THE KURDISH Human Rights PROJECT Legal Review

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KHRP LEGAL REVIEW

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.

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Contents

Section 1: Legal Developments in the Kurdish Regions

Section 2: Case Summaries and Commentaries

C. Procedure

Section 3: Appendices

Editorial

This is the second edition of the new Legal Review, published by the Kurdish Human Rights Project (KHRP). This edition considers the legal developments that have occurred in relation to the Kurdish regions of Turkey, Iraq, Iran, Syria and the Caucasus in 2002.

2002 was a significant year for the development of human rights legislation in the Kurdish regions. Turkey passed a reform package aimed at helping its accession to the EU, including the abolition of the death penalty (except in times of war or imminent threat of war) and the granting of certain cultural rights to Kurds. An illuminating article by Robert Dunbar argues about the real impact of the reform on the rights of Kurdish speakers. The package also abolished the state of emergency in two Kurdish provinces, leaving it remaining only in Diyarbakir and Sirnak, and withdrew its derogation to Article 5 (right to liberty and security) of the European Convention. Less positively, the Council of Europe issued a resolution condemning the actions of the security forces in Turkey, and the Committee for the Prevention of Torture released its most recent report on the continuing allegations of torture and ill-treatment in Turkey's F-type prisons.

Furthermore, there is the possibility that the very first cases concerning Armenia or Azerbaijan may be brought to the European Court of Human Rights in 2002 or 2003, following their accession to the Council of Europe. In particular, the article on "Compatibility of Armenian Legislation with ECHR Requirements" analyses four main areas of concern on human rights within Armenian legislation (the right to life, the protection against torture, inhuman and degrading treatment or punishment, the right to privacy and family life, and the right to freedom of thought, conscience and religion) in relation with the requirements of the Council of Europe. The Committee for the Prevention of Torture also issued its first ever report on Georgia.

The debate over the 2001 Evaluation Group Report and the future of the European Court of Human Rights continues. KHRP has secured the support of 42 international human rights organisations in its response to the Report, reproduced herein. In a significant development, two judges of the European Court have cited identical concerns in their dissenting judgments to the use of the strike-out procedure in two KHRP cases: *Togcu v Turkey* (27601/95, 9.4.02) and *T.A. v Turkey* (26307/95, 9.4.02).

Finally, the possibility of an articulated definition of terrorism by the European Court of Human Rights is analysed by Colin Warbrick in his article, while, on the other hand, Geoffrey Bindman focuses on the role of the International Criminal Court and its effectiveness as a system of international criminal jurisdiction over crimes against humanity.

Kerim Yildiz
Executive Director

Abbreviations

§	Section
CAT	United Nations Committee Against Torture
The Convention	The European Convention for the Protection Human Rights and Fundamental Freedoms
The Court	The European Court of Human Rights
CoE	The Council of Europe
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	The Democratic Party
HADEP	The People's Democracy Party
ICC	International Criminal Court
ICJ	International Court of Justice
IHD	Human Rights Association, Turkey
NATO	North Atlantic Treaty Organisation
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
UK	United Kingdom
UN	United Nations

Relevant Articles of the European Convention on Human Rights

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

Protocol No. 1 to the Convention

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

Section 1: Legal Developments in the Kurdish Regions

Compatibility of Armenian Legislation with ECHR Requirements

Armenia became a member of the Council of Europe (CoE) in 2001. Joining the European Council required that Armenia implement certain democratic reforms and take on new legal obligations in the field of human rights. In particular, after accession, Armenia ratified numerous human rights conventions, most notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Parliamentary Assembly of the CoE also required Armenia to reform its judicial system, adopt a law providing for alternative non-military service, and ensure non-discrimination in the practice of religion by "non-traditional" religious communities.

This article analyses four areas related to basic human rights in Armenia that deserve particular attention: the right to life, the protection against torture, inhuman and degrading treatment or punishment; the right to privacy and family life, and the right to freedom of thought, conscience and religion. The article attempts to asses whether current Armenian domestic law meets the requirements of the Council of Europe and points out areas where immediate legal reforms are required if Armenia does not want to be found in violation of international law and international obligations. The changes most urgently required are:

- the *de jure* abolishment of the death penalty;
- implementation of the laws banning forced confessions and maltreatment in places of detention;
- amendments to the Criminal Code decriminalising *de jure* consensual homosexual relationships between adults;
- clarifications of the relationship between church and state in the Law on Religious Organisations so that an equal treatment of all religious communities is ensured;
- adoption of a Law on Alternative Service providing for alternative non-military service for conscientious objectors;
- strengthening of an independent judiciary;

Armenia's Accession to the Council of Europe

Armenia applied for membership to the Council of Europe in March 1996. The application was considered in light of the enlargement of the Council of Europe. In this respect, the

Parliamentary Assembly of the CoE stated that "in view of their cultural links with Europe, Armenia, Azerbaijan and Georgia would have the possibility of applying for membership provided they clearly indicate their will to be considered as part of Europe".[1] Earlier that year, the Parliament of Armenia obtained a special *Guest Status* to the Parliamentary Assembly of the Council of Europe. In its recommendation, the Assembly recognised Armenia's efforts towards bringing its legislation and practice into conformity with the principles and statutes of the CoE.

At its 21st sitting of June 28 2000, the Parliamentary Assembly supported Armenia's accession and urged it to undertake the commitments that, *inter alia*, included signing and ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the European Charter for Regional or Minority Languages within one year from accession.[2]

The Parliamentary Assembly emphasized the commitments that Armenia should undertake in the field of human rights. In particular, the Assembly stressed Armenia's obligation to reform its judicial system so that it guarantees, full and immediate access to a defence lawyer in criminal cases and non-discrimination in the practice of religion by "non-traditional" religious communities. Additionally, the Assembly recommended that the country should further adopt a law on alternative military service and meanwhile pardon all conscientious objectors sentenced to prison terms.[3] Furthermore, the Assembly stated that the Constitutional Court of Armenia should grant *locus standi* to individuals and organizations within two years upon accession. The Government, the Prosecutor-General, and courts of all levels should be able to refer cases to the Constitutional Court.

According to Article 3 of the Statute of the Council of Europe, Armenia has to implement the principles of the rule of law and protection of fundamental human rights and freedoms and effectively realize the aims of the Council. At its 107th session on 9 November 2000, the Committee of Ministers adopted resolution 13 inviting Armenia to become a member of the Council of Europe. Finally, on 25 January 2001 Armenia became a full member of the Council.

Commitments under the Partnership and Co-operation Agreement

By signing the Partnership and Co-operation Agreement (PCA) with the European Community and its Member States, Armenia had previously undertaken similar obligations to make democratic reforms and the promote the protection of human rights. The PCA entered into force in July 1999. It established a framework for the development of closer political, economic and cultural ties and increased co-operation between parties. It is based on the belief

that respect for democratic principles, the rule of law, and the rights of the individual as well as a commitment to democratic and social market reforms are a precondition for co-operation and the further development of political relations. The PCA aims, among other things, at supporting Armenia in its efforts to consolidate its democratic and economic reforms. To this end, it aims to provide a basis for legislative, economic, social, financial, technological and cultural co-operation (PCA, Article 1).

The Right to Life

Requirements under the European Convention on Human Rights

The right to life, being a prerequisite for all other rights, is a fundamental right and no derogation from it is permitted either in peace-time or in times of war or in any other case of public emergency.[4] Article 2 of the Convention places upon states both a positive obligation to protect the right to life by law and a negative obligation not to take life, other than in certain exceptional cases. The first paragraph of Article 2 states:

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

The provision implies that the state has a positive obligation to make adequate laws for the protection of human life, which in turn implies that taking of life, is *per se* illegal.

Article 2 allows in principle one exception to this general rule: the death penalty. However, Protocol No.6 to the Convention and Protocol No.13 to the Convention, which has not yet come into force, restrict the death penalty.

Provisions under the Armenian Constitution and Criminal Code

The Constitutional provision on the right to life is, with few exceptions, similar to standard treaty provisions, such as the ICCPR and the European Convention. Like these treaties, the Armenian Constitution stresses the fundamental nature of the right to life, prohibiting derogation from it only in times of war or public emergency.[5] Article 17 provides:

> *Everyone has the right to life. Until such time as it is abolished, the death penalty may be prescribed by law for particular capital crimes, as an exceptional punishment.*

The article does not expressly prohibit the death penalty, thus allowing for an exception to the general rule and leaving the State a margin of appreciation in which to manoeuvre. While not explicitly forbidden, the death penalty has not actually been practised in Armenia to date. Hence, while three death sentences were passed during 1999, and 31 men were sentenced to death prior to that, no executions have yet taken place, and a moratorium on these sentences has been issued until new legislation is adopted.[6]

Nonetheless, the CoE has recommended Armenia to abolish the penalty altogether in order to ensure the Constitution's compliance with CoE requirements prior to accession.

Armenia expressed its readiness to comply with this particular requirement by adopting a new criminal code.[7] The new criminal code is to replace the death penalty with life imprisonment and was originally planned to come into force by January 1999. However, it is still under the consideration of parliamentary committees. The draft criminal code provides for life imprisonment for especially serious offences such as the intentional taking of life and in aggravating circumstances. It excludes the application of life imprisonment to women and minors (persons under the age of 18).[8]

Torture, Inhuman or Degrading Treatment or Punishment

Requirements under the European Convention on Human Rights

Torture is prohibited under Article 3 of the European Convention on Human Rights. No derogations from this right are permitted even during times of war or in cases of other public emergencies. It is thus unique insofar as it has to be guaranteed under all circumstances. Article 3 states:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

In order to ensure the proper implementation of the provision, the European Commission of Human Rights in Strasbourg stated that an act must be of a *"minimum level of severity"* in order to fall under the prohibition of Article 3.[9] This test will apply to whatever category of conduct is under consideration. The effect of setting such a high threshold is that trivial complaints on illegal activities will not fall within the scope of Article 3 unless they cause sufficiently serious suffering or humiliation. However, the assessment of seriousness is relative which indicates that the prohibition under Article 3 is not a static one, but must undergo "a living interpretation and must be considered in the light of present circumstances".[10] Due to the fact that finding a Contracting Party to be guilty of torture or of inhuman and degrading treatment carries with it a certain stigma, the Convention organs have required a very high

standard of proof of conduct, even using the term "*beyond reasonable doubt*" as was the case in *Ireland v. UK*.[11]

The protection guaranteed under Article 3 of the Convention is supplemented by the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment (Torture Convention) which came into force in 1989 and which established a European Committee for the Prevention of Torture (CPT). The CPT is made up of independent and impartial experts from a variety of backgrounds, including law, medicine, prison affairs and politics. The Committee visits places of detention in order to monitor the treatment of detainees. It is given unlimited access to such places and may interview individual detainees in private. The CPT also has the right to communicate freely with any person who can provide relevant information on a specific case, including non-governmental organisations concerned with human rights.

Provisions under the Armenian Constitution and Criminal Code

The Armenian Constitution prohibits torture, inhuman, and degrading treatment. It follows the language and format of international treaties to which Armenia is a party. Like them, the Constitution considers freedom from torture and inhuman and cruel punishment to be an inalienable right to which no derogation, even in times of war or public emergency or any other restrictions or limitations, are allowed. Article 19 of the Constitution states:

> *No one may be subjected to torture and to treatment and punishment that are cruel or degrading to the individual's dignity. No one may be subjected to medical or scientific experimentation without his or her consent.*

In spite of the constitutional provision, violations of this right have frequently been reported in Armenia. Numerous violations of the prohibition of torture and inhuman treatment have been reported to be committed by the army. As the investigation conducted by the Military Prosecutor shows,[12] some cases of supposed suicides in the Army have in fact been a direct result of injuries inflicted during hazing. Army officers have reportedly colluded in trying to cover up the real cause of such deaths.

Violations of the prohibition on torture are also reported to occur frequently in places of detention. According to Amnesty International, in 2002, several incidents of ill-treatment in custody took place during interrogations, and in one instance, such treatment resulted in the death of a detainee.[13] The 2000 Human Rights Country Report of the U.S. State Department on Armenia[14] states that "the practice of security personnel beating pre-trial detainees during arrest and interrogation remains a routine part of criminal investigations, and prosecutors rely on such confessions to secure convictions. Most cases of police brutality go unreported, due to

fear of police retribution. Impunity remains a problem." These findings were confirmed by a government-appointed Commission on Human Rights, who were told by detainees that they had been coerced physically and mentally into confessions. Attempts by defence lawyers to present such evidence in an effort to overturn improperly obtained confessions are routinely ignored by judges and prosecutors although the law provides for the investigation of all such charges.

Right to Protection of Privacy and Family Life

Requirements under the European Convention on Human Rights

The scope of the right to the protection of privacy and family life, Article 8 of the European Convention, is rather wide and relatively unexplored in case-law. It protects the individual against attacks on physical or mental integrity or moral or intellectual freedom, attacks on honour and reputation, the use of a person's name, identity, being watched, or harassed, and the disclosure of information protected by the duty of professional secrecy.[15] Article 8 of the European Convention states:

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.*

Article 8 puts a positive obligation on the state to take steps to provide these rights for individuals and those which require it to protect persons against the activities of other private individuals preventing the effective enjoyment of their rights. The article also puts a negative obligation on the state to refrain from arbitrary actions. At the same time, it provides a justification for interference under Article 8 (2).

The article as defined by the Commission protects four interests, these being the protection of private life, family life, home and correspondence. Protected under these provisions is also – as the European Court has decided in numerous cases – the freedom of choice of relations with others, including sexual relations. Homosexuality, thus, falls under the ambit of private life protected under the Convention as the precedents show: The Court considered sexual life to be one of "the most intimate aspects" of private life[16] and stressed the importance of untroubled sexual relations as a part of private life.[17] With regard to homosexuals, the

Commission recognised that laws criminalizing consensual homosexual relationship between adults constituted an interference with the right to respect for private life and are not justified by the limitations provided for under Article 8(2).

Provisions under the Armenian Constitution and Criminal Code

The Armenian Constitution protects the right to private and family life from illegal interference. It prohibits unauthorised searches and provides for the citizen's rights to privacy and confidentiality of correspondence, conversations and messages. For example, in order to wiretap a telephone or intercept correspondence, the security ministries must petition a judge for permission. The judge must then find a compelling need for the wiretap before granting the agency permission to proceed. Article 20 reads:

> *Everyone is entitled to defend his or her private and family life from unlawful interference and defend his or her honour and reputation from attack. The gathering, maintenance, use and dissemination of illegally obtained information about a person's private and family life are prohibited. Everyone has the right to confidentiality in his or her correspondence, telephone conversations, mail, telegraph and other telecommunications, which may only be restricted by court order.*

Restrictions of the right to privacy are regulated under Article 44. Such restrictions are allowed in order to protect state and public security, public order, health and morality, and the rights, freedoms, honour and the reputation of others.

The Constitution thus provides a rather full protection of the right to privacy and, in this respect, follows the European and international standard. However, due to the lack of constitutional case-law in this area, it is difficult for a judge to make reasonable and justified decisions especially with regard to the freedom of choice of private relationships, including sexual relationships. While Article 22 of the Armenian Constitution could be interpreted as including this right, the existing criminal code from 1961 explicitly criminalises consensual homosexual relationships between adults and provides for a punishment of imprisonment for up to five years. *De jure,* homosexuality is, thus, a criminal offence in Armenia.

The CoE obliged Armenia to amend its criminal legislation and decriminalise homosexual relationship within one year after accession.[18] In the meantime, the state has to justify its restrictions and try to "apply" the proportionality test of the European Court bearing in mind the existing European case-law on this issue.

Freedom of Thought, Conscience and Religion

Requirements under the European Convention on Human Rights

The right to freedom of thought, conscience and religion includes the freedom to manifest one's religion or belief. Only the manifestation of religion or belief is subject to limitations set out in Article 9(2). The Article states:

> 1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> 2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

The freedom of thought, conscience and religion as required under the PCA and the Conventions of the CoE includes the right to freedom of religion of non-traditional religious communities as well as the right to conscientious objection to military service. Since both issues were given special attention by the PCA Co-operation Committee and CoE Parliamentary Assembly, the two shall be treated in more detail.

Provisions under the Armenian Constitution and Criminal Code

The Constitution provides that everyone is entitled to freedom of thought, conscience and religion. The freedom to manifest religion and beliefs are subjected to limitations under Article 4 of the Convention.[19] While the Constitution provides for the freedom of religion, certain laws specify some restrictions on the religious freedom of adherents of faiths other than the Armenian Apostolic Church. The 1991 *"Law on Freedom of Conscience and Religious Organisations"* (Law on Religious Organisations), amended in 1997, establishes the separation of church and state, but grants the Armenian Apostolic Church special status. It forbids "proselytising" (undefined in the law) by any other religious group but the Armenian Apostolic Church and requires all religious denominations and organisations to register with the State Council on Religious Affairs. A presidential decree issued in 1993 supplemented the law of 1991 and further strengthened the position of the Armenian Apostolic Church. The Council of Religious Affairs is given the authority to investigate the activities of representatives of registered religious organisations and to ban missionaries who engage in activities contrary to their status. In 1996, the Armenian Parliament passed legislation further tightening registration requirements by raising the minimum number of members required for

registration from 50 to 200 adults. The law also banned any foreign funding for churches whose centres are outside of Armenia. Finally, it mandated that religious organisations with the exception of the Armenian Apostolic Church need the permission of the State Council on Religious Affairs to engage in religious activities in public places, travel abroad, or to invite foreign guests to the country. In practice, however, there is no restriction on travel and members of unregistered religious groups are allowed to import small quantities of religious literature for their own use.[20]

Under the 1996 legislation, no religious group that was already registered was denied re-registration. Registered groups also reported no adverse consequences since the legislation was passed. The ban on foreign funding has not been enforced and is, due to limited resources, considered unenforceable by the Council on Religious Affairs.

The only group that is still denied registration is Jehovah's Witnesses. While they are no longer denied registration on the grounds that the group does not permit military service, registration is now denied because of its alleged "illegal proselytism" which is considered integral to its activity. Negotiations between the group and the State Council on Religious Affairs over bringing the group's charter into compliance with the law have not lead to an agreement and a registration of the group. Forty-one members of the group remain imprisoned due to charges of draft evasion or desertion.[21] Human Rights Watch also notes the failure of the Armenian government to bring about a climate of religious tolerance and reports incidents where members of the Jehovah's Witnesses were attacked.[22]

Armenia, in short, still has to bring its legislation in line with the European Convention based on the recommendations of the Parliamentary Assembly. This requires, in particular, the reform of the registration provisions in the 1996 law. The only reason to deny registration and free practice of one's faith acceptable under the Convention is the protection of the rights and freedoms of others (Article 4, European Convention). However, as the *Kokkinakis* case shows, it is difficult to demonstrate that such restrictions as those outlined in the 1996 legislation are really necessary in a democratic society.

Another final aspect deserves attention in this context: the relationship between Church and State. The law on "Religious organisations" under Article 17 provides for the separation of the church and the state. Thus, the state, *inter alia*, cannot impose a religious faith on its citizens, interfere in the affairs of religious organisations, or deny employment in state administration on the grounds of religious belief. Article 17 furthermore implies that the state may not interfere in the dissemination of religious belief throughout Armenia. Finally and fore mostly, it prohibits state financing for religious activities in and outside of the country.

Against this background, a Memorandum signed between the Armenian Government and the Armenian Apostolic Church in March 2000 is of importance. The Memorandum outlines significant joint efforts to:

a) Complete and develop the legal regulation of the relationship between church and state;
b) Grant tax privileges to the Apostolic Church and its affiliates;
c) Maintaining the dominant role of the Apostolic Church in educational, social security, health areas;
d) Ensure the dissemination of historical and other information through state mass media and during events organised by the state;
e) Promote the activities of the Apostolic Church in military forces, as well as in the places of detention.

The Memorandum calling for combined efforts of the Government of Armenia and the Armenian Apostolic Church to foster and support the dominant state religion is a clear departure from the principle of church and state as stated in Armenian Law. It is not yet clear how this contradiction will be resolved in practice.

Conscientious Objection to Military Service

The Armenian Constitution requires every citizen to "participate in the defence of the Republic of Armenia in a manner prescribed by law" (Article 47). Defence as defined by Article 3 of the "Law on Military Service" includes, *inter alia*, preparation for military service, mobilisation, and military service itself.

Both the Constitution and the Law apply to all citizens regardless of their faith, thus making military service compulsory for all. Neither the Constitution nor the Law on Military Service provides for conscientious objection. Alternative service is not available under the current law. Instead, all attempts to avoid conscription are sanctioned, most frequently with imprisonment. Since there is no alternative to military service, conscientious objectors likewise face punishment or even forced conscription. Amnesty International reports that, during 1999, at least six religious believers were sentenced to imprisonment and that this practice continues up to today[23].

Armenia, in view of its obligations undertaken upon acceding to the Council of Europe and signing the PCA, must therefore adopt a law on alternative service. In March 1999, the President's office stated that a law was being drafted that would regulate alternative service for conscientious objectors, but no action has been taken by the end of the year 2000. In the meantime, until such a law has been passed, it is vitally important that the country at least introduces an interim measure for those currently imprisoned.

Recommendations

In view of fulfilling its commitments undertaken with the accession to the Council of Europe and under the PCA, the Government of Armenia is recommended to take the following actions:

- Adopt and enforce amendments to the current Criminal Code abolishing *de jure* the death penalty;
- Provide for training of law enforcement bodies in places of detention as well as members of the military on the existing legislation on the prohibition of torture, inhuman and degrading treatment and foremost, the international treaties with regard to the latter. Equally, if not more important, is the implementation of the law prohibiting torture by judges and state prosecutors. Forced confessions should no longer be accepted by prosecutors and judges. Furthermore, evidence on torture or abuse presented by defence lawyers must be investigated. Without taking such action, changes in the current practices of the security forces are unlikely;
- Adopt amendments to the Criminal Code decriminalising *de jure* consensual homosexual relationship between adults. An initial step towards this is the implementation of the draft Criminal Code (General Part) as adopted in the first reading;
- Amend the Law on Religious Organisations clarifying the relationship between the Church and the State. In addition, the Memorandum of Intentions and related documents should be revised in the light of the legal clarification. More important yet is an amendment of the law so that equal treatment of all religious communities and the free practice of faith are ensured;
- Adopt the Law on Alternative Service providing for alternative non-military service for conscientious objectors.

Legal reforms which bring Armenian law in accordance with EU and international law as well as the Conventions of the Council of Europe will not be sufficient enough to improve the country's human rights record and eliminate persisting problems. Enforcing the law and strengthening the judiciary is equally important. Nominally, the Constitution provides for an independent judiciary. In practice, however, courts are often subject to pressure from the executive branch and to corruption. In short, the legal reforms have to be accompanied by a strengthening of the independence of the judicial system. Finally, judges require additional training in the application of the new domestic laws as well as in the application of the international treaties to which Armenia has become a signatory. Under the Constitution (Article 6), international treaties are directly applicable nationally. International norms even prevail over national laws in case of a contradiction. Failure to properly apply international norms and law, thus, would result in a violation of national law and the provisions of the Armenian Constitution.

Strengthening the judiciary also includes raising the competence of the Constitutional Court of the Republic of Armenia. Currently, the functions of the Court are rather limited under the Constitution. Ideally, it should become a key body in the protection of human rights. An important step in this direction would be to make the Constitutional Court directly accessible to individuals whose constitutional rights have been violated as well as the Prosecutor-General. Finally, it is important to note that Article 34 (under Protocol 11) gives every citizen of a Contracting Party to the Convention the right to petition the European Court if they believe their rights have been violated by the State. If the application is found admissible, the Court will first attempt to reach a friendly settlement with the parties. If this is impossible, the Chamber delivers its judgement. With the accession to the Council of Europe, the European Court has, thus, become a sort of last instance court of the domestic legal system on human rights issues and potentially exercises some control over the latter.

Committee on the Elimination of Racial Discrimination Reports on Armenia

The Committee on the Elimination of Racial Discrimination has examined Armenia's efforts to implement the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination.[24]

The Committee noted that Armenia's report had contained information mainly on the legal framework for the protection of rights of minorities and did not give sufficient information on the implementation of such legislation or on the extent to which minority communities enjoy the protection afforded by the Convention (para. 3).

It was noted that, notwithstanding certain challenges, there had been progress in the area of legislative reform and Armenia had ratified a number of international and regional human rights instruments. The Committee welcomed the establishment of institutions such as the Human Rights Commission and the Co-ordinating Council on National Minorities (paras. 4, 5).

However, the Committee was concerned by the view expressed in the State party report that Armenia is a mono-ethnic state. It recommended that the State party carefully analyse the situation and provide detailed data on the demographic composition of the population (para. 7).

The Committee also noted that the Penal Code, specifically Article 69, contravenes Article 4 of the Convention, in particular as regards the prohibition of organisations which promote and incite racial discrimination (para. 8). The Committee noted with concern that no statistics on cases related to racial discrimination had been provided and requested that such information be provided in the next periodic report. The absence of complaints and legal actions by victims

of racial discrimination could possibly be an indication of a lack of awareness of available legal remedies.

The Committee also expressed concern at the lack of representation of ethnic and national minorities in the National Assembly, by the high rate of unemployment, and by inadequate access of minority children to education in their mother tongue (paras. 9, 10, 11). However, the Committee welcomed the statement by the delegation that a special budget is envisaged for the financing of publications and broadcasts in minority languages.

The Committee also expressed concern at reports of obstacles imposed on religious organisations other than the Armenian Apostolic Church (para. 14). It also reflected concerns that, under Article 25 of the Law on Refugees, restrictive measures are applied only to asylum seekers other than ethnic Armenians who fled Azerbaijan between 1988 and 1992 (para. 15).

The Committee recommended that the State party's reports be made readily available to the public from the time they are submitted and that the observations of the Committee on these reports be similarly publicised.

Committee for Prevention of Torture (CPT) visit to Georgia

The Council of Europe's Committee for the Prevention of Torture (CPT) has issued its first report on Georgia.[25] The report was adopted by the CPT at its 46th meeting, held from 6 to 9 November 2001, and concerns its May 2001 visit to police establishments, state security detention facilities, prison establishments, psychiatric establishments and military detention facilities.

Concerning police establishments, the delegation reported that in its discussions with ministerial officials, prosecutors and police staff it had received "a variety of interpretations" of the legal provisions concerning the maximum length of detention of a criminal suspect (para. 18). The CPT also received numerous allegations that persons had been detained by the police for extended periods of time (para. 19). Furthermore, it received numerous allegations of physical ill-treatment by the police of criminal suspects, and met some detainees who displayed visible physical marks (para. 20). Conditions of detention in police establishments were said to range from tolerable to totally inadequate (para. 57). The provision of food and basic essentials to prisoners was a matter of concern (para. 58).

The CPT received no allegations of ill-treatment of detainees in state security detention facilities (para. 64). Access to natural light, artificial lighting and ventilation were adequate; the sanitary facilities were in a flawless state of repair and cleanliness (para. 65). The CPT recommended, however, the provision of daily outdoor exercise (para. 66).

Concerning prison establishments, the CPT's delegation heard no allegations of torture or other forms of deliberate ill-treatment of inmates by staff in the penitentiary establishments visited, and gathered no other evidence of such treatment (para. 71). The vast majority of inmates at one prison were, "subject to a combination of negative factors – overcrowding, appalling material conditions and levels of hygiene, major deficiencies of health care, practically non-existent activity programmes – the cumulative effect of which could be described as inhuman and degrading treatment." (para. 73)

The CPT noted that the principle of "equivalence of care" according to which prisoners are entitled to the same level of medical care as persons living in the community at large was not observed in the prison establishments in Georgia. It was stressed that the CPT attaches particular importance to this principle. An inadequate level of health care can lead rapidly to situations which could amount to inhuman and degrading treatment (para. 96). The atmosphere in the establishments visited was relaxed and there was good contact between staff and prisoners. A number of prisoners, however, reported being requested to make payments in exchange for certain privileges (para. 124). Furthermore, the CPT noted the importance of maintaining contact with the outside world, discipline and a complaints and inspection procedure (paras. 125 to 143).

The delegation heard no allegations of deliberate ill-treatment by health-care staff at psychiatric establishments; however, there were allegations of ill-treatment by members of the security staff (para 146). The CPT recommended that assistance by security staff should only be provided at the request of health-care staff and conform to the instructions given by the latter (para.166).

Concerning military detention, material conditions in the disciplinary unit of Kutaisi "left a lot to be desired" (para. 175). As far as the delegation could ascertain, there are no specific regulations concerning disciplinary procedures in the Georgian army. According to the information provided, a soldier charged with a disciplinary offence is not given a hearing before the sanction is imposed and has no right of appeal. The CPT recommended that the authorities draw up specific regulations concerning placement in the disciplinary units (para. 179).

The CPT requested the Georgian authorities to provide an interim and a follow-up report on the action taken upon the report.

UN Human Rights Committee considers Georgia

The UN Human Rights Committee reviewed Georgia's compliance with the International Covenant on Civil and Political Rights on 19 March 2002. It stated that Georgia had "made considerable progress since the submission of its initial report" to the treaty body, citing the abolition of the death penalty and new laws interpreted by the Constitutional Court which would increase the amount of cases heard.

But Georgia had failed to implement presidential decrees issued since 1997 and the new institution of the Office of Ombudsman, while laudatory, could not be effective because "its powers were unclear". The committee chair acknowledged that the persistence of torture in Georgia was the most disturbing factor. "The delegation had testified to measures meant to counter it, but an independent authority had to preside over the issue. The large number of custodial debts, the prevalence of tuberculosis in prisons, and the poor salaries and unclear provisions for removal of judges were also of concern", he said.

Bill on torture rejected by Iranian Council of Guardians

In June, Iran's Guardian Council rejected a bill passed by the Iranian Parliament outlawing the use of torture and physical harassment to gain information from detainees.

The Parliament's Bill, which was approved in May, prohibited physical and psychological torture in all forms. It specifically banned blindfolding inmates, night-time interrogations, the deprivation of food, water, sleep or basic health services, confining inmates to noisy surroundings, the use of drugs on prisoners, solitary confinement, and all forms of psychological pressure. It would also outlaw the placing of more than one inmate in single-cell confinement. Any confessions obtained through physical or psychological pressure would be deemed "worthless" for presentation in court. Furthermore, inmates who were denied daily outings, access to authorised publications, or personal or telephone contact with relatives would also be considered victims of torture. However, the bill did allow for unspecified exceptional "interrogation methods" in cases of emergency and to prevent crime.

The Guardian Council asserted that five articles of the bill were contrary to Islamic Shari'a law, two were contrary to the Constitution and a further two articles required clarification by Parliament. It stated that, although Islam categorically rejects any kind of physical harm to prisoners, the Bill had failed to define examples of torture "in even one case".

