of the information from the Ministry of Foreign Affairs used in the determination of those asylum claims made by Tamils. At the hearing of his appeal before the Regional Court on 11 January 2000 the applicant submitted that amendments to the Immigrants and Emigrants Act increased the risk of his detention if he were expelled back to Sri Lanka because he left Sri Lanka on an unofficial passport. On 22 February 1998, the Regional Court rejected the appeal.

On 12 September 1998, the applicant lodged a new request for asylum. This was rejected on 16 September 1998. The applicant appealed against this decision, but this too was rejected on 4 October 1998.

Complaints

The applicant complained under Article 3 of the Convention that he would be exposed to a real risk of torture or inhuman or degrading treatment if he was forced him to return to Sri Lanka by the Government. He therefore argued that, in effect, the Netherlands had pre-emptively breached that Article.

Held

The Court held that Article 3 of the Convention would not be violated if the applicant was returned to Sri Lanka, declaring that it had not been established that the authorities harboured against the applicant the suspicions which he alleged.

Joint Commentary with *Venkadajalasarma v. The Netherlands* (No. 58510/00, 17.2.04)

There is no right to political asylum in the Convention or its Protocols. State responsibility may however be engaged by where substantial grounds exist for believing that a person would face a real risk of being subjected to ill-treatment contrary to Article 3 if extradited (see *Soering v United Kingdom*, No. 14038/88, 7.7.1989). The prohibition of ill-treatment by Article 3 is absolute in cases concerning extradition as in all others.

In the cases of *Venkadajalasarma* and *Thampibillai* the Court observed that the applicants were not known to be LTTE supporters by the Sri Lankan authorities and that, accordingly, there was no real risk of their detention or subjection to torture or inhuman or degrading treatment if they were forced to return to Sri Lanka following refusal of asylum or residency.

In the case of *Venkadajalasarma* the applicant was detained for two days by the Sri Lankan army but was released with a travel pass to travel to Colombo when an informant did not identify him as an LTTE supporter. The Court accepted that this applicant left the country following his refusal

to join the ranks of the LTTE and following his ill-treatment whilst in detention.

In the case of *Thampibillai* the Court decided that this applicant's reason for leaving the country was not the ill-treatment he endured whilst reporting to the army on a daily basis; it came to this conclusion because he had remained in the country for almost four years after his father's death and nearly three-and-a-half years since his arrest and detention by the army. The applicant failed to convince the Court that he was known to the authorities. The Court considered that the army had no suspicion that the applicant was involved in LTTE activities, as the applicant had not been arrested or detained since his arrest in 1991. In addition to this the applicant was issued with a travel pass to travel to Colombo and was able to leave the country on his own passport. The Court considered that the authorities were unlikely to be looking for the applicant ten years later to find the whereabouts of his brother. Furthermore, it noted that his mother had not been contacted by the authorities since her detention.

The Court stated in the case of *Chalal v United Kingdom* (No. 22414/93, 5.11.1996) that, since the applicant had not yet been deported,

“... the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive...” (para. 86)

In deciding the two cases above, the Court relied upon current international reports on the situation in Sri Lanka. The Court observed that domestic security in Sri Lanka had improved in recent years, highlighting that no large-scale arbitrary arrests of Tamils had taken place for some time, that permission was no longer necessary for travel to certain areas of the country and that those arrested on suspicion of being LTTE supporters were now not subjected to ill-treatment.

Recent political developments in the country affirm however that Sri Lanka cannot yet be regarded as stable. On 4 November 2003, the Sri Lankan president Chandrika Kumaratunga suspended Parliament and sacked three senior ministers, accusing the Government of making too many concessions to the LTTE. On 14 November 2003, Norwegian mediators who held talks with the LTTE stated that the peace process, initiated in February 2002, was on hold until the country's political crisis was resolved. The Court's decision seems to ignore the fact that the volatility of the prevailing political situation could jeopardise the lives of the applicants should they be returned to Sri Lanka.

Torture and ill-treatment

Elçi and Others v Turkey

(23145/93 and 25091/94)

European Court of Human Rights: Judgment of 13 November 2003

Torture - Private and family life, home and correspondence - Articles 3, 5, 8 of the Convention

Facts

This is one of a series of KHRP cases brought to the European Court of Human Rights. The applicants, sixteen Turkish nationals born between 1958 and 1971, are Tahir Elçi, Nevzat Kaya, Şinasi Tur, Sabahattin Acar, Niyazi Çem, Mehmet Selim Kurbanoğlu, Meral Daniş Beştaş, Mesut Beştaş, Vedat Erten, Baki Demırhan, Arif Altinkalem, Gazanfer Abbasioğlu, Fuat Hayri Demır, Hüsnüye Ölmez, İmam Şahin and Arzu Şahin. All are lawyers by profession.

With the exception of Mr Altinkalem, the applicants were arrested and detained by the security forces ostensibly on the suspicion of aiding the PKK. The applicants allege that they were in fact detained for acting as human rights defenders.

Between 15 November and 7 December 1993 the applicants were arrested by members of the police or gendarmerie and taken to the Diyarbakır provincial gendarmerie headquarters. Some of the applicants alleged that the security forces had searched their homes and offices and seized documents, including the files of applicants to the European Commission of Human Rights. They were held at the provincial headquarters until their releases, which occurred between 10 and 21 December 1993.

While in custody, the applicants were interrogated. They were held in cold, damp cells and corridors and forced to sleep on the floor, sometimes blindfolded. They said that they were only allowed to go to the toilet twice a day and that the only food they received was a slice of bread a day. Some of the applicants alleged that they had been stripped and hosed down with freezing-cold water, humiliated, slapped and terrified into signing any document put before them; and that the police officers interrogating them had made death threats and insulted them. Later medical reports noted bruising to Hüsnüye Ölmez' knee and pneumonia in Mesut Bestas.

Complaints

All of the applicants alleged a violation of Article 5 of the Convention.

Tahir Elçi, Niyazi Çem, Hüsnüye Ölmez, Şinasi Tur, Sabahattin Acar, Mehmet Selim Kurbanoğlu, Mesut Beştaş, Vedat Erten and Meral Daniş Beştaş complained that while in custody they had been subjected to torture and to ill treatment contrary to Article 3 of the Convention.

Tahir Elçi, Şinasi Tur, Niyazi Çem, Sabahattin Acar and Mehmet Selim Kurbanoglu complained under Article 8 and Article 1 of Protocol No. 1 to the Convention, with regards to the search and seizure operations performed upon their arrest.

Tahir Elçi, İmam Şahin, Sabahattin Acar, Baki Demırhan and Arzu Şahin complained of a violation of former Article 25 (now Article 34) of the Convention.

Held

The Court held by 6 votes to 1 that there had been a violation of Article 3 of the Convention on account of the treatment inflicted on Tahir Elçi, Niyazi Çem, Meral Daniş Beştaş and Hüsnüye Ölmezli; that there had been a violation of Article 3 of the Convention on account of the treatment inflicted on Şinasi Tur, Sabahattin Acar, Mehmet Selim Kurbanoglu, Mesut Beştaş and Vedat Erten.

The Court held by 6 votes to 1 that there had been a violation of Article 3 of the Convention in its procedural aspect on account of the failure on the part of the judicial authorities to investigate the applicants' complaints of torture and ill-treatment in custody.

The Court held unanimously that there had been a violation of Article 5(1) of the Convention in respect of each of the applicants.

It held that there had been a violation of Article 8 of the Convention as regards Tahir Elçi, Şinasi Tur, Sabahattin Acar, Niyazi Çem and Mehmet Selim Kurbanoglu.

The Court held unanimously that no separate examination of the complaint under Article 1 of Protocol No. 1 was necessary and that there had been no violation of former Article 25 (now Article 34 of the Convention).

It awarded the applicants sums ranging from EUR 1,210 to 1,750 for pecuniary damage and from EUR 2,100 to 36,000 for non-pecuniary damage.

Commentary

The Court emphasised the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention. Persecution or harassment of members of the legal profession thus struck at the very heart of the Convention system (para. 669).

The Court referred to the findings of the European Committee for the Prevention of Torture (CPT), which carried out seven visits to Turkey between 1990 and 1997 in response to the considerable number of reports received from a variety of sources which alleged that persons deprived of their liberty, in particular those held in police custody, had been subjected to torture or other forms of ill-treatment. The CPT issued two public statements during this period. In the first, adopted on 15 December 1992, the CPT concluded that torture and other forms of severe ill-treatment were defining characteristics of police custody within Turkey. After its visit in 1994, the CPT found that this was still the case. In its second public statement, issued on 6 December 1996, the CPT noted that although some progress had been made it had found clear evidence of the continuing practice of torture and other forms of severe ill-treatment perpetrated by the police against those in their custody. Consequently it concluded that resort to torture and other forms of severe ill-treatment remained a common practice in police establishments in Turkey.

Recalling its previous jurisprudence, the Court declared that in assessing evidence of a violation of Article 3 of the Convention it adopts a standard of proof “beyond reasonable doubt” (*Avşar v Turkey*, No. 25657/94, 10.7.2001, para.282). The Court found the applicants’ testimony about their dire conditions of detention – cold, dark and damp, with inadequate bedding, food and sanitary facilities – to be credible and consistent. It also found the allegations made by Şinasi Tur, Sabahattin Acar, Mehmet Selim Kurbanoglu, Mesut Beştaş and Vedat Erten that they were insulted, humiliated, slapped and terrified into signing any document that was put before them to be credible and consistent. Furthermore, the Court accepted that the applicants were blindfolded, at least at crucial moments such as during interrogations. The Court did not attach great weight to the collective medical examination to which the applicants were subjected prior to being brought before the Public Prosecutor, as this had been superficial and cursory. It found that subsequent medical examinations, however, lent credence to the applicants’ claims.

The Court found that there had also been a violation of Article 3 of the Convention in its procedural aspect due to the judicial authorities’ total failure to investigate the applicants’ complaints of ill-treatment. The Court also noted that precisely because the applicants’ complaints had not been taken seriously or investigated by the authorities, no evidence had been presented in the present case that served to undermine the applicants’ accounts. Moreover, there were inconsistencies in the evidence provided by the witnesses who had appeared on behalf of the Government.

The Court found that Tahir Elçi, Niyazi Çem, Meral Daniş Beştaş and Hüsnüye Ölmez had suffered physical and mental ill-treatment at the hands of the gendarmerie during their detention. That ill-treatment had caused them severe pain and suffering and had been particularly serious and cruel, and had to be regarded as constituting torture within the meaning of Article 3 of the Convention. The Court further found that during their detention Şinasi Tur, Sabahattin Acar, Mehmet Selim Kurbanoglu, Mesut Beştaş and Vedat Erten had also been subjected to ill-treatment sufficiently serious to render it inhuman and degrading in violation of Article 3.

Recalling its jurisprudence, the Court held that where an individual makes a credible assertion that he has suffered treatment at the hands of agents of the State which infringes Article 3 of the Convention, that Article, 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", requires by implication that there should be an effective official investigation. Such an investigation should therefore be capable of leading to the identification and punishment of those responsible (see *Assenov v Bulgaria*, No. 24760/94, 28.9.1998, para.102). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment would be rendered ineffective in practice as it would be possible for agents of the State to abuse the rights of those under their control with virtual impunity.

Regarding the alleged violations of Article 8 of the Convention, the Court found that police searches of the homes and offices did constitute an interference with the right to respect for homes and correspondence. The searches and seizures were extensive, and privileged professional materials were taken without specific authorisation. The Court was struck by the lack of accountability and any acceptance of responsibility by the officials involved. It found that the search and seizure measures had been implemented without any, or any proper, authorisation or safeguards, in breach of Article 8 of the Convention. No search warrants had been issued by a prosecutor or judge and that neither had an official document or note of verbal instructions describing the purpose and scope of the searches been drawn up by any judicial authority before or after the searches. The Court found that the search and seizure measures had been implemented without any, or any proper, authorisation or safeguards. It concluded that the interferences in question had not been shown to be "in accordance with the law" and that there had accordingly been a violation of Article 8 of the Convention on this ground in the case of the five applicants concerned.

Sadik Önder v Turkey

(28520/95)

European Court of Human Rights: Judgment of 8 January 2004

Torture - Article 3 of the Convention

Facts

The applicant was born in 1969 and lives in Istanbul.

On 9 July 1994, the applicant and fourteen other people were taken into police custody by the Anti-Terror branch of the Istanbul Security Directorate on suspicion of being members of the Kurdistan Workers Party (PKK).

The applicant alleged that he was ill-treated and tortured in the police car on the way to the Istanbul

Security Directorate. He claimed that during his detention in the Directorate he was blindfolded and stripped naked, and then subjected to “Palestinian hanging”. He was electrocuted, his head was hit against the wall, was held parallel to the ground on his hands and feet and was threatened and insulted.

The applicant further claims that he was coerced into signing a statement in which he admitted to working for and being involved in the activities of the PKK. After having signed the statement he was kept in custody for another week so that the physical evidence of his ill-treatment would disappear. During that week a police officer came to his cell at regular intervals and treated his wounds to assist this process: due to this medical attention his scars healed very quickly. On 22 July 1994, the applicant and fourteen other detainees received medical examination which showed no signs of ill-treatment.

On 23 July 1994, the applicant was brought before the Public Prosecutor at Istanbul State Security Court. Before the Istanbul Court he denied having any current relations with the PKK. He told the Public Prosecutor that he had been subjected to torture, but the Public Prosecutor did not take his statement into consideration and did not record it. When he told the Public Prosecutor that he had been tortured, the police tortured him again.

On 22 August 1994, a medical report stated that although the applicant complained of widespread pain on his back, right arm and on both of his legs, the signs of traumatic lesions could not be found.

On 15 June 1995, the Chamber of Medicine found that the same doctor had concealed signs of torture in the medical examinations of several prisoners between 3 February and 7 October 1994. He was suspended from practising for six months.

Complaints

The applicant complained under Article 3 of the Convention that he was subjected to torture both while in police custody and after returning from the Public Prosecutor’s Office on 22 July 1994.

Held

The Court was unable to find beyond reasonable doubt that the applicant was subjected to treatment severe enough to fall under Article 3 of the Convention.

However, the Court did conclude that the applicant’s claim that he was ill-treated in police custody was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention. The Court therefore decided that there was a violation of Article 3 in its procedural aspect.

The Court awarded the applicant EUR 5,000 for non-pecuniary damages such as distress and frustration with the inadequacy of the investigations concerning his alleged ill-treatment.

It awarded the applicant EUR 2,500 in costs and expenses.

Commentary

In order to constitute a violation of Article 3 of the Convention the ill-treatment in question must reach a minimum degree of severity. In *B v France* (No. 13343/87, 25.3.1992) the Court first considered whether the conduct in question could be classified as “inhuman or degrading” and then determined whether it also reached the degree of gravity necessary to be qualified as “torture.” In *Raninen v Finland* (No. 20972/92, 16.12.1997) the Court considered treatment inflicted with the aim of humiliating and debasing the person to be degrading.

In 1996, the Court found torture *per se* for the first time in the KHRP case of *Aksoy v. Turkey* (No. 21987/93, 18.12.1996). The Court has held that even the need to investigate potential terrorist acts may not in itself undermine the need to protect the physical integrity of individuals (see *Tomasi v France*, No. 12850/87, 27.8.1992). Physical injuries do not however automatically substantiate the claim of a violation of Article 3 (see *Klaas v Germany* No. 15473/89, 22.9.1993). Where the applicant is in good health when taken into police custody and then is injured at the time of release, it is the responsibility of the police to explain the injuries (see *Selmouni v France*, No. 25803/94, 27.7.1999).

In the case of *Akkoc v Turkey* (Nos. 22947/93 and 22948/93, 10.10.2000), the Court also laid out the basic provisions under Article 3 for medical exams of persons ill-treated during detention, stating that such examinations must be carried out by a properly qualified doctor without any police officer being present and that the report of the examination must include not only the detail of any injuries found but the explanations given by the patient as to how they occurred and the opinions of the doctor as to whether the injuries are consistent with those explanations.

Medical evidence is important in substantiating a torture victim’s claim. Doctors at the Human Rights Foundation of Turkey’s (HRFT) treatment centre in Izmir claim that the most severe torture takes place during the first few days in custody. After this the victim is allowed a recovery period of up to ten days during which restorative treatment is administered. This length of detention allows for signs of ill-treatment to fade. Recently, torturers have devised methods of torturing a victim so as not to leave marks. In relation to electrocution these include wetting the skin with salt water and applying specially formulated gels which prevent burning at the point of contact. A new technique which is used during ‘Palestinian hanging’ is to bandage the arms with foam to leave fewer marks.

In the present case the Court found that the doctor had concealed signs of torture in the

medical examination. In Amnesty International's February 1996 report *Principles for the Medical Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment* ten criteria are proposed in relation to the medical examination of victims of alleged torture.

- (1) The subject should have prompt access to a doctor.
- (2) The doctor performing the examination should be independent of the authorities responsible for custody, interrogation and prosecution of the subject.
- (3) The examination should be confidential.
- (4) The doctor should obtain the consent of the subject.
- (5) The doctor should have full access to all of the subject's medical records.
- (6) The doctor should elicit a verbal medical history from the subject and make an evaluation of the subject's mental state.
- (7) The doctor should prepare a report with details of time, place, name, address of the institution (including, where appropriate, the exact room) where the examination is being conducted. The report should fulfil a number of criteria: it should clearly identify the doctor carrying out the examination and should be signed; it should contain an accurate summary of the subject's medical history as given during his interview, including the time when torture or ill-treatment is alleged to have occurred; it should include a record of all abnormal physical and psychological findings on clinical examination including, where possible, colour photographs of all injuries; and it should provide an interpretation as to the probable cause of all abnormal symptoms.
- (8) The subject should be informed of the findings and allowed to review the final report.
- (9) A second examination should be carried out if the subject so requests.
- (10) The doctor performing the examination should remain totally unbiased and must in no way condone the alleged torture. No aspect of the subject's character, physical characteristics, ethnic origin, personal beliefs - nor the fact that an allegation of torture has been made by or on behalf of the subject - may permit derogation from these duties.

Despite these guidelines, the procedure for medical examinations in Turkey is not set out in any detail in a regulatory text. In 1998 the Turkish authorities amended existing guidelines in order to give detainees the right to have an examination without the presence of any other agents of the state (Article 10 of the 1998 Regulation of Apprehension, Police Custody, and Interrogation). The presence of officers often had the negative effect of making some prisoners unwilling to complain about their ill-treatment. The determination of whether or not a person has been tortured should be made by a specialist doctor qualified to ascertain torture injuries: unfortunately there is a lack of doctors in Turkey who specialise in injuries resulting from torture.

Law No. 4778 ('the Fourth Harmonisation Package'), adopted by Turkey on 11 January 2003 in pursuit of fulfilment of the Copenhagen political criteria for accession to the European Union, amends the Turkish Penal Code by inserting the requirement of medical examination during police custody.

On 19 December 2003 Alvaro Gil-Robels, the Council of Europe's Commissioner for Human Rights, issued a report on the findings of his visit to Turkey on 11 to 12 June 2003. Considering the aforementioned amendment he raises several important issues regarding the procedure that should be addressed (page 27). Lawyers who have dealt with the new medical examination procedure feel that it has the potential to be an effective obstacle to torture if properly regulated. In the current situation however, there are no specifications as to where prisoners are to be examined or who shall perform the examination. Without specific guidelines, detainees may be taken anywhere for the procedure and this puts them at significant risk. The Commissioner also noted that there are very few doctors who are qualified to diagnose the signs of torture and ill-treatment. One of the most critical aspects of the medical examination procedure was the 'virtually obligatory' presence of security officers. Doctors and detainees testified to the fact that the presence of such officers discourages the detainees to complain about their treatment in custody. The Commissioner notes the common practice among doctors of forwarding to the police reports based on the examination of possible victims of ill-treatment. Once in the possession of the police, these reports are often destroyed. The Commissioner therefore recommended the passage of an ancillary regulation which requires all medical reports to be delivered directly to the public prosecutor involved in the case.