The Guardian Council also considered that the Majlis' Bill challenged the authority of the judges, by reiterating certain provisions of the Iranian Constitution. According to Article 38 of

the Constitution: "All forms of torture for the purpose of extracting confession or acquiring information are forbidden. Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence. Violation of this article is liable to punishment in accordance with the law."

The Bill is to be returned to Parliament again but, if MPs fail to make the amendments recommended by the Guardian Council, it may not be implemented.

Iran Moves Towards Inviting The United Nation's Commission on Human Rights (UNCHR)

On 24 July 2002 in Geneva, a future technical co-operation between Iran and the UNCHR was discussed between Mary Robinson, the former UN High Commissioner for Human Rights, and Mohammed Reza Alborzi, the Iranian Permanent Representative. Mrs Robinson welcomed the move as an initial step towards long-term co-operation between Iran and the UNCHR. She stated that she would encourage the Commission's mandate holders to enter into direct discussions with the Iranian Government to plan future visits.

UN Delegation visits Iraqi Kurdistan

The Executive Director of the United Nations Iraq Programme, Benon Sevan, travelled to the Kurdish regions of Northern Iraq between 22 and 29 January 2002.

His visit was intended to review the implementation of Resolution 986 (1995), the "oil-for-food" programme, which allows Baghdad to use a portion of its revenue from petroleum sales to purchase humanitarian relief. In his briefing to the Security Council on 26 February 2002, Mr Sevan said, "I should like to state without any hesitation that, irrespective of all the complaints and/or criticisms levelled against it, the programme has indeed made, and continues to make, a considerable difference in the day-to-day life of the Iraqi people all over the country." However, he emphasised that there was no need for complacency. He stressed that, considering the oil reserves of Iraq, its citizens certainly deserved a better standard of living; but noted that there was no alternative to the programme as long as the sanctions imposed by the Security Council continued.

On 14 May 2002, the UN Security Council also passed Resolution 1409(2002), determining that most provisions of Resolution 986(1995) were to remain in force for a period of 180 days from 20 May 2002.

Committee for the Prevention of Torture (CPT) visits Turkey

The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out two ad hoc visits to Turkey in 2002, and, in April 2002, published the report of its September 2001 visit.[26]

The main objective of the visits was to examine the implementation in practice of recent legal reforms concerning custody by law enforcement agencies; those reforms related to such matters as access to a lawyer and notification of relatives. The delegation also reviewed the application of Article 3(c) of Legislative Decree No. 430, under which prisoners who have to be questioned as part of the investigation of offences giving rise to the declaration of a state of emergency may be returned to the custody of law enforcement agencies. The delegation also assessed the communal activities for inmates of the new F-Type prisons.

The CPT's preliminary observations were published, in agreement with the Turkish authorities, in July 2002.[27] The CPT noted progress as regards communal activities at Sincan F-Type prison. Some of the workshops were up and running, regular association (conversation) periods for up to ten prisoners at a time had been introduced. Arrangements for open visits and access to the telephone were developing.

However, the delegation found that practically all the prisoners held under the Anti-Terrorism Laws were still refusing to take up the offer of communal activities. In order to promote confidence among these prisoners, the CPT delegation called upon the Turkish authorities to drop the existing precondition for participation in the recently introduced association periods. All prisoners should be offered this possibility, irrespective of whether they already take part in another communal activity, concluded the CPT. In their response, the Turkish authorities put forward arguments in favour of maintaining the current precondition. This issue is the subject of ongoing discussions between the CPT and the Turkish authorities.

The delegation also gathered evidence of the gradual implementation of new measures concerning police custody. However, it found that the issue of access to lawyers for persons detained by the police clearly has been, and apparently remains, a significant problem in Diyarbakir. Moreover, with regard to the amendment of Article 10 of the Regulations on Apprehension, Police Custody and Taking of Statements, the CPT requested that the medical examination must in all cases be conducted out of the sight and hearing of law enforcement officials unless the doctor concerned requests otherwise in a particular case.

Sept 2002 visit

The CPT's ad hoc visit from 1 to 6 September 2002 focussed on the province of Diyarbakir and was designed to examine the implementation in practice of recent legal reforms concerning custody by law enforcement agencies; those reforms relate to such matters as access to a lawyer and notification of relatives. The delegation also reviewed the application of Article 3 (c) of Legislative Decree No. 430, under which prisoners who have to be questioned as part of the investigation of offences giving rise to the declaration of a state of emergency may be returned to the custody of law enforcement agencies. Further, the delegation assessed once again the conditions under which medical examinations of persons in police custody take place.

A. *Article 3(c) of Legislative Decree No. 430*

The delegations explored recent cases of resort to the provisions of Article 3(c) of Legislative Decree No. 430, under which persons detained at prison to be taken from the prison and questioned at a police station or gendarmerie for a period of up to ten days. The Report recommended that a request for the return of prisoners to the custody of law enforcement agencies should be rejected, unless it could be proven that such questioning could not be carried out in an effective manner on prison premises. Even where authorisation is given under Article 3(c) – which the CPT envisaged to be only in exceptional circumstances – the period of custody should not automatically be the maximum 10-day period, but should be determined according to the needs of the case. The CPT recommended a review of Article 3(c), and stated that the issues concerning this Article were of such gravity that it may have to return to Turkey in the near future to pursue the matter.

B. *F-type Prisons*

As of 14 August 2002, 53 'death fasters' have died of hunger strikes, in protest at the new 1 and 3-person F-type prisons. The CPT concentrated on areas of improvement for the F-type prisons and issues surrounding police custody.

The CPT reiterated the importance of regular communal activities in F-type prisons, and stated that these should not distinguish between prisoners convicted for terrorist activities and others.

Regarding allegations of torture and ill-treatment, the CPT reported it had heard no such allegations recently from prisoners in Sincan F-type prison. However, it noted the practice of prison staff being present during prisoners' medical examinations and asked for such a practice to be stopped. In the Diyarbakir province, the CPT reported that it had received a number of allegations of ill-treatment. Noting the oppressive and intimidating nature of the facility, it called upon the Turkish authorities, under Article 8(5) of the CPT's

Convention, to substantially modify the interrogation room or withdraw it from service.

The CPT was also concerned to discover that law enforcement officers were present when suspects were examined at the beginning and the end of their custody, despite even sometimes the objection of the doctor. Moreover, doctors spoke of cases where their reports recording injuries had been torn up by the police or gendarmerie. The CPT asked for information concerning the planned amendment to Article 10 of the Regulations on Apprehension, Police Custody and Taking of Statements, spelling out that medical examinations were in all cases to be conducted out of sight of law enforcement officials, stressing that efforts must also be made to ensure such regulations were complied with practically.

The Turkish authorities stated that the interrogation rooms were being withdrawn from service one by one. Regarding the allegations of torture, they stated that preparations were under way for recording the statement-taking procedure electronically with sound and/or video equipment.

The authorities stated that the Regulations on Apprehension, Police Custody and Taking of Statements would not be amended as they were consistent with CPT recommendations. However, a new circular setting out the procedure for examining prisoners would be circulated.

C. *Implementation of Recent Legal Reforms*

The CPT reported that information gathered concerning custody periods suggested that the shorter custody periods of four days were being respected. The CPT noted that many prisoners interviewed claimed that they had been denied access to a lawyer and called upon the Turkish authorities to ensure that access was guaranteed, as provided for by law.

Reforms to death penalty and minorities cultural rights in Turkey

On 3 August 2002, the Turkish Parliament voted to pass a democratic reform package – "The Harmonisation Law" – aimed significantly to amend many of the nation's rigid laws (see Appendix 4).

The Parliament hurriedly engineered the package to demonstrate its commitment to meeting European standards of democracy before the December 2002 summit, which will review Turkey's prospects of joining the EU. To gain membership in the EU, all applicant states must guarantee democracy, the rule of law, human rights, and respect for and protection of minorities.

The most notable changes included the abolishment of the death penalty, replaced with life imprisonment without the possibility of parole, and the permission for minority groups to broadcast and undertake language education in their native tongue. However, despite the package's democratic exterior, Turkey's Constitution still harbours many oppressive instruments and institutions that could interfere with the correct application of the reforms. For example, to set up a language course in Kurdish, the course must initially receive the approval of the National Security Council (a military body possessing ultimate political authority), after which it will be passed to the Ministers' Committee, and then finally to the Ministry of Education who, should the former two bodies agree, will allow for the opening of the course. Plainly, the implementation of Law No. 2932 amended to "enable the learning of the different languages and dialects used traditionally by Turkish citizens in their daily lives" is fraught with potential impediments. Furthermore, if some language courses do eventually gain approval, most Kurds will not have access to them as such courses are restricted by law to expensive, private language institutes.

Perhaps the single greatest impediment to the package's proper implementation, however, is the notorious Anti-Terror Legislation, which allows government to ban any activity considered to be against the State. The principles of the Anti-Terror Laws are reiterated throughout the text of the Harmonisation Law. Article 2, for example, may exempt "criticisms" of the nation and Government institutions from penalisation, but only where it is "not intended to insult or deride". Under Article 3, an association may be closed if it is considered to be cooperating with activities that are contrary to Turkish laws or "national interests". Furthermore, Articles 8 and 11 prohibit broadcasts and language courses which, "are against the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation". Such clauses allow wide discretionary powers to the judiciary.

Even the Law's most lauded achievement, the abolition of the death penalty, is subject to limitations: it does not apply to crimes committed "in times of war or imminent threat of war." As an exercise in improving democracy, human rights and respect for minority rights, the Harmonisation Law is therefore not an unqualified success.

State of Emergency Lifted in the Kurdish Provinces, Turkey

On 19 June 2002, the Turkish Grand National Assembly ratified Decision No. 744, lifting the state of emergency in the Kurdish provinces of Hakkari and Tunceli, effective from 30 July 2002, to be replaced with the establishment of an undersecretariat. The Decision also extended the state of emergency in the two provinces of Diyarbakir and Sirnak for four months.

On 10 July 1987, the Turkish Grand National Assembly enacted the state of emergency regime in eight provinces under Decree No. 285, due to confrontations between the state forces and the PKK. It established de facto military rule on the pretext of setting up a legal regime to deal with strife in the region, and put all private and public security forces at the disposal of a Regional Governor in each province. The State of Emergency Legislation (OHAL) accorded broad discretionary powers to the Regional Governor, including the authority to evacuate villages. It also affected the exercise of, *inter alia*, freedom of opinion, freedom of expression, freedom of association, the right to access information and ideas, the right to education and the right to participate in public affairs. In 1990, Parliament passed legislation to increase the power vested in the Regional Governor. Decree No. 413 empowered the Regional Governor to censor the press, suspend the rights of trade unions, remove recalcitrant judges and ineffective public prosecutors from duty and to exile anyone he determined to be a threat to security.[28] Nonetheless, the OHAL did not provide any procedures for impartial judicial review of the Governor's actions. Although individuals were provided with the right of petition if they had been directly harmed by a measure carried out under OHAL, courts were not allowed to prevent the general implementation of measures in furtherance of the Decree. In other words, specific grievances could be lodged with the authorities, but such complaints would not deter the Government from proceeding with its policy in the region.

The state of emergency has gradually been fazed out as the conflict between security forces and the PKK has come to an end. For example, it was repealed in the province of Mardin in 1996, but the United Nations High Commissioner for Refugees maintained that human rights conditions did not improve. While state-of-emergency law had formally been abolished, in practice the unrestricted powers previously wielded by the Regional Governor were merely transferred to provincial administrations.[29] Likewise, in theory, the newly established secretariats in Hakkari and Tunceli could maintain the same broad discretionary powers as existed under OHAL.

Recommendations for the Reform of the European Court of Human Rights

The Evaluation Group on the European Court of Human Rights was established by the Council of Europe's Committee of Ministers on 7 February 2001. It is composed of the President of the ECHR, Luzius Wildhaber; Deputy Secretary General Krüger, and is Chaired by Ambassador Justin Harman of Ireland. Its report, published on 27 September 2001, contains a number of recommendations for reform of the ECHR, in view of the rising volume of applications submitted to the court and its current relatively limited available resources.[30]

The Court's new approach was first seen in the KHRP case of *Akman v. Turkey* (No. 37453/97, 26.6.01). Concerned that the proposed reforms and use of the strike-out procedure may deny applicants of effective access to justice, KHRP started an initiative to involve civil society in addressing the downfalls of the reforms and discussing alternatives. KHRP developed a Response to the Report, and invited other NGOs to sign onto the response (see Appendix 5). At the present time, 61 NGOs have signed onto the Response, which has been submitted to the Council of Europe and the UK Foreign Office.

Striking Out – Dissent Revealed Amongst European Court Judges

In the recent judgments of *Togcu v Turkey* (No.27601/95, 9.4.02) and *T.A. v Turkey* (No.26307/95, 9.4.02), both concerning 'disappearances' of the applicants' relatives, the Court has continued its policy of striking out cases on the basis of a formulaic statement from the Turkish Government.[11] In these cases, as in *Akman* (No.37453/97, 26.6.01), the applicants refused to accept the Government's offer of friendly settlement, which they considered was not sufficient to resolve their cases.

However, in an important new development, two European Court Judges expressed concern about this 'striking out' process in their separate judgments in *Togcu* and *T.A.* In both cases Judge Loucaides opposed the striking out of the applications for reasons which are very similar to the reasons why the applicants did not accept a friendly settlement of the case. He argued that there was no acceptance by the Government of responsibility for the Convention violations complained of and that there was no undertaking to carry out any investigation of the 'disappearances'. He also argued that the undertakings given by the Turkish Government added nothing to their existing obligations under the Convention and he noted that the offers of compensation had not been accepted by the applicants, that they had not been determined by the Court and he considered that they could not rectify the Convention violations where the State had failed to take reasonable measures to provide an effective remedy.

Judge Loucaides also said that he feared that "the solution adopted may encourage a practice by States – especially those facing serious or numerous applications – of 'buying off' complaints for violations of human rights through the payment of *ex gratia* compensation, without admitting any responsibility and without adverse publicity, such payments being simply accompanied by a general undertaking to adopt measures for preventing situations like those complained of, from arising in the future on the basis of unilateral declarations which are approved by the Court even though they are unacceptable to the complainants."

He continued: "This practice will inevitably undermine the effectiveness of the judicial system of condemning publicly violations of human rights through legally binding judgments and, as

a consequence, it will reduce substantially the required pressure on those Governments that are violating human rights."

The President of the chamber, Judge Costa, stated in his concurring opinions that he came close to the views of Judge Loucaides and stressed that striking out should not be abused and should only be used in narrowly defined cases. Judge Costa said that he was "very concerned by the unilateral nature" of the Government's undertaking.

These are important judicial statements which express fundamental concerns of principle about the Court's use of the striking out procedure, and it is hoped that these views will help put the brakes on the Court's striking out policy in similar serious cases.

The Necessity of Fact-Finding Hearings in Cases of Gross Human Rights Violations

The recent judgments in the KHRP cases of Matyar v Turkey *and* Sabuktekin v Turkey *underline the importance of the European Court of Human Right's fact-finding role. This article explains the importance of the fact-finding function in cases concerning allegations of gross human rights abuse.*

The recent Evaluation Group Report to the Committee of Ministers alluded to the problems of additional time and expense created by fact-finding hearings, and notes that the Court restricts fact-finding hearings to exceptional cases. The report also noted that these hearings do not always succeed in establishing the facts to the required standard of proof. This is said to be because of the time lag involved.
NGOs have expressed concern that, if that is right, then speeding up the process, as everyone desires, will make the hearings more effective. It has often been said that fact-finding hearings do not establish the facts to the necessary standard of proof, but this assumption can be challenged in respect of the Turkish judgments, in which the great majority of judgments following fact-finding hearings have resulted in 'direct' violations, for example, of Articles 2, 3 and 8 of the Convention, not just 'procedural' violations arising from the failure of the authorities to investigate the applicants' allegations.

To put things into perspective, fact-finding hearings are, of course, not needed in the vast majority of cases which come before the Court, where the facts are rarely in dispute, and most, if not all, cases have been before several domestic courts. However, they are needed in a numerically tiny proportion of cases which concern allegations of very serious human rights abuses, where there has been no, or no adequate, investigation of the matter by the responsible domestic authorities, where there is no effective remedy available to victims and where the facts remain fundamentally in dispute between the parties.

Often the need for fact-finding hearings will arise from a problem of systematic Convention violations. Since the mid-1990s there have been a number of hearings before the Commission (and more recently the Court) in Turkey, in cases of torture, deaths in custody, extra-judicial killings and village destruction arising from the state of emergency in Southeast Turkey.

But we have been hearing for a number of years of tensions in Strasbourg between those who are pro- and anti- fact-finding hearings, reflecting in part the debate as to the Court's role of providing *individual* or *constitutional* justice: in other words, should the Court's role be to provide remedies for every individual in Europe whose human rights are violated, or should its role be similar to a constitutional court of Europe, handling only the most significant cases?

In exceptional cases, it is suggested that these procedures are essential to the Convention system and should be continued. It is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention which creates the need for the Court to hold fact-findings hearings. There are particular situations, such as allegations concerning torture or deaths in custody raising issues under Articles 2 and/or 3 of the Convention, where it is the state, rather than the applicant, which has the capability to obtain and/or preserve essential evidence. Where the state fails in its duties in this respect, the case may only be capable of authoritative resolution by the hearing of oral evidence. Where the national authorities fail to conduct such hearings (which must be independent, impartial and thorough), the European Court should do so.

Given also that the burden of proof falls on the applicant to establish her/his case *beyond reasonable doubt*, to deny an applicant an oral hearing in some circumstances would be significantly to disadvantage the applicant.

To return to the effectiveness of these hearings, one of the reasons why they have not achieved all that they might, is the Court's lack of powers. The judges do not have the powers to compel either witnesses to attend or the parties to produce documents. The hearings in Turkey, for example, have seen all sorts of shenanigans: witnesses not turning up; key witnesses only being 'offered' to the judges on conditions such as that they be heard in the absence of the applicant and his/her lawyers; documents not being produced, and so on. An obvious way to achieve much greater effectiveness, would be to give the chamber powers to compel witnesses to attend and to demand documents be produced.

As well as continuing backlog of Turkish cases which involved serious human right violations, there are now a number of cases lodged with the Court alleging human rights violations at the hands of the Russian security forces in Chechnya, such as torture and 'disappearances'. For the European Court to maintain its credibility these are the sorts of cases for which it needs to retain and use its fact-finding function.

The UN Economic and Social Council (ECOSOC) Endorses Draft Optional Protocol to the Convention Against Torture (CAT)

On 25 July 2002, ECOSOC passed the Draft Optional Protocol to CAT (the Draft Protocol) after 35 countries voted in favour, with eight countries against and ten abstaining. CAT itself identified the steps that State Parties had to take in carrying out their obligation to prevent and prohibit torture. It also established the Committee against Torture to monitor State Parties' compliance with their obligations. ECOSOC recommended that the UN General Assembly adopt the Draft Protocol, which would go further and establish a system of regular visits by independent bodies to detention and prison centres, in order to prevent torture and other cruel punishment.

Article 3 of the Draft Protocol calls for the establishment of independent, visiting national bodies for the prevention of torture. These bodies are to be granted the powers by State parties to, *inter alia*, regularly examine the treatment of persons in detention and to make recommendations to the relevant authorities for improving their treatment and conditions (Article 19). State parties are to undertake to publish the annual reports of the national preventive mechanisms (Article 23).

Article 2 also calls for the establishment of a Subcommittee on Prevention of Torture of the Committee against Torture (the Subcommittee), which will consist of 10 members. The Subcommittee's mandate is to visit places of detention within State parties and make recommendations to the relevant State party (and the national mechanism if relevant), concerning the protection of detainees from torture and other cruel, inhuman or degrading treatment (Article 11). It is to maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer training and technical assistance. The Subcommittee can publish its report if the State Party requests it to do so, or if the State party itself publishes it in whole or part (Article 16). In any case, the Subcommittee is to publish a public annual report on its activities to the Committee against Torture. If a State Party refuses to cooperate with the Subcommittee, then the Subcommittee can either make a public statement on the matter or publish its report (Article 16). All decisions of the Subcommittee are to be made by a majority vote (Article 10).

The Draft Protocol will enter into force on the thirtieth day after it has been ratified by 20 countries which are parties to CAT.

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What Can We Expect from the International Criminal Court?

In July 1998, the Rome Statute establishing an International Criminal Court (ICC) was opened for signature. By the closing date, 31 December 2000, 139 states had signed, including the United States, which had held out almost to the last day, coinciding with the end of President Clinton's term of office.

However, the Statute was not to come into force until two months after 60 of the signatories had lodged instruments of ratification of the statute with the Secretary-General of the United Nations. This did not happen until April 2002 and the Statute came into force on 1 July 2002. The ratifying states, increasing at the end of November 2002 to 84, form the "Assembly of States Parties" which provides management oversight of the court. Since July 2002, a preparatory commission has been engaged in setting up the administrative machinery for the court, including the appointment of judges, so that the court can begin operating in its designated location, the Hague, as soon as possible. These arrangements are expected to be completed by the end of 2003, when the court will start hearing cases.

The ICC is the culmination of the efforts initiated after the Second World War to create a system of international jurisdiction over crimes against humanity. The Universal Declaration of Human Rights was not intended to set out merely a series of aspirations; it was the blueprint for enforceable laws. It was the responsibility of the nation states to ensure that the agreed rights were protected by their own domestic legal systems, but from the outset it was recognised that there must also be a mechanism for enforcing compliance by those whom individual states could not or would not bring to justice. Hence the need for an international body or bodies with the necessary powers. Nonetheless, the overriding idea was that the international and domestic jurisdictions should complement each other: those who promoted or carried out systematic abuses should be brought to justice before a court wherever their crimes were committed and whatever power they might wield in their own communities. This idea can be summed up in the phrase "universal jurisdiction".

Predictably, the task has proved an extremely difficult one. Co-operation between states has always been slow and painful. The period of the Cold War brought a virtual halt to all moves towards international jurisdiction. The first successes were not achieved until the 1990s when war crimes tribunals were established by the United Nations following the regional conflicts in Rwanda and the former Yugoslavia. These tribunals have demonstrated the viability of

international co-operation in conducting criminal trials and some of the major figures implicated in the appalling events in those two countries have been duly surrendered for trial. Leaders of the genocide campaign in Rwanda have been convicted and sentenced; the trial of Milosevic by the War Crimes tribunal for Yugoslavia is still in progress.

The jurisdiction of the war crimes tribunals is limited to events which took place at particular times in particular places. It is limited to war crimes. The jurisdiction of the ICC extends to the territories of all states parties and to the citizens of those states worldwide. It extends to all crimes against humanity, as well as to war crimes and genocide. It will also extend to the crime of aggression, if and when the parties reach agreement on an acceptable definition of it.

The crimes to be tried by the ICC are identified in the statute: "For the purpose of this statute 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." There follows a list of serious crimes including murder, extermination, enslavement, torture, rape, enforced disappearance, apartheid, and a catch all clause to cover other acts of a similar character intentionally causing great suffering or injury.

The scheme of the Statute requires state parties to amend their domestic law to enable them to give full co-operation to the ICC by surrendering those indicted. In Britain, the International Criminal Court Act was passed in 2001. It creates the necessary powers to arrest, detain, and surrender to the ICC. It also ensures that all the crimes against humanity within the jurisdiction of the ICC are also crimes against British domestic law.

In two respects the jurisdiction of the British courts will fall short of that of the ICC. The ICC statute recognises no immunities for heads of state or any other officials, notwithstanding the longstanding international recognition of such immunities. The UK ICC Act preserves such immunities as are accepted in existing domestic law. Secondly – and more controversially – the Act excludes from its coverage crimes committed outside the territory of the United Kingdom, except where the accused person is a British subject or is ordinarily resident within the UK. The UK government and an obedient Parliament thus rejected universal jurisdiction which, by implication, the Rome Statute required its adherents to adopt. The argument of the government was a pragmatic one: it would be difficult to get the evidence to justify prosecutions in Britain of crimes committed abroad and an excessive burden on the British police. However, this ignores the fact that there are cases, like Pinochet, where the evidence is readily available either from witnesses already in Britain or from those who are only too willing to travel to Britain at their own expense. Lack of evidence may prevent the prosecution of some cases, yet that cannot justify failing to prosecute those where evidence is easily available.

Limiting the jurisdiction of the ICC to the territory or the citizens of states which have ratified the treaty of Rome is a serious weakness. It can be defended only on the pragmatic ground that the means do not exist to compel an unwilling state to surrender its citizens for trial outside its territory. It is hardly surprising that the states which have opted out include those in which the history and the likelihood of abuses are greatest. Iraq, Saudi Arabia, Libya and Israel are among those which have declined to participate. Above all, the hostility of the present US government to the Court is disturbing and damaging. Nonetheless, the high level of voluntary acceptance of the Court demonstrates its viability and the problem of abstaining states will have to be reviewed once it is established. The treaty provides that a review conference is to be convened by the Secretary-General of the United Nations seven years after it came into force – i.e. 1st July 2009. That is when amendments to the treaty may be considered.

Experience shows that progress in the development of international human rights law is intermittent and extremely slow. In the long history of human cruelty, the very notion of human rights is a novel one which had no concrete expression until after the Second World War. Putting an international criminal court in place within a mere 50 or so years could be seen optimistically against that background as miraculously speedy. Therefore, it should not be expected to be the perfect instrument of international justice from the outset. There will need to be a continuing struggle to extend its scope worldwide.

The United States is plainly intent on obstructing the development of the Court's jurisdiction. Notwithstanding its economic and military dominance, however, it cannot in the long run hold out against world opinion. Like that of the prime terrorist states, the United States' opposition could in the short term have a damaging effect on the authority and effectiveness of the Court. This could be the result particularly of the attempts being made to persuade other states, including the members of the European Union which have ratified the treaty, to enter into agreements that US citizens will not be surrendered to the Court.

This is claimed to be necessary to counter the risk that US troops engaged in peace keeping duties in states which were parties to the Rome treaty would be vulnerable to bogus allegations which would cause them to be indicted by the Court's prosecutor, whereupon they would be handed over to the Court and put on trial in the Hague. The justification for such agreements is said to be in Article 98 of the Rome treaty which precludes the Court from requesting a surrender which would require the requested state to breach an agreement with another state. However, it is quite clear that this provision was meant to respect existing agreements and to not allow states to escape the obligations they had undertaken when they ratified the treaty. Unfortunately, some states have already entered into such agreements with the US, either because they fear sanctions if they flout the wishes of the world's most powerful nation, or because by placating it, they hope to bring the US back into the fold of participating states.

It is difficult to take US concern for the safety of their troops seriously as an explanation for seeking these agreements. Before indicting anyone, the Court must give the home state a chance to prosecute in a domestic court. Since crimes against humanity and war crimes violate US law, why would the US not wish to prosecute? The risk of surrender to the ICC seems highly improbable. And why should US troops be treated differently from others? The whole point of the ICC is to bring all under the same judicial umbrella and to destroy the immunity which protects the worst criminals.

While US fears may seem groundless and motivated by arrogance and the isolationism which has so often infected its foreign policy, it must be acknowledged that the integrity and independence of national legal systems is not universal and that political influences and sensitivities cannot be ruled out in every case. If, as is hoped and expected, the ICC will at least be able to rise above the political conflicts which can affect the courts of individual states, it will be an important forum for reviewing the decisions of domestic courts affecting crimes against humanity. This will be especially important where there are conflicts and tensions within their society which prevent domestic courts from reaching impartial decisions. In this way, the ICC may mirror on a global basis one of the functions carried out by the European Court of Human Rights.

The choice of judges, now in progress, will be crucial to the credibility and success of the ICC. The nominations so far justify considerable optimism. We must hope that the quality of the Court's judgments will eventually persuade the abstaining countries to join in the great task of building a truly universal system of justice.

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The Principles of the European Convention on Human Rights and the Response of States to Terrorism[32]

1. Introduction

1.1 The Problem of Definition

There is no definition of terrorism in the European Convention on Human Rights ("the Convention") and the European Court of Human Rights ("the Court") has not developed one in its jurisprudence. A widely accepted definition of terrorism in international law has proved elusive, although an increasing number of anti-terrorism "suppression conventions" have been agreed and are gradually expanding the list of objective acts which States are prepared to make criminal in their national laws, regardless of the motivation for them, as manifestations of "terrorism". It has, however, proved impossible to reach agreement on a treaty covering a general offence of terrorism, in which the prohibited violence can in all circumstances be condemned without reference to the end for which the violence is being used. The most recent treaty of this kind, the Terrorist Financing Convention switches attention from the criminalisation of "terrorist" acts to activities is support of terrorist campaigns.[33]

Furthermore, a descriptive approach to an understanding of terrorism has its limitations because such is the protean nature of the phenomenon that the descriptions would range from isolated acts of single persons (the "Unabomber" case) through single issue groups (such as animal rights activists) to wholesale operations of groups which reach the level of internal or international armed conflicts.[34] There is also scope for making distinctions depending upon whether the violence is used by a State, is supported by a State, or is purely the work of non-State actors.[35]

The Court has been able to proceed with an unarticulated concept of terrorism but one which has, nonetheless, had an influence on its practice, because (a) only States may be defendants in cases in Strasbourg, so it has not been necessary to work out the legal consequences of violations of human rights by non-State actors (if such they be)[36] (b) the Court's judgments in determining the rights of individuals or the powers of States have not needed to take account of a uniform, legal concept of terrorism so much as a particular, factual one – what is the actual manifestation of terrorism in this (defendant) State? The questions for the Court are: in these circumstances, what are the rights of the individual applicant and to what extent may the State interfere with them in response to the actual threat of terrorism with which it is faced?

This focus on the actual impact of each terrorist campaign is important because one aspect of the use of terms like "terrorist" or "terrorism" is their denunciatory function, to strip of their legitimacy the claims to use force, the ends for which the force is being used and those who use it.[37] This makes for two concerns about human rights – that the de-legitimising process will lead to an unjustified denial of the human rights of those suspected to be terrorists and that those who support the terrorists' ends, even those who do not positively distance themselves from them, will be identified with the terrorists and treated likewise. There is another danger too – that measures justified by reference to terrorism will come to be used against drug-traffickers, organised criminals, ordinary criminals, so that what began as measures to meet a discrete and confined phenomenon leak out into mainstream law enforcement, putting in jeopardy the human rights of many people. If this process is supported by popular majorities, only the courts and, ultimately, the European Court have the capacity to protect human rights. In what follows in this paper, the use of the words "terrorist" and "terrorism" is made without reference to the aims of any direct measures a "terrorist" group may take, negatively or positively. It follows the Court's approach that political force by non-State actors cannot be justified in democratic States which comply with the rule of law (and may even be a breach of the human rights of its victims) and, not being justified, a State is entitled to take measures against it, so long as those measures are compatible with the principles of the Convention.