Çolak and Filizer v Turkey

(32578/96) (32579/96)

European Court of Human Rights: Judgment of 8 January 2004

Detention - Torture and inhuman and degrading treatment - Article 3 of the Convention

Facts

The applicants, Abdullah Çolak and Ömer Filizer, are Turkish nationals who were born in 1969 and 1964 and live in Sanli Urfa, Turkey.

On 28 and 29 April 1995 the applicants were taken into custody at the local headquarters of anti-terrorist security forces on suspicion of being members of the PKK. On 29 April 1995, the Istanbul State Security Court extended their custody period to 9 May 1995. The applicants allege that they were subjected to inhuman treatment during their detention. The first applicant claimed that during his detention he was throttled, beaten, kicked, strung up by his arms, threatened by police officers and told that he may share the same destiny as others who disappeared in custody.

The second applicant claimed that whilst in police custody for seven days, he was blindfolded, punched severely in the head, stomach, abdomen and kidneys, strung up by his arms and had his testicles squeezed. He alleges that electric shocks were administered to his sexual organs and his toes and that he was forced to endure music being played at an extremely high volume in his cell.

On 2 May 1995, the applicants were forced to sign police statements about their activities and their alleged involvement with the PKK. On 5 May 1995, the applicants underwent medical examinations by the Istanbul Forensic Institutes which found no signs of beating, force or violence on the bodies of the applicants. On that day the applicants were brought before the Public Prosecutor of Istanbul State Security Court. The applicants denied allegations of being involved with the PKK.

On 6 May 1995, the applicants appeared before the State Security Court where they repeated their denials to the Public Prosecutor. Due to the nature of the accusations against them, the Court ordered the applicants detention on remand.

On 18 May 1995, the prison doctor examined the second applicant. The applicant described to the doctor a feeling of pain whilst chewing and pain in both shoulders. In his report the doctor noted the presence of abrasions on the applicant's penis, pain in the chest and injury to the left eye. On 22 May 1995, the first applicant underwent medical examination in prison. The prison doctor found fading bruises on the body of the applicant and injury to his left foot. He was later transferred to Faith Forensic Medicine Institute.

On 1 June 1995, the applicants filed a complaint with the Faith Public Prosecutor's office, alleging that they had been subjected to various forms of ill treatment during their detention in police custody. A doctor's report dated 20 June 1995 concluded that the applicant's injuries would prevent him from carrying out his work for two days.

On 19 and 21 September 1995, the Faith Public Prosecutor refused to initiate criminal proceedings against the police officers due to lack of evidence. On 13 October 1995, the applicants appealed against this decision. On 14 December 1995, Istanbul Beyoglu Assize Court upheld the appeal in respect of the first applicant only.

On 8 June 1998 the Istanbul Chief Public Prosecutor indicted the two police officers accused of ill-treating the first applicant. On 27 October 1999 however, the Istanbul Assize Court acquitted the two police officers due to lack evidence: the applicant had been unable to identify the police officers as he was blindfolded whilst being tortured.

Complaints

The applicants complained under Article 3 of the Convention that they had been subjected to various forms of ill treatment causing suffering which, taken as a whole, amounted to torture.

Held

The Court held that there had been a violation of Article 3 of the Convention. It considered that, in the light of the evidence and in the absence of a plausible explanation by the Government, the symptoms noted in the prison doctor's reports were the result of treatment for which the Government bore responsibility.

The Court awarded each applicant EUR 12,000 in respect of non-pecuniary damage. It also made an award to both applicants jointly of EUR 2,500 for costs and expenses.

Commentary

The Court reiterated that, when an individual is taken into custody in good health with no signs of injuries only to emerge with injuries, the State bears a procedural obligation under Article 3 of the Convention to investigate the circumstances and to provide a plausible explanation for these injuries in order to rebut the individual's allegations. This evidence must be particularly compelling if the individual's allegations are corroborated by medical reports.

In the case of *Akkoc v Turkey* (Nos. 22947/1993 and 22948/93, 10.10.2000) the Court noted that the European Committee for the Prevention of Torture has emphasised that proper medical examinations are an essential safeguard against ill-treatment of persons in custody. Such examination must be carried out by a properly qualified doctor without the presence of any police officer. The resultant report must include not only the detail of any injuries found but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations. The Court noted that the practice of cursory and collective examinations employed in that case undermined the effectiveness and reliability of what was meant to be a safeguard. (para.18) Amnesty International's February 1996 report *Principles for the Medical Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment* proposes ten criteria in relation to the medical examination of victims of alleged torture (see Commentary to *Sadik Önder v Turkey* (No. 28520/95, 8.1.2004) above).

In the present case of *Çolak and Filizer v Turkey* the Court acknowledged that the applicants had not been medically examined at the beginning of their detention and that they had not had access to a lawyer or doctor of their choice whilst in custody. After their transfer to police custody, the applicants underwent three medical examinations which delivered contradictory pronouncements. In this case, the medical reports made in relation to the applicants were contradictory. In the event, the Court attached no particular weight to the first medical report, which had documented no signs of violence on the applicants and provided the Court with no plausible explanation for the bruises, abrasions and other injuries identified by subsequent medical reports on the bodies of the applicants.

The acquittal of those suspected of inflicting the violence that caused the applicants' injuries

does not absolve the State of its obligation under Article 3 of the Convention to carry out an investigation to determine the cause of the applicants' injuries. Turkey had failed to discharge this obligation. The Court accordingly found that the injuries sustained were the result of treatment for which the Government was responsible.

Rape

M.C. v Bulgaria

(39272/98)

European Court of Human Rights: Judgment of 4 December 2003

Rape – Inhuman and degrading treatment – Inadequate investigation – Articles 3, 8, 13 and 14 of the Convention

Facts

The applicant, M.C., is a Bulgarian national who was born in 1980. She alleged that two men raped her on 31 July 1995 and 1 August 1995, when she was fourteen years old.

On the evening of 31 July 1995 the applicant and a friend of hers had been waiting to enter a disco bar in the town of K when three men arrived: they were P (21 years old at the time), A (20 years old at the time) and VA (age not known). The applicant knew P and A. She had met P in the same disco bar once before and had danced with him. A was an older brother of a classmate of hers. A invited the applicant to go with him and his friends to a disco bar in a small town 17 km away. The applicant agreed on the condition that she would be home before 11 pm. She repeatedly urged the others to leave as it was getting late. The group left at an unspecified time and travelled back in the direction of K. On the way they were briefly stopped and checked by traffic police. After this, the group stopped for a swim at a nearby reservoir at the suggestion of A and in spite of the applicant's objections.

The applicant remained in the car while the three men headed towards the water. P soon returned to the car and sat next to the applicant. The applicant alleges that P then pressed himself against her and started kissing her. He persisted despite her verbal and physical resistance and then moved the car seat into a horizontal position, grabbing her hands so that she was unable to struggle. The applicant, scared and embarrassed, was physically unable to repel P. P partially undressed the applicant and forced her to have sexual intercourse with him. The applicant testified that this was the first time she had had sexual intercourse and that it hurt and she felt sick. After P had finished he left the car and told the two other men, using crude terms, that he had had sexual intercourse with the applicant. All three of the men returned to the car and began to drive. A and VA were not wet when they returned to the car, although they had insisted on going to the reservoir for a swim. The

applicant stated that she believes that going to the reservoir was a pretext for going to a deserted place.

The applicant testified that she was very disturbed after the rape and had cried. According to P and A the applicant was in an excellent mood and had started caressing A, which irritated P. P says the group went to a restaurant where the applicant talked with Ms. T, the singer who was performing there. The applicant disputed these statements, saying that there had been no visit to a restaurant and that she did not know who Ms T was. Instead of returning to K at 3am the group went to a neighbouring town where VA's relatives had a house. Here A, VA and the applicant got out of the car and P drove off. The applicant stated that she felt helpless and vulnerable. As A was the brother of a classmate of hers, she had expected such protection from him and followed him and VA into a room in the ground floor of the house. There was one bed in the room on which the applicant sat down. The two men smoked and talked for a while then VA left the room. At this point A sat down beside the applicant, pushed her to lie on the bed, undressed her and forced her to have sex with him. She did not have the physical strength to resist, but begged him to stop. A claimed that he had had sex with the applicant with her full consent.

On the morning of 1 August 1995, the applicant's mother found her daughter in the house of VA's relatives. There A told the applicant's mother that a truck driver had had sex with her daughter the previous night. The applicant and her mother went directly to a local hospital where the applicant was examined by a forensic medical examiner who confirmed evidence of rape and injuries commensurate with a struggle. The applicant reported only one rape, stating that it happened at 10.30pm or 11.00pm the previous day.

The applicant's mother discussed the events with P's family and discovered that her daughter had been raped twice. On 11 August 1995, the applicant's mother filed a complaint, leading to the arrest of P and A on the same day. P and A were released after giving statements claiming that the applicant had had sexual intercourse with them of her own free will. The case was then investigated and in October 1995 the resultant report credited the allegations of P and A and rejected the version of the facts submitted by the applicant and her mother. In December 1996 the case was dismissed after finding that there was no evidence that P and A had used threats or violence and proposed that the prosecutor terminate the criminal proceedings.

On 7 January 1997 the case was taken up again by the District Prosecutor's Office, on the basis that the investigation had not been objective, thorough and complete. A psychiatrist and a psychologist were appointed to give experts' opinions, but despite their testimonies in the applicant's favour an investigator proposed the termination of the proceedings in the view that experts' opinion did not affect his earlier findings. On 17 March 1997 the District Prosecutor issued a decree terminating the criminal proceedings on the basis that, inter alia, that the use of force or threats had not been established beyond reasonable doubt.

Complaints

The applicant complained under Articles 3, 8 and 13 of the Convention. She alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a predominant practice of prosecuting rape perpetrators only if there was evidence of significant physical resistance. Regarding the issue of consent, she alleges that they had not taken into account that, being only fourteen years old, she had never taken an important decision by herself, particularly under pressure. She also alleges that the prosecutors failed to consider the improbability of a fourteen year old virgin consenting to have sex with two men consecutively. She claims that overall the investigation into her claims had not been thorough and complete and that the prosecution was inadequate and left certain acts unpunished.

The applicant submitted that the investigation into her rape had not been thorough and complete. The crucial issue of the timing of all movements of the three men and applicant on the night in question, which would have shown that there was no restaurant had been visited after the rape, had not been investigated. Furthermore, contradictions in the evidence had been disregarded and the investigator had both credited the testimony of the perpetrators and their witnesses and ignored or discredited the applicant's account of events and those of her witnesses.

Held

The Court held that there had been violations of Articles 3 and 8 of the Convention. It held that the investigator and prosecutors in the present case failed to assess in a context-sensitive manner the credibility of the conflicting statements and did not make sufficient efforts to establish and verify the surrounding circumstances. In particular, the contradictory statements by witnesses were not investigated, nor was a precise timing of events established.

The Court declared that no separate issues arose under Article 13 and that it was not necessary to examine the applicant's complaints under Article 14 of the Convention.

The Court awarded the applicant EUR 8,000 in respect of non-pecuniary damage and EUR 4,110 in respect of costs and expenses.

Commentary

For a discussion of Article 14 of the Convention see *Nachova and Others v Bulgaria* (Nos. 43577/98 and 43579/98, 26.2.2004), below.

The Court's task was to examine whether or not the impugned legislation and practice and its application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.

The Court observed that proof of physical force and physical resistance was required under domestic law and practice in rape cases in a number of jurisdictions, the requirement that the victim must resist physically is no longer present in the statutes of European countries. The Court declared that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.

The Court was satisfied that the applicant's allegation of a restrictive practice was based on reasonable arguments and had not been disproved by the Government. The Court noted that the Government was unable to provide copies of judgments or legal commentaries clearly disproving the allegations of a restrictive approach in the prosecution of rape, and that the Government's own submissions on the elements of rape in Bulgarian law were inconsistent and unclear. Finally, the Court interpreted the fact that the vast majority of the Supreme Court's reported judgments concerned rapes committed with the use of significant violence as indicating that few rape cases where little or no physical force and resistance were established resulted in prosecution.

Although the Court recognised that the Bulgarian authorities were confronted with two conflicting versions of the events and little "direct" evidence, it declared that the fact that they were faced with two irreconcilable versions of the facts had obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. The Court considered that the authorities failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. The Court considered that while in practice it may be sometimes difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The Court thus found that little was done to test the credibility of the opposing versions of the events given by P and A against that of the witnesses. In addition, the Court also found that insufficient time was given to the applicant and her representative to adequately question the witnesses.

The Court found that the effectiveness of the investigation of the applicant's case, in particular in relation to the approach taken by the investigator and the prosecutors involved, fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.

Unlawful Detention

Shamsa v Poland

(45355/99 and 45357/99)

European Court of Human Rights: Judgment of 27 November 2003

Expulsion order - Detention in a transit zone - Article 5 of the Convention

Facts

The applicants, brothers Abdelsalam Shamsa and Anwar Shamsa, are Libyan nationals who reside in Warsaw, Poland.

In May 1997 the applicants, who were without valid identity papers or residence permits, were arrested in Warsaw. On 28 May 1997, an order was made for their deportation. This was to be enforced within 90 days, and both men were taken into custody pending execution of the order. From 24 August 1997, the last day of the 90 day period fixed by law for their expulsion, the authorities made three attempts to deport the applicants, first via Prague and later via Cairo and Tunisia. These attempts were unsuccessful, mainly because the applicants refused to leave willingly.

On their return from Prague on 25 August 1997, the applicants were deemed persons whose presence in Polish territory was undesirable. Between the attempts to deport them they were detained by the border police in the transit zone at Warsaw airport, where they remained until 3 October 1997, on which date they left the hospital where they had been taken without encountering any impediments.

The applicants lodged a complaint concerning their detention in the transit zone at Warsaw airport between 25 August and 3 October 1997, but the proceedings were discontinued.

Complaint

The applicants complained under Article 5(1) of the Convention that they had been unlawfully detained at Warsaw Airport by the border police.

Held

The Court held unanimously that there had been a violation of Article 5(1) of the Convention. The applicants were awarded EUR 4,000 each for the non-pecuniary damage and EUR 3,000 jointly for costs and expenses.

Commentary

The Court first examined whether there had been a deprivation of liberty within the meaning

of Article 5(1) of the Convention recalling that, in proclaiming ‘the right to liberty’, that Article protects against the arbitrary deprivation of the physical liberty of an individual. Account must be taken of a wide range of criteria in order to determine whether a person has been deprived of his or her liberty within the meaning of Article 5: these criteria include the type, length and enforcement of the measure in question (see *Engel and Others v Netherlands*, Nos. 5100/71 and 5101/71, 8.6.1979; and *Amuur v France*, No. 19776/92, 25.6.1996).

The applicants had been kept at the disposal of the Polish authorities while in the transit-zone, as they were supervised permanently by border personnel and were not free to move. The Polish Government argued that the transit zone has extraterritoriality status and therefore Polish law was not applicable within it. The Court however emphasised that in fact the applicants’ detention in that area was based upon Polish law, and therefore concluded that there had been a deprivation of liberty within the meaning of Article 5 of the Convention.

The Court then considered whether the deprivation of liberty was compatible with Article 5(1) of the Convention. The Court reiterated that this provision refers directly to domestic law, in order to respect the procedural rules of the Contracting States. Although the ‘lawfulness’ of the detention in relation to domestic law is an essential element, it is not decisive: the Court must be convinced that the detention during the period in question conforms to the aim of Article 5 of the Convention, in order to ensure that the individual is not deprived of his liberty on an arbitrary basis. The Court therefore seeks to ascertain whether the domestic law upon which detention is based conforms in spirit with the aims of the Convention (see *Winterwerp v Netherlands*, No. 6301/73, 24.10.1979; and *Erkalo v Netherlands*, No. 23807/94, 2.9.1998).

The Government saw the applicants’ detention as integral to enforcement of the order for their deportation. Polish law requires a deportation order to be enforced within 90 days of its issue, failing which the persons concerned must be released. In the present case the 90 day period expired on 25 August 1997 upon which date the applicants should have been released. Despite the expiration of the statutory time-limit, the Polish authorities however continued to attempt to enforce the deportation order without any legal basis.

The Court noted that Polish domestic law makes no provision for detention after the statutory time-limit had expired and that it accordingly fails to fulfil the requirement of foreseeability for the purposes of Article 5(1) of the Convention. The Court also stated that detaining someone in the transit zone for an indefinite and unforeseeable period without any legal basis was in itself contrary to the principle of legal certainty, which is implicit in the Convention and is a fundamental element of the rule of law.

The Court pointed out that detention for several days which has not been ordered by a court or judge or any other person authorised to exercise judicial power cannot be regarded as “lawful”

within the meaning of Article 5(1) of the Convention. Although not explicit this requirement can be deduced from provisions within Article 5: paragraph 1(c) states that ‘the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority (...)’; and paragraph 3 provides that ‘(...) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power’. Moreover, the guarantee of habeas corpus, enshrined in Article 5(4) of the Convention, entails that a detention which is longer than the initial period envisaged by Article 5(3) requires the intervention of a ‘tribunal’ in order to guarantee against arbitrariness (*Brankowski v Poland*, No. 28358/95, 28.3.2000).

Assanidze v Georgia

(71503/01)

European Court of Human Rights: Grand Chamber Judgment of 8 April 2004

Imprisonment - Presidential pardon - Continued detention - Articles 3, 5, 6(1), 10(1) and 13 of the Convention and Article 2 of Protocol No. 4 to the Convention

Facts

The applicant, Tengiz Assanidze, is a Georgian national who was born in 1944. He was formerly the mayor of Batumi, the capital of the Autonomous Republic of Ajaria, which is a semi-autonomous region of Georgia. He was also a member of the Ajarian Supreme Council.

On 4 October 1993, the applicant was arrested on suspicion of illegal financial dealings in the Batumi Tobacco Manufacturing Company and the unlawful possession and handling of firearms. He was convicted on 28 November 1994 and given an immediate custodial sentence of eight years’ imprisonment. The applicant appealed against this verdict but on 27 April 1995 the Supreme Court of Georgia upheld the applicant’s conviction for illegal financial dealings. On 1 October 1999, the Georgian President issued Decree No. 1200 by which he granted the applicant a pardon suspending the remaining two years of his sentence. In spite of this, the applicant remained in custody in the Short-Term Remand Prison of the Ajarian Security Ministry.

On 11 December 1999, the applicant was charged with having been a member of a criminal association in 1993 and with the attempted kidnapping of V.G., the head of the Ministry of the Interior department with delegated powers for the region of Khelvachauri (the Ajarian Autonomous Republic). On 2 October 2000, the applicant was convicted of these new charges by the Ajarian High Court and was sentenced to twelve years’ imprisonment. On 29 January 2001, the Criminal-Affairs Chamber of the Supreme Court of Georgia heard the applicant’s appeal against that verdict in his absence. It quashed the judgment of 2 October 2000 and the applicant was acquitted. The applicant was not however released from the custody of the Ajarian authorities. The central judicial and administrative authorities were forthright in telling the Ajarian authorities

that the applicant's deprivation was arbitrary for the purposes of domestic law and Article 5 of the Convention. However, their numerous reminders and calls for the applicant's release were unheeded.

On 18 March 2003 the Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention and Rule 72 of the Rules of Court, without any opposition from the parties.

Complaints

The applicant complained under Article 3 of the Convention due to the fact that he had been held in total isolation in a cell at the Ajarian Security Ministry prison.

The applicant complained of a violation of his right under Article 5(1) of the Convention in relation to his detention during two distinct periods: from date of the Presidential pardon on 1 October 1999 until the date of his acquittal by the Supreme Court of Georgia on 29 January 2001; and from date of his acquittal by the Supreme Court of Georgia on 29 January 2001 to the present date. He also alleged that detention during that latter period was arbitrary.

The applicant submitted that his continued unlawful detention automatically entailed a violation of Article 5(3) of the Convention without elaborating on his arguments in support of this complaint.

The applicant submitted that the failure by the Ajarian authorities to comply with the operative provision of the Supreme Court of Georgia's judgment of 29 January 2001, which acquitted him and ordered his immediate release, constituted a violation of his rights under Article 5(4) and Article 13 of the Convention.

The applicant complained under Article 6(1) of the Convention in relation to the failure of the Ajarian authorities to comply with the judgment of the Supreme Court of Georgia, delivered on 29 January 2001, which had acquitted him of his outstanding criminal conviction.

The applicant complained under Article 10 of the Convention, without advancing any argument in support of this complaint other than noting that the violation of Article 10(1) was "closely linked to that of Article 5(1) of the Convention".

The applicant submitted that his continued detention infringed his rights to freedom of movement under Article 2 of Protocol No. 4 to the Convention.

Held

The Court held unanimously that the applicant's complaint under Article 5(1) of the Convention regarding the first period of his detention, from 1 October to 11 December 1999, was out of time. Because the applicant lodged his application with the Court on 2 July 2001 his submission under

Article 5(1) in relation to the first period of his detention was made outside the six month time-limit and accordingly had to be declared inadmissible.

The Court held unanimously that the applicant's complaint under Article 5(1) of the Convention, regarding his detention from his prosecution on 11 December 1999 in the second set of criminal proceedings and his detention between that date and his acquittal on 29 January 2001, fell outside the scope of the matters referred to it for examination because this complaint was not dealt with in the admissibility decision, delivered on 12 November 2002, which defined the scope of the Court's examination.

The Court held unanimously that, since 29 January 2001, the applicant had been held in detention arbitrarily and in breach of the provisions of Article 5(1) of the Convention. The Court considered that to detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the fundamental aspects of the rule of law. The Court held unanimously that no separate examination of the issue of the applicant's place of detention was necessary under Article 5(1) of the Convention.

The Court held unanimously that the complaint submitted under Article 3 of the Convention fell outside the scope of its examination. The Court noted that this complaint was raised for the first time on 23 September 2003 and, consequently, was not referred to in the admissibility decision of 12 November 2002 which determined the scope of the proceedings to be examined by the Court.

The Court held by fourteen votes to three that there had been a violation of Article 6(1) of the Convention due to the fact that the judgment of 29 January 2001, which is a final and enforceable judicial decision, had still not been complied with more than three years after it was delivered.

The Court held that the applicant's complaints under Articles 5(4) and 13 of the Convention were based on the State's failure to comply with the second operative provision of the judgment delivered by the Supreme Court of Georgia on 29 January 2001 ordering the applicant's immediate release. It concluded that the complaints under Articles 5(4) and 13 of the Convention raised essentially the same legal issue on the basis of the same facts as that examined by the Court in relation to Article 6(1) of the Convention. Consequently, the Court held by fourteen votes to three that no separate examination of the complaint concerning the failure to comply with the judgment of 29 January 2001 was necessary under Article 5(4) of the Convention. It held unanimously that no separate examination of the complaint concerning the failure to comply with the judgment of 29 January 2001 was necessary under Article 13 of the Convention.

The Court unanimously dismissed the complaint under Article 5(3) as being out of time. The period of detention for which the applicant was entitled to benefit from the guarantees set out in Article 5(3) ended on 2 October 2000 with his conviction at first instance by the Ajarian High Court, that is to say, outside the six month time limit laid down by Article 35(1) of the Convention.

The Court held unanimously that the applicant's complaint under Article 10 of the Convention was unsubstantiated and that it could not find that there had been a violation of that Article.

The Court held unanimously that it was unnecessary to consider the complaint under Article 2 of Protocol No. 4 to the Convention. Relying on its determination of the alleged violation of Article 5 of the Convention, the Court considered that the present case was concerned not with a mere restriction on freedom of movement within the meaning of Article 2 of Protocol No 4 to the Convention but with arbitrary detention falling under Article 5 of the Convention.

The Court held unanimously that Georgia had to secure the applicant's release at the earliest possible date. Noting the declaratory nature of its judgments, the Court reiterated that it is primarily for the State concerned to choose the means within its domestic legal order in with which to discharge its legal obligation under the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.

The Court awarded the applicant EUR 150,000 for the period of his detention from 29 January 2001 to the date of this judgment in respect of all the damage sustained, and EUR 5,000 in respect of costs and expenses.

Non-Retroactivity of the Law

Puhk v Estonia

(55103/00)

European Court of Human Rights: Judgment of 10 February 2004

Retrospective application of the law - No punishment without law - Article 7 of the Convention

Facts

The applicant, Rain Puhk, was born in 1970 and lives in Tartu, Estonia.

On 10 August 1995, the applicant was charged with two offences under the Estonian Criminal Code. The first charge related to tax evasion, an offence under Article 148-1(7) of the Code, and was imposed in relation to acts carried out during the period from April 1993 to October 1995. The second charge related to inadequate accounting within his company, which is an offence under Article 148-4 of the Code, and was imposed in relation to the period of activity from 5 May 1993 to 1 October 1993. Article 148-1(7) entered into force on 13 January 1995 and Article 148-4 entered into force on 20 July 1993.

On 17 February 1999, Tartu City Court convicted the applicant of the offences with which he had

been charged under Articles 148-1(7) and 148-4 of the Estonian Criminal Code and delivered an aggregate sentence of four years' imprisonment, which was suspended for three years.

The applicant appealed against this verdict on 26 February 1999, claiming that the Court had applied the relevant law retrospectively by convicting him for acts committed prior to the dates upon which Articles 148-1(7) and 148-4 of the Estonian Criminal Code entered into force. The Court of Appeal however upheld the original judgment. The applicant's appeal to the Supreme Court dismissed his appeal on 7 September 1999.

Complaints

The applicant submitted two complaints under Article 7(1) of the Convention. He complained that his conviction under the Article 148-1(7) of the Code amounted to retrospective application of that law. He submitted the same complaint in relation to his conviction under Article 148-4 of the Code.

Held

The Court held that there had been two violations of Article 7(1) of the Convention.

In relation to the applicant's conviction under Article 148-1(7) of the Estonian Criminal Code, the Court held that the applicant could not have expected that he would risk a criminal conviction for actions performed between 1993 and 1994 due to the terms of the criminal law in force at the time.

Similarly, in relation to the applicant's conviction under Article 148-4 of the Estonian Criminal Code, the Court held that the applicant could not have foreseen the risk of criminal punishment for his conduct from 5 May 1993 to 1 October 1993 due to the absence at that time of a law establishing criminal liability for inadequate organisation of accounting.

The Court awarded the applicant EUR 3,000 for non-pecuniary damage and EUR 1,508.31 in respect of costs and expenses. It rejected the applicant's claim for compensation for pecuniary damage.

General Commentary on Article 7 of the Convention

The guarantee of non-retroactivity of the law which is enshrined in Article 7 is an essential element of the rule of law and, as such, occupies a prominent place in the Convention system of protection. This fundamental status is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It must be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, No. 20166/92, 22.11.1995; and *C.R. v. the United Kingdom*, No. 20190/92, 22.11.1995)

According to the established jurisprudence of the Court, Article 7 embodies the principle that only the law can define a crime and prescribe a penalty (*nullum crime nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment. From these principles is derived the requirement that an offence must be clearly defined in the law. This is satisfied in the case where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the domestic courts' interpretation of it, what acts and omissions will make him criminally liable (see *Kokkinakis v. Greece*, No. 14307/88, 25.5.1993).

Destruction of Homes / Property

Ayder and Others v Turkey

(23656/94)

European Court of Human Rights: Judgment of 8 January 2004

Village destruction - Lack of effective investigation - Articles 3, 8, 13 and 18 of the Convention and Article 1 of Protocol No.1

Facts

The applicants, Ahmet Ayder, Yusuf Lalealp, Nadir Doman, Şevket Biçer and Zeydin Ekmekçi, are five Turkish citizens of Kurdish origin. At the material time they resided in Kali, the north western neighbourhood of the town of Lice.

The applicants' complaints concerned events that took place on 22 and 23 October 1993. On 22 October 1993, security forces carried out a pre-planned operation in Lice. The applicants claimed that security forces fired randomly from armoured vehicles and from combat helicopters, and that bullets were heard impacting on the walls of their homes and stables. Artillery had been placed across the Diyarbakır-Lice road and fired indiscriminately.

One applicant, Yusuf Lalealp, claimed that his house in the Saar neighbourhood Southeast of Lice was deliberately set on fire by security forces on that day.

On 23 October 1993, the firing ceased but the remaining applicants claimed that their houses were deliberately burned down on this date. At 8am security forces ordered residents, including the applicants Ahmet Ayder and Nadir Doman, to leave their homes without taking any possessions and gathered them together in an open area opposite their homes.

Neighbourhood houses were already on fire by the time the applicant Zeydin Ekmekçi was ordered out of his home to join the others. When the applicant Şevket Biçer's family were forced to leave their home, the large group that had been gathered in the open area and had already departed for the police headquarters where it waited three to four hours for the arrival of the Provincial

Governor. When he finally arrived the Provincial Governor, who spoke Turkish but not Kurdish, told the people that the PKK was responsible for the destruction of buildings and their homes.

The applicants complained to the local Public Prosecutor of the events which had occurred on 22 and 23 October 1993. According to the applicants the Prosecutor did not formally record these complaints. Furthermore although arrangements were made for damage assessment reports to be drawn up, the applicants were not compensated. No investigation was launched into the actions of the security forces until the communication of the present application to the respondent state, despite the applicants' complaints and allegations of a similar nature being widely reported in the media.

Complaints

The applicants complained under Article 3 of the Convention that the terrifying manner in which they were forced out of their homes constituted inhuman treatment.

The applicants also complained under Article 3 of the Convention that being made to stand and watch the burning of their homes and possessions also constituted inhuman and degrading treatment.

The applicants further requested the Court to find that they had been subjected to collective punishment the imposition of which constituted inhuman and degrading treatment in violation of Article 3 of the Convention.

Relying upon Article 8 of the Convention the applicants complained that the deliberate destruction of their homes and possessions by the security forces operation violated their right to private life.

The applicants also complained under Article 13 of the Convention that they had not effective remedy available to challenge the destruction of their homes and possessions by the security forces.

Relying upon Article 18 of the Convention the applicants complained that they were victims of a practice of the deliberate destruction of homes and possessions and forced evacuation of two to three million residents, perpetrated by the security forces in the Southeast of Turkey around 1993. They alleged that their experiences of the 22 and 23 October 1993 were part of this practice, which fell outside the framework of domestic legal safeguards and consequently constituted an arbitrary exercise of state power.

Finally the applicants complained under Article 1 of Protocol No.1 to the Convention of the destruction of their properties.

Held

The Court refused to consider Article 3 of the Convention in relation to complaints of ill-treatment whilst applicants were forced out of their homes, as these events did not reach the minimum level of severity required by Article 3 of the Convention.

The Court upheld the claim that the destruction of the applicants' homes and possessions constituted inhuman treatment within the scope of Article 3 of the Convention, and as such found Turkey in violation of this Article.

The Court also held that the destruction of the applicants' homes and property was in breach of Article 8 of the Convention.

The Court held that the failure to investigate the applicants' complaints violated Article 13 of the Convention. It upheld the claim that the destruction of the applicants' possessions was in breach of Article 1 of Protocol No. 1 to the Convention.

The Courts refused to consider the applicants' complaint under Article 18 of the Convention that this particular case formed part of a practice implemented by the authorities.

The Court awarded the applicants pecuniary damages ranging from EUR 20,144.90 to EUR 26,239.70 in respect of the loss of their houses and properties. It also awarded each applicant EUR 14,500 for non-pecuniary damage.

Commentary

The Court's refusal to consider whether the applicants' eviction from their homes constituted a violation of Article 3 of the Convention was based upon its decision that this treatment was not severe enough to constitute ill-treatment within the meaning of this Article. In *Ireland v The United Kingdom* (No. 5310/71, 18.1.1978) the Court established that various factors must be considered when determining whether alleged ill-treatment was severe enough to constitute a violation of Article 3. These factors include the duration of the treatment in question and also its physical and mental effects on the victim.

The Court however found that being forced to watch as one's home is burned and destroyed did amount to inhuman and degrading treatment within the meaning of Article 3 of the Convention. It was in *Selçuk and Asker v Turkey* (Nos. 23184/94 and 23185/94, 24.4.1998) that the Court first recognised that the destruction of homes and property amounted to inhuman treatment under Article 3. The facts in the present case upon which the Court declared a breach of Article 3 are similar to those in *Selçuk and Asker v Turkey*. In both cases the security forces made residents stand and watch the burning of their homes and ignored their protests, and no assistance was

provided to residents after the event. In agreement with the Court in *Selçuk and Asker v Turkey*, the Court held in the present case that the anguish and distress caused to family members from the destruction of their homes and possessions must have caused a degree of suffering of such severity as to fall within the meaning of inhuman and degrading treatment under Article 3 of the Convention.

Freedom of Expression

Hirst v United Kingdom (No. 2)

(74025/01)

European Court of Human Rights: Judgment of 30 March 2004.

Prisoners banned from voting - Right to free elections - Articles 10 and 14 of the Convention and of Article 3 of Protocol No.1 to the Convention

Facts

The applicant, John Hirst, is a citizen of the United Kingdom. He was born in 1950 and is currently serving a life sentence at HM Prison Rye Hill, Warwickshire (UK).

On 11 February 1980, the applicant pleaded guilty to manslaughter on the ground of diminished responsibility. The applicant's guilty plea was accepted due to evidence that he was a man with a gross personality disorder of such severity that he was amoral. He was sentenced to life imprisonment on a discretionary term.

On the 25 June 1994, the applicant's tariff expired. However he remained in detention on the grounds that the parole board deemed him to be a risk and danger to the public.

The applicant was banned from voting in parliamentary and local elections by Section 3 of the Representation of the People Act 1983 due to his status as a particular type of convicted prisoner. The features of his sentence, both in respect of its custodial nature and its length, were determinative of the ban. He issued proceedings in the High Court seeking a declaration that Section 3 of the 1983 Act was incompatible with the European Convention on Human Rights, under section 4 of the United Kingdom Human Rights Act 1998.

On 21 and 22 March 2001, the application was heard by the Divisional Court, together with two other prisoners who also sought a declaration of incompatibility. All three claims were rejected. The applicant appealed unsuccessfully.

Complaints

The applicant complained under Article 10 of the Convention that Section 3 of the Representation of the People Act 1983 violated his right to freedom of expression, on the grounds that voting is a form of expression which is fundamental to a functioning democracy.

Relying upon Article 3 of Protocol No.1 to the Convention the applicant complained of being barred from voting.

The applicant complained under Article 14 of the Convention in conjunction with Article 3 of Protocol No.1 that he suffered discrimination as a convicted prisoner.

Held

The Court unanimously held that banning prisoners from voting constituted a breach of Article 3 of Protocol No.1 of the Convention.

The Court found that no separate issue arose regarding the applicant's complaint of a violation of Article 10 of the Convention.

The Court also held that no separate issue arose in relation to Article 14 of the Convention.

It declared that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

It awarded EUR 12,000 in respect of costs and expenses incurred by the applicant's legal representatives, and EUR 144 in respect of the applicant's own costs and expenses.

Commentary

Article 3 of Protocol No. 1 to the Convention is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people: the Court's jurisprudence affirms however that this Article guarantees individual rights, including the right to vote and to stand for election. Despite the fact that these rights are central to democracy and the rule of law, they are not absolute and may be subject to limitations and States have a wide margin of appreciation in this sphere. It is however for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been met, and in doing so it seeks to satisfy itself in several respects: that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate to the aim pursued (see *Mathieu-Mohin and Clerfayt v Belgium*, 9267/81, 23.1987; *Matthews v United Kingdom*, No. 24833/94, 18.2.1999; *Labita v Italy*, No. 26772/95, 6.4.2000; and *Podkolzina*

v Latvia, No. 46726/99, 9.4.2002).

The Government submitted that the purpose of removing the right of prisoners to vote was to prevent crime, punish offenders and enhance civic responsibility and respect for the law. In determining whether the Government had exceeded the permissible margin of appreciation in relation to the implementation of this right, the issue was whether the ban posed a legitimate aim and whether the measures employed by the Government were proportionate to this.

The Court noted that the objectives submitted by the Government in justification of the ban were the same as those cited by the Canadian Government case of *Sauve v Canada* (No.1) (1992), 31 October 2002. In that case prisoners serving sentences of two years or more in prison were denied the right to vote under Section 51 (e) of the Canada Elections Act 1985. The Supreme Court of Canada had stated that the measures imposed to achieve these aims were likely to undermine respect for the law and democracy rather than to enhance it and that no arguments had been made for the ban to constitute an additional punishment. The Supreme Court consequently held by five votes to four that Section 51(e) of the Canada Elections Act 1985 was unconstitutional and in violation of Articles 1 and 3 of the Canadian Charter of Rights and Freedoms.

In the present case of *Hirst v United Kingdom*, the Court emphasised that although a convict might lose his liberty due to the imposition of a prison sentence, all other rights under the Convention remain protected. The Court did not consider the legitimacy of the objections submitted by the Government, but instead proceeded to consider whether the issue of proportionality. It declared that, by imposing a blanket restriction on all convicted prisoners, the relevant provision indiscriminately stripped a large category of persons of their Convention right to vote: it noted that a prisoner sentenced to a week's imprisonment for a minor infraction might lose his right to vote if he was detained over election day, and that conversely a prisoner serving several years for a more serious crime might, by chance, avoid missing an election and therefore suffer no interference with his right to vote. The Court further remarked upon the additional anomaly in the present case where the applicant, having completed the life sentence imposed as punishment, continues to be detained only on grounds of his continuing danger to society.

Although the Court accepted that a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck, it could not however accept that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. The Court observed that there was no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. As such, the Court found that the restriction imposed upon the applicant's right to vote was disproportionate to the aims pursued, and held that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

Gündüz v Turkey

(35071/97)

European Court of Human Rights: Judgment of 4 December 2003

Conviction for hate speech - Freedom of expression – Article 10 of the Convention

Facts

The applicant, Müslüm Gündüz, is a Turkish national who was born in 1941. He is a leader of Tarikat Aczmendi, a radical Islamic sect.

On 12 June 1995, the applicant appeared on a television programme broadcast live by the HBB channel in his capacity as leader of the sect. The programme hosted a panel discussion on the sect and its unorthodox ideology. In this context the applicant expressed his opinions on subjects included secularism, democracy, the Turkish State and Islam.