1.2 The General Principles of Convention Law

The Court has developed over the years its understanding of the three basic policies which inform the Convention values – democracy, the rule of law and human rights. "Democracy" is not simply majoritarianism, however fair the process by which the legislature is elected and the government chosen: it is a plural and responsive system, so that a mere majority may not override the rule of law and human rights.[38] The rule of law includes a substantive notion of "law", beyond simply formal compliance with the national law-making process, which excludes blanket powers for the executive[39] but requires effective access to courts as a means of accountability.[40] Human rights are strong rights of individuals, sometimes absolute or unqualified, and where interference with or derogation from them may be justified, the State is required to demonstrate the need for this and provide the evidence for it. While the Court is prepared to take into account the background of terrorism in assessing the counter-terrorist actions of States,

> ... the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to [counter-terrorism measures]. The Court being aware of the danger such [action] poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.[41]

Where the Convention allows a State a "margin of appreciation"[42] in the exercise of its powers to introduce measures to combat terrorism (as it does to some degree for most of its provisions), the Court retains the ultimate responsibility to decide whether or not a State has remained within the confines of those powers.[43] Further, the Court has expanded the explicit duties (mainly negative duties) of States in the Convention, relying on the principle of "effectiveness" – the effective enjoyment of express human rights requires implied duties, usually to assure the accountability of the State, through courts or otherwise.[44] So, in addition to their express obligations in Articles 5, 6 and 13 to provide remedies for violations of the Convention and the determination of civil rights and criminal charges, the State must, in some cases, provide preventative regimes or investigate allegations of violations of the Convention.[45] A duty to take action will arise in some circumstances where the person inflicting the real, material damage on a victim is another non-State actor.[46] In Strasbourg terms, it is not necessary to characterise this private action as a "violation" of the human rights of the victim, although in Ireland v UK, the Court did say,

> "...it is not called upon to take cognizance of every single aspect of the tragic situation prevailing in Northern Ireland. For example, it is not required to rule on the terrorist activities in the six counties of individuals or groups, activities that are clearly in disregard of human rights."[47]

Rather, the need is for States to recognise that they have a duty under the Convention to act. For the Court, there is the awkward dual role of setting these duties and at the same time, seeing that an over-enthusiastic fulfilment of them does not impinge unfairly on the rights of others. It should be borne in mind, that a mere reading of the Convention text will not provide the answers to the question of what are the principles of the European Convention which condition the counter-terrorism responses of States. For these, we must look at the jurisprudence of the Court (and the now defunct Commission).

2. The Jurisprudence of the European Court of Human Rights

2.1 Article 2 – The Right to Life

Article 2(1) provides an express, positive obligation on States to protect the right to life "by law". The Court has been constantly expanding the duties of States subsumed under this general language to make it clear that the responsibility of a State goes further than the mere enactment of a general homicide law, to securing its effective enforcement, particularly where death occurs at the hands of the security forces. It goes without saying, though, that the States' duties extend to deaths at the hands of non-State actors but, as positive obligations, the demonstration that a State has failed in its duty will be harder where the killing is at the hands of a private person than it will be if a State agent is responsible.

A State has a positive duty to protect a person threatened with death by another private person but the duty is a narrow one, leaving a wide margin of appreciation to the State about the deployment of its protective force. After the decision in Osman, where the Court found no violation of Article 2 when a person had been killed after the police had been informed about death threats from his eventual killer,[48] it is likely that a State will be in violation of its positive protective duty only where the security forces decline to intervene in an actual or immediately imminent attack on a person, in circumstances where effective action would have been possible. It will be very difficult to show that the planning of the deployment of its forces by a State so contributed to a private killing that it would constitute a violation of Article 2.[49]

Article 2(1) expressly envisages the legitimate use of the death penalty where it is the sentence provided by law, the law meeting the requirements of Article 7, and it follows the conviction of the individual by a court satisfying the standards of Article 6(1)-(3).[50] Now, though, almost all parties to the Convention are also parties to the Sixth Protocol under which States agree to abolish the death penalty (Article 1), save that a State might make provision in its law for recourse to capital punishment in time of war or imminent anticipation thereof (Article 2). The prohibition on intentional killing by the State in circumstances other than the execution of a capital sentence rules out any recourse to "shoot to kill" policies or the organisation of death squads as part of a counter-terrorism policy, however great the provocation to the authorities the activities of the terrorists are. If the operations against the terrorists reach the level of an internal armed conflict, the legality of the use of force by either side will be judged against the standards of international humanitarian law[51] but, subject to any lawful modifications made by a State, its human rights obligations, including those under Article 2, will continue.

In practical terms, the extended duties of States under Article 2(1) must be considered in connection with Article 2(2), which sets out the circumstances and conditions upon which the

State may lawfully have recourse to force which results in the death of an individual. Because there are such possibilities, it is necessary to have a mechanism which can determine whether or not any particular death falls within the standards established by the Convention. It should be noted that the existence of a terrorist threat or the fact that the person killed is a suspected terrorist does not, of itself, provide any stronger justification for the use of lethal force than if, say, the victim were involved in drug-trafficking or organised crime or an ordinary criminal incident.[52] In each case, it will be necessary to establish that the actual use of force was "absolutely necessary" (Note: it is the use of force and not the death which must be absolutely necessary, though where troops or police are equipped with guns or rifles and trained to use them to kill, there is unlikely to be any difference between the two situations, whereas, if the death results from force neither intended to nor likely to kill, then the enquiry as to lawfulness must concentrate on the use of force, not on the unanticipated death.)[53]

Article 2(2) says that "deprivation of life" (which I shall call "death") will not have been inflicted in violation of Article 2 if it has resulted from force which was no more than "absolutely necessary" for any one of three justifications:

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

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

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

Depending upon the intensity of the terrorist campaign, it is clear that all three situations might be relevant to determining the legality of counter-terrorism force. Before we get to the actual use of force, it is necessary to draw attention to two aspects of the duty of States which the Court has found to be implicit in the notion of "absolute necessity". First, a State which equips its forces with lethal weapons is obliged to train its troops and police in their use, so that the chances of unintended deaths resulting from uncontrolled actions are reduced.[54] Second, those charged with planning the deployment of officers so armed, are obliged to take into account the dangers of unnecessary recourse to the force (and so to deaths which are not absolutely necessary).[55] In McCann, the Court found that the planning of the operation against terrorists suspected of bringing a bomb into Gibraltar was so defective that it resulted in the responsibility of the United Kingdom under Article 2(2). The terrorists were shot dead by special forces (whose training and armaments made it practically certain that, if they used force, that force would be lethal), even though they were not armed nor was there a bomb in Gibraltar which they could have detonated). The operation was carried out in the way it was

so as to maximise the chances of obtaining evidence against the terrorists for use in a subsequent trial but the Court found that that could not justify putting unnecessarily at risk the lives of the victims and, potentially, the lives of innocent parties in Gibraltar. The planning obligation is a strict one and, according to the Court, a breach of it will arise,

> "where [state authorities] fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civil life."[56]

and a State can be obliged to produce evidence of its planning, with a failure to do so contributing to evidence that it had not been carried out in compliance with Article 2.[57]

The introduction of the planning obligation is an important development in the jurisprudence because it requires the calculated incorporation of the Convention standards into decision-making, whereas the circumstances surrounding the actual use of force by the soldiers who fire their guns are often such that they allow no real time for reflection – the need for instantaneous decision-making is not calculated to permit finely balanced assessments of "absolute necessity" and the soldiers are entitled to rely on their orders having a proper factual grounding: in McCann, the United Kingdom was not held to be in violation of Article 2(2) by reason of the actual killing of the terrorists by the special forces, given the information made available to them and on which they were entitled to rely.[58]

Whether the inquiry at the international level focuses on the planner or the operative, there is a formidable forensic problem for the applicant in obtaining and for the Court in evaluating the evidence. The more fraught the circumstances, as they may be up to and including fire-fights between the security forces and terrorist groups, the more the fact-finding capacity of the Court is tested.[59] In several contested cases, the Court has been unable to establish beyond a reasonable doubt that the State agents were responsible for the death, let alone that they did so in violation of the State's responsibility under Article 2(2).[60] The Court has tried to mitigate this disadvantage for applicants in some cases, by shifting the burden of proof. In McKerr, the Court said,

> Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation...[61]

However, this will be an expedient available only in some cases. More generally (though not excluding such cases), the Court has been developing a series of implied procedural obligations in the event of deaths at the hands of the security forces and even where the authorities merely have knowledge of a suspicious death.[62] The object is to make the right to life effective in practice. Where a person dies at or in the hands of State authorities or where the State has knowledge of his suspicious death, the following obligations arise:

(a) there must be an official investigation into the facts surrounding the death, instituted by officials of their own motion, without waiting for an individual complaint;[63]

(b) while the form of the investigation might vary with the circumstances, it must be characterised by the independence of the investigator, who should not be beholden to those whose conduct he is investigating;[64]

(c) the investigator should have the power to examine witnesses and to have carried out for him effective autopsies and must carry out his inquiry in good time;[65]

(d) the investigation must be capable of reaching a definitive conclusion about whether or not the force used was lawful;[66]

(e) even if the investigation does not take place in public, interested parties should have the opportunity to participate and be informed of the result of the inquiry;[67]

(f) if the inquiry concludes that the death was the result of the use of unlawful force, its report must be considered by the prosecution authorities and a prosecution commenced or the relatives of the victim given the reasons why a prosecution is not going ahead.[68]

These obligations are cumulative, so that a criminal prosecution which fails will not be an adequate discharge of a State's duty under Article 2 if the reason for the failure was that the State had not done enough to assemble the evidence in a timely and effective manner.[69] There have been a number of cases where States have been found in breach of one or more of their obligations of this procedural kind under Article 2.[70] Because of the failure to carry our proper inquiries, it has often then not been possible for the Court to conclude definitively that the State was responsible for a death. It is, therefore, of great importance that States take these procedural obligations seriously, that they have in place processes adequate to discharge their obligations and that they make effective use of them when the occasion arises.[71] The Court has explained its developing jurisprudence in this area by reference to the need to maintain public confidence in the propriety of the actions of the authorities, particularly when the

consequences of their activities can be so serious.[72] It is a consideration of central importance to many counter-terrorist operations, given that one object of the terrorists will be to claim that the authorities have ready recourse to force outside the law and can, thus, claim no greater legitimacy for their own measures than the unofficial groups themselves.

2.2 Article 3 – Right not to be tortured, to be made subject to inhuman or degrading treatment or punishment

It is not proposed to engage in a detailed analysis here of what conduct falls within "torture, inhuman or degrading treatment or punishment", except to note that the Court's notion of the categories is quite wide and embraces mental or psychological ill-treatment as well as physical abuse and covers continued conditions of treatment as well as discrete incidents affecting an individual.[73] In the nature of things, the infliction of Article 3 treatment by the State on an individual requires that the victim be within the custody or control of the State. There is much evidence of the susceptibility of persons in the State's control to ill-treatment, particularly early in their detention if they have been taken as suspects or as potential sources of evidence or intelligence about the activities of other people.[74] Needless to say, this vulnerability is intensified where detention is an element in a counter-terrorism operation. Accordingly, not only is the State required to order its officials not to engage in conduct prohibited by Article 3 but it must have in place mechanisms of control and accountability to see, so far as feasible, that they comply. The Court has condemned various treatments as torture – a definitive list is not possible and any assessment must take into account the characteristics of the victim[75] – that which would be torture of a child or old person might not be so of a trained, adult soldier – but they include severe beatings, electric shock treatment, subjection to extremes of temperature, rape – the common element being the severity of the pain, mental and physical, suffered by the victim.[76] Torture is usually inflicted deliberately and for a purpose but, since torture is always to be condemned, the demonstration of the purpose is irrelevant to a finding of responsibility and it can never be an excuse.[77]

The Court acknowledges that there may be difficulties in the interrogation of some terrorist suspects, who, by reason of specific training to resist questioning or because of fear of sanctions from their colleagues, will demonstrate exceptional resistance under examination. Even so, that, nor anything the suspect may have thought to have done, will justify recourse to treatment contrary to Article 3. In the Ireland v UK case, the Court condemned the so-called "five techniques" of sensory deprivation, resorted to by the security service because of its belief in their efficacy as interrogation methods. The "five techniques" – hooding, wall-standing, deprivation of sleep, limited food and subjection to a constant wall of neutral sound – worked by causing serious psychological disorientation, sufficient for the Court to hold that it was inhuman treatment and so excluded absolutely by the Convention, whether or not it were an efficacious aid to questioning.[78]

Although sensory deprivation will violate Article 3, strict conditions of detention, including isolation, will not.[79] However, what is always required is some supervision of the detention regime: incommunicado detention is never compatible with Article 5 (see below) and, for any prolonged period will be breach of Article 3. Whatever the conditions of detention, the State has a positive obligation to protect the welfare of vulnerable prisoners, such as young people or those with medical or psychological conditions,[80] even if the conditions are due to the conduct of the applicant himself.[81]

The regulation of detention at the hands of the State raises similar problems to those considered above in connection with deaths caused by State officials: indeed, the cases often overlap for it is by no means unknown for persons in custody to die and to die because of how they have been treated while in custody. Again, the Court has developed implied duties of accountability, mirroring those under Article 2.[82] The Court will require the State to explain injuries suffered during a person's detention and may conclude that they were unjustified if the State cannot prove a proper explanation for them. This procedural device, which depends upon the availability of medical evidence about the condition of the victim immediately before being taken into custody,[83] has been reinforced with a substantive development – the Court will regard the infliction of any form of physical injury upon a person in the custody of the State as treatment prohibited by Article 3 unless the State can show that it was made necessary by the person's own conduct, e.g. such that requires physical restraint to protect jailors or fellow prisoners.[84] Generally, the Court is reluctant to take judicial notice of notorious conditions in a particular State or place of incarceration. However, it has been willing to admit into evidence and to rely upon it in reaching its own conclusions, findings of the European Committee for the Prevention of Torture.[85] All these protective obligations apply to terrorist prisoners.

Article 3 does prohibit judicially ordered corporal punishment[86] but, in general, the means and measures of punishment, always on the assumption that they are ordered by a court after conviction following a fair trial, are for the State to decide. Literal life sentences are not excluded by Article 3.[87]

2.2.1 The Soering Principle – removal to a third-State

In Soering,[88] the applicant complained that his extradition from the United Kingdom to the United States to face trial on a capital charge would violate his rights under Article 3 of the Convention. His claim was that the conditions of detention following any conviction and sentence – the "death row phenomenon" – would, if imposed by a Convention State, violate Article 3. (He could not rely on Article 2 because it contemplates the lawful use of the death penalty and, at that time, the United Kingdom was not a party to the Sixth Protocol.) The Court accepted his argument, saying that he had brought substantial evidence that there was

a real risk of treatment incompatible with Article 3, if he were extradited. The Court also examined whether or not the same argument could apply where the applicant alleged that there would be serious breaches of the fair trial standard if he were returned, although the Court found the claim not proved on the facts.[89]

This important principle has been extended beyond extradition to any process for the removal of a person (usually an alien, of course) from a State to one where there is a real risk of a treatment which would, if imposed by a Convention State, be seriously incompatible with the Convention.[90] Furthermore, the obligation not to return an applicant arises where he shows that the risk comes from the unwillingness or incapacity of the authorities in the destination State to protect him from ill-treatment at the hands of non-State actors.[91] This means that the Convention provides greater protection against **refoulement** than does the Refugee Convention, because the absolute nature of the proscription under the Convention requires that a State not return a person, whatever the conduct of that person and whatever threat he might be deemed to pose to important national interests.[92]

The firmness with which the Court holds to this principle was demonstrated in Chahal.[93] Chahal had been involved in terrorist activities in India and had been tortured there. He had come to England, where he was suspected of involvement in terrorist offences, but he had not been convicted. Faced with deportation to India, Chahal made the Soering claim that if returned, there was a real risk that he would be treated in a way incompatible with Article 3 by the Indian security services. The Court affirmed that the principle was without exception and that there was no room for a balancing test where the conduct of the applicant was alleged to threaten national security.[94] Of course, there were highly sensitive questions of assessment of the evidence about the measure of the risk to Chahal but, after a lengthy analysis, the Court found that the risk had been substantiated by Chahal and concluded that his deportation would violate Article 3. To the extent that Chahal's alleged involvement in terrorism were relevant, the Court regarded it as a reinforcing, rather than a qualifying, factor in favour of his protection because, if the assertions were true, he would be an object of concern to the security forces in India whose attentions he so wished to avoid.

The Chahal example of the Soering principle is of particular significance in the response of States to international terrorism. Very often States will be willing (or even required)[95] to secure the return of a suspect to a State where he alleges there is a real risk of Convention incompatible treatment. If a State may not do that, it faces the possibilities, either that a person which it cannot convict (and therefore may not detain) and whom it regards as a danger to public safety remains at large within the State or it allows him to go to a State willing to have him where he faces no Convention risk, but where it will likely be the case that he will not be hampered in continuing his activities.

[The British Parliament has passed legislation following "11th September" in which a power of detention is provided of persons whom the application of the Soering principle would prohibit the government from removing to their national States[96] but which, it was recognised, was incompatible with Article 5 of the Convention. Accordingly, the government has made a declaration of derogation under Article 15, asserting that there is an emergency arising out of the UK's participation in the "war" against terrorism and that the measure outlined is strictly required to meet it.[97] Doubts have been expressed by commentators about this response, inter alia, questioning the evidence for the existence of an emergency of such gravity as Article 15 requires.[98]]

It seems clear that the Soering principle will now apply to those States which are parties to the Sixth Protocol to prohibit removal to a State where there is a real risk that the applicant will face the death penalty (without any regard to the post-conviction conditions of detention).[99]

2.3 Article 5 – Right to Liberty

2.3.1 Internment, Detention and Fair Trial

Practically whatever form anti-terrorism measures take, they will involve some form of extended detention power or a reduction of the controls on detention. States want to characterise terrorist violence not merely as illegitimate but criminal. On the other hand, the authorities face great obstacles in the way of obtaining criminal convictions against terrorists, particularly the major figures in terrorist movements. The tension between the rhetoric of criminality and the actuality of counter-terrorist practice is at the heart of the State's dilemma. Sometimes, States have found it necessary to concede the priority of the need to detain terrorist suspects over respect for their rights in the criminal process[100] – so, there may be recourse to preventative detention, a device which may be justified in Convention terms only if the State is able and willing to make a declaration of emergency under Article 15 (see below).[101] However, the inclination to rely on criminal convictions as the basis for detention remains strong. In 1976, the Diplock Commission in the United Kingdom suggested modifications to the criminal process in Northern Ireland which, it contended, were compatible with Articles 5 and 6 of the Convention but which gave the security forces a reasonable chance of gaining convictions, a chance they did not have under the prevailing law. The proposals were made part of United Kingdom law by the Northern Ireland (Emergency Provisions) Act 1978 and, though not without criticism, have largely served the purpose which Lord Diplock set for them and have escaped adverse scrutiny under the Convention.

2.3.2 Detention on reasonable suspicion of having committed an offence

Among the innovations was a much wider power of "Diplock Courts" to rely on confession evidence in the absence of corroboration. The relationship between pre-trial detention and fair

criminal trial here is a close one: the danger that a person detained will be compelled or induced to make a confession while vulnerable in detention is a real one and, once made, the confession will be hard to retract effectively. Convictions before the Diplock Courts have seldom been successfully challenged as having been obtained in breach of Article 6. On the other hand, the United Kingdom has had to rely on an emergency declaration under Article 15 to justify aspects of the pre-trial detention regime which accompanies the revised trial system.[102]

Generally, a person detained under counter-terrorism powers will held under Article 5(1)(c), on reasonable suspicion of having committed an offence. The "offence" must be specified in a way which satisfies Article 7 and "terrorism" might be, for the reasons set out in the introduction, just too wide a notion to comply with Article 7. Membership of a proscribed organisation (so long as the proscription comports with Article 11 – see below) will be an Article 7 compliant offence but its undoubted usefulness with respect to domestic terrorism is diminished where the counter-terrorism is directed against international terrorist groups, by no means all of which will be familiar to the authorities of a particular State and who, accordingly, will not have taken steps to proscribe them.

The need to rely on Article 5(1)(c) follows from the judgment in Lawless, where the Court held that a general power of preventative detention could not be found in Article 5(1)(b).[103] Since then, the Commission found unobjectionable the use of a power of detention for questioning of persons entering the United Kingdom or moving between the mainland and Northern Ireland, even though no suspicion of involvement in a criminal offence fell on the person interviewed. The Commission specifically referred to the increasing difficulty States faced in combating terrorism.[104] When persons are detained, they are entitled to be given reasons why this is so, Article 5(2). The Court has not interpreted this obligation very strictly. In Fox, the Court allowed that the reasons need not be given at the very moment of arrest, a concession of some importance in terrorist cases, but only "promptly" thereafter.[105] Furthermore, the reasons need not be explicit but it might be sufficient if the victim can reasonably deduce the explanation, for instance, from questioning about a specific offence.[106] There is a clear danger that detention for questioning will creep into the armoury of the investigating authorities, where persons are arrested on the most general grounds – "suspicion of being involved in terrorism" – and released after an interrogation which was primarily for intelligence gathering rather than criminal investigation. The protection, such as it is, emerges from the requirement of promptness of communication of the grounds of detention, a demand reinforced for those arrested on suspicion of a criminal offence by Article 5(3).

Article 5(3) requires that persons arrested be brought "promptly" before a "judge or other officer authorised by law to exercise judicial power", the judge to decide whether the person be detained in custody or released on bail (or released altogether if no justification for his arrest

has been shown). In fact, this process serves several protective functions – it establishes a record of the defendant's presence in the State's custody, it allows a judge to hear any allegations about ill-treatment or adverse conditions of detention and to assess the defendant's condition and it usually will allow contact between the accused and his lawyer. The period covered by "promptly" is, therefore, of considerable importance. In the various versions of its Prevention of Terrorism legislation,[107] the United Kingdom has created and maintained a power of judicially unsupervised detention in terrorist cases, first, on the authority of the police for 48 hours and then, on the authority of a Minister, for up to five more days. The power was justified by the United Kingdom because of the inculcated obduracy during interrogation of terrorists, because of the high importance of forensic evidence which requires time for it to be assembled and because of the danger of communication with terrorist colleagues which could lead to the intimidation of witnesses, the destruction of evidence or the escape of other suspects. In Brogan, the Court acknowledged the relevance of these considerations in the pursuit of terrorist crime[108] but found that all judicially unauthorised detentions in excess of four days did not satisfy the "promptness" criterion.[109] So important did the United Kingdom regard the detention power, that it reintroduced its emergency derogation and, in a later judgment, Brannigan, the Court found the seven day power "strictly required by the exigencies" of the Northern Ireland emergency.[110] The United Kingdom argued that, under common law procedure, an accused was not brought before a judge until he had been charged with an offence, a process which, in some terrorist cases, required the extra time. It maintained that judicial supervision of the application for extended detention was impracticable and, indeed, incompatible with its purpose. [In the Terrorism Act 2000, the power was reintroduced, with a judicial element in s.41 and Schedule 8 (and the UK's derogation with respect to Northern Ireland was withdrawn). The importance of the change is that it allows the power to be used against international terrorists whose activities may not have sufficient impact on the United Kingdom to enable the State to make a lawful emergency derogation.]

2.3.3 Bail

Where persons are detained for the purpose of being brought to trial, they are entitled to a hearing before a judge to determine whether or not they should be detained in custody, with the difficulties this may pose for the organisation of their defence, as well as the principled objection to detaining someone not yet found guilty. The Court has held that there may be no irrefutable presumption against the granting of bail,[111] but it is anticipated that in most terrorist cases, there will, at the beginning of the process at least, be evidence which would justify continued detention. If there is, then the State has an obligation to proceed expeditiously to trial,[112] because reasons which were good initially may be less convincing as time goes on and the State must avoid the appearance of detaining a person to put pressure upon him to co-operate with the investigating authorities, even to the point of waiving his

right to silence or his privilege against self-incrimination. Nonetheless, the Court has acknowledged the special features of the investigation of some terrorist crime and has not found a violation, even where the suspect has been held in custody for a long time.[113] During extended pre-trial detention, an accused has the right under Article 5(4) to periodic review of the lawfulness of his continued detention.

2.3.4 Detention – Striking the Balance

What we see in relation to the procedural safeguards of Article 5 is a willingness of the Court to accept the modification of the obligations of States to take into account the special characteristics of some terrorist crime. However, the Court has not conceded every argument made by States and they have had to rely on emergency derogations to justify some of the procedures which they have adopted. As we shall see, not all measures have been found to be lawful, even taking Article 15 into account. We should note, as well, that the right against unlawful detention protects not only a general right of liberty but the right not to be mistreated in custody – time, then, is not the only consideration; there must be adequate accountability for the treatment of a detainee. The balance point is that the period of lawful detention for the purpose of investigating terrorist crime may be extended but not for lengths of time or without the supervision which is necessary to see that the investigation itself is not conducted in a way which would violate Convention, particularly by exposing a detainee to the risk of Article 3 treatment. Where the State wishes to use information gained during detention for a subsequent trial, there is another sanction at work – it may modify its ordinary rules but at the risk of running an unfair trial where the evidence-gathering process does not protect the elementary rights of a defendant (see below).[114]

2.4 Article 6 – Right to Fair Trial

2.4.1 Introduction

It has already been suggested that most activities which constitute terrorism will be characterised as criminal by the State: some will be ordinary offences, such as murder, others, specific to terrorism, like membership of proscribed organisations. The obvious response to terrorism, then, is to bring suspects to a criminal trial, a trial which satisfies the requirements of Article 6 and then punish those convicted. Although the Article 6 standards are the minimum standards of fair trial, they are an extensive catalogue, all the various elements of Article 6(1) and the specific provisions of Article 6(2) and (3). It will not be possible to deal here with all the aspects of Article 6. There is a whole range of reasons why States may want to modify their ordinary criminal procedure to combat terrorist crime, in main reflecting the difficulty in obtaining convictions by the standard route. On the other hand, the designation of the terrorists as criminals is also a significant objective of States and so any alterations in procedure ideally should be compatible with Article 6 so that the State does not have to rely

on Article 15 and which will pre-empt any claims by the terrorists that they are "political prisoners".[115]

2.4.2 Special Courts

The most fundamental change a State can make is to create a separate system of tribunals to try terrorist offenders. The first question will be whether these courts are "independent and impartial" in the sense of Article 6 or whether, in actuality or appearance, they or individual members of them are susceptible to executive influence in a way that ordinary judges are not.[116] It is one thing for a common law system to exclude juries from terrorist trials (since there is no right to jury trial in the Convention) but it would be quite another to subject terrorist defendants to trials before, say, military courts which did not offer the usual guarantees of independence and impartiality. In Incal,[117] the Court found that the National Security Courts in Turkey did not satisfy the standards of independence and objective impartiality because of the presence of a military legal officer as one of the judges of a three-judge court. The government argued that the terrorist threat in Turkey required the experience of military judges to assist their civilian counterparts. The soldier-judge had certain constitutional guarantees about his status but the Court was persuaded that a defendant could have a reasonable suspicion about the role of the military judge, given that he remained a serving soldier and that his future career prospects were dependent upon decisions of his military superiors. The military had an interest in the decisions of the special National Security Courts.[118] Although the judgment is very sparse, the Court said that Incal did have objective grounds for doubting the independence and impartiality of the court before which he was tried. The exact ramifications of Incal are hard to estimate but the judgment would certainly seem to rule out wholly military tribunals for the trial of terrorist offences as being compatible with Article 6. Even where special courts do satisfy the standards of Article 6, there remains a matter not yet tested under Convention law – what protection is an individual entitled to when the decision is made that his case will go before a special tribunal rather than an ordinary criminal court?[119] The Human Rights Committee, interpreting the International Covenant on Civil and Political Rights, has recently decided that the decision must be on the basis of reasonable and objective grounds communicated to the individual, so that the special power may not be abused by sending ordinary criminal suspects to the special jurisdiction.[120] Such a procedure is necessary in order to confine the special courts to their legitimate jurisdiction and would be accommodated under Convention law by reference to the right of access of a defendant to the court, at least where the result of the decision was to send him to a tribunal not compatible with Article 6.

2.4.3 Public Trial

One advantage for the State in setting up special courts is that it can further be provided that they need not sit in public. Apart from disreputable reasons why a State might want that, a

prevailing concern of States in terrorist cases is the protection of witnesses and sources of evidence.[121] The Convention concept of fair criminal trial is based upon an adversarial model in which the defendant is confronted by the witnesses against him, who deliver oral evidence to the court, which is open to the public.[122] If the national trial courts continue to sit in public, the State may find it necessary to modify the procedures to protect the identity of witnesses and the confidentiality of sources. Since the Court has accepted that measures of witness protection may be resorted to sufficient to protect witnesses and sources without prejudicing the defendant's right to a fair trial (see below), there would have to be very special circumstances for the Court to be satisfied that it was necessary to hold trials wholly in secret.