Criminal proceedings were instituted against him on the basis of comments made by the applicant in the panel discussion and he was charged with inciting the public to hatred and hostility on the basis of religious distinction, an offence under Article 312, sections 2 and 3, of the Turkish Penal Code. On 1 April 1996, Istanbul State Security Court held that he had described contemporary secular institutions as ‘dinsiz’ (meaning ‘impious’), had fiercely criticised secular and democratic principles and had openly called for the introduction of Islamic Shariah law, and accordingly found the applicant guilty as charged. The Court sentenced him to two years’ imprisonment and a fine. The applicant appealed unsuccessfully to the Court of Cassation.

Complaints

The applicant complained that his conviction violated his right to freedom of expression under Article 10 of the Convention.

Held

The Court held by 6 votes to 1 that there had been a violation of Article 10 of the Convention. The Court declared that the Turkish courts had given insufficient weight to the context in which the applicant’s statements were made and to the fact that the applicant had been actively engaged in a lively public debate at the time. The Court prioritised the fact that the applicant’s comments were made in the context of a necessary public debate and were balanced by the contributions of other participants on the panel. The Court therefore found that the necessity of the restriction imposed upon the applicant’s right to freedom of expression had not been established.

The Court awarded the applicant EUR 5,000 for non-pecuniary damage.

Commentary

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Article 10 of the Convention guarantees a right that exists not only in relation to the expression of information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb, in order to promote pluralism, tolerance and broadmindedness without which there is no "democratic society". (see *Surek v. Turkey No. 1*, No. 26682/95, 8.7.1999; and *Fressoz and Roire v. France*, No. 29183/95, 21.1.1999).

Article 10(2) prescribes rules governing any restrictions which might be imposed upon the right to freedom of expression guaranteed by Article 10(1). The interference with the right to freedom of expression must be strictly necessary for the purpose of meeting the aims established within Article 10(2) of the Convention. This is determined by assessing the competing interests of preserving the individual's right and protecting the rights of others. Necessity within the meaning of Article 10(2) of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists.

In exercising its supervisory jurisdiction the Court must consider the alleged interference with the right within the context of the case as a whole. Accordingly, it must consider the context in which the impugned statements were made. In particular, it must determine whether the interference was "proportionate to the legitimate aims pursued" and whether the authorities' justification for imposing it is "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were compatible with the principles embodied in Article 10 and, moreover, that they based their decisions upon an acceptable assessment of the relevant facts.

The present case is however characterised by the particular assertion that the expression concerned constituted hate speech. Many international instruments, including the Charter of the United Nations and the Universal Declaration of Human Rights, contain prohibitions of "hate speech" as well as all forms of intolerance and discrimination based on religion. Two European instruments also provide guidance to the governments on how to combat hate speech. These are Recommendation No. R (97) 20, adopted by the Committee of Ministers of the Council of Europe on 30 October 1997, and Recommendation No. 7, adopted by the European Commission against Racism and Intolerance on 13 December 2002.

In *Surek v Turkey No. 1* the Court reiterated that, although the mere fact that the content of the expression in question offends, shocks or disturbs does not suffice to justify any interference, the impugned expression constituted hate speech and the glorification of violence (para. 62). These types of expression must be treated in a different manner as they are incompatible with democratic principles of tolerance and pluralism.

In the light of the international instruments and its own jurisprudence, the Court concluded in the present case that in principle it can be regarded as necessary in a democratic society to sanction or even to prevent all forms of expression which justify, or constitute propaganda for, hatred based on intolerance if the “restrictions”, “conditions”, “formalities” or “sanctions” imposed are proportional to the legitimate aim. The Court stated that expression constituting hate speech may attack particular groups and therefore may not benefit from the protection of Article 10 of the Convention.

Regarding the relationship between democracy and shariah, the Court recalled that its judgment *Refah Partisi and Others v Turkey* (Nos. 41340/98 and 41342/98, 31.7.2001 and 13.2.2003) highlighted that it was difficult to declare respect for democracy and human rights, and at the same time to support a regime that is based on shariah. The Court considered that shariah has a static and invariable character and in this way differs fundamentally from the Convention. Its values are also different from those within the Convention especially those concerning criminal law rules, the status of women in the legal system and the subordination of all areas of private and public life to its governance. The present Court distinguished the case of *Rafah Pariti v Turkey* from the present case of *Müslüm Gündüz v Turkey* because the former concerned the dissolution of a political party that intended to install shariah in a state that is party to the Convention.

Gerger v Turkey

(42436/98)

European Court of Human Rights: Judgment of 9 March 2004

Freedom of expression - Articles 6 and 10 of the Convention - Friendly settlement

Facts

The applicant, Haluk Bahri Gerger, is a Turkish national who was born in 1948 and lives in Ankara, Turkey. He is a journalist by profession.

On 30 June 1995 the applicant published an article in the daily Turkish newspaper *Evrensel* (meaning ‘Universal’) entitled ‘State of Emergency and Provide Comfort Forces’. On that day, following the request of the Public Prosecutor, a single Judge of the Istanbul State of Security Court made an interim order for the seizure of copies of that edition of *Evrensel*.

On the 3 July 1995, the applicant and the editor-in-chief of the newspaper were charged at Istanbul State Security Court under Article 312(2) and (3) of the Turkish Penal Code with incitement to hatred and hostility by making distinctions on the basis of race and region.

On 23 September 1995, the applicant was released having served his sentence of one year and eight months' imprisonment in relation to another conviction of incitement to hatred.

On 17 November 1995, the Ankara State Security Court found the applicant guilty of incitement of hatred for the article he published on 30 June 1995. His sentence of imprisonment was commuted to a fine in accordance with Law No.4126 which had come into force on 27 October 1995. The sentence was subsequently suspended.

On 15 May 1996 Istanbul State Security Court found the applicant guilty of the charge with which he was issued on 3 July 1995. He was sentenced in absentia to imprisonment for a term of one year and eight months and a fine of 500,000 Turkish liras. On 18 November 1996 the Court of Cassation quashed the conviction on the basis that the lower court had not heard the applicant's defence.

The case was remitted to the Istanbul State Security Court which reconvicted the applicant on 29 December 1997 under Article 312(2) and (3) of the Turkish Penal Code. He was sentenced to imprisonment for a term of one year and eight months and fined 500,000 Turkish Lira.

The applicant unsuccessfully appealed to the Court of Cassation on 12 January 1998. On 17 August 1998 the applicant lodged a petition with the Istanbul State Security Court requesting that the deduction of the period for which he had already spent in prison in relation to the conviction of 17 November 1995 from the prison sentence handed down by the Istanbul State Security Court on 29 December 1997. This request was upheld at a hearing on 11 September 1998 and consequently the applicant was not imprisoned.

Complaints

Relying upon Articles 6 of the Convention the applicant complained of the unfairness of the criminal proceedings brought against him.

He complained under Article 10 of the Convention in relation to the interference with his right to freedom of expression.

Held

On 31 October 2003 the Government submitted a declaration to the Court in accordance with Article 39 of the Convention and offered the applicant a payment of 7,000 EUR including legal expenses.

Following the applicant's agreement to the Government's settlement offer, the Court struck the case out of the list in accordance with Article 39 of the Convention and Rule 62 of the Rules of Court.

In its declaration the Government asserted that,

“The Court’s rulings against Turkey in cases involving prosecution under former Article 312 of the Penal Code clearly showed that Turkish law and practice needed to be brought into line with the Convention’s requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. To that end, amendments were made by the Government to Article 312 by Law No. 4744. The Government undertake to ensure that the amended Article 312 will be applied in accordance with the requirements of Article 10 of the Convention as interpreted in the Court’s case law.

The Government will continue to implement all necessary reform of domestic law and practice in this area, including by means of the organisation of training programmes for prosecutors and judges on the relevant Convention standards. The Government refer also to the individual measures set out in the Interim Resolution adopted by the Committee of Ministers of the Council of Europe on 23 July 2001 (ResDH (2001) 106, which they will apply to the circumstances of cases such as the instant one.” (Para.23)

Commentary

Although this case was concluded by a friendly settlement, the Court has on many occasions found Turkey guilty of violating the right to freedom of expression enshrined in Article 10 of the Convention (see for example *Gündem v Turkey*, No. 22275/93, 25.5.1998; and *Ozgür Gündem v Turkey*, No. 23144/93, 16.3.2000). Furthermore Turkey has a poor record of implementing the judgments of the Court both generally and in relation to this Article in particular (see for example *Başkaya and Okçuoglu v Turkey*, No. 23536/94 and 24408/94, 8.7.1999⁹²).

The decision in the present case comes at a time when Turkey is attempting to increase freedom of expression in order to fulfil the Copenhagen political criteria for accession to the European Union (EU). It has already made a number of major constitutional and legislative reforms to provisions which impose penalties for a wide range of expression not only that made via the press but also via potentially all media, ostensibly for the purpose of protecting the Turkish Republic and its major agents as well as its territorial integrity: Article 312 of the Turkish Penal Code, upon which the indictment of the applicant in the present case was based, has been included in this reform process. The actual implementation of these reforms has however fallen far short of the standards imposed by the EU, and the right to freedom of expression in particular has continued to be frequently undermined and violated by regulatory bodies and the courts.⁹³ It remains to be seen whether the Court continues to receive cases alleging a breach of Article 10 of the Convention during the period of its enactment of accession reforms, and a decision whether or not Turkey has succeeded in fulfilling the accession criteria is made in December 2004.

Freedom of Assembly and Association

Socialist Party of Turkey and Others v Turkey

(26482/95)

European Court of Human Rights: Judgment of 12 November 2003

Dissolution of a political party – Freedom of association – Articles 9, 10 and 11 of the Convention

Facts

The applicants are the Socialist Party of Turkey (the STP) and the thirteen Turkish nationals who founded the party: İlhami Alkan, Süleyman Zeyyat Baba, Murat Beşer, Sedat Cengiz, Nihat Çağlı, Mehmet Ali Doğan, Aydemir Güler, Kemal İbrahim Okuyan, Uğur Pişmanlık, Ahmet Hamdi Samancılar, Hüseyin Yıldız, Neşenur Domaniç and Selma Kuzulugil.

The STP was formed on 6 November 1992. On 30 November 1993 the Constitutional Court dissolved the party, following an application by Principal State Counsel, on the basis that its programme was liable to undermine the territorial integrity of the State and the unity of the nation by proclaiming the Kurds' right to self-determination and supported the right to "wage a war of independence". The Court compared the party's manifesto to those of terrorist groups, thus inferring a link between the party to the PKK, and held that those views alone constituted unlawful incitement to violence.

Complaints

The applicants alleged that the party's dissolution had infringed their rights guaranteed by Articles 11, 10 and 9 of the Convention. They also allege that they had been discriminated against as a result of the political opinions associated with their party, in violation of Article 14 of the Convention.

Held

The Court found that the dissolution of the STP amounted to an interference with the applicants' right to freedom of association guaranteed by Article 11 of the Convention. The Court noted that the STP had been dissolved before it had been able to commence its activities solely on the basis of its manifesto, which contained nothing which could be considered to be an incitement to violence.

The Court ruled that it was unnecessary to examine the complaints under Articles 9, 10 and 14 of the Convention separately, as they related to the same matters.

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. It awarded the applicants EUR 10,000 jointly

for costs and expenses.

Commentary

In the present case, as in other relevant cases concerning Article 11 of the Convention, the Court first considered whether there has been an interference with the applicant's right granted by the relevant Article and then examined whether the interference was justified under Article 11(2) of the Convention. Such an interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 of Article 11 and is "necessary in a democratic society" for the achievement of those aims.

The Court interprets the permissible restrictions upon Article 11 very strictly whenever political parties are concerned because of the fundamental role performed by these organisations in the maintenance of a democratic society. The Court accordingly stresses that only convincing and compelling reasons can justify restrictions on the freedom of association held by political parties. The judgement in the present case follows that delivered in *United Communist Party of Turkey v Turkey* (No. 19392/92, 30.1.1998), to which the present Court referred.

In *United Communist Party of Turkey v Turkey*, the alleged violation of Article 11 of the Convention consisted in the order made by the Constitutional Court for the dissolution of that party (TBKP) even before it had been able to begin its activities, the order having been based solely upon features of the party's name, constitution and programme which were incompatible with legislative and Constitutional provisions protecting the territorial integrity of the State and the unity of the nation. The Court confined its review to the two grounds for the dissolution which were upheld by the Constitutional Court. The first was that the TBKP had included the word 'communist' in its name, contrary to Law no. 2820, and that this formal requirement triggered dissolution. The second was that the TBKP sought to promote separatism and the division of the Turkish nation. The Constitutional Court accepted that, by drawing a distinction in its constitution and programme between the Kurdish and Turkish nations, the TBKP had revealed its intention of working to achieve the creation of minorities which posed a threat the territorial integrity of Turkey.

In view of the role played by political parties, the Court considered that any measure taken against them affected both freedom of association and, consequently, democracy in the State concerned. (para. 31) The Court noted that protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11, and this applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. (paras. 42 and 43)

The Court rejected the submission that a party's name may, by itself, entail its dissolution. In relation to the second submission, the Court recalled that one of the principal characteristics of democracy was the possibility it offers of resolving a country's problems through dialogue,

without recourse to violence, and cited the right to freedom of expression as an essential condition for a thriving democracy. It concluded that there could be no justification for hindering a political group solely because it sought to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. Considering the TBKP's programme, the Court was satisfied that this was indeed the party's objective, (para. 57).

The Court considered the background of cases before it, in particular the difficulties associated with the fight against terrorism (see *Ireland v. the United Kingdom*, No. 5310/71, 18.1.1978; and *Aksoy v. Turkey*, No. 21987/93, 18.12.1996) but found no evidence to enable it to conclude - in the absence of any activity by the TBKP - that the party bore any responsibility for the problems which terrorism posed in Turkey, (para. 59). The Court concluded that a measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, was disproportionate to the aim pursued and consequently unnecessary in a democratic society. (para.61) It consequently held that the dissolution constituted a violation of Article 11 of the Convention.

The case of *Refah Partisi (The Welfare Party) and Others v Turkey* (Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13.2.2003), stands in contrast to the two aforementioned cases due both to its facts and, consequently, to its treatment by the Grand Chamber. This case concerned the dissolution of that party by the Constitutional Court on the ground that the party had become a "centre of activities against the principle of secularism". Having found that the dissolution was prescribed by law and pursued several of the legitimate aims listed in Article 11, the Court then considered whether the party's dissolution and the secondary penalties imposed on the other applicants were necessary in democratic society.

The Court performed an extensive review of the relevant issues, including the roles of political parties and religion within a democracy, as envisaged by the Convention system. It went on to state that,

"In view of the very clear link between the Convention and democracy, no-one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some freedoms they enjoy in order to guarantee the greater stability of the country as a whole... In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime..." (para. 99)

In assessing whether there existed a “pressing social need” for the interference in question, the Court considered that the plan of establishing a plurality of legal systems would not only infringe upon the principle of non-discrimination between individuals as regards their enjoyment of public freedoms but would eradicate the State’s role of guarantor of individual rights and freedoms and would instead oblige individuals to obey static rules imposed by the religion concerned, (para. 119). The Court concurred with Chamber’s view that sharia is incompatible with the principle of democracy, due to its divergence from key Convention values, and that consequently a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention could not be recognised as complying with democratic ideal that underlies the whole Convention, (para. 123). The Court concluded that the penalty imposed upon the applicant by the Constitutional Court, even in the context of the restricted margin of appreciation left the Contracting States, may reasonably be considered to have met a “pressing social need”, (para.132).

In considering whether the penalties imposed were “proportionate to the legitimate aims pursued”, the Court followed the judgment of the Chamber, which had recognised that the nature and severity of the interference were factors to be taken into account when assessing its proportionality. The facts that there was no allegation of considerable pecuniary damage and that 151 remaining MPs continued to sit in parliament and pursued their political careers normally were also relevant to the conclusion that the requirement of proportionality had been met, (para.133). The Court concluding that there had been no violation of Article 11 of the Convention because the dissolution of the party met a “pressing social need” and was “proportionate to the aims pursued”, and as such could be regarded as “necessary in a democratic society” within the meaning of Article 11(2).

Balikçi v Turkey

(26481/95)

European Court of Human Rights: Judgment of 6 January 2004

Membership of the trade union - Freedom of association – Articles 11, 13, 14 of the Convention

Facts

The applicant, Hasan Balikçi, was born in 1961 and lives in Adana, Turkey. He was a member of *Enerji Sen* from 7 July 1993 until his death on 11 October 2002.

On 15 January 1990, he was contracted for work as an electrical engineer by the Turkish Electricity Company (*Türk Elektrik Kurumu*, hereinafter the TEK). According to Law No. 399, the contract between the applicant and the TEK forbade him from engaging in political or union-related activities.

In 1994 the applicant was one of the founding members of a union for contractual agents and civil servants. On 20 July 1994, the majority of state employees underwent a one-day work strike

supported by many of the main unions in the country.

On 9 August 1994, the local management of TEK decided to take disciplinary action against the applicant. In a letter dated 17 August 1994 the applicant was informed that a disciplinary inquiry had investigated his actions and he was invited to present submissions in his defence. In this letter it was alleged that the applicant had participated in a national strike which aimed to interrupt the work of the public sector; that he had neglected his own work; and that he had held placards and shouted slogans outside the TEK building. The applicant's participation in the strike was noted in an official report which was sent to the Adana Chief of Police.

In his submissions, dated 28 August 1994, the applicant argued that the legislation concerning unions is unconstitutional and requested the termination of the disciplinary proceedings against him. In the decision of the disciplinary body of 10 October 1994, the applicant received a "warning." With the enactment of Law No. 4455 on the granting of amnesties to civil servants and public sector employees, the applicant was granted an amnesty. He continued to work for the TEK and was promoted to chief engineer. On July 1 2002, he was made Director of Customer Service in Şanlıurfa.

On 29 November 2002, the applicant's representative informed the Court of the death of his client and of the intention of his family to continue the application in his name.

Complaints

The applicant complained under Article 11 in conjunction with Article 14 of the violation of his right to freedom of association.

He submitted that there was no effective domestic remedy and that there was consequently a violation of Article 13 of the Convention.

Held

The Court noted that following the entering into force of Law No. 4455 the applicant benefited from an amnesty pursuant to this law. This had the effect of removing from his administrative record the fact that he had received a "warning" following disciplinary proceedings. Furthermore, the applicant had continued to work for TEK and was in fact promoted a number of times. The Court also pointed to the fact that Law No. 4688, which came into effect on 12 July 2001, amended the national legislation so that it conforms to the Convention. The Court consequently concluded that the dispute had been resolved for the purposes of Article 37(1)(b) of the Convention. Accordingly the case was struck off the list.

Commentary

The right to the freedom to form and join trade unions is seen as a sub-division of freedom of

association, not a special and independent right. The state must allow the establishment of trade unions and is not permitted to treat a specific union more favourably than another. In the *Swedish Engine Drivers Union v. Sweden* (No. 5614/72, 6.2.1976) the Court stated that, “The Convention nowhere makes an express distinction between the functions of a contracting state as a holder of public power and its responsibilities as employer... Article 11 is accordingly binding upon the ‘State as employer’, whether the latter’s relations with its employees are governed by public or private law.” (para. 37) Despite the language of Article 11 of the Convention, trade unions have enjoyed relatively little success in claims that they or their members have brought under the article. The Court has noted that Article 11 is phrased in very general terms and “does not secure any particular treatment of trade unions or their members.”

The present case of *Balikçi v Turkey* appears to have been decided on the fact that the Government had amended Article 51 of the Constitution, which prevented civil servants from engaging in union activities, before the applicant’s case came before the Court. The Court made specific reference to the fact that Law No. 4688 brought domestic law into accordance with the Convention (para. 35). Had the law relating to unions not been amended, it is likely that the case would have proceeded to consideration before the Grand Chamber.

Gorzelik and Others v Poland

(44158/98)

European Court of Human Rights: Grand Chamber Judgment of 17 February 2004

Refusal to register an association - Freedom of assembly and association - Article 11 of the Convention

Facts

The applicants, Jerzy Gorzelik, Erwin Sowa and Rudolf Kolodziejczyk, are Polish nationals who live in Poland. The first and second applicants live in Katowice and the third lives in Rybnik.

The applicants describe themselves as “Silesians”. They decided to form an association called “Union of People of Silesian Nationality”. On 11 December 1996, they applied to the Katowice Regional Court to register their association. Their application was refused. On 27 January 1997, the Katowice Governor, acting through the Department of Civic Affairs, gave several lengthy arguments for his refusal of registration of the association. A key argument disputed the existence of a Silesian nationality. The Governor claimed that there were no set requirements which could be used to determine if a person was of Silesian nationality and whether they could become a member of the association. The name of the association could allegedly mislead the public to believe that “Silesian” is a national minority.

On 13 March 1997, the applicants initiated legal proceeding against the arguments made by the Governor. On 9 April 1997, the Governor reiterated his position before the Court.

On 24 June 1997, a single judge, sitting in camera as the Katowice Regional Court, granted the registration of the applicants' association under the name of the "Union of People of Silesian Nationality". The memorandum of association established that the aims were "to awaken and strengthen the national consciousness of Silesians, to restore Silesian culture, to promote knowledge of Silesia and to provide social care for the members of the association". The Court held that such aims would not infringe the rights and freedoms of others or result in an unequal treatment of other local communities, as had been claimed by the Governor. In addition to this the Court accepted that there was a distinct Silesian nation constituting a "Silesian national minority".

On 2 July 1997, the Governor appealed against that decision. On 24 September 1997, the Katowice Court of Appeal upheld his appeal by quashing the decision of the Katowice Regional Court.

On 3 November 1997, the applicants appealed to the Supreme Court. The Court dismissed these proceedings on 18 March 1998.

On 20 December 2001 the Court held that Article 11 of the Convention had not been violated as the grounds for refusal were justified under Article 11(2) of the Convention because they were necessary to "protect the state electoral system against the applicants' potential attempt to claim unwarranted privileges under electoral law" (para 49). This was on the basis of Article 5 of the 1993 Elections Act, which introduced special privileges only in favour of "registered associations of national minorities". This Law does not however provide any indication of what criteria a "national minority" must fulfil in order to have its organisation registered.

Complaints

The applicants complained under Article 11 of the Convention that the Polish authorities' arbitrary refusal to register the "Union of People of Silesian Nationality" violated their right to freedom of association. They added that the absence of any legal definition of a national minority in Poland, or any procedure whereby such a minority could obtain recognition under domestic law, made it impossible for them to foresee what criteria they were required to fulfil to have their association registered.

Held

The Court found that there had been no breach of Article 11 of the Convention as the restriction imposed upon the applicants' right to freedom of association was accordingly justified under Article 11(2) of the Convention. It was "prescribed by law", because the lack of an express definition of the concept of a "national minority" in Polish legislation did not therefore mean that Poland was in breach of its duty to frame law in sufficiently precise terms. The Court recognised that, in

the area under consideration, it might be difficult, and even undesirable, to formulate rigid rules in relation to this entity.

The restriction pursued one or more legitimate aims under the Article and was “necessary in a democratic society” for the achievement of those aims. The Court declared that the applicants’ request to register their association had been refused in order to protect the rights of others and to protect existing democratic institutions and procedures by preventing the abuse of electoral laws by means of establishing associations. Moreover, the Court reasoned that it was not in fact the applicants’ freedom of association per se that was restricted by the State as the authorities had not prevented them from forming an association to express and promote distinctive features of a minority but from creating a legal entity which, through registration under the Law on Associations and the description it gave itself in paragraph 30 of its memorandum of association, would inevitably become entitled to a special status under the 1993 Elections Act.

Commentary

In *Sidropoulos and Others v Greece* (No. 26695/95, 10.07.1998) the Court stated that the most important aspect of freedom of association as guaranteed by Article 11 is the empowerment to act collectively by establishing a juridical entity. Interference with this freedom is only justified according to Article 11(2) of the Convention which stipulates that it must be prescribed by law and necessary in a democratic society, in the interests of national security, public safety, prevention of disorder or crime, protection of health or morals and protection of the rights and freedoms of others.

The expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require the impugned measure to have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Sunday Times v the United Kingdom* (No. 1) 6538/74, 26.4.1979; *Larissis and Others v Greece*, Nos. 23372/94 and 26377/94, 24.2.1998; *Hashman and Harrup v the United Kingdom*, No. 25594/94, 25.11.1999; and *Metropolitan Church of Bessarabia and Others v Moldova*, No. 45701/99, 13.12.2001). For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention: the law must therefore indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria*, No. 30985/96, 26.10.2000).

In the present case of *Gorzelik and Others v Poland*, the Court found the authorities’ refusal to register the applicants’ association was prescribed by law within the meaning of Article 11(2) of the Convention. The Court replied to the applicants’ allegation that the Polish law did not provide any definition of a “national minority” by observing that such a definition would be

very difficult to formulate. It also noted that the choice as to what form official recognition by States of national, ethnic or other minorities within their population must be left to the State concerned as it would depend upon national circumstances, (para. 67). The Court recognised that, while there was a consensus in Europe that respect for minorities is a condition sine qua non for democratic society, there was no obligation under international law to adopt a particular concept of “national minority” in their legislation or to introduce a procedure for the official recognition of minority groups, (para. 68). For those reasons the Court considered that it may be difficult or even undesirable to formulate highly precise or rigid rules in relation to national minorities and consequently did not consider that leaving the authorities discretion to determine the applicable criteria with regard to the concept of “registered associations of national minorities” underlying Article 5 of the 1993 Elections Act.

Maestri v Italy

(39748/98)

European Court of Human Rights: Grand Chamber Judgment of 17 February 2004

Disciplinary sanctions imposed on judge for membership in Masonic lodge - Freedom of assembly and association – Articles 9, 10 and 11 of the Convention

Facts

The applicant, Angelo Massimo Maestri, was born in 1944 and lives in Viareggio, Italy. He was acting president of the La Spezia District Court when he lodged his application.

On 23 November 1993, disciplinary proceedings were brought against the applicant under Article 18 of the Royal Legislative Decree of 31 May 1946 governing the judicial office, construed in the light of Law No. 17 of 1982 on the right of association, for his membership at a Masonic lodge from 1981 until March 1993.

On 10 October 1995, the disciplinary section of the National Council of the Judiciary held that the applicant had committed the offence of which he was accused and reprimanded him. The disciplinary section stated that it was contrary to disciplinary rules for a judge to be a Freemason, on account of the incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the rejection of State justice in favour of Masonic justice and the indissoluble nature of the bond between Freemasons. It referred to two directives issued by the National Council of the Judiciary, the first in March 1990 and the second in July 1993. The directive of March 1990, entitled “Report on the incompatibility of judicial office with membership of the Freemasons”, declared problematic a judge’s membership of lawful associations which, like the Freemasons, were governed by specific rules of conduct. In the directive of July 1993 the National Council of the Judiciary clarified that the exercise of judicial functions was incompatible with

membership of the Freemasons.

On 5 January 1996, the applicant appealed against the decision on points of law to the Court of Cassation, and the Ministry of Justice lodged a cross-appeal on 2 February 1996. On 20 December 1996, the Court Cassation dismissed the applicant's appeal.

On 10 October 2002 the Chamber of the European Court of Human Rights relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention in conjunction of Rule 72 of the Rules of Court, neither party having objected.

Complaints

The applicant complained under Article 9 of the Convention that his right to freedom of thought and conscience had been violated.

Relying upon Article 10 of the Convention the applicant complained of a violation of his right to freedom of expression.

The applicant complained that his right to freedom of association as guaranteed by Article 11 of the Convention had been violated.

Held

The Grand Chamber found it unnecessary to consider complaints under Articles 9 and 10 of the Convention as these fell within the scope of Article 11 of the Convention.

The Grand Chamber held that there had been a violation of Article 11 of the Convention on the basis that the interference with the applicant's right was not prescribed by law and thus could not be justified under Article 11(2) of the Convention. Although the disciplinary measure had a basis in Italian law, and the relevant law was accessible to the applicant on account of his profession, it was not clear enough to fulfil the criteria of foreseeability. This was because the wording of the directive of the National Council of the Judiciary issued in March 1990 had not been sufficiently clear to enable the applicant, despite being a judge, to realise that his membership of a Masonic lodge could lead to sanctions being imposed on him.

The Court awarded the applicant EUR 10,000 in respect of non-pecuniary damage and EUR 14,000 in respect of costs and expenses.

Commentary

The Court had previously ruled in *N.F. v. Italy* (No. 37119/97, 2.8.2001) on the compatibility with Article 11 of the Convention of the imposition of a disciplinary sanction upon a judge for membership in the Freemasons on the basis of Article 18 of the 1946 decree, construed in the light of Law no. 17 of 1982 and the 1990 directive of the National Council of the Judiciary. In both that case and the present case of *Maestri v Italy* the Court concluded that the disciplinary measure

had a basis in domestic law, and that the law was accessible to the applicant as to its effects. In determining whether the condition of foreseeability had been fulfilled, the Court had to consider whether Italian law laid down with sufficient precision the conditions in which a judge should refrain from joining the Freemasons. In both cases the Court considered that Article 18 of the decree of 1946 contained insufficient information to satisfy the condition of foreseeability, as it does not define whether and how a judge can exercise his or her right of association. The guidelines passed by the National Council of the Judiciary in 1990 had stated that a judge's membership of lawful associations which, like the Freemasons, were governed by specific rules of conduct could be problematical for him or her: therefore, the Court had to determine whether Article 18, combined with the above-mentioned guidelines, rendered foreseeable the sanction in question.

Regarding the condition of foreseeability in *N.F. v Italy*, the Court declared that the wording of the guidelines of 22 March 1990 were not sufficiently clear to enable the users (who, being judges, were nonetheless well-versed in the law) to realise that their membership of an official Masonic lodge could lead to sanctions being imposed on them. This was because the reference to judicial membership of the Freemasons, stating merely that "membership ... raises delicate problems", was ambiguous and could give the impression that not all Masonic lodges were being taken into consideration, especially as these guidelines were passed after the national debate on the illegality of the secret Masonic P2 lodge. The Court declared that this assessment was confirmed by the fact that the National Council of the Judiciary itself felt the need to return to the issue on 14 July 1993 and produce guidelines which stated in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons.

Regarding the condition of foreseeability in *Maestri v Italy*, the majority of the Court considered that a distinction had to be made between two periods: the period from 1981, when the applicant joined the Freemasons, to 22 March 1990, when the National Council of the Judiciary adopted its first directive; and the period between that date and March 1993, when the applicant left the Freemasons. In relation to the first period, the Court found that, in spite of the introduction of the law of 1982 on the right of association, the applicant would have been unable to foresee that a judge's membership of a legal Masonic lodge could give rise to a disciplinary issue. In relation to the second period, the Court had to determine whether Article 18 combined with the 1990 directive rendered foreseeable the sanction imposed upon the applicant. Crucially, the Court noted that the debate held on 22 March 1990 before the National Council of the Judiciary sought to examine the issue of compatibility of the judicial office with membership of the Freemasons, rather than to solve it. The Court noted that this nature was confirmed by the facts that that debate of the National Council of the Judiciary had followed the major national debate on the unlawfulness of the secret P2 Masonic lodge, and that it took place in the context of judicial career progression. Of the two relevant directives, only that of 14 July 1993 had concerned the disciplinary supervision of judges. The Court considered it clear from an overall examination of that the National Council of the Judiciary was on 22 March 1990 merely questioning whether it was advisable for a judge to be a Freemason, and had not on that date indicated that membership of the Freemasons could

constitute a disciplinary offence in every case.

Dissenting opinions were however produced by three judges who heard the case of *Maestri v Italy*. In their joint dissenting opinion, Judges Bonello, Stráznická, Birsan Jungwiert and Del Tufo questioned both the reasoning of the majority in relation to the issue of foreseeability. They noted the historical context of the events in question, the facts that the domestic courts involved had deemed the sanction foreseeable, and the fact that the applicant himself had never claimed in his defence before the domestic courts that he could not have foreseen that membership of a Masonic lodge was incompatible with the exercise of his judicial functions. They went on to question the Court's willingness to substitute its own interpretation of domestic law in the face of such strong evidence of consensus on the matter at the domestic level. They noted that,

“...at least to date, the Court has declined to interpret domestic law and has taken the domestic courts' interpretation to be correct and binding. The Court only exceptionally interferes, but not in reinterpreting domestic law: its intervention is limited to enquiring whether domestic law, as established by the national authorities, is compatible with the Convention.

In view of this well-established case-law, it is a matter of considerable concern that the majority elected to disregard the unanimous interpretation of Italian law repeatedly made by the highest Italian adjudicating authorities about the sufficiency of the legal basis in this particular case, and found it expedient to second guess the consistent and unanimous legal assessment made by the Italian courts.” (para. 7)

They concluded by stating that the majority had consequently “totally pushed aside the principle of subsidiarity... so fundamental to the proper application of the Convention.” (para.9) The dissenting judges proceeded to review jurisprudence of the Court which had been established in relation to the two conditions of accessibility and foreseeability which must be fulfilled in relation to any interference with Article 11 of the Convention to avoid its violation. In particular, they noted the judgment of *Gorzelik and Others v Poland*, which had been delivered earlier that day. That judgment had reiterated that it was the role of the domestic courts to dissipate interpretational doubts which may naturally exist in relation to a given law, emphasising that such doubts do not render a provision unforeseeable in its application. (para. 26)

Judge Loucaides, joined by Judge Birsan, delivered an individual dissenting opinion in which he asserted that,

“... it is inevitable in the field of disciplinary law that only a general indication (accompanied perhaps by specific prohibitions) as to the kind of behaviour that may be considered as amounting to a disciplinary offence will be possible and that the degree of foreseeability will often be less than in other cases where a higher level of clarity and foreseeability of the law is in fact possible.”

Judge Loucaides stated that, in order for the condition of foreseeability to be satisfied, the legal provision in question must indicate the actual type of conduct which is prohibited. He stated that there must also be the possibility of independent judicial review of the relevant decision by a competent disciplinary body. Judge Loucaides felt that these criteria were fulfilled in relation to Article 18 of the decree of 1946 and that accordingly the application of the relevant law was foreseeable even before the passage of the law on associations of 1982.

Discrimination

B.B. v United Kingdom

(53760/00)

European Court of Human Rights: Judgment of 10 February 2004

Homosexuality - Right to privacy and family life - Prohibition of discrimination - Articles 8, 14 of the Convention

Facts

The applicant, B.B., was born in 1957 and lives in London, the United Kingdom.

The events described below took place between January 1998 and February 1999. The applicant contacted the police after he was attacked by a young man with whom he had homosexual relations. He was arrested for allegedly engaging in buggery with a young man aged sixteen years of age. This was contrary to section 12(1) of the Sexual Offences Act 1956, according to which it was an offence for a person to commit buggery with another person, and to Section 1 of the Sexual Offences Act 1967, which provided that the minimum age for those engaging in homosexual acts is 21. The applicant consensually underwent a medical examination and his premises were searched by the police.

The applicant appeared before the Magistrates' Court in relation to this charge on four different occasions. Each time, he was given bail and told to re-appear at a later date. The applicant wrote to the Crown Prosecution Service (CPS) informing them that these proceedings violated his human rights. He requested permission to apply for judicial review of the CPS decision to prosecute him, but this was refused. The CPS later advised him by letter that it had decided not to proceed with the case against him and that he should accordingly attend Central Criminal Court on a particular date. On that date he was formally acquitted by the court.

Complaints

The applicant complained that his prosecution under the applicable legislation constituted a

violation of Article 14 in conjunction with Article 8 of the Convention on the basis of discrimination on the grounds of sexual orientation. The matter of his initial attack only came to the attention of the police because he reported it, and instead of being protected by the State he was prosecuted in violation of the Convention.

Held

The Court upheld the applicant's claim and declared that the Government had violated Article 14 in conjunction with Article 8 of the Convention.

It awarded the applicant EUR 7,000 for non-pecuniary damage and EUR 600 for costs and expenses.

Commentary

For discussion of Article 14 of the Convention see the Commentary to *Nachova and Others v Bulgaria* (Nos. 43577/98 and 43579/98, 26.2.04), below.

Until the Human Rights Act 1998 came in to force in 2000, the rights enshrined in the European Convention on Human Rights were not directly enforceable in the United Kingdom. Although the decisions of the Court were not directly enforceable the UK would be in breach of its treaty obligations if it failed to comply.

The purpose of the Human Rights Act was to reduce time and costs incurred in bringing a case by enabling domestic courts to apply its laws directly. This enables the Convention rights to be woven into British law and spares the UK the expense and opprobrium of repeatedly being a respondent state in cases before the Court.

The Sexual Offences Act 2003, which came into force in May 2004, repealed section 12 of the 1956 Act and Section 1 of the 1967 Act. It also held the age of consent for homosexual and heterosexual sex to be 16.

Nachova and Others v Bulgaria

(43577/98 and 43579/98)

European Court of Human Rights: Judgment of 26 February 2004

Killing by police - Lack of effective investigation - Racial discrimination - Articles 2, 13 and 14 of the Convention

Facts

The four applicants are Bulgarian nationals who describe themselves as being of Roma origin.

Their applications concern the killing of Kuncho Angelov and Kiril Petkov on 19 July 1996 by a member of the military police who was attempting to arrest them. The first applicant, Anelia Kuncova Nachova, was born in 1995 and is the daughter of the first deceased, Kuncho Angelov. The second applicant, Aksiniya Hristova, is the first applicant's mother. The third and fourth applicants, Todorka Petrova Rangelova and Rangel Petkov Rangelov, were born in 1955 and 1954 respectively and are the parents of Kiril Petkov.

In 1996 both Angelov and Petkov were serving in the Construction Forces, a division of the Bulgarian army in which conscripts discharge their national service as construction workers on non-military projects. Both men had previous convictions for theft and for repeated absence without leave from compulsory military service.

Early in 1996 Angelov and Petkov were charged for their absences without leave from their duties in the Construction Forces. They were convicted for those offences on 22 May 1996 and were sentenced to nine and five months' imprisonment respectively.

On 15 July 1996 the two men left the construction site where they were working, outside the detention facility, without permission. Neither man was armed.

On 16 July 1996, a warrant for their arrest was received by the Vratsa Military Police unit. On 19 July 1996 the Vratsa Military Police received an anonymous tip-off that the two men were in the village of Lesura. Colonel D dispatched four police officers under the command of Major G to locate and arrest the two men. Colonel D informed them that Angelov and Petkov were "criminally active", a term which indicates previous convictions without specifying their exact nature. Colonel D instructed the officers to use all necessary means to arrest the two men. The officers carried handguns and Major G wore a bullet proof vest.