2.4.4 Presumption of Innocence

Terrorist offences frequently attract considerable publicity and those thought to be responsible for them face public denunciation. However well-intentioned, the news and the sentiments can infringe the presumption of innocence if delivered before the conclusion of the trial. Article 6(2) sets out the presumption of innocence, the first function of which is to protect a defendant against condemnation by the media or by politicians in ways which can prejudice his right to a fair trial. Accordingly, public pre-judgment of guilt should be avoided because a failure to do so may thwart any attempt to bring a defendant the victim of the prejudice to trial.[123] Article 6(2) imposes limitations on shifting the burden of proof on to the defendant but it appears that the defendant can legitimately be made to carry an evidential burden about matters peculiarly within his knowledge, perhaps so long as the effect of the shift is not to compel a defendant to incriminate himself.[124]

2.4.5 The Right to Silence and the Privilege against Self-incrimination

The right to silence and the privilege against incrimination are implied rights necessary to secure to a defendant the right to fair trial. Neither is an absolute protection.[125] While a defendant may not be compelled to answer questions or volunteer evidence, for example, as to his line of defence, a court may draw evidential inferences adverse to a defendant at his trial from the silence of a defendant during the investigation of his offence or at his trial. However, if the prosecution proposes to raise this with the court, the accused must have had the benefit of legal advice on the consequences of his silence at the time that he is being questioned. Even then, his silence must not be the sole or major evidence against him.[126] Access to a lawyer is required so that any statement made by a defendant is voluntary as well as informed.[127] In Heaney v Ireland, the Court had to consider the compatibility of convictions under s.52 of the Offences against the State Act 1939. S.52 (which was designed to deal specifically with terrorist offences) allowed the police to require a detained person to give a full account of his movements and so on. A refusal to do so or the provision of an inaccurate account constituted an offence. The Court found that the convictions constituted compulsion which "destroyed

the very essence of their privilege against self-incrimination and their right to remain silent."[128] The Court further held that the security situation in Ireland could not make proportionate interferences with the Article 6(1) rights which destroyed them altogether.[129]

2.4.6 Equality of Arms

A defendant is entitled to "equality of arms" with the prosecution in the opportunity to influence the tribunal. This implied principle of the right to fair trial is pervasive, covering not only the trial procedure itself but extends to the collection and use of evidence. The principle requires, inter alia, that the prosecution should disclose all material evidence, both for and against the defendant, to the defence.[130] Like many other defence rights, this right to disclosure is not absolute. Particularly in terrorist trials, the State may wish to keep the sources of some of its evidence from the defence. If it does, it must have in place a procedure which, so far as possible, satisfies the principle of equality of arms.[131] Given that some terrorist trials will have international aspects, the application of the principle of equality of arms to international criminal assistance is likely to be of significance in such trials.[132]

2.4.7 Witnesses

The Court has conceded that the rights of a defendant to call witnesses and to confront and cross-examine witnesses against him are not absolute rights – a court may limit the rights where there is a compelling reason to do so.[133] The arrangements must be the least adverse to the defendant that the necessity will allow and the evidence so given should not be the major item in the case against the defendant. Thus, in limited circumstances, the prosecution need not reveal the source of intelligence evidence or security personnel may give their evidence anonymously or behind screens, the same for informers.[134] Where a court allows evidence to be given in such circumstances, it is required that there be appropriate procedures to assess the necessity for so doing, in which the defence can take part, to the extent that the purpose of the protective measures is not undermined.[135]

2.4.8 Fair Trial – Conclusion

Because of the concentration of each case before the Court on its particular facts, the final question for the Court is "Was this trial fair?" Where there are modifications in the ordinary criminal law, whether on the admission of evidence or the confrontation with witnesses, the Court will ask itself whether the prosecution had presented evidence capable of satisfying the burden of proof and whether the defence has had an opportunity to influence the tribunal at least equal to the prosecution's. An important consideration is that, wherever the rights of the defence are diminished, so far as possible, there should be some compensating protection. In PG and JH, the Court, finding no violation, said,

> "... as far as possible, the decision-making procedure complied with the requirement of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."[136]

For States, there is some flexibility in that "as far as possible"; for individuals, some protection in "adequate safeguards" but it must be conceded that conclusive, abstract assessment on any discrete proposal to modify criminal procedure is difficult.

2.5 Article 7 – The Principle of Legality

The principal objective of Article 7 is to protect individuals against retrospective criminalisation of their conduct. Further, the provision is concerned not just with formal illegality but to ensure, as elsewhere in the Convention, that the "law" is accessible and precise[137] – it must be doubted whether an offence of "terrorism" would satisfy Article 7, given the difficulties of definition already alluded to. In Ecer and Zeyrek, the Court said that Article 7,

> "... should be construed and applied... in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."[138]

The principle extends to the indictment and the facts upon which the conviction was based: the State cannot argue that there were other offences or were other facts on which a prosecution could have been properly based. The applicants in Ecer and Zeyrek, were sentenced according to Prevention of Terrorism Law of 1991 (which imposed an addition 50% tariff on punishment for offences in connection with terrorism). The conduct on which the indictment was based occurred before 1991 but the prosecutor argued that the offences (aiding and sheltering terrorists) was a continuing one. The national court sentenced them on that basis. No evidence was brought about any conduct after 1991 (though it could have been).

2.6 Article 8 – Right to Respect for Private Life etc

The interpretation of Article 8 is a matter of great complexity.[139] For the present purposes, it will be assumed that the kind of measures States wish to take which impinge on the interests protected by Article 8 do interfere with a person's enjoyment of his Convention rights. Typically, the measures will be secret surveillance of persons and interception of their communications, increasingly covering electronic messages. The legality of these provisions will turn of the interpretation of Article 8(2), which permits interference provided that it was (a) in accordance with the law, (b) that it was for one of the objectives set out in Article 8(2), of which the interests of national security and the prevention of crime are the ones which will usually be invoked and (c) that it is necessary in a democratic society.

Again, the matter of "law" is not simply a formal inquiry into a domestic legal base for any action taken by the State. Where the interference consists of a criminal conviction of a person, the law under which the conviction was obtained must satisfy the standards of Article 7. Where the law confers powers on the State to interfere with a protected right, that law must be accessible and precise and must protect against arbitrary use of the powers by providing such controls as are compatible with their effective implementation. For instance, the Court is careful to ensure that there is protection of lawyer-client communications.[140] The approach of the Court is to determine what the State may justifiable do in substance to interfere with the right. It then fashions the procedural obligations of States (and the closely associated remedial one under Article 13) in such a way that they do not prevent the effective use of the power already conceded to the State.[141] Sometimes, there is no legal base at all for action taken by the authorities or the legal base is so defective that it does not constitute "law" in the Convention sense.[142] In these cases, there will be no need for the Court to proceed further to identify a violation.

Generally, there is no dispute about the aim for which the action is taken. Accordingly, the debate focuses on whether or not it was "necessary in a democratic society". The Court has conceded that in deciding this matter, it must have regard to a "margin of appreciation" in the State authorities, by reason, inter alia, with their great familiarity with conditions in the State and because of their superior fact-finding capacity.[143] It is necessary for the State to show a "pressing social need" for the interference with a human right and that the interference is "proportionate" to the need.[144] In reaching its conclusion to what is a multi-faceted inquiry (and not, as sometimes suggested, a simple balance), the Court will take into account the "background of terrorism", which, by reason of the serious threat it poses to public order and because of the problems States face in investigating terrorist crime, might be sufficient to justify interferences beyond those necessary for the investigation and prosecution of ordinary crime. Many of the techniques used by the investigating authorities involve clandestine surveillance or interception, where it is not possible to give an individual a prior opportunity to challenge the legitimacy of the proposed action (and it may not even be feasible to provide the information at the conclusion of the operation). The Court has accepted that something other than pre-emptive judicial authorisation may be adequate. In Klass, the Court decided that telephone-tapping by the police in Germany, which was supervised by a confidential Committee chaired by a judge, was justified under Article 8(2).[145] In reaching its conclusion, the Court took into account of the threats arising from more sophisticated means of espionage and the development of terrorism – at the time Germany was facing several varieties of urban terrorism. While recognising the seriousness of any interference and the real possibilities of abuse by the authorities of their powers, the Court accepted the necessity and proportionality of the German arrangements, based on the whole scheme of the law. Once the necessity of secret interception was accepted, the control regime had to accommodate to its effective

operation, a big concession, which, by accepting secret legislative/judicial supervision in place of exclusive, public, judicial control of the executive, shows great faith in the efficacy of the separation of powers. The "background of terrorism" is, then, a significant element in the equation for deciding whether or not the State action falls within its margin of appreciation.[146]

It remains only to mention a point which relates to fair trial. In general, matters of evidence are for the national legal system to determine. There is no general rule in the Convention for the exclusion of evidence obtained by methods incompatible with the Convention. Accordingly, even if interception or surveillance evidence is collected in violation of the Convention standards, it will (with the exception of evidence obtained by breach of Article 3)[147] be admissible in criminal proceedings without violating an individual's fair trial rights under Article 6.[148]

2.7 Articles 10 and 11 – Freedom of Expression and Association

The Court attaches high importance to these rights because of their centrality to an effective democratic system and makes it clear that there is a close association between freedom of political expression under Article 10 and the freedom of association of political parties under Article 11. There are two, related aspects which are germane to our considerations. A plural democratic process requires that even unpopular opinions be heard and that political parties wishing to promulgate them be permitted. The fact that the aims of the political programme are anathema to government or a majority of the population is not, of itself, grounds for interference.[149] There are restricted limitations to this principle but the general approach of the Court is not to allow interferences simply on the basis that the views or programmes are themselves not protected by Articles 10 and 11. Rather, it decides whether or not the actual interference may be justified under Articles 10(2) or 11(2).[150] The content of the expression or the objective of the association will then be relevant to determining the need to interfere with it.[151]

It is important first to distinguish the expression of views which are the same as those of a terrorist group but which do not endorse the methods the terrorists adopt to secure their ends. Persons holding such opinions should not automatically be identified with the terrorist group. It seems unlikely that a State is entitled to demand that an individual group explicitly distance themselves from the terrorists' methods.[152] Nonetheless, there are limited circumstances in which a State might justifiably prohibit or punish the dissemination of expression or might proscribe or disband an association. The matter will be considered by the Grand Chamber of the Court in Refah Party v Turkey in an appeal brought by the applicant. The Third Section of the Court said that the programme of a political party may advocate change only by means which are legal and democratic and that the content of the proposed programme must itself be compatible with fundamental democratic principles, so that, for instance, the Party must

not propose to limit the State's role as the protector of human rights nor may it propose a system of government which is based on discrimination.[153] The question becomes more difficult where there is some link between political speech or a political association and a terrorist group. The Commission did uphold limited broadcasting bans on political republican parties in Ireland and Northern Ireland, holding it proportionate to the need to protect national security and prevent disorder and crime but the Commission did note that the support which Sinn Fein gave the Provisional IRA (a proscribed organisation) was such that it might lawfully have been proscribed itself.[154] As the attention of States now is going beyond the actual terrorist operatives themselves to taking co-ordinated action against their supporters, especially their financial supporters, one can expect the Court to endorse the harder line if a State wishes to limit expression which supports terrorist means, even if the speaker does not involve himself in the criminal activities of the active terrorists themselves. It is to be hoped, though, that the Vogt line will be held and that the Court will not countenance any thing like loyalty oaths from those against whom there is no evidence of active support for terrorism. This would keep on the State an evidential burden of demonstrating the link and so avoid the easy reduction of the rights of all who have any remote link with the terrorists – a crucial consideration where the terrorist claim to be protecting or advancing the cause of a whole ethnic group, the situation which prevails in Turkey, given the aspirations of the PKK: all Kurds should not be vulnerable in the enjoyment of their rights simply because of the activities of a group they have no means of influencing.[155]

2.8 1st Protocol, Article 1 – Right to Property

The most prominent demand made of States by the Security Council in its reaction to "11 September" was to require that they take effective action against terrorist sources of finance – action to freeze and, possibly, ultimately to confiscate the assets of terrorists and their supporters.[156] There is a wide margin of appreciation to States in regulating the enjoyment of possessions in their national law, including the power, in exceptional circumstances, to confiscate property.[157] In each case a State does so act, it will be limiting the "civil rights" of the property owner and the determination of these rights will be subject to a fair hearing under Article 6(1). There are two principal issues which arise: what is the condition for the freezing or confiscation of property? And how is the existence of that condition to be demonstrated? In some cases, confiscation will follow a criminal conviction – seizure of the proceeds of drug-trafficking, say. In Phillips, the Court held that presumptions as to the source of property (that it was obtained from trafficking) did not violate the presumption of innocence in Article 6(2) because the confiscation was part of the sentencing process which followed conviction on a criminal charge (this was the pre-condition); then, neither did the procedure fail the civil standard of fair trial because the presumption was rebuttable, the defendant could present evidence and the decisions were taken by a judge, applying the civil standard of proof (this was

an adequate procedure).[158] The question is whether the criminal conviction is a necessary condition for proceeding to confiscation or whether free-standing confiscation proceedings (triggered perhaps by a suspicion that the property owner were involved in crime) would be permissible under 1st Protocol, Article 1. The Court did raise the possibility, not present in Phillips, that an order based on an estimated value of assumed undisclosed assets might raise a question of fairness.[159] On the face of it, this would not enable a State to use the process except following a conviction and with respect to property presumed to be the product of the defendant's criminal activities (even if not simply the ones for which he was convicted). The procedure was justified as being necessary to secure the payment of a penalty within 1st Protocol, Article 1, para 2, the proportionality of the strict measure being determined against the pressing need to combat drug-trafficking, a case which could be made equally against terrorism.[160]

2.9 Article 13 – Right to an Effective National Remedy

It is natural enough to concentrate on the substantive protection the Convention gives to individuals so that the central part of Article 13 in the Convention system and the protection of individuals is often underestimated. Part of the reason for this is the obscurity of the language of Article 13 but the Court has substantially refined it to provide a workable understanding of Article 13. It has a dual role of providing efficacious and speedy (and in some cases, pre-emptive) remedies in the national legal order, to the advantage of individuals and, by doing so, it contributes to easing the case-load on the Court and enabling it to decide cases which truly need its judgment with greater consideration but with reasonable expedition. The Convention system depends upon States, especially their courts, taking notice of the European Court's jurisprudence and, so far as they are constitutionally capable, fashioning remedies to provide for national protection of Convention rights. As a result of the Court's considerations, we can now say that Article 13 provides the right that be an effective national remedy to consider the substance of an arguable claim that the Convention has been violated.[161]

Everything turns on "effective"[162] – ideally (but not necessarily) the process will be judicial, the avenue of redress must be accessible to the individual and the decision-maker must be capable of giving a decision which puts right the violation if the individual makes his case. Usually, these standards are met by some form of judicial review of public law powers within the State or by civil actions. Where positive obligations are at stake, the national body should be in a the position to order the authorities to take action. The signal development which emerges from the cases brought against Turkey which allege violations of Articles 2 and 3 is that Article 13 may, in some cases require the commencement of a criminal action, where individual wrong-doing contrary to Articles 2 or 3 is revealed by the investigatory obligations implied into those provisions.[163] Where there are independent national courts to which the individual has access,

the superior fact-finding capacity of such tribunals over the means available to the European Court is a further and significant factor in favour of a strong interpretation of States' obligations under Article 13. In Ergi the Court said that the Article 13 obligation was broader than those under Article 2. It,

> "entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure..."[164]

2.10 Fourth Protocol – Freedom of Movement etc[165]

2.10.1 Article 2 – Freedom of Movement and Choice of residence

Article 2 of the Fourth Protocol protects the freedom of movement and choice of residence of those persons lawfully within the State. Interferences with the rights may be justified under Article 2(3), according to law, for identified aims and as are necessary in a democratic society. Restrictions on freedom of movement have an impact on the right to liberty and there are links between this Article and Article 5 of the Convention. In Raimondo, the Court found residence restrictions imposed on a member of the mafia to be justified under Article 2(3), given the threat to public order the mafia posed.[166] This outcome suggests that, given the appropriate evidence, similar restrictions could be imposed on those involved in terrorism.

Article 2(2) provides the right to leave the State (a matter of importance given the provisions brought recently into effect in UK law allowing for the detention of persons against whom not charges have been brought but whom the State might not be willing to allow to leave.)[167]

2.10.2 Articles 3 and 4 – Expulsion

Article 3 prohibits the expulsion of nationals and Article 4 the collective expulsion of aliens – it is necessary that each case be considered on its own merits,[168] a protection reinforced by Article 1 of the Seventh Protocol, which provides for procedural rights for aliens lawfully within a State who are faced with expulsion. Given the international nature of much terrorist activity, these provisions must be taken into account for those State bound by them in fashioning their counter-terrorist strategies.

2.11 Article 15 – Emergency Derogation

It is perhaps surprising that, given the number of States that have had to deal with terrorist action in Europe, very few of them have felt the need to rely on Article 15 derogations to justify proceeding with their counter-terrorist proposals (and only one, the United Kingdom, has

found the need for such a declaration in its response to "11th September"). It might be that only these few States have regarded the actual threat of terrorism to be of sufficient gravity to meet the "public emergency" standard of Article 15 and/or that they have found quite enough flexibility in the Convention standards to accommodate any special provisions for counter-terrorist purposes.

It is for a State to identify the "public emergency threatening the life of the nation" and to notify (though not necessarily in advance of any action the State takes) the Secretary-General of the measures in derogation of its obligations that it wishes to take. The Court has generally accepted without much inquiry the State's claim that there is an Article 15 emergency. It laid down some parameters and indicated the evidence that would satisfy them in Lawless.[169] It is now clear that emergencies may exist in only part of a State and that legislation may be similarly geographically limited.[170] Where there is a long campaign of terrorism, the State may face the situation that the level of violence fluctuates substantially, whether because of gains made by the security forces, whether because of tactical quiescence by the terrorists. In Brannigan, the Court took a generous view of the British government's position that there was a continuing emergency arising out of Northern Ireland related terrorism, acknowledging a wide margin of appreciation to the government and saying that there was "no doubt" that there was a public emergency.[171] The level of disruption had moderated to such a degree that the government had felt able to withdraw its Article 15 derogation, before making a new one following the Brogan case,[172] without there having been any noticeable deterioration in the situation in the meantime – it was the overall, intermittent nature of the terrorist actions, capable of constituting a continuing emergency – on which the derogation was legitimately based.

For future terrorist threats, particularly threats from international terrorist groups, a State wishing to rely on Article 15 will face two evidential obstacles: first, because the power will be claimed in relation to a threat, there will have to be an assessment of the risk of the execution of the threat, as well as its seriousness; this prospective evidence is likely to be intelligence, which the State might have difficulty putting to the Court and, especially, of revealing to an applicant. However, something more than mere assertion is necessary if the Court's role is to be taken seriously.[173] To some extent, the undoubted sensitivity of determining the existence of an emergency, can be compensated for if the Court pursues the "strictly required" criterion for measuring the legality of any measures proposed by the State under cover of the derogation. In principle, the standard is a high one – more demanding than "necessary in a democratic society", itself more stringent than "reasonable". Nonetheless, its power of assessing the situation is a wide one. In Brannigan, the Court said,

> It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with the emergency situation for that of the Government which has direct responsibility for establishing the balance between taking effective measures to combat terrorism on the one hand and respecting individual human rights on the other...[174]

The Court was satisfied in Brannigan that the seven-day, pre-judicial detention power following arrest (which was condemned in Brogan) was "strictly required".[175] The intervening NGOs in Brannigan had contested this because the State had looked at the power exclusively in terms of the functional necessity of investigating terrorist crime and had not given attention to the vulnerability of detainees in these conditions – they argued for some element of supervision of the detention as a necessary ingredient for its legality, independently of the time for which the detention power could be invoked. The Court accepted that there were adequate safeguards against ill-treatment to save the seven-day power, notably, access to the courts to challenge the detention itself and the right of access to a lawyer after 48 hours.[176] In Aksoy, these protections were absent and Turkish law allowed for pre-judicial detention for up to 30 days – the applicant had been detained for at least 14 days. Even allowing for the lawfulness of Turkey's Article 15 derogation to meet the activities of the PKK terrorist war, the Court found that this measure of derogation could not be justified.[177]

Just as a State would prefer to convict terrorists through an Article 6-compliant trial rather than intern them, which would require an Article 15 derogation, so for other deviations from procedure which need the same justification, there is the political prospect that the terrorists affected by them will use them to claim a "political" status. There is, then, an incentive for a State to try to fashion its response to terrorism within the ordinary possibilities of the Convention. However, even if a State does make an Article 15 declaration, it does not give itself an unrestricted power to take counter-terrorist measures: the Court retains the power to review its actions against the standards of Article 15, in which the precise nature of the terrorist threat will be a central element.

2.12 Article 14 – Protection against Discrimination[178]

Article 14 protects against discrimination in the enjoyment of Convention rights, which means that it will often be associated with a breach of the Convention, though not necessarily so for it is enough, the Court has said, that the conduct complained of falls within "the ambit" of a Convention right. The list of prohibited grounds of discrimination in Article 14 is both a long one and an open one. Although the ground of discrimination may be relevant to the justification that a State makes for any differentiation between the way it treats people, the central thrust of

the Court's investigations is on the different treatment complained about and the explanation for it which the State gives. Not all differences of treatment are prohibited, rather those for which the State cannot give a "reasonable and objective" justification.[179] In considering whether or not the State has done this, the Court has developed an equivalent to the notion in American law of the "suspect category", where the burden of justification will be particularly high if certain grounds of discrimination are relied upon – race, sex, nationality, illegitimacy.

The Court frequently finds it unnecessary to pursue claims of a violation of Article 14 where it has already concluded that there has been a breach of another provision and, even when it does, applicants have had some difficulty in demonstrating that counter-terrorism action has been based on a discriminatory rather than a functional motive.[180] An associated obstacle for applicants is that the jurisprudence on indirect discrimination is immature and the Court has shown itself reluctant to shift the evidential burden to the State in such cases. Nonetheless, Article 14 is potentially of pervasive effect throughout the Convention. It is hard to imagine the circumstances when the Court would reach the conclusion that, even in an admitted Article 15 emergency, it was "strictly required" that a State discriminate in the sense the term is understood in the case law.

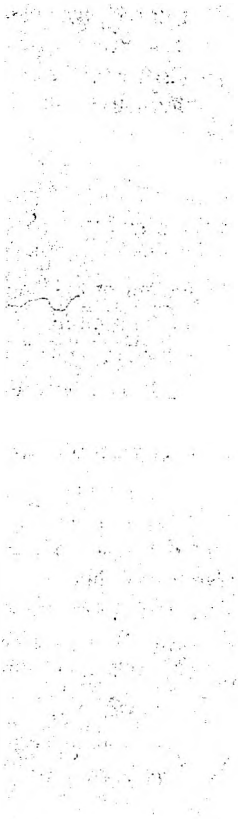
3. Conclusion

In Fox, Campbell and Hartley, the Court said,

> "[It] recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of human rights... Accordingly... the Court will... take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and overall object and purpose."[181]

The account of the Court's jurisprudence shows that the balancing exercise is neither a mechanical nor an easy task. It varies from right to right, from duty to duty and from terrorist situation to terrorist situation. Where the Court allows the context to have an impact on its judgment (and it does not when considering cases under Article 3), the Court has taken account of the practical circumstances, political as well as tactical, which face States but a common feature of its tolerance of interferences with or derogation from rights in the Convention is that the State should provide some mechanism of accountability for the use of its extended power. There can be differences about whether or not these measures are adequate

compensation but, given its status as an international court, the European Court of Human Rights could probably not have adopted any different strategy, requiring as it does the co-operation of States to give effect to its judgments.



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Turkey's August 2002 Reform Package and the Kurdish Language: A Glimmer of Light?

On August 3, 2002, the Turkish Grand National Assembly (the "Turkish Parliament") adopted Law No. 4771, Harmonization Law (3) (the "August Reform Package"). This was the third package of reforms passed by the Turkish Parliament in 2002 aimed at modifying various provisions of Turkey's laws in order to address a range of human rights issues.[1][2] These three reform packages followed a package of amendments to Turkey's constitution which was adopted in 2001, and all of these changes are explained in part by Turkey's ongoing pursuit of membership in the European Union (EU). While some have hailed the August Reform Package as a major breakthrough for Kurdish speakers, the immediate implications of the changes for the legal status of the Kurdish language and the rights of its speakers are, it is argued here, fairly minimal. Even the limited progress that has been made will depend, to a very significant degree, on the implementation of the changes by the administrative authorities of the Turkish State, and there is as yet no reason to believe that the attitudes of these authorities to the Kurdish language have changed very much.

The broader legal position of the Kurdish language in Turkey was explored in a recent KHRP report, prepared by the author of this article with solicitor Fiona McKay, entitled *Denial of a Language: Kurdish Language Rights in Turkey*[1][3] (the "KHRP Language Report"). As pointed out in this report, the use of the Kurdish language in both public and private has been subject to a wide range of restrictions, many of which exist up to the present. As noted above, the process of accession to the EU has forced the Turkish authorities and political class to reconsider this issue.

In particular, the EU has established both political and economic criteria for accession which must be met by all candidate countries such as Turkey.[1][4] The political criteria were laid down by the Copenhagen European Council in June, 1992, and these provide that candidate countries must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". The Accession Partnership between the EU and Turkey identified both short- and medium-term priorities for legislative changes in Turkey. Among the short-term priorities with respect to the political criteria (and which were to be met by March, 2002) were the strengthening of legal and constitutional guarantees for the right to freedom of association and peaceful assembly and encourage the development of civil society, and to remove any legal provisions forbidding the use by Turkey's Kurdish citizens of their mother tongue in TV/radio broadcasting. Among the medium-term priorities with respect to the political criteria were to guarantee full enjoyment by all individuals

without any discrimination and irrespective of their language, race, colour, sex, political opinion, philosophical belief or religion of all human rights and fundamental freedoms, to ratify the United Nations' *International Covenant on Civil and Political Rights* (ICCPR) and its first optional protocol and the United Nations' *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and *to ensure cultural diversity and guarantee cultural rights for all citizens irrespective of their origin*, and that *any legal provisions preventing the enjoyment of these rights should be abolished, including in the field of education* (emphasis added).

The Accession Partnership did not make clear what particular steps Turkey should take to "ensure" cultural diversity or what sort of rights "cultural rights" are included, but as was argued in the KHRP Language Report, cultural rights must go beyond the basic civil and political rights contained in the ECHR and the ICCPR, the minority rights set out in Article 27 of the ICCPR, and the broader cultural rights set out in the ICESCR, otherwise the Accession Partnership would not have made reference to "cultural rights" as a separate category.[185] As also noted in the KHRP Language Report, this impression is strengthened by the annual Regular Reports on Turkey's Progress Towards Accession, prepared by the European Commission. These Regular Reports make clear that the Commission views the Kurdish population as a minority which should be a beneficiary of minority rights, cultural rights and active State protection. In particular, these reports make clear that rights to things such as Kurdish language broadcasting and education are cultural and minority rights within the meaning of the Copenhagen criteria, and consistently make reference to Turkey's failure to sign and ratify the Council of Europe's *Framework Convention for the Protection of National Minorities* (the "Framework Convention"), thereby signalling the importance that the Commission attaches to this particular instrument in the promotion and protection of cultural and minority rights.[186] Given Turkey's professed desire to become a full member of the EU, it is submitted that it is appropriate to assess any changes instituted by Turkey in respect of the position of the Kurdish language and its speakers in light of the standards set out in international instruments relevant to minorities and their cultural rights, such as the Framework Convention, as well as other instruments of relevance to minorities developed within the Council of Europe, of which Turkey is a member, and within the Organisation for Security and Co-operation in Europe (OSCE), a process in which Turkey is a participant.

The changes contained in the August Reform Package that were of immediate relevance to the Kurdish language and its speakers focussed on two particular areas: broadcasting and education. With respect to broadcasting, prior to the amendments made to the Turkish constitution in October, 2001, the ability to broadcast through the medium of the Kurdish language had been constitutionally limited: Articles 26 and 28 of the Turkish constitution had banned free expression and the dissemination of thoughts and opinions in the press, by speech, in writing or in pictures or through other media "in a language prohibited by law", and until 1991, under Law No. 2932, the use of any language other than Turkish in publications

was prohibited by law.[187] In the constitutional amendments of October, 2001, references in Articles 26 and 28 to languages prohibited by law were removed, with the result that any constitutional obstacle to the use of Kurdish in the press or in the expression and dissemination of thoughts and opinions by speech, in writing or in pictures or through other media was also removed. However, these constitutional changes were not enough to ensure the use of Kurdish in the press and in broadcast media, because significant restrictions remained in Turkish legislation.

Radio and television broadcasting in Turkey is governed by the *Law on the Establishment of Radio and Television Enterprises and Their Broadcasts*, Law No. 3984 of 20 April, 1994 (the "RTUK Law"). Until the passage of the August Reform Package, the RTUK Law essentially required all broadcasting to be in Turkish. Paragraph 1 of Article 4 of the RTUK Law provided, for example:

> Radio, television and data broadcasts shall be conducted within a spirit of public service, in compliance with the supremacy of the law, the general principles of the Constitution, fundamental rights and freedoms, national security and general moral values. *The broadcasts shall be in the Turkish language. However, it may also be broadcast* [sic] *for the purpose of teaching foreign languages, which may have contribution* [sic] *to the formation of universal cultural and scientific works or transmitting music or news in those languages.*[188] (emphasis added).

As noted in the KHRP Language Report, the meaning of the exception set out in Paragraph 1 of Article 4 is not clear and has apparently not been judicially considered, but was understood by many informants as the basis for permitting the use of languages such as English, French and German, while excluding Kurdish.[189] Pursuant to Article 8(A) of the August Reform Package, however, a new paragraph was added to Article 4 of the RTUK Law, which immediately follows this first paragraph and provides the following:

> Furthermore, there may be broadcasts in the different languages and dialects used traditionally by Turkish citizens in their daily lives. Such broadcasts shall not contradict the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation. The principles and procedures for these broadcasts and the supervision of these broadcasts shall be determined through a regulation to be issued by the Supreme Board [of RTUK].

Significantly, this new paragraph does not make express reference to Kurdish, although the

scope of the provision should be sufficiently wide to encompass Kurdish, as various forms of the Kurdish language have, in fact, been traditionally used by Turkish citizens in their daily lives. It is also not clear how the new paragraph will be interpreted in light of other provisions in Article 4, particularly paragraph (h) (formerly (f)), which was not amended by the August Reform Package and which provides that "broadcasts shall use the Turkish language in its spoken form without destroying its characteristics and rules; shall ensure its development in the form of a modern cultural, educational and scientific language as a basic element of national unity and integrity".[190]

This new paragraph is, nonetheless, of considerable importance, in that it recognises that there are, in fact, languages and dialects other than Turkish which have been used traditionally in Turkey. To the extent that Kurdish medium broadcasting is permitted under authority of this provision, it will amount to an implicit recognition by the Turkish authorities that Kurdish is, in fact, a language, a point which many in positions of authority have refused to accept. Significantly, however, the provision, while admitting that such languages exist, scrupulously avoids any particular language, including Kurdish. The regulation referred to in the last sentence of this paragraph will, in practice, be of crucial importance in confirming that Kurdish does, in fact, come within the ambit of this new paragraph, and in defining precisely how much Kurdish language broadcasting will be permitted, at what times, on what channels and frequencies, in what parts of the country, and so forth.