When the officers arrived at the house where Angelov and Petkov were hiding, the two men tried to escape. Sergeant N ordered them to stop and pulled out his gun but did not fire any shots. The two men continued running. Major G warned the men that if they did not stop he would shoot them. He opened fire and wounded Angelov and Petkov, who were pronounced dead upon arrival at the hospital in Vratsa. An investigation into the deaths was launched, but it failed to take into account important facts, especially regarding the alleged element of racism on the part of the officers towards the two Roma men.

Complaints

The applicants complained under Article 2 of the Convention that the two deceased were deprived of their lives as a result of deficient law and practice which allowed the use of lethal force in a situation in which it was not absolutely necessary. The Court declared that the use of force, which must be strictly proportionate to the achievement of the permitted aims, was excessive considering

the arresting officers knew that Angelov and Petkov were not armed or dangerous.

The applicants also complained under Article 2 of the Convention that the authorities had failed to conduct an effective investigation into the deaths.

The applicants complained under Article 13 of the Convention in relation to the inadequacy of the investigation into the deaths of Angelov and Petkov.

Relying upon Article 14 of the Convention the applicants complained that prejudice against Roma people had been a decisive factor in the deaths of Angelov and Petkov, who were Roma.

Held

The Court found that there had been a violation of the substantive aspect of Article 2 of the Convention in relation to the deaths of Angelov and Petkov because firearms were used to arrest two unarmed and non-violent fugitives. The Court stated that the violation aggravated by the fact that the firepower used had been disproportionate and unnecessary. Furthermore, it concluded that Bulgaria was responsible for the failure to plan and control the operation for the arrests of Angelov and Petkov in a manner compatible with Article 2 of the Convention.

The Court held that there had also been a violation of the procedural aspect of Article 2 of the Convention in relation to the Government's obligation to conduct an effective investigation. It stated that not only were the investigation and the conclusions of the prosecutors characterised by serious and unexplained omission and inconsistencies but that the overall approach was flawed.

The Court held that no issue arose under Article 13 of the Convention separate to that which had been determined in relation to the procedural aspect of Article 2.

The Court found that authorities had failed to discharge their duty under Article 14 of the Convention, taken together with Article 2, to take all possible steps to establish whether or not discriminatory attitudes may have affected the circumstances surrounding the killings. The Court considered that the failure to discharge this duty was relevant to its examination of the allegation of a "substantive" violation of Article 14 of the Convention.

The Court made a joint award to the first and second applicants of 25,000 EUR in respect of pecuniary and non-pecuniary damage.

The Court made a joint award to the third and fourth applicants of 25,000 EUR in respect of pecuniary and non-pecuniary damage.

The Court also made an award jointly to all applicants for 3,740 EUR in respect of costs and

expenses.

Commentary

Article 14 of the Convention provides for the prohibition of discrimination in relation to the rights assured by the Convention and Protocols. It does not have an autonomous nature but applies in conjunction with another article of the Convention. In *Rasmussen v Denmark* (8777/79, 28.11.1984) the Court made clear that:

“Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to the “enjoyment and freedoms” safeguarded by those provisions. [...] There can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.” (para.29)

The Court has however expressed the need for a broad interpretation of the protection provided by Article 14 (see *Thlimmenos v Greece*, No. 34369/97, 6.4.2000). According to the Court’s jurisprudence, a difference in treatment is discriminatory under Article 14 if it “has no objective and reasonable justification”, that is if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Karlheinz Schmidt v Germany*, No. 13580/88, 18.7.1994; *Salgueiro da Silva Mouta v Portugal*, No. 33290/96, 12.12.1999; and *Fretté v France*, No. 36515/97, 26.2.2002).

The case of *Jordan v United Kingdom* (No. 24746/94, 4.5.2001), like the present case of *Nachova and Others v Bulgaria*, concerned the killing of a civilian from a minority community by the police: the Court stated that where a general policy or measure has disproportionately prejudicial effects on a particular group, this may be considered as discriminatory notwithstanding the fact that it is not specifically aimed or directed at that group. The Court however noted that, even though statistically it appeared that the majority of people shot by the security forces were from the Catholic or nationalist community to which the deceased had belonged, statistics could in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. In the present case of *Nachova and Others v Bulgaria*, the Court gave great weight to a recent report on Bulgaria produced by the European Commission against Racism and Intolerance, as well as acknowledging the reports of “non-governmental organisations such as Human Rights Project and Amnesty International”. (paras. 53 – 54) It further considered the reports of specialised UN agencies which were adduced by the applicants. (para. 153)

In the cases of *L. and V. v Austria* (Nos. 39392/98 and 39829/98, 9.1.2003) and *S.L. v Austria* (No. 45330/99, 9.1.2003), which concerned alleged difference in treatment based upon the applicants’

sexual orientation, the applicant relied upon Article 8 of the Convention, taken alone and in conjunction with Article 14, to allege that his right to respect for his private and family life had been violated by a discriminatory piece of legislation. Significantly, the Court deemed it appropriate to examine the case directly under Article 14 taken together with Article 8: although this does not attribute to Article 14 a freestanding quality, it does confirm the importance of its status. In both cases the Court held unanimously that there had been a violation because the distinction in treatment, having been discredited by recent research, could not be justified by the remaining reason, which was the bias of the heterosexual majority against a homosexual minority.

In the present case of *Nachova and Others v Bulgaria*, the Court reiterated that it is particularly important that the authorities investigate the killing with particularly rigorous impartiality in order to reassert social condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the State to protect them from the threat of racist violence (see *Menon v United Kingdom*, No. 47916/99, 2003).

The Court emphasised that the State bears an additional duty to verify the existence and potential role of ethnic hatred or prejudice in cases concerning any violent incidents and, in particular, deaths at the hands of State agents. Failing to do so would be to treat racist violence as equal to cases which have no racist overtones and to ignore the specific nature of acts which potentially violate the fundamental right to non-discrimination guaranteed by Article 14 of the Convention. The Court noted that although this duty is not absolute, due to the difficulty of proving racist motives, it is extensive:

“The authorities must do what is reasonable in the circumstances to collect and secure evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a [sic] racially induced violence.” (para. 159)

Relevant evidence suggesting racist motives of the officers involved in the incident, in particular Major G., was ignored during the domestic investigation into the deaths. The Court considered that any evidence of racist verbal abuse by law enforcement agents during an operation involving the use of force against persons from an ethnic or other minority, such as that averred by witnesses during domestic proceedings, must be verified. The Court accordingly found that the authorities had failed to fulfil their duty under Article 14 of the Convention, taken together with Article 2, to take all possible steps to establish whether or not discriminatory attitudes may have played a role in the events.

The Court noted that it had held on many occasions that the standard of proof which it applies is that of proof “beyond reasonable doubt”, but that this standard should not be interpreted as requiring such a high degree of probability as in criminal trials.

The Court considered that in cases where the authorities have not pursued clearly warranted lines of inquiry in relation to acts of violence by State agents and have disregarded evidence of possible discrimination, it may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government (see *Salman v Turkey*, No. 21986/93, 27.6.2000; *Selmouni v France*, No. 25803/94, 28.7.1999; and *Conka v Belgium*, No. 51564/99, 5.2.2002). When the burden of proof shifts the respondent Government must provide either additional evidence or a convincing alternative interpretation of the facts.

In holding that there had been a violation of the Article 14 of the Convention, taken together with Article 2, the Court was influenced by the fact that the present case was not the first brought against Bulgaria in which the Roma have been alleged to be the victims of racial violence at the hands of State agents (see *Velikova v Bulgaria*, No. 41488/98, 18.5.2000; *Anguelova v Bulgaria*, No. 38361/97, 13.6.2002; *M.C. v Bulgaria*, No. 39272/98, 4.12.2003). This reasoning renders the present case of *Nachova and Others v Bulgaria* of critical importance, as it affirms that the Court is willing to acknowledge an accretion of allegations of this sort even if previous applicants have been unsuccessful in proving their individual complaints of discrimination.

Expropriation of Property

Ilkay v Turkey

(42786/98)

European Court of Human Rights: Judgment of 8 January 2004

Expropriation of land - Article 1 of Protocol No. 1 of the Convention

Facts

The applicant, Nuran Ilkay, is a Turkish national who was born in 1949 and lives in Ankara, Turkey. She owned land in Yenimahalle, Ankara, which was expropriated by the Directorate General for National Highways (the Directorate). The applicant was awarded 6,457,500 Turkish Lira in compensation for the expropriation but did not accept that this was the correct amount which she was due.

On 24 December 1993, Ilkay applied to court to have the amount of this award reviewed and on 22 September 1994, the Directorate was ordered to pay her an additional 71,955,000 Turkish Lira. On 12 December 1994, the Court of Cassation upheld this judgment.

The Directorate did not pay the applicant until 20 January 1998, 37 months after the original judicial decision in her favour. When the payment was made it still did not meet the amount awarded in the court judgments.

Complaints

The applicant complained under Article 1 of the Protocol No. 1 to the Convention in relation to the authorities' delay in paying the judicially awarded additional compensation for the expropriation of her land.

Relying upon Article 13 of the Convention the applicant complained that there had been no effective remedy with which she could compel the Directorate to pay her the compensation promptly.

Held

The Court unanimously held that there had been a violation of Article 1 of Protocol No. 1 to the Convention. It found that it was unnecessary to examine the complaint under Article 13 of the Convention separately as the actual judgement provided sufficient satisfaction for the moral damage sustained by the applicant.

The Court awarded the applicant EUR 1,900 for pecuniary damage and EUR 500 for costs and expenses.

Commentary

For discussion of Article 1 of Protocol No. 1 to the Convention see the Joint Commentary with *Kayıhan and Others v Turkey* (No. 42124/98, 8.4.2004) and *Güçlü and Others v Turkey* (No. 42670/98, 8.1.2004), below.

Kayıhan and Others v Turkey

(42124/98)

European Court of Human Rights: Judgment of 8 April 2004

Expropriation of land - Compensation – Adjustment of interest rates according to inflation - Article 1 of Protocol No.1 to the Convention and Article 14 of the Convention in conjunction with Article 1 of Protocol No.1

Facts

The applicants are nineteen Turkish nationals whose plots of land in Hilvan, Şanlıurfa, were expropriated in November 1994 by the General Directorate of the National Water Board, the public sector body responsible for dam construction, in order to build the Atatürk Dam. The applicants were paid compensation of an amount determined by a committee of experts. The applicants requested more compensation and were awarded 3,878,470,910 Turkish Lira in additional compensation by the Hilvan Court of First Instance. An appeal against this decision

by the General Directorate was rejected by the Court of Cassation. On 7 November 1997 the administration paid the applicants 8,716,708,000 Turkish Lira as additional compensation, 35 months after the first decision in favour of the applicants.

Complaints

The applicants complained under Article 1 of Protocol No.1 to the Convention that the additional compensation awarded for the expropriation of their land was reduced due to the delay of two years and ten months between the decision of the Hilvan Court of First Instance and its payment. The applicants submit that the statutory rate of interest was not in line with the very high rate of inflation in Turkey, which had increased over the period of the delay.

The applicants also complain of a violation of Article 14 in conjunction with Article 1 of Protocol No.1 to the Convention of the exceptional situation which was favourable to the State as a result of the difference between the rate of interest payable on debts owed to the State (which stood at around 84% per annum) and the rate of interest on overdue State debts (around 34% per annum) at the material time.

Held

The Court held that Article 1 of Protocol No.1 to the Convention had been violated by the fact that the applicants had to bear an additional loss incurred due to the delay in compensating them for the expropriation of their land.

The Court found it unnecessary to examine the complaints under Article 14 of the Convention in conjunction with Article 1 of Protocol No.1 to the Convention.

The applicants were awarded EUR 27,700 in respect of pecuniary damage.

Commentary

For a general discussion of Article 1 of Protocol No. 1 to the Convention see the Joint Commentary with *Ilkay v Turkey* (No. 42786/98, 8.1.2004) and *Güçlü and Others v Turkey* (No. 42670/98, 8.1.2004), below.

In the present case the Court considered that the delay in payment of the compensation was attributable to the authorities and had caused the applicant to incur financial loss in addition to that sustained due to the expropriation of her property. That delay had imposed upon the applicant an individual and excessive burden. This upset the fair balance between the general public interest, as pursued by the expropriation of privately owned land, and the protection of the rights and freedoms of the individual, here the right to peaceful enjoyment of possessions. The Court accordingly found that Article 1 of Protocol No. 1 to the Convention had been violated.

The Court considered that the damage sustained by the applicant is equal to the difference between the amount actually paid to her as compensation and the amount she would have received had the sum she was owed been adjusted to take account of the depreciation of the value of her land over the period of the delay in payment.

Güçlü and Others v Turkey

(42670/98)

European Court of Human Rights: Judgment of 8 January 2004

Expropriation of land - Compensation – Article 1 of Protocol 1 to the Convention

Facts

The applicants are Turkish nationals living in Çorum, Turkey.

In 1991 the applicants' land was expropriated by Osmaniç District Council. The applicants were paid compensation, the amount of which was decided on by a commission of experts. The applicants disagreed with the amount of compensation they were paid. In 1991, the applicants went to the High Court to request that their compensation be increased.

On 13 December 1994, the Court granted them partial relief and ordered that they be paid an extra 1,577,142,000 Turkish Lira. The applicants appealed but the Court of Appeal upheld the judgment on 17 July 1995. The applicants were paid a total of 3,518,761,000 Turkish Lira in compensation.

Complaints

The applicants complained under Article 1 of Protocol 1 to the Convention that the authorities had failed to respect their right to peaceful enjoyment of their possessions due to non-payment of the sum awarded to them by the High Court.

Held

The Court held that there was a violation of Article 1 of Protocol 1 to the Convention because a balance had not been struck between the requirements of the general interest of the community and the right of the applicants to peaceful enjoyment of their possessions.

Joint Commentary with *Ilkay v Turkey* (No. 42786/98, 8.1.2004) and *Kayıhan v Turkey* (No.42124/98, 8.4.2004)

In *Sporrong and Lönnroth v. Sweden* (Nos. 7151/75 and 7152/75, 23.9.1982) the Court stated that Article 1 of Protocol 1 to the Convention "...comprises three distinct rules. The first rule, set out in the first sentence of the paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same

paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest...” (para 67).

In determining the cases of *Ilkay v Turkey*, *Kayihan v Turkey* and *Güçlü and Others v Turkey* the Court followed the previous cases of *Akkuş v Turkey* (No. 19263/92, 9.7.1997) and *Aka v Turkey* (No. 19639/92, 23.9.1998) which also concerned the expropriation of land. In *Akkuş v Turkey* the Court found that the adequacy of compensation diminishes if it is paid without regard to various circumstances which could reduce its value. It declared specifically that abnormally long delays in the payment of compensation for expropriation of land lead to increased financial loss for the person whose land has been expropriated and can put him or her in a position of severe financial uncertainty. (para 29)

The Court applies a “fair balance” test in assessing compliance with the first rule of Article 1 of Protocol 1: in doing so it seeks to determine whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

C. Procedural

Folgerø and Others v Norway

(15471/02)

European Court of Human Rights: Communicated on 4 December 2003

Religion - exemption from teachings of Christianity in school - Articles 8,9,14 and Article 2 of Protocol No.1 of the Convention

Facts

The first nine applicants are parents of children who attended primary school at the time of events complained of. The tenth applicant is a Norwegian Humanist Association. Complaints surround legislative reforms to the Norwegian school curricula since 1997, when subjects of Christianity, other religions and philosophy were introduced. Emphasis was placed on the teachings of Christianity. Previously pupils who adhered to other religions or beliefs could be completely exempted from the lessons concerning the Christian faith. Since the 1997 curricular reforms such pupils could only be exempted from parts of these lessons and this partial exemption required the provision of a parental note.

The applicants filed proceedings before domestic courts for the full exemption of their children from the subject. Their action was rejected within three judicial proceedings.

In 2000 two reports on the 1997 curricular reforms concluded that partial exemption had not worked as intended and that the system needed to be reviewed.

Communicated under Articles 8, 9, 14 of the Convention and Article 2 of Protocol No.1 of the Convention.

Commentary

The main procedural obstacle in this case is the fact that some applicants have brought a petition before the Human Rights Committee of the United Nations using the individual complaints procedure of the International Covenant on Civil and Political Rights (ICCPR) and its First Optional Protocol.

Article 35 (2) (b) of the Convention reads: “The Court shall not deal with any application submitted under Article 34 that [...] (b) [...] has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.” This Article precludes the admissibility of an application under the Convention that was decided or is being considered by an ‘international body’, the Human Rights Committee in particular. This restriction applies only to cases in which the applicant, the facts and the claims are identical. In these cases, the applicant may not merely stay the proceedings before the international body but must retract his / her claim so as to avoid jeopardising the admissibility of his/ her application before the Court (see *Cacerrada Fornieles and Cabeza Mato v Spain*, No. 17512/90, 6.7.1992).

The same rule applies to the procedure before the Human Rights Committee. Article 5 (2) (a) of the First Optional Protocol to the ICCPR precludes the admissibility of cases which are being simultaneously considered by a comparable human rights body. A number of European State parties have entered a reservation to the First Optional Protocol, blocking the Human Rights Committee from acting as an ‘appeal body’ for applicants who submitted claims unsuccessfully before the Court.

Azinas v Cyprus

(56679/00)

European Court of Human Rights: Grand Chamber Hearing of 28 April 2004

Protection of property – Disciplinary proceedings – Dismissal – Forfeiture of retirement benefits – Article 1 of Protocol 1 to the Convention

Facts

The applicant, Andreas Azinas, is a Cypriot national who was born in 1927 and lives in Nicosia, Cyprus.

The applicant worked as Governor of the Department of Co-operative Development of the Public Service in Nicosia from the establishment of the Republic of Cyprus until his dismissal from this position following disciplinary proceedings initiated on 28 July 1982. In Cyprus a non-contribution based pension scheme is provided within the employment contract of all public servants and as such formed part of the applicant's package of retirement benefits.

On 8 April 1981, the applicant was found guilty of theft, breach of trust and abuse of authority by Nicosia District Court and was sentenced to eighteen month's imprisonment. His appeal against the decision was rejected by the Supreme Court on 16 October 1981.

On 28 July 1982, proceedings were brought against the applicant by the Public Service Commission, which decided to dismiss him retrospectively on the basis of the conviction delivered by Nicosia District Court and sustained by the Supreme Court. The Commission held that he had managed the resources within his Department as though its resources had been his own private property and spent them for purposes other than those of the Department. The disciplinary sentence issued was his dismissal from office and, in accordance with Section 79(7) of Public Services Law No. 33/67, it resulted in the forfeiture of all retirement benefits including his pension. He appealed against this decision, but was unsuccessful.

On 8 October 1982, the applicant filed an application with the Supreme Court requesting that the decision for his dismissal be declared null and void, arguing that the decision had been made in excess or abuse of power because the sanction of dismissal which had been imposed, including as it did the forfeiture of his retirement benefits, was disproportionate to the severity of the offence which was being adjudicated.

The application was lodged on 18 January 2000 and was declared partly admissible on 19 June 2001, despite the Government's objection that the applicant had failed to exhaust local remedies. In a Chamber judgment of 20 June 2002 the Court held by six votes to one that there had been a violation of Article 1 of Protocol 1 to the Convention. On 13 September 2002, the Government requested the referral of the case to the Grand Chamber. The request was accepted on 6 November 2002 and a Grand Chamber Hearing was held on 4 June 2003.

Complaints

The applicant complained under Article 1 of Protocol 1 to the Convention regarding the forfeiture of his retirement benefits and pension upon dismissal.