It is understood that the regulation referred to in the previous paragraph was issued by RTUK in November, 2002. Although this regulation was not available to the author at the time of writing, it has been reported that broadcasts in Kurdish and in other minority languages could only be aired on state television and radio stations, and not on private broadcasts. The regulation is also understood to provide that radio broadcasts in Kurdish or other minority languages (such as Laz, Adige and Armenian; it is not clear whether the regulation mentions any specific language by name, either) could not exceed 45 minutes per day and could not exceed a total of four hours per week. It is also understood that television broadcasts in Kurdish cannot exceed 30 minutes a day and a total of two hours per week. It is not yet clear when the broadcasts will commence.[191] This information is consistent with earlier reports, which had added that two hours a day would be set aside for minority language broadcasts on one state broadcaster, GAP (which mainly broadcasts to the south-east of Turkey).[192]

Any assessment of the extent of the change being authorised by the amendment of Article 4 of the RTUK Law must also be tempered by the recognition that the Turkish state continues to have a wide range of other tools which could be deployed effectively to limit the extent to which Kurdish language broadcasting does take place. Already, the Turkish authorities have made broad use of provisions such as Article 8 of the Anti-Terror Law,[193] Article 312 of the

Penal Code[194], and Article 159 of the Penal Code[195] to prosecute broadcasting outlets which have played Kurdish songs which the authorities have found to contain lyrics which undermine the unity of the Turkish state. Similarly, RTUK itself has used other provisions of Article 4 of the RTUK law to close down broadcasting outlets which have played Kurdish songs which RTUK has found to undermine the unity of the state.[196]

Thus, it is still too early to make a definitive statement about the ultimate effect of the August Reform Package on Kurdish medium broadcasting. To the extent that these reforms do pave the way for such broadcasting, though, they would bring Turkey somewhat closer to meeting obligations imposed, relevant to minorities and to the cultural rights of minorities, such as the Framework Convention, Article 9 of which provides that members of national minorities should not be discriminated against in their access to the media, that States shall ensure, as far as possible, that they have the possibility of creating and using their own media and that States adopt adequate measures to facilitate their access to the media and in order to promote tolerance and permit cultural pluralism. Based on reports concerning the regulation under which the changes will be implemented, however, the position with respect to Kurdish-medium broadcasting still falls considerably short of international standards. Since private broadcasting through the medium of Kurdish is effectively foreclosed, the requirements of Article 9 of the Framework Convention have not been met; furthermore, such a blanket prohibition is arguably an unjustified infringement of the freedom of expression of Kurdish speakers, a right guaranteed already under the ECHR.

With respect to education, until the August Reform Package, the Kurdish language had no place whatsoever in the Turkish educational system at any level. Indeed, it was the harsh official response to petitions by university students for the limited teaching of Kurdish as an optional subject which inspired the KHRP mission reported in the KHRP Language Report. The most fundamental barrier to even the most limited presence of Kurdish in the educational system has been Article 42 of the Constitution, which simply provides that no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. This article was not amended by the October, 2001 package of constitutional reforms or by the August Reform Package. This constitutional provision is supported by other legislation; in particular, paragraph (a) of Article 2 of the Law on Foreign Language Education and Training, Law No. 2923, provides that Turkish citizens may not be taught their mother tongue in any language other than Turkish, and paragraph (b) provides that lessons concerning a wide array of subjects may not be taught in a "foreign language". These provisions also do not appear to have been amended by any of the recent packages, including the August Reform Package.

As pointed out in the KHRP Language Report, the Turkish authorities have relied on both the

constitutional provision and those of Law No. 2923 as the bases for the complete prohibition of Kurdish, including even the teaching of Kurdish at private establishments at evening or weekend classes. As also pointed out in the KHRP Language Report, though, the precise effect of all of these provisions is unclear, and they do not appear to go so far as to prohibit the teaching of Kurdish as a subject, although they may effectively prohibit any teaching through the medium of Kurdish.[197]

The August Reform Package has not ensured that the teaching of Kurdish as a subject will become part of the curriculum, or even an available optional course at State educational institutions. The package has, however, potentially opened the door to the teaching of the Kurdish language at private institutions. Article 11 of the August Reform Package made three significant changes in this regard. First, paragraph (A) of that article changed the name of Law No. 2923 to the "Law on Foreign Language Education and Teaching, *and the Learning of Different Languages and Dialects by Turkish Citizens*" (emphasis added). To the extent that Kurdish is a "different language" now covered by this law, this change arguably marks the recognition by the Turkish State that Kurdish is not a "foreign" language. Again, however, the legislation scrupulously avoids mentioning any particular language, including Kurdish, by name. Second, paragraph (B) of Article 11 amended Article 1 of Law No. 2923 to specify that "the purpose of the law was also to regulate the procedures pertaining to the learning of different languages and dialects traditionally used by Turkish citizens in their daily lives". Again, the change does not make specific reference to Kurdish, but the scope of this language would clearly encompass Kurdish. Third and most significant, paragraph (C) of Article 11 added the following to paragraph (a) of Article 2 of Law No. 2923:

> Private courses subject to the provisions of the Law on Private Educational Institutions No. 625 dated 8.6.1965 can be opened to enable the learning of different languages and dialects used traditionally by Turkish citizens in their daily lives.

This paragraph went on to make clear that such courses "cannot be against the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation". This, once again, could provide the basis for the Turkish authorities to effectively considerably limit the teaching of courses in Kurdish, even on the limited basis contemplated in this amendment. Finally, paragraph (C) provides that the procedures and principles related to the opening and regulation of these courses shall be undertaken through a regulation to be issued by the Ministry of National Education. Thus, as with broadcasting, this regulation will be crucial in confirming that Kurdish does, in fact, come within the ambit of this new provision, and in defining precisely how many Kurdish language courses will be permitted and on what terms.

It is understood that the regulation referred to in the previous paragraph was issued by the Ministry of Education in September, 2002. Although this regulation was not available to the author at the time of writing, it has been reported that under the new regulation, teachers will be required to go through a rigorous vetting process by the government before being permitted to teach in privately run institutions. They will have to be Turkish citizens and must demonstrate that they have not been convicted of any crimes against the State. To be eligible for the courses, it is reported that students will have to be above 18 years of age or to have parental approval for attendance.[198] It is also understood that students will have to have an 8-year elementary education diploma in order to attend such classes; effectively, this will mean that all students wishing to learn Kurdish on private courses will have to have learned Turkish.[199] Given that many Kurdish speakers have an insufficient command of Turkish and have not completed a Turkish elementary education, they will be unable to benefit from such courses. It is understood that the regulation does not specifically mention Kurdish, and that the Education Council of the Ministry of Education will set the curriculum on all such language courses.[200]

What is clear, however, is that the amendment in the August Reform Package, when taken together with the relevant regulation implementing the changes, falls well short of what the student protesters were seeking – the opportunity to learn Kurdish as part of their State education. The relative lack of teachers trained to teach Kurdish – itself a product of the complete exclusion of Kurdish from the education system – together with the restrictive licensing requirements which appear to have been set under the regulation, as well as the costs associated with private as opposed to public education, all suggest that the real impact of this change in the August Reform Package will be limited in the extreme. At best, then, this is a limited first step towards international standards in instruments directed at the rights of minorities, such as paragraph 1 of Article 14 of the Framework Convention, which affirms the right of every member of a national minority to learn his or her minority language.

In conclusion, then, it is still too early to say whether the August Reform Package has ensured even the limited progress in the area of Kurdish language broadcasting and the teaching of the Kurdish language in classes at private educational institutions. Much will depend on the regulations which implement the amendments contained in the August Reform Package, and both regulations appear to be quite restrictive. Much will also depend on the ongoing attitudes and practices of the administrative authorities of the Turkish State, which have a wide range of statutory bases for effectively emasculating the effects of these amendments. In this, it must be said that there is limited cause for optimism. For example, in spite of court rulings to the effect that parents are entitled to register Kurdish names for their children, many reports continue to come out of Turkey that this right is still being denied. Significant attitudinal changes will need to occur in order for even these limited changes to be effective. It must also be borne in mind that the use of Kurdish is effectively restricted in many domains beyond

broadcasting and education, in ways that have significant negative consequences on the daily lives of Kurdish-speaking Turkish citizens.[201] None of these areas have yet been addressed by Turkey, and are unaffected by the August Reform Package. Even if the recent changes are fully implemented, then, Turkey has a very considerable way to go before the linguistic and cultural rights of minorities, including members of the Kurdish minority, are given the sort of respect which is required under the main international instruments dealing with the rights of minorities.

Section 2: Case Summaries and Commentaries

A. Case News – Admissibility decisions and communicated cases

Extra-Judicial Killings

Andreou v Turkey
(45653/99)
European Court of Human Rights, Communicated in April 2002

Wounding of applicant by shots fired by soldiers of the TRNC near the UN buffer zone – Article 2 (right to life) – Article 3 (prohibition of torture and inhuman or degrading treatment)

Facts
In 1996 the applicant attended the funeral of a friend of her son who had been beaten to death in the UN buffer zone. After the funeral, a number of people gathered near where the incident had occurred. The applicant remained outside the buffer zone, observing from a distance. At a certain point soldiers started shooting from the area under the control of the Turkish armed forces. Several people were wounded, including the applicant, who was hit by a bullet in the abdomen. She had to be operated on and lost a kidney. She claims to be still suffering from this injury, as a result of which she has not been able to find work and has suffered psychological distress.

Communicated to the Turkish Government under Articles 2 and 3 of the Convention.

Disappearance

İpek v Turkey
(25760/94)
European Court of Human Rights, Admissibility decision of May 14, 2002

Disappearance – Article 2 (right to life) – Village destruction – Article 13 (right to effective remedy) – Protocol 1 Article 1 (protection of property)

Facts
The application was brought by Abdürrezzak İpek and concerns the disappearance of his two sons and the destruction of their home.

On the 18 May 1994, soldiers from the Gendarmerie Headquarters in Lice raided the Dahla settlement of Türeli village near Lice, province of Diyarbakir. They gathered the villagers together and set fire to all the houses in the village. They subsequently released all the villagers but left the settlement with the applicant's sons and several other men. Four of these men were later released but three of them, including the applicant's two sons, remained in custody. The applicant requested information from the Lice Police Headquarters, Lice Gendarmerie Headquarters and the Emergency Legislation Governor in Diyarbakir. The authorities denied that the men had been detained.

Complaints

The applicant complained under Articles 2, 3, 5, 13 and Article 1 of Protocol No. 1 of the Convention.

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

Invoking Article 3 of the Convention, he referred to his inability to discover what has happened to his sons.

He complained of a breach of Article 5 of the Convention in respect of the unlawful detention of his sons, 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, as well as the inability to bring proceedings to have the lawfulness of his sons' detention determined.

He further alleged 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 complained under Article 1 of Protocol No.1 of the Convention of the destruction of his home.

The Government submitted that the application should be declared inadmissible as being premature, imaginary and ill-founded as the investigation showed that no operation had been conducted in the area on 18 May 1994 and that the applicant's sons had not been taken away by security forces.

Held

The Court unanimously declared the application admissible.

Torture and Inhuman or Degrading Treatment

Tepe (Talat) v Turkey

(31247/96)

European Court of Human Rights: Admissibility decision of January 22, 2002.

Article 3 (prohibition on torture or inhuman or degrading treatment) – Torture of human rights defender

Facts

The application was brought by Talat Tepe, a lawyer practicing in the State Security Courts in Turkey. On 9 July 1995 the applicant was arrested at the airport in Istanbul on the grounds that he was prohibited from leaving the country. He was detained and handed over to the Bitlis Security Directorate on the 18 July 1995. He was accused of aiding the PKK and allegedly beaten and tortured. The applicant agreed to sign and accept the charges against him but, on pleading duress and inhuman treatment, his release was ordered by the Diyarbakir State Security Court on 20 July 1995. Concerning the applicant's allegations of torture whilst in detention the Bitlis Provincial Administrative Council decided on 18 April 1996 that no prosecution should be brought against the police officers concerned. On 6 June 1996, the Diyarbakir State Security Court acquitted the applicant of charges of aiding and abetting the PKK (brought on 24 November 1995).

Complaints

The applicant complains under Articles 3, 5, 6, 13 and 14 of the Convention.

The applicant complains under Article 3 of the Convention that he was the victim of inhuman and degrading treatment or torture while in police custody.

He also complains under Article 5 of the Convention (right to liberty and security) that his detention was not in accordance with a procedure prescribed by law.

He claims under Article 6 of the Convention that there exists no independent and impartial tribunal before which he could initiate proceedings in relation to his allegation of torture.

He claims under Article 13 of the Convention that he had no effective remedies as regards the violations of his Convention rights.

He complains under Article 14 of the Convention that he was subjected to discrimination due to his Kurdish origin.

The Government submits that the applicant failed to exhaust domestic remedies and points to the inaccuracies in the medical report relied on by the applicant.

Held
The European Court declared all of the applicant's complaints admissible.

Commentary
In regions where human rights abuses are common, defenders of human rights, like the applicant in this case, are frequently subjected to pressure. Where a lawyer faces pressure for taking a case for another individual to the Court, this can in itself constitute a violation of the European Convention (Article 34: the right to bring applications under the Convention). This reasoning has been used in previous cases including *Kurt v Turkey* (24276/94), where the Court found that a violation of the Convention had occurred where the applicant's lawyer faced criminal proceedings due to his filing of an application to the Court.

Furthermore, lawyers are the only professional group to enjoy special protection from the United Nations which in 1990 agreed a statement of basic principles on the role of lawyers.

Nuray Şen v Turkey
(41478/98)
European Court of Human Rights, Admissibility decision of April 30, 2002

Article 3 (prohibition of torture and inhuman or degrading treatment) – Length of detention – Article 5 (right to liberty and security) – Article 13 (right to effective remedy)

Facts
The applicant, Nuray Şen, is a Turkish national. She was the director of the Mesopotamia Cultural Centre (MKM) in Istanbul, which works for the preservation of the culture and art of the peoples who have lived and currently live in Mesopotamia, mainly Kurds. In November 1995, she travelled to Diyarbakir, where she was arrested, along with nine of her MKM colleagues. They were brought to the Gendarme Intelligence and anti-terrorism Headquarters in Diyarbakir, and Mrs Şen was held in custody for eleven days. Although they were taken for a medical examination at the Diyarbakir Forensic Medicine Institute, the applicant alleges that no examination took place. Another medical report from 10 November 1995, drawn up in relation to the ten detainees, stated that there were razor blade injuries on the bodies of two of the applicant's co-detainees.

While in custody, the applicant claims that she was subjected to a range of torture and abuse. She was allegedly repeatedly beaten and kicked, sexually abused and threatened with rape,

continually blindfolded, stripped and held under cold water, subjected to electric shocks, constantly verbally abused, made to run on the spot for long periods of time, forced to listen to loud music and deprived of food. Furthermore, she claims that while being interrogated, she was threatened with death and forced to sign a statement without reading it in which she recognised being connected to the PKK. She did not have access to a lawyer, nor were her relatives informed that she had been taken into custody.

On 21 November 1995, the applicant was charged at the Diyarbakir State Security Court and sent to Diyarbakir High Security Prison. She was released on bail on 15 February 1996.

The Government claims that the applicant had told the Public Prosecutor that the police officers had not treated her badly. In addition, in January 1997, following the introduction of the present complaints with the then European Commission, an investigation based on the 1995 medical reports and carried out by the Diyarbakir chief public prosecutor concluded that there was no evidence that the applicant had been subjected to torture.

Complaints

The applicant complained of violations of Articles 3, 5 and 13 of the Convention.

The applicant complained of violations of Articles 3 and 13 of the Convention on account of the fact that she was tortured while in custody and that the authorities failed to investigate adequately her complaint.

The applicant further complained under Article 5 of the Convention that she was detained for eleven days and was not brought before a judge within a reasonable time.

The Government claims that the applicant has failed to exhaust domestic remedies within the meaning of Article 35(1) of the Convention, submitting that it would have been possible for the applicant to seek redress before the administrative courts under Article 125 of the Constitution. The applicant claims that such remedies offered domestically were illusory, inadequate and ineffective.

Held

The complaints under Articles 3 and 13 of the Convention were declared inadmissible.

In relation to Article 3, the Court found that the applicant had failed to exhaust domestic remedies as laid down in Article 35(1) of the Convention: she did not bring her allegations to the attention of the national authorities nor did she lodge an appeal against the January 1997 Public Prosecutor's decision. The Court further concluded that the applicant had not

substantiated her allegation that she would have been intimidated if she had appealed against the Public Prosecutor's decision.

The Court also found inadmissible the applicant's complaint under Article 13 of the Convention for non-compliance with the six-months rule laid down in Article 35(1) of the Convention. The Court observed that the applicant's custody ended on 21 November 1995 and that the applicant invoked her complaint under Article 13 of the Convention in her observations in reply to those of the Government submitted to the Court on 30 March 1999, i.e., more than six months later.

The case as regards complaints under Article 5 regarding the length of her 11-day detention has been adjourned, pending a response by the Turkish government.

Commentary

Nuray Şen brought her complaints to the Court in April 1996, initially as a supplementary petition to an earlier case in 1994 regarding the alleged killing of her husband by state agents. The Court declared this earlier case admissible in March 1996 and subsequently held a fact-finding hearing in June 1998. Because the taking of evidence was limited to issues declared admissible, it was decided that Mrs Şen's later complaints would be registered as a separate application.

Regarding the two medical reports which led the Diyarbakir chief public prosecutor to take a decision not to prosecute, the applicant referred to the Amnesty International report 'Turkey: Human Rights and the Health Professions' (1996) and to the Physicians for Human Rights report 'Torture in Turkey and its Unwilling Accomplices" (1996). She invited the Court to find that, in the light of her own evidence about the treatment she suffered and the evidence of a practice of torture contained in these reports, no credence should be given to medical reports which suggest that there was no evidence of ill-treatment in the absence of a full investigation into the facts on which her complaints were based. The Court noted that ill-treatment in custody is prohibited by the Turkish Criminal Code and that it had not been disputed in the instant case that if such acts did take place, as alleged, they would constitute criminal offences. However, the Court found that the applicant did not comply with the exhaustion of domestic remedies rule laid down in Article 35(1) of the Convention. In these circumstances, the Court did not consider it necessary to establish whether, as alleged by the Government, the applicant told the public prosecutor during the course of the investigation that the members of the security forces who questioned her had not behaved badly towards her.

Karagöz v Turkey
(78027/01)

Duşun and Yasar v Turkey
(4080/02)
European Court of Human Rights, Communicated in March 2002

Article 3 (prohibition of torture and inhuman or degrading treatment) – Article 3(c) Legislative Decree no. 430 – Length of detention – Article 5 (right to liberty and security)

Facts
The applicants were arrested in October and November 2001 and taken into custody at the Diyarbakir gendarmerie command. The State Security Court ordered their detention pending trial, following which they were transferred to prison. Following requests under Article 3(c) of Legislative Decree No. 430, the judge authorised the return of the applicants to the gendarmerie for questioning for a maximum period of 10 days. This order was renewed twice for the first and third applicant, each time for 10 days. The applicants alleged that they were subjected to ill-treatment while being questioned. The Public Prosecutor declined jurisdiction and transmitted the file on the complaints to the Diyarbakir Public Prosecutor's Office.

Communicated to the Turkish Government under Articles 3, 5(1) and 18 of the Convention.

Freedom of Expression

Karakoc and Demokrasi Bariş Partisi v Turkey
(43609/98)
European Court of Human Rights, Communicated in January 2002

Leader of political party prevented from entering Southeast Turkey where meetings of his party were to take place

Facts
The first applicant is the chairman of the Democracy and Peace Party, the second applicant. The party's leaders decided that the first applicant should visit several towns in the Southeast of the country with members of the management committee in order to meet the local population and civilian bodies. The programme for the visit was sent to the governors of the two provinces concerned in order to obtain the necessary authorisations. Once the party leaders had reached their destination, they were advised that because of the state of emergency that had been declared there the Regional Governor had prohibited their visit to the region on

the basis of section 11(k) of Law No. 2935, which relates to the "establishment of the region where the State of Emergency has been declared". That provision laid down that any person or group could be banned from entering all or part of the region covered by the state of emergency or be expelled from it.

Communicated to the Turkish Government under Articles 10, 11, 13 and 14 of the Convention.

Destruction of Homes/Property

Eski v Turkey

(44291/98)

European Court of Human Rights, Communicated in April 2002

Member of political party – visit to state of emergency region prohibited – Law No. 2935 – Article 10 (freedom of expression) – Article 11 (freedom of association)

Facts

The applicant is one of the elected members of the steering committee of the Democracy and Peace Party (DBP) who decided to visit various towns in Southeast Turkey to meet local people and civil organisations. The programme of the visit was sent to the mayors of the towns concerned with a request for the necessary authorisation. The prefect of the region, where a state of emergency was in force, decided to prohibit the applicant from entering Van under Act No. 2935. The DBP members, including the applicant, who were travelling en route to the region were arrested and prevented from entering.

Communicated to Turkish Government under Articles 10, 11 and 13 of the Convention.

Freedom of Assembly and Association

Vatan (People's Democratic Party) v Russia

(47978/99)

European Court of Human Rights, Communicated March 2002

Activities of local branch of party suspended for 6 months – Article 6 (right to a fair trial) – Article 11 (freedom of assembly and association) – Article 34 (right of individual application)

Facts

The applicant is the People's Democratic Party, also known as the Vatan. It was created to support the rebirth of the Tartar nation and to protect Tartar's political, socio-economic and

cultural rights. In October 1997 a regional branch of the Vatan launched an appeal to the indigenous population of the Volga region, calling them to celebrate their ancestors, deploring the discrimination which they had endured from the authorities, promoting indigenous languages and calling for a return to Islam. In May 1998 this branch of the party obtained from the Mayor of Ulyanovsk the authorisation to hold a ceremony; it took place a few days later. In June 1998 the Regional Prosecutor applied to the Regional Court for the activities of this branch of the Vatan to be suspended on the ground that the party's activities were against the Constitution. In July 1998 the Regional Court granted the Prosecutor's request and suspended the activities of the regional branch of the Vatan for six months. In order to reach its decision, the court took into account, in particular, the appeal of October 1997 which called for "de-colonisation of nations captured by Moscow" to "start the national liberation fight" and to "return to Islam". The court also referred to the fact that this regional branch of the Vatan had held a religious ceremony in the centre of Ulyanovsk in breach of the terms of the Mayor's authorisation whereby it should have been circumsubscribed to worship places and cemeteries. The regional branch contested this assertion, arguing that the ceremony had taken place in the allowed areas. The Supreme Court upheld the Regional Court's decision.

Communicated to the Russian Government under Articles 11 and 34 of the Convention.

Inadmissible under Article 6(1) of the Convention: The proceedings before the Regional Court and the Supreme Court dealt exclusively with the question of whether the association could pursue its political activities. Proceedings which determine political rights do not fall within the ambit of Article 6(1). Besides, the question of the financial consequences of the suspension of the activities of the regional branch of the Vatan was not raised during the proceedings. Therefore, these proceedings did not determine the applicant's civil rights and did not fall within the ambit of Article 6 of the Convention. It was therefore incompatible *ratione materiae*.

Freedom of thought, conscience and religion

Helmi Baspinar v Turkey

(45631/99)

European Court of Human Rights, Admissibility decision of October 3, 2002

Social security card denied – photographic portrait wearing Islamic scarf – Dismissal of husband from army – Supreme Military Council – Article 94(b) Law No. 926 – insubordination and immoral conduct – Article 8 (right to respect for private and family life) – Article 9 (freedom of thought, conscience and religion) – Article 13 (right to an effective remedy)

Facts

In 1996 the applicant requested to have a social security card for his wife. This request was refused on the grounds that photography showing his wife carrying an Islamic scarf was not acceptable for the social security identity cards.

On 16 June 1998 the Supreme Military Council decided to discharge the applicant from the army on grounds of acts of insubordination and immoral conduct pursuant to Article 94(b) of Law 926.

Complaints

The applicant complains under Articles 6, 8, 9, 13, 14 and 17 of the Convention.

The applicant complains under Article 6 of the Convention that, having regard to its severe consequences, his discharge from the army imposed by the Supreme Military Council can be regarded as a penal sanction rather than a disciplinary one. The applicant further complains that he had no recourse to challenge the decision of the Supreme Military Council. He points out that the decisions of the Supreme Military Council are not subject to judicial review according to Article 125 of the Turkish Constitution.

The applicant complains under Article 8 of the Convention that the decision constitutes a breach of his right to respect for his private and family life, insofar as it was based on his family and wife's way of life and behaviour.

The applicant complains under Article 9 of the Convention that the decision amounts to a violation of his right to freedom of thought, conscience and religion. He maintains that the implicit reason for the decision was based on his religious convictions and his wife's Islamic scarf.

The applicant complains under Article 13 of the Convention of the lack of any independent national authority before which any complaints can be brought with any prospect of success.

Furthermore, the applicant complains under Article 14 of the Convention in connection with Article 6 § 1 that the legislation constitutes discrimination between soldiers whose cases are subject to the examination of the Supreme Military Council and those whose cases are subject to the examination of the General Staff.

Finally, the applicant complains under Article 17 of the Convention that his discharge constitutes a violation of his rights guaranteed by the Convention since he had no recourse to challenge the decision of the Supreme Military Council.

Held

(1) The Court held the complaint under Article 6 of the Convention to be inadmissible.

(a) The existence of "any criminal charge". The Court observed that in choosing a military career the applicant was accepting a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. The Court notes that the essence of the sanction of discharge imposed to the applicant falls into the field of disciplinary proceedings and addresses itself only to one given group. Consequently the Court concludes that the decision of discharge cannot be considered as a "criminal charge" within the meaning of Article 6 of the Convention.

(b) The existence of a "determination" of "civil rights". The Court considered that Article 6(1) of the Convention was not applicable as the applicant was employed as an officer in the Turkish army and could therefore be regarded as a direct participation in exercise of the public authority and functions.

(2) The Court recalled that, as Articles 14 and 17 of the Convention were taken in conjunction with Article 6(1), the inapplicability of Article 6 would thereby render the complaints under Articles 14 and 17 inadmissible.

(3) The Court noted that the Supreme Military Council's order was based not on the applicant's religious beliefs and opinions but on his conduct and activities in breach of military discipline and the principle of secularism. It followed that the applicant's complaint under article 9 was declared inadmissible.

(4) The Court considered the applicant's complaints under article 8 of the Convention inadmissible as his beliefs and opinions were not the basis for the Supreme Military Council's order.

(5) The Court recalled that Article 13 requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention. The Court found the applicant's complaints not "arguable", having regard to the violations contested under Articles 8 and 9.

Commentary
See also
Özcan v Turkey
(44199/98), below.

Özcan v Turkey
(44199/98)
European Court of Human Rights, Admissibility decision of May 15, 2001.

Dismissal from army – photographic portrait wearing Islamic scarf – Supreme Military Council – Article 50(c) Law 926 – insubordination and immoral conduct – Article 8 (right to respect for private and family life) – Article 9 (freedom of thought, conscience and religion) – Article 10 (freedom of expression) – Partly inadmissible

Facts
Before his discharge from the army, the applicant was serving as a specialist doctor in the GATA Military Hospital in Istanbul.

Following an administrative ordinance issued by the General Staff on 20 June 1995 the applicant and his family was denied access to the military premises on the grounds that photography showing his wife carrying an Islamic scarf was not acceptable for the military and social security identity cards. The applicant's close relatives carrying Islamic scarves were also not allowed in the military buildings.

On 22 April 1996 the applicant was appointed to the İzmir Military Hospital as the chief of the laboratory department.

On 28 May 1996 the applicant filed an action with the Supreme Military Administrative Court. He requested the court to annul his appointment to the İzmir Military Hospital.

In May 1998 the Supreme Military Council decided to discharge the applicant from the army on grounds of acts of insubordination and immoral conduct pursuant to Article 50(c) of Law 926.

Complaints
The applicant complains under Articles 3, 6, 7, 8, 9, 10, 13, 14 and Article 1 of Protocol No. 1 of the Convention.

The applicant complains under Article 3 of the Convention that his discharge from the army amounts to degrading treatment.

The applicant complains under Article 6(1) of the Convention that, having regard to its consequences and its degree of severity, his discharge from the army imposed by the Supreme Military Council should be considered a penal sanction rather than a disciplinary sanction. He further complains that he was not heard by an independent and impartial tribunal, insofar as the decision to discharge him was taken by an administrative body. Finally, he alleges that he had no effective remedy by which to challenge the decision of the Supreme Military Council, as decisions of that body are not subject to judicial review according to Article 125 of the Turkish Constitution.

Furthermore, he complains under Articles 7, 8, 9, 10, 13, 14 and Article 1 of Protocol 1 of the Convention.

Held

In the final decision of October 3, 2002 the Court unanimously declared the application inadmissible.

As for the applicant's complaints under Articles 8, 9, 10 the Court found that there was no interference with the rights guaranteed wherein. It followed that these complaints were, according to the Court, manifestly ill founded within the meanings of Article 35 §3 and had to be rejected in accordance with Article 35 §4.

Commentary

These cases are examples of problems on restrictions on dress and appearance for Muslims in Turkey on a much larger scale. The 1982 Turkish Constitution protects the principle of secularism as a fundamental principle of the State. The Constitutional Court has provided a definition of secularism which includes the following:

"Where religion goes beyond the spiritual life of the individual and relates to actions and behaviour which affect societal life, restrictions may be imposed and the abuse and exploitation of religion may be prohibited, with a view to protecting public order, public safety and the national interest."

However, this jurisprudence has been used to deny many Muslim women access to education and employment because the wearing of headscarves is restricted in educational settings or on state premises. In 1989, the Parliament attempted to amend the law on higher education to allow the wearing of the veil for religious reasons. However, at the request of the President of the Republic, the Constitutional Court set aside the proposed amendment and explained that to allow female students to cover their heads on university grounds might adversely affect public security and the unity of the nation because the headscarf or turban shows who belongs to which religion. They stated that this would, in turn, lead to religious conflict and inequality and was incompatible with the principle of secularism.

B. Substantive – Judgments

Extra-judicial killings

Haran v Turkey
(25754/94)
European Court of Human Rights: Judgment of 26 March 2002 – Strike out

Extra-judicial killings – Article 2 (right to life) – strike out

Facts
The case concerns the killing of the applicant's son, Vahdettin Haran, by security forces in May 1994. The applicant claims that on 12 May 1994, gendarmes and soldiers arrived in the applicant's village, convened everyone in the schoolyard and started burning houses. The applicant heard the sound of gunfire coming from his vineyard where his son had remained. Vahdettin's corpse was later found in the vineyard.

The applicant went to Lice and reported the killing of his son to the Public Prosecutor. The Prosecutor said he would not go to the village because he feared for his life and asked the applicant to bring the body to Lice for an autopsy, which the applicant did. The applicant was not given any information or any document regarding the autopsy but he was allowed to take his son's body home to be buried.

Complaints
The applicant alleged that his son was unlawfully killed by security forces in violation of Article 2 of the Convention. He also alleged a violation of Articles 3, 6 and 14 of the Convention on account of his son's death.

The Government, in a letter dated 9 October 2001, submitted a declaration requesting that the application be struck out under Article 37 of the Convention. In the declaration, the Government regretted the occurrence of individual cases of death resulting from the use of unjustified force; accepted that such excessive force constituted a violation of Article 2 of the Convention; undertook to issue appropriate instructions and adopt all necessary measures to ensure that the right to life was respected; noted that new legal and administrative measures had already been adopted which had resulted in a reduction in the occurrence of deaths in circumstances similar to those of the instant application; and offered to pay the applicant *ex gratia* £80,000.

Held
The Court decided to strike out the application (unanimously).

The Court noted the failure of the parties to reach a friendly settlement under Article 38 of the Convention. Having regard to Article 37(1) and taking into account the nature of the Government's admissions as well as the scope and extent of the undertakings referred to in the declaration, together with the amount of compensation proposed, the Court considered it was no longer justified to continue its examination of the application.
Commentary
The Court has continued its policy of 'striking out' cases on the basis of a statement from the Turkish Government, first seen in the KHRP case of *Akman v Turkey* (No. 37453/97, 26.6.01). In both cases, the applicant refused to accept the Government's offer of friendly settlement, which they considered was not sufficient to resolve their cases. From January to July 2002, there were 126 strike-outs in 192 cases against Turkey at the Court. Although the practice now appears widespread, two recent KHRP cases (*Togcu v Turkey* (27601/95, 9.4.02) and *T.A. v Turkey* (26307/95, 9.4.02)) have revealed dissent among Court judges regarding the 'striking out' procedure.[202]

Semse Önen v Turkey

(22876/93)
European Court of Human Rights, Judgment of May 14, 2002

Extra-judicial killing – Article 2 (right to life) – inadequate investigation – Article 13 (right to an effective remedy) – fact-finding hearing

Facts
The applicant is a Turkish national of Kurdish origin who stated that she brought the application also on behalf of her deceased parents, her deceased brother Orhan and ten other surviving siblings.

At the time of the events in issue, the applicant and her family lived in the village of Karatas. Tension had arisen between Karatas and its neighbouring village Balpinar due to the refusal of Karatas to accept the village guard system. This refusal had also resulted in pressure being applied to the villagers by the gendarmes.

On or about 15 November 1992, four Balpinar village guards were killed in a clash with the PKK. Shortly afterwards, gendarmes and village guards attacked the village of Karatas for several hours.

On 16 March 1993, the applicant's older brother Orhan Önen, and her parents were killed and the applicant wounded as a result of planned action by members of the Balpinar village guards to kill Orhan. The applicant's father was able to pull the scarf from the head of one of the intruders and shouted that he recognised the gunman as Ali Ertas, head of the Balpinar village guards, and his nephew Orhan Ertas, a former Balpinar village guard. The applicant's mother, who was seriously injured by a bullet, died on her way to hospital. The Commander of the local gendarme station, who had possibly been informed beforehand of the plan by the Balpinar village guards to kill Orhan, delayed the applicant's mother's access to medical treatment by refusing to provide a car to replace the defective minibus which was to transport her to a hospital.

The subsequent investigation of these killings was not only ineffective and inadequate in professional terms, but was in fact designed to cover up the involvement of the Balpinar village guards and to prevent the conviction of Ali and Orhan Ertas.

Complaints

The applicant alleged that her parents and brother had been deliberately killed by village guards without justification, in breach of Article 2 of the Convention. Moreover, the investigation was inadequate, in violation of Article 13 of the Convention. There were further breaches of Articles 3, 8, 6 and 14 of the Convention.

The Government contended that PKK guerrillas had a motive for the killing.

Held

In 1998, the European Commission held fact-finding hearings in Ankara at which they found Turkey's version of certain events in the case to be unsubstantiated and contradicted by substantial evidence. Concluding that the Önens had been murdered by two masked gunmen who entered the family's home after having introduced themselves as soldiers, the Commission found "grave deficiencies" in the State's investigation.

The Court confirmed the Commission's conclusions.

The Court found Turkey to have committed a procedural violation of Article 2 of the Convention in its failure to conduct a serious, adequate or effective investigation into the murders. However, the Court found that there was insufficient evidence to establish beyond reasonable doubt that they had been killed by State officers. Most notably, the Court found the investigation team to have committed multiple errors in standard criminal investigation procedures which included a failure to take any photographs of the crime scene, drawing an inadequate sketch map of the scene, and taking no eyewitness statements at the crime scene.

In addition, the Court found that the public prosecutor in the case requested that the Önen's death certificates state that they "were murdered by fire-armed members of the outlawed PKK terrorist organisation" without having first conducted an effective official investigation. Consequently, the domestic investigation in Turkey proceeded under the assumption that the PKK was responsible for the deaths, and constituted a violation of Article 13 of the Convention.

Commentary

There is often a dispute over facts in cases against Turkey at the Court. In this case, the Commission held a fact-finding hearing in Ankara to resolve inconsistencies between the parties' reports. The Commission noted several of its limitations with regard to the fact-finding hearing. In relation to the oral evidence, the Commission was aware of the difficulties in assessing evidence obtained through interpreters. In addition, the Commission had no powers to take specific measures to compel witnesses to give oral or written evidence. In the present case, despite the Commission's specific request, the Government failed to submit certain relevant documents. The Commission noted it was therefore faced with the difficult task of determining events on the basis of incomplete evidence. The Court determined thereafter that there was insufficient evidence to establish beyond reasonable doubt that the intruders had been State officers.

Unknown Perpetrator Killings

Sabuktekin v Turkey

(27243/95)

European Court of Human Rights, Judgment of March 19, 2002.

'Unknown perpetrator' killing – Article 2 (right to life) – Complicity of State agents – adequate or effective investigation – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy) – Fact-finding hearing

Facts

The applicant is a Turkish citizen. In September 1994 her husband, Salih Sabuktekin, a regional delegate of HADEP, was killed in front of his house in Adana, outside the State of Emergency area. According to the applicant, her brother-in-law tried to run after the killers, but was held back by plain-clothed police officers who arrested him and took him into police custody, from which he was released shortly afterwards. The police carried out an investigation at the scene of the murder and took statements from a number of witnesses. The Adana public prosecutor began a preliminary investigation. In July 1995 the Adana anti-terrorist branch

arrested and detained a suspect belonging to the illegal organisation, Hizbullah. An investigation was begun in connection with his suspected involvement in, among other things, the murder of the applicant's husband. He was acquitted for lack of evidence. The public prosecutor then requested the head of the anti-terrorist branch to pursue its investigation into Salih Sabuktekin's murder.

Complaints

The applicant argued that it was necessary to conduct a fact-finding hearing. There was a dispute between the parties as to whether Halil Sabuktekin had been prevented from pursuing those responsible for shooting at his brother-in-law. Furthermore, the statements taken by police, prosecutors and the anti-terror police could not be confirmed by the applicant, who is illiterate and had thumb printed them.

The applicant complained under Articles 2, 6 and 13 of the Convention.

The applicant argued that the murder had been carried out by the security forces or at their instigation, in substantive violation of Article 2 of the Convention.

As a separate violation of Article 2 of the Convention, it was argued that the authorities had failed adequately to protect the applicant's husband's life, particularly as members of HADEP were frequently victim to such attacks.

It was argued that the Turkish authorities had failed to carry out a prompt, adequate and effective investigation, in procedural violation of Article 2.

Finally, it was argued that the applicant had been denied effective access to a domestic remedy, in violation of Article 13, and that there had been a violation of Article 6 of the Convention. The Government objected that the domestic remedies had not been exhausted.

Held

The Court dismissed the Government's preliminary objections. The Government had referred to the availability of a remedy in administrative law which would result in an award of damages. The Court reiterated that the duty on the Contracting States under Articles 2 and 3 of the Convention to carry out investigation in order to identify and punish those guilty of fatal assault could be rendered illusory if, for complaints based on those provisions, an applicant was required to use a remedy, such as that one, resulting merely in an award of damages.

The Court held, unanimously, that there was no violation of Article 2 of the Convention with regard to the allegation that Salih Sabuktekin had been killed by the security forces or at their

instigation. The statement of the applicant's brother-in-law conflicted with the statements made by other eyewitnesses. The applicant's allegations were based on hypothesis and speculation rather than reliable evidence.

The Court held, unanimously, that there was no violation of Article 2 of the Convention with regard to the allegation that the investigation had been inadequate. Although it has not resulted in the identification of the perpetrator or perpetrators of the murder, it had not been entirely ineffective. It could not be maintained that the relevant authorities had remained passive in respect of the circumstances in which the applicant's husband had been killed.

The Court held, unanimously, that separate examination of the complaint under Article 6(1) of the Convention was unnecessary. This complaint was inextricably linked to the applicant's more general complaint concerning the manner in which the investigating authorities had treated her husband's death. It was therefore appropriate to examine it in relation to the more general obligation prescribed by Article 13 of the Convention.

The Court concluded, by six votes to one, that there had been no violation of Article 13 of the Convention. It was held that, in the present case, in the light of the various measures taken, it could not be maintained that the relevant authorities had remained passive in respect of the circumstances in which the applicant's husband was killed.

Judge Casadevall, *dissenting*, gave examples of specific inadequacies in the investigation.

Commentary

Prior to November 1998, a case in Strasbourg was examined in two stages. The Commission would deal with preliminary matters, including the question of whether or not domestic remedies had been exhausted, and issues of fact.

In the instant case, the Commission declined to hold a fact-finding hearing and proceeded to give its opinion. It found that it was not established beyond reasonable doubt that the applicant's husband was killed by or with the connivance of the security forces of the State. It considered, unanimously, that the investigation was not prompt, adequate and effective, resulting in a violation of Article 2 of the Convention. Finally, it considered, by 25 votes to 2, that there was also a violation of Article 13 of the Convention.

In contradistinction, the Court found that there had been no violations of Article 2 or 13 of the Convention.

The applicant had pleaded a violation of Article 2 on three grounds: first, that Salih Sabuktekin

had been killed by the security forces or at their instigation resulting in a substantive violation of Article 2; secondly, that there was inadequate protection for Salih's life in substantive violation of Article 2; thirdly, that the investigation had been inadequate in procedural violation of Article 2 of the Convention.

The first argument, that the applicant's husband was killed by or with the connivance of the State, was rejected unanimously by both the Commission and the Court, who considered that it was not established beyond reasonable doubt. This argument has been used in a number of cases involving killings by unknown perpetrators, but to date it has not been successful (see *Yasa v Turkey* No. 22495/93, 2.9.98; *Tanrikulu v Turkey* No. 23763/94, 8.7.99; *Kilic (Cemal) v Turkey* No. 22492/93, 28.3.00; and *Akkoc v Turkey* Nos. 22947/93, 22948/93, 10.10.00). To prove such allegations 'beyond reasonable doubt' is a hurdle in such cases, where there is often a lack of direct evidence to identify the perpetrators or independent evidence from the scene of the incident which would corroborate the applicant's version of events. If the allegations are correct, applicants are also unlikely to be given access to the resources of the State which would ordinarily be available to investigate murders. The applicant in *Sabuktekin* argued that it was necessary to hold a fact-finding hearing in order to gather and evaluate further evidence. The Convention mechanisms rejected the request, deciding instead to proceed to judgment.[203]

Where there has been a lack of direct evidence and the Court has taken a cautious approach to circumstantial evidence, litigants have called upon the Convention institutions to give a further dimension to the positive obligations imposed on States by Article 2(1) of the Convention. In previous cases involving killings by unknown perpetrators, *Kaya (Mahmut) v Turkey* (No. 22535/93, 28.3.00) and *Kilic (Cemil) v Turkey* (No. 22492/93, 28.3.00), the Commission and the Court have considered the reasoning that, at the relevant time, the authorities had actual or constructive knowledge that the deceased were at risk of unlawful attack. In *Kaya (Mahmut)*, it was found that the deceased, as a medical practitioner suspected by the authorities of aiding and abetting the PKK, was at this time at real and immediate risk of being the victim of unlawful attack due to the high incidence of such attacks occurring against suspected PKK supporters at that time. The Commission and the Court considered the question of whether the authorities had done all that could reasonably be expected of them to avoid the risk of such attacks against individuals who were at a high risk. The Commission and the Court, in those cases, found that they had not. In *Sabuktekin* the applicant argued that her husband, a member of HADEP, was at a similar risk; and the authorities had failed to provide adequate protection for his right to life. The Court did not provide reasons for declining to examine this complaint separately.

The Court held, unanimously, that there was no violation of Article 2 of the Convention with regard to the allegation that the investigation had been inadequate and therefore was a

procedural violation. Judge Casadavall dissented, arguing instead that there were several inadequacies in the investigation. The investigation had six of the fourteen types of failings of an investigation which were identified to be inadequate in *Ilhan v Turkey* (No. 22277/93, 27.6.00).

Ekinci v Turkey
(27602/95)
European Court of Human Rights, Judgment of July 16, 2002

'Unknown perpetrator' killing – Article 2 (right to life) – Complicity of State agents in killing – Obligation to provide adequate or effective investigation – Article 3 (prohibition of torture and inhuman or degrading treatment) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy)

Facts
The applicant is a Turkish national of Kurdish origin. The case concerns the killing of her husband, a prominent lawyer of Kurdish origin, in May 1995.

On 25 February 1994, road workers found Yusuf Ekinci's body alongside the E-90 highway in Gölba?i on the outskirts of Ankara, Turkey. A criminal investigation was opened into his death and an autopsy, carried out on 26 February 1994, found 11 bullet entry wounds on his body and concluded that he had died of bullet wounds to the head and breast.

The applicant submitted to the Court that the killing of her husband was one of about 400 so-called "unknown perpetrator" killings in 1994, as documented by various human rights organisations. The principal victims had included prominent Kurdish businessmen and intellectuals. At the time Yusuf Ekinci was killed, the focal point of the campaign against terrorism was the victim's native Lice (Southeast Turkey) and its surrounding villages. Moreover, the method used in the killing of Yusuf Ekinci was identical to that used in the murders of intellectuals and businessmen of Kurdish origin in the main Turkish cities in 1994. The applicant therefore alleged that her husband had been killed with the knowledge and under the auspices of the Turkish authorities, and that there was no effective investigation into his killing.

Complaints
The applicant relied on Articles 2, 3, 6, 13 and 14 of the Convention.

She complained that her husband was killed in circumstances indicating that agents of the Turkish State were in one way or another involved. She further complained of a failure by the authorities to protect her husband's life and to carry out an effective and adequate investigation into his killing (Article 2 of the Convention).

She alleged that the killing of her husband, the indifference of the authorities and their failure to carry out any serious investigation into the killing had caused her very great anguish, mental torment, stress and suffering, in violation of Article 3.

She complained that the authorities' failure to conduct an effective criminal investigation fatally undermined the effectiveness of any other remedy which might have existed, thus violating her rights under Articles 6(1) and 13 of the Convention.

She also alleged that her husband was killed because of his Kurdish origin, in violation of Article 14.

The Government complained that the applicant had not exhausted domestic remedies, as the investigation into the death of her husband was ongoing. It further submitted that, as the applicant claimed that the criminal investigation was not effective, her application had to be rejected for having been lodged out of time. The Government observed that the applicant's husband was killed in February 1994 whereas her application was introduced on 4 May 1995, more than six months later.

Held

The Court noted that there were no eye-witnesses to the killing (the witness referred to by the applicant had remained anonymous and, reportedly, was unwilling to give a written statement), and the only forensic evidence available consisted of a number of bullets found at the scene of the crime which a forensic examination had shown bore no resemblance to bullets previously examined. Thus, the Court found there was insufficient evidence to conclude that the applicant's husband was, beyond reasonable doubt, killed by or with the connivance of State agents.

However, as to the alleged inadequacy of the investigation, the Court noted that the investigating authorities failed to draw a link between the killing and an earlier killing with several similarities. Thus, the Court concluded that the investigation by the Turkish authorities into the circumstances surrounding the killing of the applicant's husband was neither adequate or effective. There had therefore been a violation of the State's procedural obligation under Article 2 of the Convention to protect the right to life.

With reference to Article 3 of the Convention, the Court recalled its finding that it had not been established that any State agent was implicated, directly or indirectly, in the killing of the applicant's husband and consequently there was no violation of Article 3.

With reference to Article 6 of the Convention, the Court considered that as no attempt was

made to take any proceedings before the domestic courts, it was not possible to determine whether these courts would have been able to adjudicate on the applicant's claims. However, by six votes to one, it was held that there had been a violation of Article 13 of the Convention in the failure to provide an adequate investigation.

Commentary

The allegation that the killing had taken place by or with the connivance of State agents once again faced an evidential hurdle (cf. *Sabuktekin v Turkey No. 28243/95, 19.3.02).* The applicant sought to highlight the failures of the investigation by referring to obvious omissions, such as the failure of the authorities to seek to identify a petrol station employee who had been an eyewitness.

The applicant submitted reports from human rights organisations and UN Special Rapporteurs to prove that there was a phenomenon of 'unknown perpetrator' killings of Kurdish businessmen or intellectuals at that time.

The Convention mechanisms have been invited in several cases to consider whether there was reason to believe that unlawful attacks were carried out by persons acting under the auspices of certain State authorities and whether other State authorities were aware of such acts (*op. cit. Kaya (Mahmut) v Turkey, Kilic v Turkey*). In those cases, the Commission considered the evidence of the 'Susurluk Report' of 1996. The Commission observed that this report, while expressly stated not to be an investigative or legal report, was drawn up under the instructions of the Prime Minister who has made the majority of it public. It is therefore a document of some significance.

"It does not purport to attribute responsibility or establish facts but describes and analyses certain problems brought to public attention. On this basis, it states that certain elements, particularly in the south-east, were operating outside the law and using methods which included extra-judicial executions of persons suspected of supporting the PKK. It also states that this was known to the relevant authorities. The report lends strong support to the allegations that State agencies, such as JITEM, were implicated in the planned elimination of alleged PKK sympathisers, including Musa Anter and other journalists."

Unfortunately, while such reports can instil strong suspicions of the involvement of State agents in extra-judicial killings, applicants nonetheless face a strong burden in establishing evidence 'beyond reasonable doubt'.

Death in Custody

Abdurrahman Orak v Turkey

(31889/96)

European Court of Human Rights, Judgment of May 14, 2002.

Death in custody – Article 2 (right to life) – obligation to refrain from excessive use of force – obligation to protect the lives of persons deprived of their liberty – obligation to provide adequate or effective investigation – Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 14 (prohibition of discrimination)

Facts

On 11 June 1993 the applicant's son, A.O., and one A.G. were arrested and taken to a gendarmerie station, before being transferred to barracks in Bitlis, where they were detained. According to the Government, A.O. and A.G. tried to escape on 14 June 1993 while they were under surveillance in a corridor in the barracks. During the attempted escape a fight allegedly broke out with the gendarmes. According to the incident report, A.O. found himself trapped between a wall and a door which had been forced open by gendarmes. He did not undergo any kind of medical examination after the fight. He subsequently went on hunger strike, during which he received only serotherapy. He was transferred to hospital on 20 June 1993. The doctors who examined him found that he had lost consciousness and had injuries all over his body. He was diagnosed as suffering from cranial trauma. On 23 June 1993 A.O. died. The following day an autopsy was carried out; it was again noted that A.O. had sustained injuries all over his body and the cause of his death was given as a stroke.

On 6 July 1993 the applicant lodged a complaint with the public prosecutor's office against the gendarmes. In the course of the investigation the public prosecutor took evidence from the gendarmes in question. At his request, a panel of four forensic medical experts drew up a report, concluding that the death had been caused by a traumatic shock to the cranium. Three of the persons charged and a number of other gendarmes who had been present at the time of the attempted escape gave evidence. At the public prosecutor's request, the criminal proceedings were stayed in accordance with a decree concerning the authority of the governor of the state of emergency region and the case was referred to the Administrative Council in Bitlis. On 17 August 1995 the Administrative Council decided not to bring criminal proceedings against the gendarmes in question, as there was insufficient evidence. That decision was quashed by the Supreme Administrative Court. In 25 November 1997 the Assize Court in Bitlis acquitted the gendarmes, holding that it was not possible on the basis of the evidence adduced before it to establish that the traumatic shock from which the applicant's son had died was attributable to them.

Complaints

The applicant alleged violations of Articles 2, 3, 5, 14, 16 and 18 of the Convention.

He alleged that the death of his son engaged the responsibility of the State, in violation of Article 2 of the Convention. Furthermore, the investigation had been inadequate.

The applicant alleged a violation of Article 3 of the Convention in respect of his son's injuries, for which the State had provided no plausible explanation.

The applicant alleged a violation of Article 5 of the Convention that his son's right to liberty and security had been violated.

It was also alleged that there was a violation of Article 6 of the Convention in respect of his right to a fair trial, and of Article 13 of the Convention, in respect of the applicant's right to an effective remedy.

Furthermore, the applicant alleged that the treatment received by his son was discriminatory, and based on his son's Kurdish origin.

Held

Article 2

The Court held, unanimously, that there had been a violation of Article 2 of the Convention.

It was not disputed that the applicant's son's death had been caused by a stroke resulting from traumatic shock; the origin of the injury was the point of dispute. However, irrespective of the origin of the injury that had led to A.O.'s death, reliable and persuasive evidence that the death was imputable to the State had been adduced. Injuries sustained following A.O.'s arrest engaged, in principle, the responsibility of the State: on the one hand, a "negative" responsibility, consisting in refraining from excessive use of force, and, on the other hand, a positive responsibility to protect the lives of persons deprived of their liberty. Although the applicant's son had injuries all over his body and was suffering from cranial trauma, he had not been transferred to hospital until six days after the alleged escape attempt; he had then fallen into a coma and died.

Regarding the alleged inadequacy of the investigation, the fact that the authorities had been informed of A.O.'s death in custody in itself imposed a duty on them to conduct an effective investigation into the circumstances of his death. The public prosecutor did not appear to have doubted the gendarmes' version of events since he had charged them with causing death through the excessive use of force during the alleged escape attempt. During the preliminary

investigation he had neglected to question A.G., whose statements were nonetheless crucial in that he had been the only witness present, apart from the gendarmes, when the fight had broken out. The subsequent inquiry conducted by the administrative authorities had not remedied these shortcomings.

Article 3
The Court held, unanimously, that there had been a violation of Article 3 of the Convention.

The autopsy report stated that A.O. had injuries all over his body. That report, and the one subsequently drawn up by a panel of forensic medical experts, confirmed the presence of traumatic lesions on the deceased's body. In the absence of any plausible explanation from the Government, it had been established that the injuries observed on A.O.'s body had been caused by treatment for which the State bore the responsibility.

Articles 6 and 13
The Court held, by six votes to one, that there had been violations of Articles 6 and 13 of the Convention.

The judicial investigation could not be regarded as effective within the meaning of Article 13, the requirements of which provision may be broader than the obligation under Article 2 of the Convention to conduct an investigation. Accordingly, the applicant had been denied an effective remedy and had not had access to any other remedies that were available in theory, such as an action for damages.

Articles 5, 14 and 18
In view of the Court's conclusion as regards compliance with those provisions, it was not necessary to examine the complaints separately.

Commentary
The Court noted that any injuries sustained by A.O., who had been in good health when arrested and showed no signs of illness or previous injuries, following his arrest engaged, in principle, the responsibility of the State. On the one hand, there was a "negative" responsibility, constituting from refraining from excessive use of force, and, on the other hand, a positive responsibility to protect the lives of persons deprived of their liberty. It was therefore not necessary to establish the precise origins of the injuries sustained, merely to prove that the circumstances engaged the responsibility of the State (see *Ribitsch v. Austria*, No. 18896/91, 4.12.1995, § 34).

Disappearance

T.A. v Turkey

(26307/95)

European Court of Human Rights: Judgment of April 9, 2002.

Disappearance – Article 2 (right to life) – Obligation to provide adequate or effective investigation – Strike out

Facts

This case concerns the 'disappearance' of a Kurdish farmer, Mehmet Salim A. ('A'), in August 1994 in the village of Ambar in Southeast Turkey. The application was brought on behalf of the applicant, T.A., the brother of A.

On 20 August 1994, A. was working in a field when the armed men in an unregistered car stopped and asked him to accompany them. When A. refused to go with them, they threatened him with their weapons, blindfolded him, tied his hands, took his identity card, punched him and forced him into their car. Several villagers testified that they had witnessed this abduction.

The family filed a series of petitions and complaints about his 'disappearance' to the authorities in order to find out where and why he was detained. His sister was told that A. was in the hands of the State and that there was nothing she could do for him. After additional requests for an investigation from A.'s family, the Bismil Public Prosecutor finally opened an investigation in September 1994, requesting information from the Bismil Gendarmerie Commander and also taking statements from A.'s wife, mother, son and a fellow farmer. Thereafter, A.'s family continued to request information about the progress of the case, but were given no replies from the Public Prosecutor. In 1995, the family received phone calls from unknown persons asking for money for A.'s release and also to keep secret the names of those who had abducted him as well as where and by whom he had been detained. The family refused these demands. In October 1995, A.'s sister gave a statement to the Bismil Gendarmerie Command that two gendarme officers and a Village Guard in the State's pay were responsible for her brother's abduction. Three days after she had given this statement, her house was raided by officers from the Diyarbakir Anti-Terror Branch who allegedly threatened A.'s sister with death and tried to abduct of her 12-year old son.

Two-and-a-half years after the abduction, the Diyarbakir Provincial Administrative Council decided not to take any proceedings against the gendarme officers and Village Guard on the basis of lack of sufficient evidence. The family later saw A. on a television news broadcast on 2 February 2000 which said that he had been apprehended in Diyarbakir and although the

Bismil Public Prosecutor confirmed that he had been apprehended, when the family tried to get further information and to see A., they were sent from one office to another and finally led to meet a prisoner who was not A. Following yet another petition by the A.'s sister to open an investigation, the Diyarbakir Public Prosecutor issued a decision not to open the case claiming that A. was not the complainant's brother.

Complaints

The applicant complained of the unlawfulness and excessive length of his brother's detention, of the ill-treatment and acts of torture to which his brother had allegedly been subjected in detention, and of the failure to provide his brother with the necessary medical care in detention. The applicant further complained that his brother had been deprived of the services of a lawyer and of any contact with his family. The applicant invoked Articles 2, 3, 5, 6, 8, 13, 14, 18, 34 and 38 of the Convention.

On 27 August 2001 the Court received a letter from the Government declaring that, "The Government regrets the occurrence of the actions which have led to the bringing of the present application, in particular the disappearance of the applicant's brother Mr Mehmet Salim A. and the anguish caused to his family. It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, such as in the present case, constitute violations of Article 2, 5 and 13 of the Convention. The Government undertake to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that the effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention. The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context." The Government argued that it was no longer justified to continue the examination of the application and requested that the case be struck out under Article 37 of the Convention. The Government also agreed to pay the applicant the sum of £70,000 for a final settlement of the case.

The applicant rejected this friendly settlement and asked the Court to deny the Government's request to 'strike out' the case, arguing that the terms of the declaration were unsatisfactory in that it contains no admission of any Convention violation including a failure to acknowledge that A.'s "disappearance" undermines and is inconsistent with the prohibition of torture under Article 3 of the Convention.

Held

The Court decided to 'strike out' the case stating that 'having regard to the nature of the admissions contained in the declarations as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application.'

Commentary

In this case, as in *Togcu v Turkey (No. 27601/95, 9.4.02)*, the applicants refused to accept the Government's offer of friendly settlement, which they considered was not sufficient to resolve their cases. This led the Court to strike out the cases on the basis of a formulaic statement from the Turkish Government and the payment of compensation.

However, in a strong dissenting opinion, Judge Loucaides stated that he found the Government's declaration to be "perplexing" in that it "seems to imply that the Government consider the Committee of Ministers as a more appropriate mechanism for enduring improvement in cases like this one... than an examination of 'this and similar' cases by the Court.... [signifying] a preference for a political organ rather than a judicial one." Judge Loucaides also noted that, "the Government do not admit any responsibility.... and give no undertaking to investigate the alleged disappearance in this case.... and the compensation... cannot rectify a violation in a situation where the State has not taken reasonable measures to give an effective remedy in respect of the relevant complaint through an appropriate investigation."[204]

Togcu v Turkey

(27601/95)

European Court of Human Rights, Judgment of April 9, 2002 – Strike out

Disappearance – Article 2 (right to life) – Obligation to provide adequate or effective investigation – Article 3 (prohibition of torture and inhuman or degrading treatment) – Article 5 (right to liberty and security) – Article 14 (prohibition of discrimination) – Strike-out

Facts

The application was brought by Hüseyin Togcu and concerns the disappearance of his son, Önder Togcu, in Diyarbakir, Southeast Turkey in November 1994.

According to the applicant, Önder Togcu's cousin had been taken into detention in relation to a criminal investigation and, when a photograph of Önder was found on him, he apparently made a statement to the effect that he and Önder were partners in the alleged crime. The cousin was subsequently released without charge. On or around 29 November 1994, Önder's

pregnant spouse felt unwell and was taken to the maternity hospital in Diyarbakir. Önder was with his wife at the hospital, but failed to return home and has 'disappeared' since. On the night of 29 November 1994, the applicant alleges that plain-clothes police officers came to his home in Diyarbakir and enquired about Önder's whereabouts. The applicant told them, knowing that this was not the truth, that Önder had left Kaysei three days earlier. According to the applicant, the police officers then told him that his son was in the hands of the police and that they would hand over his body in three days. The next day, Ali Togcu, Önder's brother, was apprehended by the police and taken to the Security Directorate. He was subsequently taken to the Diyarbakir Rapid Reaction Force detention facilities where he was interrogated and ill-treated. He was questioned about Önder's whereabouts. When he told the police officers that he did not know where his brother was, he was told that Önder had been apprehended. During his interrogation Ali could hear the screams of his brother Önder, although he was told that Önder had "gone to the mountains". After having been interrogated for about 4 to 5 hours and believing that he was dead, the police officers left Ali on a dump about 50 kms from Diyarbakir.

Continuing inquiries about Önder made by the family remained unanswered and family members were allegedly apprehended and detained by police who accused them of meeting and helping Önder, whom they alleged to be in the mountains. Ali Togcu was also allegedly approached by police officers who asked him for money in exchange for which Önder would not be killed. Following an application filed by the applicant's wife on 6 April 1995 with the Diyarbakir Public Prosecutor, she was informed by the authorities that the name of Önder Togcu was not in their records.

The applicant was heard by the Public Prosecutor for the first time on 16 July 1996. On 6 November 1996 the Diyarbakir Chief Public Prosecutor issued a decision not to take any proceedings. The investigation was apparently reopened in October 1999. As the applicant and his wife do not speak Turkish, their grandson Mehmet, who does speak Turkish, was present when their statements were taken. According to Mehmet, the official court interpreter distorted the statements and when he objected to this, Mehmet was removed from the Public Prosecutor's office and he was not allowed to read the recorded statements.

Complaints

The applicant alleged violations of Articles 2, 3, 5, 13, 14, 18, 34 and 38 of the Convention.