The Government lodged the objection that the applicant had not exhausted effective local remedies because he had referred to the withdrawal of their retirement benefits before the Supreme Court only in the context of challenging his dismissal as a disproportionate sanction, rather than alleging

that this had violated a substantive right. The Government claimed that the Supreme Court had therefore been denied the opportunity to deal with the property violation which was the subject of the current application.

Held

The Court held by twelve votes to five that the application was inadmissible on the basis that the applicant had failed to exhaust domestic remedies by failing to provide the Cypriot courts with the opportunity of addressing, and thereby preventing or remedying, the violation alleged in his application.

Commentary

The rule of exhaustion of local remedies is intended to allow national authorities to address the alleged violation of a Convention right and, where appropriate, to redress the grievance before that allegation is submitted to the Court (see further *Kudla v Poland*, No. 31210/96, 26.10.2000; *Guzzardi v Italy*, No. 7367/76, 6.11.1980; and *Cardot v France*, No. 11069/84, 19.3.1991). In essence therefore it is designed to ensure the subsidiary character of the Convention machinery in relation to the domestic authorities of Contracting States.

In the present case of *Azinas v Cyprus* the Court emphasised that while the rule of the exhaustion of local remedies must be applied with some degree of flexibility and without excessive formalism, there are two basic requirements which must be met. First, the applicant should invoke the relevant remedies before the appropriate domestic courts in order to challenge the impugned decisions which allegedly violate the Convention right.

Secondly, and crucially in this case, the complaints intended to be raised subsequently at international level must be made within these domestic proceedings, at least in substance if not explicitly, and in accordance with the formal requirements established by domestic law (see *Fressoz and Roire v France*, No. 29183/95, 21.1.1999). If the Convention argument is not raised before the national courts, the national legal order is denied the opportunity to address the Convention issue which, the Court noted, would be contrary to the character of the subsidiary Convention machinery, (para.38). Therefore, the obligation imposed upon the applicant by this rule is to exhaust 'effective' local remedies. In this way, the applicant's pleadings before national courts determine whether he can subsequently fulfil this obligation before the Court.

In failing to raise the complaint of a violation of his Convention right at the domestic level the applicant had not allowed the Cypriot judiciary to be an effective remedy. Had the Court declared this case admissible it would have exceeded its subsidiary role in relation to the protection of Convention rights.

Footnotes:

⁸⁹ See (2003) 4 KHRP LR, p. 158

⁹⁰ 'Application Nos. 46827/99 and 46951/99, *Mamatkulov and Askarov v Turkey*, Intervention submitted by Human Rights Watch and AIRE Centre'; available: <http://hrw.org/backgrounders/eca/turkey/eu-submission.pdf> (11.5.04)

⁹¹ See (2003) 3 KHRP LR, p.116 and (2002) 2 KHRP LR, p.101

⁹² See KHRP, *Turkey's Non-Implementation of European Court Judgments: The Trials of Fikret Başkaya*, KHRP: London, September 2003.

⁹³ See KHRP, *The Cultural and Linguistic Rights of the Kurds in Turkey, Iraq, Iran and Syria*, KHRP: London, 2004 (forthcoming).

Section 3: Appendices

1. Table of Cases Brought Before the ECHR Against Turkey Invoking a Violation of Article 6 of the Convention (2003 – May 2004)

Application No:	Applicant (s):	Date of decision:	Out come of the case:
32984/96	<i>Alfatlı and Others</i>	02/10/2003	Struck out -friendly settlement
27528/95	<i>Kızılyaprak</i>	02/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Violation of Article 10
37059/97 37062/97 37062/97	<i>Aysenur Zarakolu</i>	02/10/2003	Struck out-friendly settlement
47165/99	<i>Fadime Özkan</i>	09/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * No Violation of Article 6 § 1 with regards to other complaints made.
47311/99	<i>Ertan Özkan</i>	09/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * No Violation of Article 6 § 1 with regards to other complaints made.
59649/00	<i>Gönülşen</i>	09/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * No Violation of Article 6 with regards to other complaints made.
60847/00	<i>Saçık</i>	09/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
49164/99	<i>Ayşe Kılıç</i>	16/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
37452/97	<i>Demirtaş (No 2)</i>	16/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal * Articles 6 § 3(b), 6 § 3(c) inadmissible.

42741/98	<i>Çakar</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Violation of Article 10
48617/99	<i>Özyol</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
50743/99	<i>Hayrettin Barbaros Yılmaz</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Articles 6 § 1 & 6 § 3 (b)
51053/99	<i>Tutmaz and Others</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine complaints Articles 14 in conjunction of Article 6 § 3.
52665/99	<i>Akkaş</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6 §1
53014/99	<i>Peker</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine complaints under Articles 14 in conjunction of Article 6 §1.
53431/99	<i>Gençel</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6 §1
53895/00	<i>Mesut Erdoğan</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
41580/98, 42439/98	<i>Çavuş and Bulut</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6

46106/99	<i>Eren</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
50118/99	<i>Şimşek</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
50119/99	<i>Süvarioğulları and Others</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
52744/99	<i>Ergül and Engin</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
51416/99	<i>Dalgıç</i>	23/10/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
36596/97	<i>Karatay</i>	28/10/2003	Struck out - friendly settlement
24849/94, 24850/94, 24941/94	<i>Kalın, Gezer and Ötebay</i>	28/10/2003	Struck out – friendly settlement
32984/96	<i>Alfath and Others (as regards the applicant Mahmut Memduh)</i>	30/10/2003	*Violation of Article 6 § 1 with regard to the length of the proceedings * Violation of Article 6 § 1, right to an independent & impartial tribunal.
52661/99	<i>Kenan Yavuz</i>	13/11/2003	*Violation of Article. 6 §1 as regards independent and impartial tribunal *No violation of Article. 6 §1 with regard to the length of the proceedings ; *Not necessary to examine Article 6 concerning the other complaints

53968/00	<i>İsmail Güneş</i>	13/11/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
59234/00	<i>Al and Others</i>	13/11/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
38389/97	<i>Can</i>	27/11/2003	*Violation of Article 6 § 1 as regards the independence and impartiality of the court * Not necessary to examine Article 6 § 1 regarding the fairness of the proceedings *complaint inadmissible under Article 6 with regards the failure to communicate the public prosecutor's opinion ;
42738/98	<i>Tuncel and Others</i>	27/11/2003	*Violation of Article 6 § 1 as regards the independence and impartiality of the court. *Unnecessary to examine Article 6 § 1 with the fairness of the proceedings.
47296/99	<i>Günel</i>	27/11/2003	*Violation of Article 6 § 1 as regards the independence and impartiality of the court. *Unnecessary to examine Article 6 § 1 regarding the fairness of the proceedings.
48263/99	<i>Kirman</i>	27/11/2003	*Violation of Article 6 § 1 as regards the independence and impartiality of the court. *Unnecessary to examine Article 6 § 1 regarding the fairness of the proceedings.
51289/99	<i>Özülkü</i>	27/11/2003	*Violation of Article 6 § 1 as regards the independence and impartiality of the court. *Unnecessary to examine Article 6 § 1 regarding the fairness of the proceedings.

55951/00	<i>Uçar and Others</i>	27/11/2003	*Violation of Article 6 § 1 with regards the independence and impartiality of the court ; *Inadmissible under second and third applicants' complaint ; *Inadmissible under Article 6 with regards the fairness of the proceedings
44267/98	<i>Dursun and Others</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
46388/99	<i>Bilal Bozkurt and Others</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
47654/99	<i>Duran</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
47757/99	<i>Çavuşoğlu and Others</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
48054/99	<i>Sarioğlu</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
49517/99	<i>Taşkın</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
48134/99	<i>Taş</i>	04/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
57944/00	<i>Çetinkaya and Others</i>	18/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (b)
42775/98	<i>Ükünç and Güneş</i>	18/12/2003	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (c)

57561/00	<i>Toprak</i>	08/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
57562/00	<i>Becerikli and Altekin</i>	08/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine other complaints under of Article 6
54919/00	<i>İçöz</i>	15/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
56021/00	<i>Erolan and Others</i>	15/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (b)
46952/99	<i>Hıdır Özdemir</i>	15/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (b), 6 § 3 (c) and 6 § 3 (d)
48065/99	<i>Metin Polat and Others</i>	15/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (c)
48155/99	<i>Çınar</i>	15/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. * Unnecessary to examine Article 6 § 3 (c)
50903/99	<i>Korkmaz</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
48438/99	<i>Özertikoğlu</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal. *Unnecessary to examine complaint of Article 6 with regards to fairness
44054/98	<i>İrfan Kaya</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal.

47340/99	<i>Jalaliaghdam</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
48062/99	<i>Kırcan</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
26518/95	<i>Sekin and Others</i>	22/01/2004	* Violation of Article 6 § 1 for excessive length of civil proceedings
40528/98	<i>Güven and Others</i>	22/01/2004	* Violation of Article 6 § 1, right to an independent & impartial tribunal.
57939/00	<i>Kalyoncugil and Others</i>	29/01/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3
46503/99	<i>Halil Doğan and Others</i>	29/01/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Article 6 § 3 (d) inadmissible.
40997/98	<i>Tahir Duran</i>	29/01/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal
42435/98	<i>Abdullah Aydın</i>	09/03/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine complaint of Article 6 § 1 with regards to fairness *Violation of Article 10
40299/98	<i>Boztaş and Others</i>	09/03/2004	Struck out – friendly settlement
42436/98	<i>Gerger</i>	09/03/2004	Struck out –friendly settlement
30452/96	<i>Takak</i>	01/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3 (d)
21689/93	<i>Ahmet Özkan and Others</i>	06/04/2004	*No separate issue arising under Article 6 § 1
26982/95	<i>Mehdi Zana</i>	06/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3 (c) * Violation of Article 10
26307/95	<i>Tahsin Acar</i>	08/04/2004	No Violation of Article 6
32457/96	<i>Özalp and Others</i>	08/04/2004	Unnecessary to examine Article 6

55427/00	<i>Serdar Özcan</i>	08/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3
35070/97	<i>Tezcan Uzunhasanoğlu</i>	20/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3
29486/95, 29487/95, 29853/96	<i>Mamaç and others</i>	20/04/2004	No violation of Article 6 § 1 and 6 § 3 (c)
46272/99	<i>Haydar Güneş</i>	22/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal
48059/99	<i>Özer and Others</i>	22/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3 (c)
53586/99	<i>Yavuzaslan</i>	22/04/2004	*Violation of Article 6 § 1, right to an independent & impartial tribunal * Unnecessary to examine Article 6 § 3 (c)
36115/97	<i>Sarıkaya</i>	22/04/2004	No Violation of Article 6 § 1 and 6 § 3 (c)

2. Table of Cases Brought Before the ECHR Against Turkey Involving a Violation of Article 3 of the Convention (2003 – May 2004)

Application No:	Applicant:	Date of decision:	Type of decision
29875/96	<i>Başak and Others</i>	16/10/2003	Struck out - friendly settlement
39978/98	<i>Oğras and Others</i>	28/10/2003	Struck out -friendly settlement
24849/94 , 24850/94, 24941/94	<i>Kalm, Gezer and Ötebay</i>	28/10/2003	Struck out – friendly settlement
31730/96	<i>Yurtseven and Othera</i>	18/12/2003	Struck out-friendly settlement
23145/93, 25091/94	<i>Elçi and Others</i>	13/11/2003	* Violation of Article 3-toture and inhuman treatment
23656/94	<i>Ayder and Others</i>	08/01/2004	*Violation of Article 3 inhuman treatment * Not necessary to examine Article 3 with regard to inhuman punishment
28520/95	<i>Sadık Önder</i>	08/01/2004	* Violation of Article 3- inhuman treatment
32578/96, 32579/96	<i>Çolak and Filizer</i>	08/01/2004	* Violation of Article 3- inhuman treatment
27699/95	<i>Tekdağ v. Turkey</i>	15/01/2004	* No violation of Article 3- inhuman treatment
32861/96	<i>Çalışkan</i>	09/03/2004	Struck out- friendly settlement
25354/94	<i>Nuray Şen(No.2)</i>	30/03/2004	* No violation of Article 3- inhuman treatment
26307/95	<i>Tahsin Acar</i>	08/04/2004	* No violation of Article 3- inhuman treatment

21689/93	<i>Ahmet Özkan and Others</i>	06/04/2004	*Violation of Article 3 with regard to ill-treatment of villagers ; * Violation of Article 3 with regard to ill-treatment of detainees and lack of effective investigation *No violation of Article 3 with regard to search of village and rounding up of villagers;
32457/96	<i>Özalp and Others</i>	08/04/2004	* No violation of Article 3 with regards to ill treatment
25142/94, 27099/95	<i>Sadak</i>	08/04/2004	* No violation of Article 3-inhuman treatment
28298/95	<i>Buldan</i>	20/04/2004	* No violation of Article 3-inhuman treatment

3. Members of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was adopted and opened for signature, ratification and accession by the General Assembly on 18 December 1990. It entered into force on 1 July 2003, following the deposit of the twentieth instrument of ratification on 14 March 2004. At present, 25 States are parties to the Convention.

The first session of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families convened at the United Nations Office in Geneva from 1 to 5 March 2004. The Committee consists of ten experts of high moral standing and acknowledged impartiality, serving in their personal capacity, elected by the States parties in accordance with the procedure set forth in the Convention. Central to the agenda was the election of the Chairperson, Vice Chairperson, Rapporteur and other officers of the Committee were elected.

Name	Nationality	Term Expires on 31 December in the year:
Francisco ALBA	Mexico	2007
José S. BRILLANTES	Philippines	2005
Francisco CARRION-MENA	Ecuador	2007
Ana Elizabeth CUBIAS MEDINA	El Salvador	2007
Anamaría DIEGUEZ	Guatemala	2005
Ahmed Hassan EL-BORAI	Egypt	2007
Abdelhamid EL JAMRI	Morocco	2007
Arthur Shatto GAKWANDI	Uganda	2005
Prasad KARIYAWASAM	Sri Lanka	2005
Azad TAGHIZADET	Azerbaijan	2005

The membership of the Committee will rise from ten to fourteen experts when forty-one ratifications have been registered; there are currently twenty-five States parties to the Convention.

4. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention

Council of Europe Treaty Series No. 194

Preamble

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Having regard to Resolution No. 1 and the Declaration adopted at the European Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000;

Having regard to the Declarations adopted by the Committee of Ministers on 8 November 2001, 7 November 2002 and 15 May 2003, at their 109th, 111th and 112th Sessions, respectively;

Having regard to Opinion No. 251 (2004) adopted by the Parliamentary Assembly of the Council of Europe on 28 April 2004;

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;

Considering, in particular, the need to ensure that the Court can continue to play its pre-eminent role in protecting human rights in Europe,

Have agreed as follows:

Article 1

Paragraph 2 of Article 22 of the Convention shall be deleted.

Article 2

Article 23 of the Convention shall be amended to read as follows:

“Article 23 – Terms of office and dismissal

- 1 The judges shall be elected for a period of nine years. They may not be re-elected.
- 2 The terms of office of judges shall expire when they reach the age of 70.
- 3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
- 4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.”

Article 3

Article 24 of the Convention shall be deleted.

Article 4

Article 25 of the Convention shall become Article 24 and its text shall be amended to read as follows:

“Article 24 – Registry and rapporteurs

- 1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.
- 2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court’s registry.”

Article 5

Article 26 of the Convention shall become Article 25 (“Plenary Court”) and its text shall be amended as follows:

- 1 At the end of paragraph d, the comma shall be replaced by a semi-colon and the word “and” shall be deleted.
- 2 At the end of paragraph e, the full stop shall be replaced by a semi-colon.

3 A new paragraph f shall be added which shall read as follows:

“f make any request under Article 26, paragraph 2.”

Article 6

Article 27 of the Convention shall become Article 26 and its text shall be amended to read as follows:

“Article 26 – Single-judge formation, committees, Chambers and Grand Chamber

- 1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time.
- 2 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
- 3 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
- 4 There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
- 5 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.”

Article 7

After the new Article 26, a new Article 27 shall be inserted into the Convention, which shall read as follows:

“Article 27 – Competence of single judges

- 1 A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
- 2 The decision shall be final.
- 3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination."

Article 8

Article 28 of the Convention shall be amended to read as follows:

"Article 28 – Competence of committees

- 1 In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
 - a declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
 - b declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
- 2 Decisions and judgments under paragraph 1 shall be final.
- 3 If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b."

Article 9

Article 29 of the Convention shall be amended as follows:

- 1 Paragraph 1 shall be amended to read as follows: "If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and

merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.”

2 At the end of paragraph 2 a new sentence shall be added which shall read as follows: “The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.”

3 Paragraph 3 shall be deleted.

Article 10

Article 31 of the Convention shall be amended as follows:

1 At the end of paragraph a, the word “and” shall be deleted.

2 Paragraph b shall become paragraph c and a new paragraph b shall be inserted and shall read as follows:

“b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and”.

Article 11

Article 32 of the Convention shall be amended as follows:

At the end of paragraph 1, a comma and the number 46 shall be inserted after the number 34.

Article 12

Paragraph 3 of Article 35 of the Convention shall be amended to read as follows:

“3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that :

a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this

ground which has not been duly considered by a domestic tribunal.”

Article 13

A new paragraph 3 shall be added at the end of Article 36 of the Convention, which shall read as follows:

- “3 In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.”

Article 14

Article 38 of the Convention shall be amended to read as follows:

“Article 38 – Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

Article 15

Article 39 of the Convention shall be amended to read as follows:

“Article 39 – Friendly settlements

- 1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
- 2 Proceedings conducted under paragraph 1 shall be confidential.
- 3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
- 4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.”

Article 16

Article 46 of the Convention shall be amended to read as follows:

“Article 46 – Binding force and execution of judgments

- 1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
- 2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
- 3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
- 4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
- 5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

Article 17

Article 59 of the Convention shall be amended as follows:

- 1 A new paragraph 2 shall be inserted which shall read as follows:
“2 The European Union may accede to this Convention.”
- 2 Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively.

Final and transitional provisions

Article 18

- 1 This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by
 - a signature without reservation as to ratification, acceptance or approval; or
 - b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
- 2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 19

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.

Article 20

- 1 From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.
- 2 The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.

Article 21

The term of office of judges serving their first term of office on the date of entry into force of this Protocol shall be extended *ipso jure* so as to amount to a total period of nine years. The other judges shall complete their term of office, which shall be extended *ipso jure* by two years.

Article 22

The Secretary General of the Council of Europe shall notify the member States of the Council of

Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c the date of entry into force of this Protocol in accordance with Article 19; and
- d any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 13th day of May 2004, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

5. (Updated) Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights

To the Committee of Ministers of the Council of Europe:

We, the undersigned organizations submit the following views on the proposals to reform the European Court of Human Rights. This Response updates the Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights submitted to the Committee of Ministers in March 2003, in light of the reform proposals currently under consideration.

Introduction:

1. We consider the European Court of Human Rights (the Court) to be a guiding star in the constellation of human rights protection mechanisms.

The Court has ensured individuals redress for violations of human rights when states have failed to provide this. In doing so, it has played a crucial role in holding states accountable for these violations. The judgments of the Court have also led to better implementation of human rights obligations through changes of law and practice in Member States.

Its judgments have guided not only Member States of the Council of Europe but other countries too - on what steps they must take to respect and secure fundamental human rights.

2. We consider that the increasing number of applications being submitted to the Court and the Court's current backlog of cases require measures to be taken to ensure its future effectiveness.