The Government submitted a declaration requesting that the application be struck out under Article 37 of the Convention. In the declaration, the Government regretted the occurrence of the actions which had led to the bringing of the application, in particular the disappearance of the applicant's son and the anguish caused to his family. The Government accepted that

unrecorded deprivations of liberty, such as in the present case, constitute violations of Articles 2, 5 and 13 of the Convention. The Government undertook to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that the effective investigations into alleged disappearances are carried out in accordance with its obligations under the Convention.

The Government then claimed that it was no longer justified to continue the examination of the application and requested that the case be struck our under Article 37 of the Convention. The Government agreed to pay the applicant the sum of £70,000 for a final settlement of the case. Again, as in *T.A.*, the applicant rejected this friendly settlement for similar reasons and asked the Court to reject the Government's request to 'strike out' the case.

Held

The Court, using identical language as in *T.A. v Turkey* (*op.cit.*), decided to strike-out the case stating that 'having regard to the nature of the admissions contained in the declarations as well as the scope and extend of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application.' In a strong dissenting opinion, Judge Loucaides stated that he found the Government's declaration to be 'perplexing' like the *T.A.* case and that he found the applicant's rejection of the settlement a reasonable one.

Commentary

The strong dissenting judgments express fundamental concerns of principle about the Court's use of the striking out procedure, and therefore represent a significant development.[205] In this instance, in his dissenting opinion, Judge Loucaides expresses concern for a solution that does not require the State to admit any responsibility, encouraging at the same time the practice of "buying off" complaints for human rights violations through *ex gratia* compensation. Previous friendly settlements (see *Akman V. Turkey*, no. 37453/97, 26.6.2001; *Aydin v. Turkey*, nos. 28293/95, 29494/95 and 30219/96, 10.7.2001) do not establish any principle of law that would prevent a different solution. Moreover, the present offer of compensation was neither accepted by the other side nor determined by the Court; furthermore, it cannot rectify a violation for which the State has not taken reasonable measures to provide an effective remedy (see, mutatis mutandis, *Donnelly and six others v. the United Kingdom*, no. 5577-5583/72, 15.12.1975, § 4).

Orhan (Salih) v Turkey
(25656/94)
European Court of Human Rights: Judgment of June 18, 2002.

Disappearance – Article 2 (right to life) – Village destruction – Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) – Article 5 (right to liberty and security) – Article 8 (right to respect for private and family life) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination) – Article 34 (right to individual petition) – Protocol 1 Article 1 (protection of property)

Facts
The applicant is a Turkish national of Kurdish origin. The case concerns the destruction of his village, the detention and disappearance of his two brothers, Selim and Hasan Orhan, and his son, Cezayir Orhan, and the ensuing investigations.

The applicant claimed that, on 6 May 1994, a large military convoy gathered the villagers in Deveboyu, Southeast Turkey, giving them one hour to clear their houses. He alleged that the soldiers began burning the houses in the village, including his home and those of Hasan and Selim Orhan.

He further alleged that, on 7 May 1994, Selim Orhan and other villagers went to Kulp and complained about the incident to the Kulp District Gendarme Commander, who gave the villagers permission to stay in their village in order to harvest crops. On 24 May 1994 the soldiers returned to the village. Selim, Hasan and Cezayir Orhan were still in Deveboyu and were allegedly forced by the soldiers to accompany them as guides. The three men were, the applicant claimed, last seen alive in Gümüşsuyu hamlet in the custody of the soldiers.

Complaints
The applicant relied on Article 2, 3, 5, 8, 13, 14, 18 and 34 and Article 1 of Protocol No.1 of the Convention.

The applicant argued that the circumstances in which the men had died had engaged the responsibility of the State in violation of Article 2 of the Convention. Furthermore, the investigation was so inadequate as to constitute a procedural violation of Article 2 of the Convention.

The applicant complained that the men had been subjected to ill-treatment in detention, in violation of Article 3 of the Convention.

The applicant complained that the men's right to liberty and security (Article 5 of the Convention) had been violated.

The applicant complained that he had been denied access to an effective remedy, in violation of Article 13 of the Convention.

The applicant further complained that the treatment had been discriminatory and based on the Kurdish origin of himself and his family.
The Government maintained there was no military operation on that village on 6 or 24 May. Consequently, the Orhans had not been taken into custody, and records show that they were not detained.

The facts being disputed by the parties, the Commission appointed Delegates who took oral evidence in Ankara in 1999.

Held
Article 2
The Court noted that the Orhans were last seen being taken away to an unidentified place of detention by authorities for whom Turkey was responsible. There was also some direct evidence that the Orhans were wanted by the authorities and, in the general context of the situation in South-east Turkey in 1994, it could by no means be excluded that an unacknowledged detention of such people would be life-threatening. The Court also recalled that defects undermining the effectiveness of criminal law protection in the Southeast during the relevant time allowed or fostered a lack of accountability of members of the security forces for their actions.

As no information had come to light concerning the whereabouts of the Orhans for almost eight years, the Court was satisfied that they must be presumed dead following an unacknowledged detention by the security forces. It followed that liability for their death was attributable to the Turkish Government. Accordingly, there had been a violation of Article 2 the Convention in respect of their deaths.

The Court also highlighted a series of deficiencies in the three investigations into the disappearance of the three men. The Court criticised, inter alia, the composition of the Kulp District Administrative Council, which was not an independent body and was composed of civil servants hierarchically dependent on an executive officer linked to the very security forces under investigation. It also condemned the failure to take statements from witnesses, and the failure to request the security forces for information concerning their operations at the time in the region. Furthermore, the applicant was never informed of the progress of, or decisions taken in, the investigations.

The Court therefore found a separate violation of Article 2 of the Convention in respect of the investigation's deficiencies.

Article 3

a) Concerning the Orhans' detention

The Court recalled that, where an apparent forced disappearance was characterised by a total lack of information, the question of the detainee's treatment could only be a matter of speculation. It could not be found to the required degree of certainty that the Orhans had been subjected to ill-treatment in detention. The Court concluded there had not been a violation of Article 3 of the Convention.

b) Concerning the applicant

The Court found that the uncertainty and apprehension suffered by the applicant over a prolonged period had caused him severe mental distress and anguish constituting inhuman treatment, in violation of Article 3 of the Convention.

Article 5

The Court noted that the Orhans' detention was not logged in the relevant custody records. Indeed, there existed no official trace of their subsequent whereabouts or fate. This fact in itself had to be considered a most serious failing since it enabled those responsible to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainees. The absence of data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it, had to be seen as incompatible with the very purpose of Article 5 of the Convention.

Further, given the deficiencies in the investigations into the applicant's early, consistent and serious assertions about the apprehension and detention of the Orhans by the security forces and their subsequent disappearance, the Court concluded that the Orhans had been held in unacknowledged detention in the complete absence of the most fundamental of safeguards required by Article 5. There had therefore been a violation of Article 5 of the Convention.

Article 8 and Article 1 of Protocol No. 1

The Court found that the homes and certain possessions of the applicant and of the Orhans were deliberately destroyed by the security forces and that the village had to be evacuated after the harvest. There was no doubt that these acts constituted particularly grave and unjustified interferences with the applicant's and the Orhans' right to respect for their private and family lives and homes.

Accordingly, the Court found a violation of Article 8 and of Article 1 of Protocol No. 1 of the Convention in respect of the applicant, his brothers and of Article 8 only in respect of the applicant's son.

Article 13
Having regard to the circumstances in which his, the Orhans' and other villagers' homes were destroyed in Deveboyu, the Court considered it understandable that the applicant could have considered it pointless to attempt to secure satisfaction through national legal channels. The insecurity and vulnerability of villagers following the destruction of their home and village was also of some relevance in this context.

Accordingly, the Court found that there was no available effective remedy in respect of the presumed death of the Orhans in detention and the destruction of Deveboyu.

Article 34
The Court noted that the applicant was summoned before Diyarbakır Chief Public Prosecutor in relation to his application to the former European Commission of Human Rights, which could have been an intimidating experience. The Court emphasised that it was inappropriate for State authorities to enter into direct contact with an applicant in this way.

Judge Gölcüklü expressed a dissenting opinion.

Commentary
The Court noted "with some concern" the failure of the Government to disclose documents when requested. It reiterated that it is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38(1) of the Convention. The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.

The motivation of the Government witnesses was described as being "transparently exculpatory", while the evidence of the gendarme witnesses was considered to be "evasive" and contradictory. Furthermore, the Government's denial that there was any military operation in the village was considered to be weakened by the inferences drawn by the Court from their

delays in identifying both the commander of military operations and the military units so operating and in disclosing operation records for that period and region, records the Court had found to be summary and incomplete.

In contradistinction, the Court found the testimony of the applicant and supporting witnesses to be "clear, credible and consistent". Nevertheless, certain arguments made by the applicant relied merely on hearsay. The Court considered that, despite the strong suspicions to which the evidence gave rise, indirect evidence was insufficient to enable the Court to conclude beyond all reasonable doubt that the Orhans were detained in the Lice Regional Boarding School.

Nonetheless, as no information had come to light concerning the whereabouts of the Orhans for almost 8 years, the Court was satisfied that the Orhans must be presumed dead following an unacknowledged detention by the security forces. Consequently, as the circumstances engaged the responsibility of the State, it was necessary to find a violation of Article 2 of the Convention.

Access to Court

Kutic v Croatia
(48778/99)
European Court of Human Rights, Judgment of March 1, 2002

Article 6 (right to a fair trial) – Access to court – Staying of proceedings

Facts

The applicants' house was destroyed in 1991 following an explosion. In November 1994 they brought an action for damages against the Republic of Croatia. In January 1996, while the proceedings were pending, an amendment to the Civil Obligations Act was introduced, providing that all proceedings concerning actions for damage resulting from terrorist acts were to be stayed pending the enactment of new legislation and that in the meantime damages could not be sought in respect of such acts. The proceedings brought by the applicants were duly stayed in April 1998. Further proceedings, which they had brought in connection with the destruction of their garage and other buildings in an explosion, were similarly stayed in July 2000.

Complaints

The applicants complained of a violation of Article 6 of the Convention.

The applicants alleged that they had no access to a court in so far as they were prevented from having their civil claim for damages decided due to the enactment of the 1996 legislation.

The applicants also alleged a separate violation of Article 6 of the Convention, in that the length of proceedings had exceeded the "reasonable time" requirement of that article.

The Government contended that the applicants did have access to a court and that they had availed themselves of it when they had lodged two civil actions for damages with the Zagreb Municipal Court. The proceedings were stayed following the enactment of new legislation. However, this situation was only temporary and the proceedings would be resumed after the enactment of a new law governing responsibility for damage resulting from the terrorist acts.

Held

(1) There had been a violation of Article 6(1) of the Convention in respect of the applicants' access to a court (unanimously).

The Court reiterates that the right of access to a court is not limited to the right to institute proceedings, but includes the right to obtain a determination of the dispute by a court. The legislative provision at issue had hindered the applicants' right to have their civil claims for damages decided by a court and they were thus prevented from pursuing their claims. While the decisions to stay the proceedings had been stayed *de facto* since enactment of the amendment in January 1996, since the court was unable to continue its examination of the cases thereafter. Having regard to the time which had elapsed since then, the impossibility of having the claims decided was not only temporary. A situation where a significant number of legal actions claiming large sums of money are lodged against a State may call for further regulation by the State, which enjoys a certain margin of appreciation in that respect, but such measures must be compatible with the requirements of Article 6 of the Convention. Given that the proceedings had been pending for over six years and no new legislation had been passed which would have enabled the applicants to have their claims determined, the degree of access afforded under national legislation was not sufficient to secure the applicants' right to a court.

It was unnecessary to examine separately the issue of the length of the proceedings, which was absorbed in the issue of access to a court.

Commentary

Whether a remedy is effective or a trial fair depends, in the first place, on the possibility to address the claim before a court or other tribunal. Art. 6, however, does not imply only the right to access to a court (see *Golder v. the United Kingdom*, no. 4451/70, 21.2.1975, §§ 28-36) but also protects the implementation of final, binding judicial decisions as the execution is to be considered an "integral part of the trial" (see *Philis v. Greece*, nos. 12750/87; 13780/88; 14003/88, 27.8.1991, § 59; *Hornsby v. Greece*, no. 18357/91, 19.3.1997, § 40). In fact, the Court highlights the effective nature of the Convention under which the rights protected are not just

theoretical (see, mutatis mutandis, *Airey v. Ireland*, no. 6289/73, 9.10.1979, § 24; *Garcia Manibardo v. Spain*, no. 38695/97, 15.02.2000, § 43).

An interesting step taken by the Court with regard to the length of the proceedings concerns its linking it with the issue of access to a court. As a matter of facts, the Court recognizes the failure of the State to pass any significant legislation, after the Convention had been entered into force in Croatia, as to guarantee the applicants' right to a fair trial (see, mutatis mutandis, *Di Pede v. Italy*, no. 15797/89, 26.9.1996, § 20-24; *Immobiliare Saffi v. Italy*, no. 22774/93, 28.7.1999, § 70).

Destruction of Homes/ Property

[see also:
Ipek v Turkey (Disappearance)

Orhan v Turkey (Disappearance)]

Matyar v Turkey
(23423/94)
European Court of Human Rights, Judgment of February 21, 2002.

Village destruction – Article 8 (right to respect for private and family life) – Article 1 Protocol 1 (protection of property) – Article 13 (right to an effective remedy) – Fact-finding hearings

Facts
The applicant, ?zzet Matyar is a Turkish citizen who was living in the Baso? hamlet in ?irnak province, Southeast Turkey at the time of the alleged events. On 24 July 1993 the applicant alleged that his village was attacked by village guards, with the support of a helicopter gunship. The village guards burned his house and crops and two villagers were killed. The applicant alleged that the Silvan district gendarme captain told the villagers to say that terrorists had attacked the village. Due to the applicant continuing to live in his house for a year, he was summoned to and detained at the Bayrambasi gendarme station. The applicant's son Burhan Matyar was told that, unless his father's house was burnt down, his father would not be released. Burhan Matyar susbsequently burnt down his father's house and the applicant was released. The Silvan Public Prosecutor made a decision of non-prosecution on 3 October 1994.

The Government submitted that an armed clash broke out between village guards and the PKK on 23 July 1993. As the terrorists fled to the applicant's village, they fired their guns a random, killing two villagers. On 24 July 1993, an incident report was drawn up by gendarmes

and statements were taken from the villagers. The father of one of the murdered victims blamed the PKK for his son's murder and six village guards gave corroboratory stories. On 27 July 1993, a villager lodged a complaint, alleging that the attack was committed by village guards. Four village guards were arrested as part of this investigation, and in 1997 the guards were acquitted due to lack of sufficient evidence. The applicant made no complaint to the Public Prosecutor about events. On being informed that the applicant had made a complaint to the European Court of Human Rights, the Public Prosecutor questioned the applicant, who stated that none of his possessions had been burned and that no complaint had been made on that issue.

Complaints

The applicant complained of violations of Articles 3, 6, 8, 13, 14, 18 and 25 of the Convention and Article 1 of Protocol No. 1 to the Convention.

The applicant submitted that the armed attack by village guards, forcing him and his family to flee from their village, amounted to inhuman and degrading treatment under Article 3 of the Convention. He also claimed that the failure of the State to regulate the village guard system or to investigate allegations of ill-treatment also amounted to violations of Article 3 of the Convention.

Relying on Article 13 the applicant submitted that there was no effective remedy available for him in Southeast Turkey; or in the alternative that he had no access to court to obtain compensation for interference with his civil rights, under Article 6 of the Convention.

Invoking Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the applicant submitted that the deliberate attack on his home, his forced expulsion from his village and the destruction of his property amounted to breaches of his right to respect for private and family life and his right to the enjoyment of his possessions.

The applicant also complained under former Article 25 of the Convention (now 34) that his questioning by the Turkish authorities about his application to the Court was a hindrance to his right to individual application.

Held

(1) There were no violations of Article 3, 6, 8, 13, 14, 18 of the Convention and Article 1 of Protocol No. 1 to the Convention (unanimously).

The Court, considering the length of time elapsed since the events complained of and the nature of the documentary evidence submitted, decided that a fact-finding hearing would not effectively assist in resolving the issues.

The Court noted the inconsistencies in the evidence of the applicant and, recalling that the applicant was required to prove the allegations "beyond reasonable doubt", the Court held that it was in no better position than the domestic courts to resolve the inconsistencies and that there was insufficient evidence to establish Convention violations.

(2) There was no violation of Article 25 of the Convention (by 4 votes to 3).
The Court recalled that it was of the utmost importance that applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. In the context of the questioning of applicants about their applications under the Convention by authorities exercising a domestic investigative function, this will depend on whether the procedures adopted involved a form of illicit and unacceptable pressure which may be regarded as hindering the exercise of the right to individual petition (*Salman v Turkey*, No. 21986/93, 27.6.00, §130). The Court found that there was an insufficient factual basis for it to conclude that the Respondent State had intimidated or threatened the applicant about his application to the Court.

(3) Dissenting Opinion
Judge Hedigan, joined by Judge K?ris, dissented in the majorities' decision concerning the application of Article 25 (now 34) of the Convention. They stated that, as a general rule, where authorities bring an applicant before them for questioning about their Court application, a *presumption* arises that it is with the intention of discouraging them from their application. In the present case, as no clear explanation was given as to why the gendarmes needed to question the applicant, one day prior to the applicant's interview with the Public Prosecutor, the dissenting judges did not believe this presumption had been rebutted. Therefore they found the Respondent Government in violation of Article 25 (now 34) of the Convention.

Commentary
The applicant argued that it is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention, which creates the need for the Court to hold fact-finding hearings.[206] However, as it has been already highlighted, the most recent tendency of the European Court of Human Rights is to fail to hold fact-finding hearings because of budget concerns. The facts in *Matyar v. Turkey* case, which were disputed by both parties, did not constitute the object of a Court's investigation. The Court, as a matter of fact, though acknowledging the "contradictory nature of the evidence", claimed to be "in no better position, more than eight years after the event, to resolve the inconsistencies in the account". Given that the burden of proof falls on the applicant "beyond reasonable doubt", not conducting a hearing significantly mines the application, as the conduct of the parties when evidence is being obtained constitutes a basis for proof as stated in *Ireland v. United Kingdom*, no. 5310/71, 18.01.1978, § 161.

The applicant had pleaded a violation of art. 3 of the Convention on two grounds: first, the armed attack by village guards on him, his family and his property and the consequent need to flee for their lives constituted an inhuman and degrading treatment as regulated in art. 3; secondly, "the alleged failure of the State adequately to regulate the village guard system or to investigate allegations of serious ill-treatment" gives rise to violation of art. 3. Where allegations are made under Article 3, the Court's vigilance must be heightened and a particularly thorough scrutiny has to be undertaken (see *Ribitsch v. Austria*, no. 18896/91, 4.12.1995, § 32; mutatis mutandis, *Ireland v. the United Kingdom*, no.5310/71, 18.01.1978, § 163). However, the first argument was rejected unanimously by the Court that found the alleged events were not established to the required degree of proof.

Freedom of Expression

Dichand and others v Austria

(29271/95)

European Court of Human Rights, Judgment of February 26, 2002

Injunction on repeating statements – Article 10 (right to freedom of expression)

Facts

The first applicant is chief editor and publisher of a newspaper. He published an article in which he criticised the Chairman of Parliament's Legislative Committee, Mr Graff. The article, referring to the example of another Minister, criticised Mr Graff for not giving up his law practice; it further stated that when Mr Graff was presiding the Legislative Committee an amendment benefiting his clients had been adopted; finally, the article referred to Mr Graff's "disreputable attitude". Mr Graff brought injunction proceedings, requesting that the applicants be prohibited from making or repeating these statements and that the statements be retracted. The Commercial Court granted an injunction. It considered that the statements amounted to an insult and that they were statements of fact which the applicants had failed to prove. The applicants' appeal was dismissed by the Court of Appeal and their extraordinary appeal on points of law was rejected as inadmissible by the Supreme Court.

Complaints

The applicants complained under Article 10, that their right to freedom of expression had been infringed.

Held

The Court held that the interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others. As to the necessity of the interference, the Court

considered that the Austrian courts' conclusion that the injunction was justified because an incorrect statement of fact had been published – namely, the allegation that Mr Graff was a member of the Government – could not be endorsed. The Court noted that the article did not explicitly state that Mr Graff was a member of the Government. The second comment concerning the legislative amendments did not imply that it served the interests of Mr Graff's clients exclusively, only that it brought them considerable advantages. The Court considered there was sufficient factual basis for the value-judgment, which represented fair comment on an issue of general public interest. In any event, the restriction on the applicants' freedom of expression was not necessary in a democratic society. Mr Graff was an important politician and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion. While the applicants published harsh criticism in strong, polemical language, on a slim factual basis, Article 10 protects information or ideas that offend, shock or disturb, and on balance the courts overstepped the margin of appreciation.

The Court held there had been a violation of Article 10 of the Convention.

Commentary
See General Commentary below.

Unabhängige Initiative Informationsvielfalt v Austria
(28525/95)
European Court of Human Rights, Judgment of February 26, 2002

Injunction on repeating statements alleging politician racist – Article 10 (right to freedom of expression)

Facts
The applicant association published a periodical. In 1992 it published a leaflet inviting readers to send the Austrian Freedom Party "small gifts in response to their racist agitation". It mentioned in particular Jörg Haider, leader of the party and at the time a Member of Parliament, and gave a list of the addresses and telephone numbers of party members. Mr Haider sought an injunction prohibiting the applicant from repeating the statement and the Commercial Court granted the injunction, finding that the statement about racist agitation was a statement of fact rather than a value-judgment. The applicant's appeal was dismissed and an extraordinary appeal on points of law was declared inadmissible by the Supreme Court.

Complaints
The applicant complained of an interference with Article 10 (right to freedom of expression).

Held

The interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others. As to the necessity of the interference, the impugned statement ought to be seen in the political context in which it was made, namely as a reaction to an opinion poll initiated by Mr Haider and the Austrian Freedom Party against "immigration without control". The Government's argument that the allegation of racist agitation was a particularly serious one, as it amounted to a reproach of criminal behaviour, could be accepted in principle in the light of the duties and responsibilities of journalists, but in the circumstances of the case there was no indication of deliberate carelessness on the part of the applicant. Rather, it appeared that the statement did not constitute a gratuitous personal attack, as it was made in a particular political situation, in which in contributed to a discussion on a matter of general interest. In so far as the Government maintained that the statement was one of fact and should therefore be proved, since proof of "incitement to hatred" could be established in criminal proceedings, the degree of precision for establishing the well-foundedness of a criminal charge could hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, particularly in the form of a value-judgment. The applicant published what might be considered as fair comment on a matter of public interest, that is a value-judgment, and the court disagreed with the qualification given to the statement by the Austrian courts. While such an opinion may be excessive, in particular in the absence of any factual basis, that was not so in the present case. The Austrian courts had therefore overstepped the margin of appreciation.

The Court concluded that there had been a violation of Article 10 of the Convention.

Commentary

See General Commentary below.

Krone Verlag GmbH & CO. KG v Austria

(34315/96)

European Court of Human Rights, Judgment of February 26, 2002

Injunction of publishing photograph of politician – Article 10 (right to freedom of expression)

Facts

The applicant company publishes a newspaper. It published a series of articles on the financial situation of Mr Posch, a local politician who was a member of both the national and the European parliaments. The articles were accompanied by photographs of him. He applied for and was granted an injunction prohibiting publication of his photograph in connection with such articles. The court considered that, as his face was not generally known, his legitimate

interests were infringed by creating the possibility of identifying him. It added that the photographs had no information value. The applicant's appeal was dismissed and an extraordinary appeal on points of law was declared inadmissible by the Supreme Court.

Complaints
The applicant complained of a violation of Article 10 of the Convention (right to freedom of expression).

Held
The interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others. As to the necessity of the interference, the subject matter of the articles dealt with a matter of public concern which did not wholly fall within Mr Posch's private sphere and the Austrian courts failed to take into account the essential function the press fulfils and its duty to impart information and ideas on all matters of public interest. It is of little importance whether a person or his or her picture is actually known to the public: what counts is whether the person has entered the public arena. In this case, there was no doubt that as a politician Mr Posch had done so and had to bear the consequences. Thus, there was no valid reason why the applicant should be prevented from publishing his picture. Particular importance may be attached to the fact that there was no disclosure of details about his private life. Moreover, Mr Posch's curriculum vitae and photograph appear on the Austrian Parliament's internet site. Even within the scope delimited by the terms of the injunction, the measure did not correspond to a pressing social need.

The Court concluded, unanimously, that there had been a violation of Article 10.

Commentary
See General Commentary below.

Gawęda v Poland
(26229/95)
European Court of Human Rights, Judgment of March 14, 2002

Refusal to register title of a periodical – Article 10 (freedom of expression)

Facts
The Regional Court refused the applicant's request for registration of the title of a periodical, "The Social and Political Monthly – a European Moral Tribunal", to be published in Kęty. The court considered that the title suggested that a European institution had been established in K?ty, which was untrue and misleading for prospective buyers. The Court of Appeal rejected

the applicant's appeal. The Regional Court subsequently refused the applicant's request for registration of the title "Germany – A Thousand Year-old Enemy of Poland", considering that registration of a periodical with such a title would be harmful to Polish-German relations. The Court of Appeal upheld the decision, considering that the title would be in conflict with reality. At the material time, an Ordinance of the Minister of Justice on the register of periodicals, issued pursuant to the Press Act, provided that registration was not permissible if it would be in conflict with the regulations in force and with reality. The Press Act itself provides for refusal of registration if the request does not contain the required data or if the proposed title would prejudice a right to protection of the title of an existing periodical.

Complaints

The applicant complained of a violation of Article 10 of the Convention (right to freedom of expression).

Held

The Court held, unanimously, that there had been a violation of Article 10 of the Convention.

Under Polish law, the refusal to register the title of a periodical is tantamount to a refusal to allow its publication and the refusal of the applicant's requests thus amounted to an interference with his Article 10 rights. Although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications, the relevant law must provide a clear indication of the circumstances in which such restraints are permissible, especially when the consequences of the restraint are to block publication completely. In the present case, the courts relied essentially on the Ordinance of the Minister of Justice in so far as it required that registration be refused if "in conflict with reality". They thus inferred from that notion a power to refuse registration where they considered that a title conveyed an essentially false picture. While the terms used were ambiguous and lacked the clarity to be expected in a legal provision of this nature, they suggested at most that registration could be refused where the request for registration did not comply with the technical requirements specified in the Press Act. To go further and require that the title of a magazine embody truthful information was inappropriate from the standpoint of freedom of the press: a title o a periodical is not a statement as such, since its function is essentially to identify the periodical on the press market for its actual and prospective readers. Moreover, such interpretation would require a legislative provision which clearly authorised the courts to do so. In short, the interpretation given by the courts introduced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title could be refused. Previous interpretations of the provisions had not provided a basis for the approach adopted by the courts in the present case and the fact that the case-law of the Polish courts did not show that the provisions were particularly difficult to interpret only highlighted the lack of foreseeability of the

interpretation given by the courts in the present case. While the judicial character of the system of registration was a valuable safeguard of freedom of the press, the decisions given by the national courts in this area must also confirm to the principles of Article 10. In the present case, this in itself did not prevent the courts from imposing a prior restraint on a printed media in a manner which entailed a ban on publication of entire periodicals on the basis of their titles. The law applicable was not formulated with sufficient precision to enable the applicant to regulate his conduct. Therefore, the manner in which restrictions were imposed on the applicant's exercise of his freedom of expression was not "prescribed by law".

Commentary
See General Commentary below.

E.K. v Turkey
(28496/95)
European Court of Human Rights, Judgment of May 7, 2002

Violation Article 7 Violation Article 10 Violation Article 6 § 1

Facts
E.K., a Turkish citizen living in Istanbul, is a lawyer and the owner of the *Doz Bas?n Yay?n Ltd ti* publishing house ("Doz").

As secretary of the Istanbul section of the Human-Rights Association, she signed an article entitled "*Dünyan?n Kürt Halk?na Borcu var*" ("The world owes a debt to the Kurdish people"), which appeared in the Istanbul daily newspaper *Özgür Gündem*. A first set of criminal proceedings concerned that article. On 16 September 1994 the State Security Court convicted her under Article 8 (1) and (2) of Law no. 3713. It sentenced her to two years' imprisonment and a fine of 250,000,000 Turkish liras (TRL), holding that she had expressed support in the article for the activities of the PKK and referred to part of the national territory as "Kurdistan". In October 1992 Doz published a book, which E.K. edited. A second set of criminal proceedings followed. On 9 September 1994 the State Security Court convicted her under Article 8 (2) of Law no. 3713 and sentenced her to six months' imprisonment and a fine of TRL 50,000,000. It also ordered seizure of the publication. The State Security Court found that an article in the book undermined territorial integrity and the unity of the nation.

On 30 October 1995 Law no. 4126 came into force. It amended, among other provisions, Article 8 of Law no. 3713. Under that Act, the State Security Court reviewed the merits of the applicant's case and reached the same verdict as in its judgment of 9 September 1994. It again sentenced the applicant to six months' imprisonment and a fine of TRL 50,000,000, but

converted the prison sentence into a fine of TRL 50,900,000, suspended. On 4 August 1997 Law no. 4304 was enacted, which provided for the suspension of judgment and sentence in cases concerning offences committed before 12 July 1997 by editors of periodical publications. Under that Act, the Court of Cassation overturned the impugned judgment on 27 November 1997 and remitted the case for retrial before the lower court. On 25 December 1997 the State Security Court held, under Article 1 (3) of Law no. 4304, that judgment should be suspended in the applicant's case, and only delivered if the applicant was convicted, in her capacity as editor, of a new offence with intent within three years, otherwise the charges were to be dropped.

Complaints

The applicant complained that her conviction under Article 8 (2) of Law no. 3713, in relation to the publication of the book, violated Article 7 (no punishment without law), as the law in question was too vague to be understood and because, under that law, prison sentences could be imposed only on editors of periodicals, newspapers and magazines, but not books. She also maintained that her two convictions infringed on her right to freedom of expression and that she had been denied a fair hearing, since the state security court that had twice convicted her included a military judge.

Decision

The Court held unanimously that there had been a violation of Article 7 of the Convention concerning the applicant's conviction as editor of the book, because, while her punishment was foreseeable, the application of a prison sentence to a book editor was not in accordance with the law.

The Court also held, unanimously, that there had been a violation of Article 10 of the Convention concerning both convictions. The article signed by the applicant did not incite hatred or condone violence and her punishment was harsh. The book included all the speeches made at an international conference and the book had to be taken as a whole. In both cases the Court found the applicant's punishment disproportionate.

Finally, the Court held, unanimously, that there had been a violation of Article 6 § 1 of the Convention concerning both sets of criminal proceedings, in view of the presence of a military judge.