3. This is why many of the undersigned organizations (and bodies) have followed and contributed to the discussions within the Council of Europe over the last three years on proposals to ensure better implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) by the 45 Member States of the Council of Europe and to reform the European Court of Human Rights.

4. Given the Court's fundamental role in ensuring the protection of human rights in all of the 45 Council of Europe Member States and the importance we attach to ensuring its long-term effectiveness, we regret that the overwhelming majority of states have failed to inform their populations of the debate on the reforms and to consult with members of civil society, the legal community and their national parliaments before arriving at decisions on proposals for such reform.

5. We consider that the current process of reform must result in effective measures to meet three objectives. It must ensure:

- I. better implementation of the European Convention at national level, which will reduce people's need to apply to the Court for redress;
- II. a more efficient and effective mechanism for processing the more than 90% of applications received which are inadmissible under the current criteria set out in Article 35 of the European Convention;
- III. the expeditious rendering of judgments, particularly in cases that raise repetitive issues concerning violations of the European Convention where the Court's case law is clear - which represent some 60% of the Court's judgments on the merits.

6. Measured against these objectives we support the following proposals which we urge the Committee of Ministers to adopt:

- Recommendations aimed at preventing violations in Member States and ensuring the availability of accessible and effective domestic redress for alleged violations of the European Convention;
- The provision of sufficient, additional financial and human resources to the Court and its Registry;
- Additional measures to ensure the independence and impartiality of the Court's elected and *ad Hoc* judges;
- Empowering Committees of three judges to rule, in an expedited procedure, on "manifestly well-founded" cases where the Court's case law is clear;
- Empowering the Council of Europe's Commissioner for Human Rights to bring cases before the Court and to intervene in cases pending before the Court;
- Strengthening the monitoring of the execution of the Court's judgments by the Committee of Ministers, including empowering the Committee of Ministers to seek clarification of judgments of the Court and to bring proceedings before the Court where a state has failed to implement a judgment.

7. We consider the following proposals do not meet the objectives set out in paragraph 5 above; we therefore oppose them and urge the Committee of Ministers not to adopt them:

- The addition of new Admissibility Criteria (see paragraphs 27-32, below);
- Empowering a single judge to make final decisions on inadmissibility, except in cases which are clearly inadmissible (see paragraph 18, below);
- Creation of a mechanism to increase the numbers of the Judges of the Court, in the absence of the creation of a separate filtering mechanism within the Court (see paragraph 26, below).

We are also concerned that some of the wording of the proposed amendment to Article 28(3) of the Convention raises serious issues about the appearance of the independence of the Court and therefore should be deleted (see paragraph 24, below).

Improving Implementation of the European Convention in Member States:

8. We believe that a principle objective of the Council of Europe and indeed this reform process should be to improve the implementation of the European Convention in each of the Member States of the Council of Europe. An underlying principle of the European Convention is that states are responsible for ensuring respect for and protection of the rights enshrined in the European Convention, including preventing violations and providing effective domestic remedies.

9. Better implementation of the European Convention in Member States would reduce the number of people who need to seek redress with the Court, and hence the Court's workload.

10. For this reason, we therefore particularly welcome the proposals aimed at preventing violations of the European Convention at the domestic level including ensuring that Member States have effective mechanisms for screening draft and existing legislation and practice in the light of the Court's case law; and ensuring Member States are both engaging in and promoting awareness-raising, training and education in the field of human rights.

11. In addition we welcome the proposals aimed at ensuring the availability of redress at the domestic level for alleged violations of the rights guaranteed under the European Convention. Effective domestic remedies must be accessible to any individual alleging a violation of the European Convention. In addition to ensuring a fair and reasoned decision on the merits of the complaint by an independent and impartial body, the mechanism must also ensure reparation to victims of human rights violations.

12. We urge the Committee of Ministers to monitor Member States' implementation of the recommendations aimed at preventing violations at the domestic level, improving domestic remedies and accelerating the execution of judgments of the Court. To ensure transparency and accountability, we also call on the Committee of Ministers to ensure that the reports of such monitoring be made public.

Filtering Applications

13. We consider that new measures are required to ensure more efficient and effective mechanism for processing the more than 90% of applications received which are inadmissible under the current criteria set out in Article 35 of the European Convention.

14. There is no way to stop the flow of applications to the Court. Each application received must be screened in order to determine whether it meets the admissibility criteria.

15. We therefore continue to urge the Committee of Ministers to ensure that the Registry receives adequate human and financial resources, including sufficient paralegal, secretarial and clerical support for the Registry lawyers.

16. With a view to reducing the number of inadmissible applications to the Court, we urge the Committee of Ministers to recommend that Member States ensure that legal-aid is available to prospective applicants. Our experience is that the provision of such advice has often dissuaded people from making misconceived applications.

17. We share the opinion of the Court that a separate judicial filtering mechanism within the Court will be necessary to cope with the increasing number of applications. We regret that this proposal has not been given more consideration in this reform process.

18. Should the Committee of Ministers accept the proposal to amend the European Convention to enable a single judge to make decisions on inadmissibility, we believe that the scope of the decision by the single judge should be limited to those “technical” criteria that do not require the exercise of wide discretion: six month time limit, exhaustion of domestic remedies, and requirements relating to persons, place, subject matter and time. A single judge should not be enabled to rule an application inadmissible on the basis of any new admissibility criteria that may be adopted.

19. For the reasons set out in paragraphs 27-32 below, we remain totally opposed to the proposal to adopt additional admissibility criteria. In the event, however, that new admissibility criteria are adopted, we consider it essential that the Grand Chamber should be able to provide early definitive guidance to the Court, the Registry lawyers and applicants on how such criteria are to apply in practice. This would be necessary to ensure legal certainty and consistency in approach between the various Sections of the Court. We are therefore concerned that a rigid application of Article 30 of the Convention could preclude cases posing questions of the interpretation of any new admissibility criteria from reaching the Grand Chamber, if a party objects to the relinquishment of the case to the Grand Chamber by a Chamber of the Court.

20. Should a “new category” of “Rapporteurs” be created to assist judges, such Rapporteurs should not be appointed by Member States but should be recruited by the Court, in an open and transparent process, on the basis of criteria which include expertise in human rights law, in particular the Convention system and the Court’s case law; independence; impartiality; professionalism and language skills.

Expedited Procedure for Manifestly-Well Founded Cases

21. We welcome the proposed amendment to the Convention which would empower committees of three judges to make unanimous rulings in an expedited procedure on the admissibility and merits of “manifestly well-founded” cases - including cases which raise repetitive issues where the case law is clear. Given that some 60% of the Court’s judgments on the merits of cases fall into this category, we consider that the implementation of this proposal will significantly expedite the rendering of judgments, and leave more time for judges to handle more complex cases, while retaining the essence of the right of individual petition.

Independence of the Court’s Elected and Ad Hoc Judges

22. We believe that the Convention must ensure the independence and the appearance of independence of the Court. In this regard, we welcome the proposed amendment to the Convention which provides for a single non-renewable term of nine years for the Court’s judges.

23. We urge the Committee of Ministers to delete the provision in the proposed amendment to Article 28(3) (set out in Article 9 of the draft text of Protocol 14) that would give a three-judge Committee discretion to substitute a judge elected on behalf of the respondent state, *if that state has contested the application of the expedited procedure*. We consider that such a provision would raise serious issues about the appearance of independence of the Court and has no place in a human rights treaty.

24. We consider that the current system for appointment of *ad hoc* judges - whereby the *ad hoc* judge is designated by a respondent state after the case has been communicated - creates the appearance of a lack of independence and impartiality. We welcome the proposal to create a pool of potential *ad hoc* judges, whose names would be submitted to the Court by the Member States, leaving it for the Court to appoint an *ad hoc* Judge, when necessary to replace an elected-Judge.

Increase in Number of Judges

25. We are unconvinced of the necessity of increasing the number of Judges on the Court in the absence of the creation of a separate filtering mechanism within the Court. While we do not oppose the proposed procedure for increasing the number of Judges, we would be strongly opposed to decisions being made to appoint additional Judges in respect of a State on the grounds that a significant number of applications have been filed against it. This proposal would seem to “reward” such states by increasing their judicial presence on the Court, thereby sending an unfortunate signal.

Addition of New Admissibility Criteria

26. We reiterate our opposition to proposals to add new admissibility criteria. We note that this view is shared by some member states, judges of the Court, members of the Registry, members of the Parliamentary Assembly, representatives of the European National Human Rights Institutions and other experts.

27. We believe that amending the admissibility criteria is wrong in principle. It will not address either of the two challenges faced by the Court: weeding out the more than 90% of applications received which are *currently* inadmissible or ensuring the expeditious rendering of judgments on “manifestly well-founded” cases, which make up some 60% of the Court’s judgments on the merits. On the contrary, in fact, we believe that adding either of the new admissibility criteria currently under consideration would make the admissibility process more time consuming and more complex.

28. The proposals for new admissibility criteria under discussion- to dismiss applications where the applicant has not suffered a “significant disadvantage” or where “respect for human rights does not require examination of the application”- are objectionable, vague and may be interpreted differently with respect to different states. We consider that all violations of human rights are “significant” and that the individual victim, members of the community, and the integrity of the authorities suffer “disadvantage” when violations of human rights go without redress. We also consider that “respect for human rights” requires an inquiry into allegations of violations. We believe that the proposed new admissibility criteria will give the Court too wide a discretion to reject otherwise meritorious cases, and will also create real uncertainty amongst applicants and their advisers as to the prospects of the success of their applications to the Court.

29. The right of individual petition is fundamental to the protection of human rights in the Council of Europe system. Adding the proposed new admissibility criteria will have the effect of severely curtailing the right of individual petition. It will result in the dismissal at the admissibility stage of cases that are currently examined on the merits, leaving more victims of human rights violations without a remedy.

30. We are also concerned that, if new admissibility criteria are introduced, some “manifestly well-founded” repetitive cases, including those resulting from structural defects, may be declared inadmissible. Such a measure could result in depriving victims of human rights violations caused by structural problems of any redress. To declare inadmissible a case involving a repeat violation would send an entirely inappropriate message to the offending state and would undermine measures to strengthen implementation of the Convention in Member States. In the words of Lord Justice Sedley of the English Court of Appeal, who has served as ad hoc Judge to the Court, “the second, the third, the hundredth or the thousandth identical violation of the Convention by a

state is even more serious than the first.”

31. Such a measure will be seen as an erosion of the protection of human rights by Council of Europe member states particularly at a time when human rights - including the right to fair trial and the absolute prohibition of torture and inhuman or degrading treatment or punishment - are under great pressure around the world.

Commissioner for Human Rights

32. We join the Parliamentary Assembly in recommending that the Council of Europe’s Commissioner for Human Rights be given the right to bring cases before the Court which raise serious issues of general nature. (See, e.g., Recommendation 1640 (2004) at paragraph 7(a)). We consider that that such a power, which the Commissioner would only exercise as a last resort would complement his existing roles, and could provide an effective remedy in situations of grave violations in a manner that may reduce a number of repetitive applications and thus could reduce the Court’s case load.

33. We welcome the proposal to amend the European Convention in a manner that would expressly permit the Commissioner for Human Rights to intervene in cases pending before the Court.

34. Should either of these proposals be adopted, we recommend that the Committee of Ministers ensure additional financial and human resources to the office of the Commissioner for Human Rights to support the Commissioner in his/her newly acquired powers.

Execution of the Court’s Judgments, Decisions on Friendly Settlements and Infringement Proceedings

35. We support the proposals to improve and accelerate the execution of judgments of the Court. In particular, we support the Court identifying underlying systemic problems in its judgments. We welcome the recommendation that the Committee of Ministers further develop procedures to give priority to the rapid execution of such judgments.

36. We also welcome the proposals to empower the Committee of Ministers to supervise the execution of decisions taken by the Court with respect to friendly settlements and to empower the Committee of Ministers to refer a case to the Court when it considers that a state has persistently failed to execute a judgment of the Court.

Additional Resources to the Court

37. We consider that adequate financial and human resources of the Court are vital for its

continued effectiveness. It is noted that in 2003 the total budget of the Court of Human Rights was only a fifth of the budget of the European Court of Justice. It is essential that parties to the European Convention show greater commitment to the Court system, by providing the Court with sufficient resources to carry out its tasks.

April 2004

1. AIRE Centre (Advice on Individual Rights in Europe) [United Kingdom]
2. Albanian Helsinki Committee [Albania]
3. Amnesty International
4. Associação Clube Safo [Portugal]
5. Associação Obra Gay - Opus Gay [Portugal]
6. Association for the Defense of Human Rights in Romania (Romanian Helsinki Committee) [Romania]
7. Association for European Integration and Human Rights [Bulgaria]
8. Association for the Prevention of Torture (APT)
9. Association "Green Alternative" [Georgia]
10. Bar Human Rights Committee [United Kingdom]
11. Belgrade Centre for Human Rights [Serbia and Montenegro]
12. British Irish Rights Watch [United Kingdom]
13. Bulgarian Helsinki Committee [Bulgaria]
14. Bulgarian Lawyers for Human Rights [Bulgaria]
15. Caritas Austria [Austria]
16. Center for Civil and Human Rights [Slovak Republic]
17. Centre for the Development for Democracy and Human Rights [Russian Federation]
18. Center for Legal Resources [Romania]
19. Center of Comparative Jurisprudence [Armenia]
20. Centre international de recherches pénales
21. Conférence européenne des commissions justice et paix
22. Congres juif Européen
23. Conselho Português para os Refugiados (CPR) [Portugal]
24. Consultative Council of Jewish Organizations
25. Contemporary Lawyers Association [Turkey]
26. Danish Helsinki Committee [Denmark]
27. Danish Red Cross [Denmark]
28. Dansk Flygtninghjælp [Denmark]
29. Dansk Retspolitisk Forening [Denmark]
30. Diakonie [Austria]
31. Diakonisches Werk der EKD - Human Rights Desk [Germany]
32. European Association for Psychotherapy
33. European Centre [Albania]
34. European Council on Refugees and Exiles (ECRE)
35. European Drama Encounter for Children and Youth
36. European Human Rights Advocacy Centre [United Kingdom]

37. European Organization of Military Associations
38. European Roma Rights Center
39. Fair Trials Abroad
40. Federal Union of European Nationalities
41. Finnish Federation of Social Welfare and Health [Finland]
42. Finnish Helsinki Committee [Finland]
43. Finnish League for Human Rights [Finland]
44. Folkekirkens Nødhjælp [Denmark]
45. Forum Law Centre [Armenia]
46. German Helsinki Committee for Human Rights, Security and Cooperation in Europe [Germany]
47. Gesellschaft fuer bedrohte Voelker [Germany]
48. Gesellschaft zum Schutz von Bürgerrecht und Menschenwürde e.V. [Germany]
49. Greek Helsinki Monitor [Greece]
50. Helsinki Committee for Human Rights in Bosnia and Herzegovina [Bosnia and Herzegovina]
51. Helsinki Foundation of Human Rights [Poland]
52. Humanistische Union e.V [Germany]
53. Human Rights Association [Turkey]
54. The Human Rights Center of Azerbaijan [Azerbaijan]
55. Human Rights Lawyers Association [United Kingdom]
56. Human Rights Watch
57. Human Rights Without Frontiers Int.
58. Hungarian Helsinki Committee [Hungary]
59. Interights
60. Immigration Law Practitioners' Association [United Kingdom]
61. Institute International de droit humanitaire
62. Institute International d'Etude des droits de l'homme
63. International Commission of Jurist (ICJ)
64. International Federation of the Action by Christians for the Abolition of Torture (FIACAT)
65. International Federation for Human Rights (FIDH)
66. International Federation of Social Workers European Region
67. International Helsinki Federation for Human Rights
68. International Protection Centre [Russian Federation]
69. International Society for Human Rights (ISHR) [Germany]
70. Justice [United Kingdom]
71. Kindernothilfe [Germany]
72. Kurdish Human Rights Project (KHRP) [United Kingdom]
73. Latvian Centre for Human Rights and Ethnic Studies [Latvia]
74. The Law Society of England and Wales [United Kingdom]
75. Legal Action Group [United Kingdom]
76. Leo Kuper Foundation [United Kingdom]
77. Liberty [United Kingdom]
78. Lithuanian Centre for Human Rights [Lithuania]
79. Lithuanian Human Rights Association [Lithuania]
80. Medica mondiale e.V. [Germany]

81. Memorial Human Rights Centre [Russian Federation]
82. Menschenrechte Schweiz MERS - Association suisse pour les droits de la personne [Switzerland]
83. Mental Disability Advocacy Center (MDAC) [Bulgaria]
84. Minority Rights Group [Greece]
85. Montenegrin Helsinki Committee for Human Rights [Serbia and Montenegro]
86. Moscow Helsinki Group [Russian Federation]
87. Movement Against Racism
88. Movement International d'Apostolat en Mileaux Sociaux Indépendants
89. NJCM- Dutch section of the International Commission of Jurists [The Netherlands]
90. Nizhny Novgorod Committee against Torture [Russian Federation]
91. Nuremberg Human Rights Centre (Nürnberger Menschenrechtszentrum - NMRZ) [Germany]
92. Office International de l'Enseignement Catholique (OIEC)
93. Open Society Foundation [Romania]
94. Peace Brigades International, Deutscher Zweig e.V [Germany]
95. Physicians for Human Rights [United Kingdom]
96. Pro Asyl [Germany]
97. Public Interest Law Initiative (PILI) [Hungary]
98. Rehabilitation and Research Centre for Torture Victims [Denmark]
99. Resources Center of Moldovan Human Rights NGO's [Moldova]
100. Rights and Accountability in Development [United Kingdom]
101. Save the Children [Denmark]
102. Scottish Human Rights Centre [United Kingdom]
103. Slovak Helsinki Committee [Slovak Republic]
104. Slovenian Commission of Jurists [Slovenia]
105. Sokadre (Coordinated Organizations and Communities for Roma Human Rights) [Greece]
106. SOS Racismo [Portugal]
107. Stichting Chechnya Justice Initiative [Netherlands, Russian Federation]
108. Statewatch [United Kingdom]
109. Swedish Helsinki Committee for Human Rights [Sweden]
110. Ukrainian Committee "Helsinki-90" [Ukraine]
111. Union Internationale Humaniste et Laïque/International Humanist Ethical Union
112. United Nations Association [Denmark]
113. University of Nottingham Human Rights Law Centre [United Kingdom]
114. World Organisation Against Torture (OMCT)

6. KHRP Publications 2001-2004

CODE	TITLE	PUBLISHER	PRICE/ISBN
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	Taking Human Rights Complaints to UN Mechanisms – A Manual (Russian language)	KHRP/ BHRC/ Platform	Only available in Armenia and Azerbaijan or www.khrp.org
	Torture in Turkey – the Ongoing Practice of Torture and Ill-treatment	KHRP	£8.00
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03/C	Second International Fact-Finding Mission Baku-Tbilisi-Ceyhan Pipeline – Turkey Section March 16 th -24 th 2003	KHRP, Campagna per la Riforma della Banca Mondiale, Platform, the Cornerhouse	Available online
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03/A	The State and Sexual Violence – Turkish Court silences Female Advocate – Trial Observation Report	KHRP/ BHRC January 2003	ISBN 1900 175 56 8
2002			
02/S	The Kurdish Human Rights Project Legal Review 2	KHRP December 2002	£8.00 ISBN 1 900175 55X
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“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 Solly QC, *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.”

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“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, *Director Human Rights Watch UK*

“In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better.”

Can Dunder, *Journalist in Turkey*

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