The applicant was awarded 10,700€ for non-pecuniary damage and 3,000€ for costs and expenses.

Commentary

See General Commentary below.

General Commentary

In all the cases presented in the section "Freedom of Expression", the Court refers to a few general principles deriving form Article 10 of the Convention. The right to freedom of expression implies no interference by public authority except in such cases as prescribed by the law and as are "necessary in a democratic society". The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of responds to a "pressing social need", whether it was proportionate to the legitimate aid pursued and whether the reasons given by the national authorities to justify it are reasonable (*the Handyside v. the United Kingdom*, No, 4.11.1976, § 50).

In addition, the Court reiterates the fundamental principles underlying its judgments relating to Article 10 of the Convention, as set out, for example, in *Zana v. Turkey* (No. 18954/91, 25.11.1997, § 51) and in *Baskaya and Okçuoğlu v. Turkey* (Nos. 23536/94 and 24408/94, 8.7.1999, § 61). 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. In a democratic society the press plays a central role, so that its duty, as set out in *De Haes and Gijsel v. Belgium* (No. 7/1996/626/809, 27.1.1997, § 37), is to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. Furthermore, the public has the right to receive these information and ideas, being in question the vital role of the press as "public watchdog" (*Observer and Guardian v. the United Kingdom*, No. 51/1990/242/313, 24.10.1991, § 59; *Thorgeir Thorgeirson v. Iceland*, No. 47/1991/299/370, 28.5.1992, § 63; *Bladet Tromsø and Stensaas v. Norway*, No. 21980/93, 20.5.1999, § 62).

As the Court held in *the Handyside v. the United Kingdom* (No, 4.11.1976, § 50), however, art 10 not only is applicable to information or ideas that are favourably received or regarded but it also protects information or ideas that offend, shock or disturb. Moreover, the form into which ideas or information are conveyed falls under the article provision, as reported, for example, in *Oberschlick v. Austria* (No. 6/1990/197/257, 25.4.1991, § 57).

Accordingly, as the Court held in *Kokkinakis v. Greece* (No. 14307/88, 25.5.1993, § 52) and in *C.R. v. United Kingdom* (No, 20190/92, 22.11.1995, § 33), Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage, it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). Furthermore, Article 7 of the Convention enshrines the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It derives from these principles that an offence must be clearly defined in the law. In its aforementioned judgments the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and the courts' interpretation of it, what acts and omissions will make him criminally liable. In *E.K. v Turkey* the Government did not comply with this principle of legal certainty.

Freedom of Assembly and Association

Stankov and the United Macedonian Organisation Ilinden v Bulgaria (29221/95, 29225/95)

European Court of Human Rights, Judgment of October 2, 2001

Association refused registration on grounds that it was "against the unity of the nation" – Article 11 (freedom of assembly and association)

Facts

The applicant association, a branch of which was chaired by Mr. Stankov at the time of the events, was founded in 1990 to unite Macedonians in Bulgaria on a regional and cultural basis and to achieve recognition of the Macedonian minority in Bulgaria. In 1991, it was refused registration as the courts found that its aims were, in reality, directed against the unity of the nation, that it advocated ethnic hatred and was dangerous for the territorial integrity of Bulgaria.

The scope of the case before the Court was limited to events between 1994 and 1997, when the authorities prohibited the holding of commemorative meetings organised by the applicant association.

Complaints

The applicants complained of a violation of Article 11 of the Convention.

The Government expressed doubts as to the peaceful character of the association's meetings and on that basis disputed the applicability of Article 11 of the Convention.

Held

The Court was not satisfied that the organisers and participants in the meeting had violent intentions, and therefore the Government's objection was dismissed.

The Court concluded that there had been an interference with Article 11 of the Convention, as on all occasions under examination the authorities had prohibited the meetings planned.

Regarding the question of whether the interference was prescribed by law, the Court noted that the reasons given by the authorities for the prohibition fluctuated and were not elaborate. Despite this, the Court observed that the authorities referred to an alleged danger to public order which in accordance with domestic law was among the grounds justifying interference with the right to peaceful assembly. Accordingly, the Court accepts that the interference could be regarded as being "prescribed by law".

Regarding the prohibition's "legitimate aim", the Government contended that the measures taken pursued several legitimate aims: the protection of national security and territorial integrity, the protection of the rights and freedoms of others, guaranteeing public order in the local community and the prevention of disorder and crime. The Court accepted that the interference was intended to safeguard one or more of these interests.

The Court held there had been a violation of Article 11 of the Convention.

Commentary

The Court recalled that Article 11 of the Convention only protects the right to "peaceful assembly". That notion, according to the Commission's case-law, does not cover a demonstration where the organisers and participants have violent intentions (*G. v The Federal Republic of Germany*, No. 13079/87, 6.3.89). In this case, the Court reviewed all the materials before it and was not satisfied that those involved in the organisation of the prohibited meetings had violent intentions; therefore, Article 11 was applicable (para. 78).

Moreover, the Court recalled that, notwithstanding its autonomous role and particular sphere of application, Article 11 must be considered in the light of Article 10 of the Convention. The protection of opinions and the freedom to express them is one of the objectives of the freedom of assembly and association as enshrined in Article 11 (*Freedom and Democracy Party (ÖZDEP) v Turkey*, No. 23885/94, 8.12.99 §37). 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. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (*Handyside v United Kingdom*, No. 5493/72, 7.12.76; *Gerger v Turkey*, No. 24919/94, 8.7.99, §46). Likewise, the freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote (the *Plattform "Ärzte für das Leben" v Austria*, 10126/82, 21.6.88, §32).

Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey (22723/93, 22724/93 and 22725/93)

European Court of Human Rights, Judgment of April 9, 2002

Dissolution of political party – Article 11 (freedom of assembly and association) – 'Necessary in a democratic society'

Facts

At the material time, the first applicant was chairman of the People's Labour Party, the HEP, the second applicant its vice-chairman and the third its secretary general. The Party was established in 1990. In 1992, the Principle State Counsel at the Court of Cassation asked the Turkish Constitutional Court to dissolve the HEP. In 1993, the Constitutional Court decided in a judgment to dissolve the party. On the basis of written and oral statements made at meetings by its leaders, it found that the party was seeking to undermine national integrity by differentiating between Turks and Kurds, with the aim of setting up a separate state. The HEP's view was that there was a separate Kurdish people with its own culture and language, which the Turkish authorities did not allow them to practice freely. According to the Constitutional Court, "the HEP's objectives resembled those of terrorists" and "statements based on lies, accusations and hostile attitudes, which the HEP's leaders constantly repeated as a form of provocation, were likely to promote tolerance of terrorist acts, and justify and encourage their perpetrators."

Complaints

The applicants complained under Article 11 and Article 6(1) of the Convention that their right to freedom of association had been violated.

The Government maintained that the dissolution of political parties fell within the margin of appreciation of constitutional courts and that in this case Turkey's fundamental constitutional principles were being challenged.

Held

The Court considered that political parties made a key contribution to the workings of democracy and were covered by Article 11 of the Convention. Political parties did not cease to be covered by the Constitution simply because national authorities considered that their activities posed a threat to the relevant country's constitutional institutions and must have restrictions placed on them. The Government's objection was therefore untenable.

The Court concluded, unanimously, that there had been a violation of Article 11 of the Convention. Dissolution of the HEP constituted interference in the three applicants' right of freedom of association. Such interference was prescribed by law and had the lawful aim of protecting territorial integrity and national security. However, in judging whether such restrictions were necessary in a democratic society, the Constitutional Court had not taken account of the lawfulness of the HEP's programme and statutes and had confined its assessment to the party's political activities. Its decision to dissolve the party had been based on the party leaders' public statements, which it had accepted as evidence of the HEP's general position. The Court could therefore confine itself to considering these statements. The

Government maintained in particular that the party leaders were inciting ethnic hatred, insurrection and violence. Yet the Court noted that the HEP had offered no explicit support or approval for violence for political ends. At the material time, none of the HEP's leaders had been convicted of incitement to ethnic hatred or insurrection, even though these were criminal offences. The Government's arguments were therefore unconvincing. As to whether HEP's objectives were incompatible with democratic principles, the party's platform amounted to claims that Kurds were not free to use their own language and were unable to make political demands based on the principle of self-determination, and that the security forces engaged in the struggle against terrorist organisations had committed illegal acts and were responsible in part for the suffering of Kurdish citizens in certain parts of Turkey. These views were not, as such, incompatible with fundamental democratic principles. To see the defence of such views by a political party as support for terrorism could amount to giving terrorist movements a monopoly of the defence of such views. Moreover, even if defending such views ran counter to government policy or the convictions of a majority of the public, it was necessary in a properly functioning democracy for political parties to be able to introduce them into public debate. The Constitutional Court's decision did not establish that the HEP's political proposals posed a threat to Turkey's democratic system. By themselves, the HEP party leaders' strong criticisms of certain actions of the security forces did not provide sufficient evidence that the HEP amounted to a terrorist group. The acceptable limits for criticism were broader when the target was a government rather than an individual. Nor had it been established that by criticising the actions of the armed forces the HEP's members of parliament and officers were pursuing any other goal than that of discharging their duty to draw attention to their electors' concerns. Briefly, since the HEP had not advocated any policy which could have undermined the country's democratic regime and had not urged or sought to justify recourse to force, its dissolution could not be considered to reflect a pressing social need.

With regard to Article 6(1) of the Convention, the proceedings before the Constitutional Court had concerned the HEP's right, as a political party, to pursue its political activities. They therefore concerned a political right, which was not covered by Article 6(1) of the Convention. The party's dissolution had led to the transfer of its assets to the Treasury and as such it could have brought a civil law action, within the meaning of this article.

Commentary

This not the first time that the dissolution of a political party in Turkey has been condemned by the European Court. Successful Strasbourg applications have also previously been brought by other Turkish political parties (see *United Communist Party of Turkey and Others v Turkey,* No. 19392/92, 30.1.98; *Socialist Party and Others v Turkey* No. 21237/93, 25.5.98; *the Freedom and Democracy Party (ÖZDEP) v Turkey*, No. 23885/94, 8.12.99; *Sadak and Others v Turkey,* Nos. 25144/94; 26149-54/95; 27100-1/95, 11.6.02). In *Refah Partisi (The Welfare Party) and*

Others v. Turkey (No. 41340/98, 31.7.01) the Court found no violation of Article 11 of the Convention by the slim margin of four votes to three, but the case has been accepted for review by the Grand Chamber of the Court.

The most significant recent development in such cases is the case of *Sadak and Others v Turkey* in which the Court found a violation of the right to free elections (Protocol 1 Article 3 of the Convention) for the first time in a case against Turkey. In their application to the ECHR, the applicants raised a number of grounds (freedom of expression, freedom of association, non-discrimination, etc), but not the right to free elections under article 3 of Protocol n. 1. It is the Court, which ruled that the application should also be determined under this provision. In its ruling, the ECHR noted that the penalty imposed on the applicants was not proportionate to the legitimate aim pursued by the Turkish authorities being the measure incompatible with the very essence of the right to stand for election and to hold parliamentary office.

In the present case, the Court's task was to assess whether the dissolution of the HEP and the accessory sanctions imposed on the applicants constituted a "pressing social need". Article 11 of the Convention is seen by the Court strictly related to article 10, guaranteeing both the principle of pluralism and democracy (see *Handyside v. the United Kingdom*, no. 5493/72, 7.12.96, § 49). The Court further considered that even where proposals informed by such principles were likely to clash with the main strands of government policy or the convictions of a majority of the public, the proper functioning of democracy required political groupings to be able to introduce them into public debate in order to help to find solutions to problems of general interest concerning politicians of all persuasions. The Court took the view that it had not been established in the judgment of 14 July 1993, by which the HEP was dissolved, that its policies were aimed at undermining the democratic regime in Turkey. Nor had it been argued before the Court that the HEP had any real chance of installing a type of regime, which did not meet with the approval of everyone on the political stage.

Right to Free Elections

[see also:
Yazar, Karatas, Aksoy and People's Labour Party (HEP) v Turkey (Freedom of Assembly and Association)]

Sadak and Others v Turkey
(25144/94; 26149-54/95; 27100-1/95)
European Court of Human Rights, Judgment of June 11, 2002

Dissolution of political party – imprisonment of parliamentary members – Articles 2, 3, 14 and 69 of the Constitution – Article 81 Law on Political Parties – Protocol 1 Article 3 (right to free elections)

Facts

The thirteen applicants (Nizamettin Toguc, Selim Sadak, Remzi Kartal, Zubeyir Aydar, Naif Gunes, Ali Yigit, Sedat Yurttas, Mahmut Kilinç, Mehmet Hatip Dicle, Sirri Sakik, Orhan Dogan, Leyla Zana and Ahmet Türk) are all Turkish nationals who were elected as members of the Turkish Grand National Assembly (the Turkish parliament) in October 1991. They were originally members of the People's Labour Party (HEP) but, due to the Turkish Government's efforts to prevent HEP members from standing for election and the subsequent dissolution of that party, the applicants founded and became members of the Democracy Party (DEP) on 7 May 1993.

On 2 November 1993, the Chief Public Prosecutor petitioned the Constitutional Court to dissolve the DEP, stating that statements made by the Party's chairman were of a nature to undermine the integrity of the State and the unity of the nation; and therefore in breach of Articles 2, 3, 14 and 69 of the Constitution, as well as Article 81 (a) and (b) of the Law on Political Parties.

The Constitutional Court, in its judgment of 16 June 1994, concluded that the DEP's purpose was to demand that "their [the Kurdish people's] identity should be recognised with all its effects including the right to divide the country and found a separate state" (Judgment of the Constitutional Court, p. 108) and therefore that it was acting in contravention of the Constitution. The Court accordingly ordered the dissolution of the DEP and, as a consequential measure, under Article 84 of the Constitution, all the then members of the Democratic Party also lost their status as members of Parliament.

Fearing the probability of criminal proceedings being instigated against them, Toguç, Gunes, Kilinç, Aydar, Yigit and Kartal all left Turkey for Brussels. Sadak and Yurttas, however, voluntarily placed themselves into police custody. On 21 July 1994, the Chief Public Prosecutor instigated criminal proceedings against the applicants, accusing them of separatism and of undermining the integrity of the State, crimes for which offenders were liable to be sentenced to death. On 8 December 1994, the Ankara State Security Court handed down the following sentences: Sakik to three years' imprisonment, under Article 8 of the Anti-Terrorism Law No. 3713 for separatist propaganda; Turk, Dicle, Dogan, Sadak and Zana to fifteen years' imprisonment under Article 168 of the Penal Code for being members of an armed gang; and Yurttas to seven years' imprisonment under Article 169 of the Penal Code for aiding and abetting an armed gang. On 26 October 1995, the Court of Cassation, on appeal, quashed the sentences of Yurttas and Turk but confirmed the sentences imposed on the other applicants.

Complaints

The applicants complained of violations of Articles 6, 9, 10, 11 of the Convention, and Article 1 and Article 3 of Protocol No.1 to the Convention.

Invoking Article 3 of Protocol No. 1 to the Convention, the applicants submitted that the deprivation of their parliamentary mandate, following the dissolution of the DEP, had violated the right of the people to freely express their opinion in the choice of the legislature.

Invoking Articles 9, 10 and 11 of the Convention, the applicants complained that the termination of their political mandate infringed their rights to freedom of thought, expression and association respectively.

The applicants also submitted that, under Article 1 of Protocol No. 1 to the Convention, the deprivation of their parliamentary remuneration infringed their right to the peaceful enjoyment of their possessions.

Held

1) There was a violation of Article 3 of Protocol No.1 to the Convention.

The Court recalled that the right to vote and the right to run for elections, enshrined within Article 3 of Protocol No. 1 of the Convention, were not absolute. Without being stated in express terms, the Article allowed room for "implied limitations". Although Contracting States enjoy a significant margin of appreciation in setting down conditions in relation to the above rights, it is the Court's role to ensure that such conditions do not reduce the said rights to the point of depriving them of their substance and effect; that they pursue a legitimate aim; and that the means employed are not disproportionate (*Mathieu-Mohin and Clerfayt v Belgium*, No. 9267/81, 2.3.87).

The Court considered that Article 3 of Protocol No.1 of the Convention guaranteed the right of all individuals to stand for election and, once elected, to exercise their mandate (*Ganchev v Bulgaria*, No. 28858/95, 25.11.96). Furthermore, the Court recalled that a previous judgment had held that "freedom of speech [...] is particularly important for an elected person [...] Therefore, the Court must exercise one of the strictest controls, when dealing with interferences with the freedom of speech of an opposition member of Parliament"(*Castelles v Spain*, No. 11798/85, 23.4.92).

2) In the light of its decision regarding Article 3 of Protocol No. 1 of the Convention, the Court did not consider it necessary to consider any of the other complaints.

3) The Court awarded, on an equitable basis, 50,000 Euros to each of the applicants for the material prejudice and moral damage suffered, plus legal costs.

Commentary

The notion of a democratic society is a concept which the Court has described as a fundamental feature of the European public order: "democracy...appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"(*United Communist Party of Turkey and Others v Turkey,* No. 19392/92, 30.1.98, §45). These cases against Turkey have clarified the extent to which the European Convention will uphold the rights of political parties within a democratic state. They have confirmed that political parties fall within the ambit of Article 11 of the Convention as "political parties are a form of association essential to the proper functioning of democracy", and also that freedom of association not only concerns "the right to form a political party", but also guarantees "the right of such a party, once formed, to carry on its political activities freely." (*United Communist Party of Turkey and Others v Turkey, ibid.*, §§ 25, 33)

In *Socialist Party and Others v Turkey* (No. 21237/93, 25.5.98), the Court emphasised "the fact that... a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself" (*Socialist Party and Others v Turkey, ibid.*, §47). In all the cases with the exception of the *Welfare Party* case, the Court found that to dissolve the party was disproportionate to any legitimate aim pursued and unnecessary in a democratic society and therefore Article 11 of the Convention had been violated (cf. *Refah Partisi (The Welfare Party) and Others v Turkey,* No. 41340/98, 31.7.01).

In each of these earlier cases, the main applicant was the political party itself, rather than representatives of the party, and the primary issue which arose was accordingly whether the dissolution of the party contravened Article 11 of the Convention by denying it the right to form an association for the purpose of expressing the views of its members and representing its constituency.

This case however was brought on behalf of the members of Parliament themselves, rather than the party which they represented, and it is the first judgment in which the Court has found a violation of Article 3 of Protocol 1 of the Convention (the right to free elections) against Turkey. Article 3 of Protocol No.1 to the Convention was raised in the *United Communist Party* case, the *Socialist Party* case and also the *Welfare Party* case. However, in each of those cases, the Court found it unnecessary to consider such complaints separately on the basis that the bans on representatives from participating in elections was merely an incidental or secondary effect of the parties' dissolution, an act which was already held to be in breach of

Article 11 of the Convention (*United Communist Party of Turkey and Others v Turkey, op. cit.*, §64; *The Socialist Party and Others v Turkey, op. cit.* §57; *Refah Partisi v Turkey, op. cit.*, § 87). The difference in the Court's approach in this case may reflect its view of the extent of the impact of the dissolution of the DEP on the system of parliamentary representation in Southeast Turkey and therefore the impact on the ability of the Kurdish minority to take part meaningfully in the democratic process.

The *Sadak* case is, then, a significant decision which builds on the Court's earlier jurisprudence relating to democratic rights and freedoms. The Court has previously had cause to emphasise that freedom of expression is especially important for parliamentary members as they "represent the electorate, draw attention to their preoccupations and defend their interests" (*Castells v Spain*, No. 11798/85, 23.4.92). Now the Court has given further guidance about the scope of Article 3 of Protocol 1 of the Convention. In this judgment the Court has for the first time confirmed that this Article guarantees not only the right to *stand* for election, but also, once elected, to *continue* to exercise the democratic mandate. The judgment also acknowledges the dual aspects of Article 3 of Protocol 1 of the Convention, in that it protects the right of the electoral body to elect their representative without interference (*Sadak and Others v Turkey*, §40), as well as protecting the rights of those elected to parliament. It therefore appears that were the dissolution of a political party to occur again, those entitled to complain of violations of their Convention rights could include not only the MPs and the political party itself, but also those people who voted for them.

C. Procedure

Non-exhaustion of domestic remedies

Epözdemir v Turkey

(57039/00)

The European Court of Human Rights, Admissibility decision of January 31, 2000

Article 35(1) of the Convention – Non-exhaustion of domestic remedies – Article 2 (right to life) – Article 13 (right to an effective remedy)

Facts

The applicant, Muazzez Epözdemir, is a Turkish national and the widow of Nihat Epözdemir. The applicant's husband suffered psychological problems as a result of financial problems and left his home in June 1998. He was never seen again by the applicant. On 1 September 1998, the applicant informed the Siirt Public Prosecutor of her missing husband. On 16 March 1999, the Public Prosecutor decided to discontinue the investigation into the disappearance, stating that Nihat Epözdemir had not disappeared in suspicious circumstances and that no evidence of a crime had been found.

In April 1999, the uncle of Nihat Epözdemir was at the registry office for unconnected purposes and discovered a record stating that the applicant's husband had been killed in July 1998. The uncle went to the Dargeçit Public Prosecutor to ask for clarification of the record and was informed that, on 23 July 1998, following Nihat Epözdemir's death, his file had been sent to the Diyarbakir State Security Court, as it was alleged that the applicant's husband had been a member of the PKK. The applicant subsequently obtained a copy of an autopsy report, carried out on 20 July 1998. According to a statement of a village guard in the report, Nihat Epözdemir had been in a group of PKK terrorists, which had been involved in an armed clash with village guards on 19 July 1998. According to the autopsy report, the applicant's husband had been shot five times, possibly by different weapons.

On 29 June 1999, the applicant applied to the State Security Court for the village guard named in the report to be prosecuted for her husband's murder. She stated that her husband had never been a member of the PKK and that he had been suffering psychological problems. She also stated that it was cruel not being informed about the killing, despite her husband having his identity card with him. On 6 September 1999, the Diyarbakir State Security Court prosecutor decided not to prosecute the village guards as, though it was established that one of them had killed the applicant's husband, it was not possible to establish which one.

Complaints

The applicant complained under Article 2 that her husband had been killed without a lawful excuse in circumstances where the responsibility of the State was engaged.

The applicant complained, under Article 13, that she did not have recourse to an effective remedy in respect of her husband's murder.

The Government submitted that the applicant had not exhausted domestic remedies.

Held

The Court declared the application inadmissible due to the applicant not having exhausted domestic remedies under Article 35(1).

As the applicant had not appealed against the prosecutor's decision not to prosecute the village guards, the Court examined the issue of whether domestic remedies had been exhausted. The Court reiterated that the rule under Article 35(1) required applicants to first use remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Such remedies must be sufficiently certain in practice as well as in theory. Recourse only had to be made to remedies that are adequate and effective (*Aksoy v Turkey*, No. 21987/93, 18.12.96 §§51-52; *Akdivar and Others v Turkey*, No. 21893/93, 1.4.98 §§ 65-67). A mere doubt as to the prospect of success is not sufficient to exempt an applicant from applying to a relevant court (*Whiteside v U.K*, No. 20357/92, 7.3.94).

Regarding the applicant's argument that she was not required to pursue any further domestic remedies since there was an administrative practice in Southeast Turkey which made any remedies illusory, inadequate and ineffective, the Court noted that the applicant did in fact pursue a remedy by petitioning the public prosecutor to conduct an investigation. Also, the applicant had not given sufficient indication that she had been subjected to intimidation or referred to any specific facts that would have indicated that she would have risked reprisals is she had appealed. The Court noted that there had been at least two applications before it where there had been successful appeals against public prosecutors' decisions not to prosecute (*Keçeci v Turkey*, No. 38588/97, 17.10.00; *Fidan v Turkey*, No. 24209/94, 29.2.00). Therefore, the Court did not find it established that an appeal by the applicant would have been devoid of any chance of success.

Commentary

Under Turkish law, a public prosecutor who is informed by any means whatsoever of a situation that gives rise to a suspicion that an offence has been committed is obliged to investigate the facts, instituting criminal proceedings if he or she decides that the evidence

justifies the indictment of a suspect (*ex officio*). A complainant can appeal against a decision of the public prosecutor not to institute criminal proceedings at the Assize Court. The Court considered that the failure to exhaust domestic remedies arose when the applicant declined to appeal the public prosecutor's decision.

There have been previous cases where applicants have not made recourse to domestic remedies and the Court has agreed with the applicant that such remedies would have been ineffective (*Ate? v Turkey,* No. 28292/95, 30.5.00) but these have related to remedies for village destruction. In *Yilmaz v Turkey* (No. 35875/97, 14.6.01) the domestic proceedings relating to the applicant's wife's death was still pending at the time of the admissibility decision and the question of whether such a domestic procedure was effective was joined to the merits. In the two admissibility decisions mentioned by the Court in the present case as evidence that an appeal to the Assize court could have been successful (*Keçeci v Turkey,* No. 38588/97, 17.10.00; *Fidan v Turkey,* No. 24209/94, 29.2.00), it is notable that in neither of them was the appeal actually successful. Unfortunately, neither of the applicants raised Article 13 as an issue in their complaints.

Six-month limitation period

Hazar and Others v Turkey

(62566/00-62577/00 and 62579-62581/00)

European Court of Human Rights, Admissibility Decision, January 10, 2002

Article 3 (prohibition of torture and inhuman or degrading treatment) – Article 5 (right to liberty and security) – Article 6 (right to a fair trial) – Article 8 (respect for home and family life) – Article 13 (right to an effective remedy) – Article 14 (prohibition on discrimination) – Six-month time limit – Inadmissible

Facts

In October 1993 clashes took place between security forces and PKK militants in the district of Lice in Southeast Turkey. The incidents resulted in the deaths of 16 people, injuries to 35 others and the destruction of a great number of properties, including the applicants' homes or shops. Following these incidents, the applicants all applied to the Magistrates' Court for an assessment of the damage sustained. Criminal proceedings are still pending before the Public Prosecutor's office at the State Security Court.

Complaints

The applicants complained under Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1

Held

The Court held that all the complaints were inadmissible. If no effective remedies are available, the six-month time-limit starts running in principle from the date of the act complained of. However, special considerations can apply in exceptional cases where applicants who availed themselves of a domestic remedy only became aware, or should have become aware, at a later stage of circumstances that made that remedy ineffective. In such instances, the six-month period may be calculated from that time.

In the present case, the applicants were aware of the destruction of their properties as of 23 October 1993. Following their request, the Magistrates' Court determined the damage in November 1993. The applicants did not avail themselves of any further remedies, which they considered ineffective. On 29 November 1994, their representative introduced before the Convention organs 201 applications concerning the same incident, in which it was also alleged that no effective remedies were available. In view of these elements, assuming that there were no effective remedies, both the applicants and their representative must have been aware of this situation no later than 29 November 1994, and should have introduced their applications within six months from then. The applications having been introduced on 6 October 2000, they were not submitted to the Court within the six months' time-limit.

Bayram and Yildrim v Turkey

(38587/97)

European Court of Human Rights, Admissibility Decision, January 29, 2002

Article 2 (right to life) – Article 3 (prohibition of torture and inhuman or degrading treatment) – Article 13 (right to an effective remedy) – Inadmissible

Facts

On 26 April 1994, the husband of the first applicant, Hamail Bayram, and the son of the second applicant, Sekir Yildrim, were passengers on a vehicle travelling to Sirnak. On the route, the vehicle hit a mine and all the people in the vehicle died as a result. The Sirnak Public Prosecutor initiated an investigation into the incident. On 16 May 1994, the Public Prosecutor declined jurisdiction, stating that the mine was placed on the road by the PKK and that therefore jurisdiction fell to the Diyarbakir State Security Court. On 9 September 1997, the applicants petitioned the public prosecutor attached to Diyarbakir State Security Court, requesting to be informed about the investigation. The applicants received a reply that that the investigation was ongoing, with no further details.

Complaint

The applicants complained under Article 2 of the Convention that the Government had failed to protect the lives of their relatives due to a failure to observe security measures for national roads.

Invoking Article 6 and 13 of the Convention, the applicants complained that the Government had failed to conduct an effective investigation into the deaths.

The Government complained that the application was introduced out of time.

Held

The application was declared inadmissible due to it being introduced out of time, under Article 35(3) and 4 of the Convention.

The Court recalled that, if no remedies are available or if they are judged to be ineffective, the six-month's time-limit contained in Article 35(1) of the Convention runs from the date of the act complained of. However, special considerations could apply where an applicant relies on an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective. In that case, it is appropriate to take as the start of the six-month period the date when he first became aware, or ought to have become aware of those circumstances.

In this case, the Court observed that the application to itself was submitted almost three and a half years after the event complained of. The Court was of the opinion that, assuming that there were no effective remedies, the applicants must have been aware of the lack of any effective investigation long before they petitioned the Public Prosecutor on 9 September 1997. If the applicants were not so aware, as they alleged, then the Court considered that that was due to their own negligence.

Jovanovic v Croatia

(59109/00)

European Court of Human Rights: Admissibility decision of February 28, 2002

Dismissal from work following alleged participation in a referendum – Article 10 (freedom of expression) – ratione temporis – inadmissible

Facts

The applicant, Zelimir Jovanovic, is a Croatian citizen of Serbian national origin and was an employee of a State prison for young offenders. In 21 January 1992, the applicant and four other employees were dismissed, as a disciplinary measure, for having voted for the formation of the Serbian Autonomous Territory of Western Slavonia, and the secession of that Territory

from Croatia, in the Referendum for Serbian Autonomy in Croatia in August 1990. The decision of the applicant's dismissal stated that the Referendum was found to be contrary to the Croatian Constitution, thus illegal and participation in it was declared incompatible with service in State organs. The applicant appealed the decision through various judicial bodies, finally requesting a revision of the decision with the Supreme Court on 19 February 1993. On 20 December 1995 the Supreme Court upheld the lower courts' judgments. The applicant then filed a constitutional complaint on 2 May 1996. The complaint was rejected by the Constitutional Court on 20 October 1999. The applicant lodged an application with the European Court of Human Rights on 3 April 2000.

Complaints

The applicant complained of a violation of Articles 10 of the Convention, on the basis that his dismissal from work following his alleged participation in the Referendum violated his right to freedom of expression.

The Government argued that the application was incompatible *ratione temporis* with the provisions of the Convention. They argued that the events complained of, i.e. the applicant's dismissal from work, took place in January 1992, while the Convention entered into force in respect of Croatia on 5 November 1997.

The applicant argued that the proceedings concerning his dismissal ended by the Constitutional Court's decision of 20 October 1999, and therefore the facts complained of do fall within the Court's competence *ratione temporis.*

Held

The Court declared the application inadmissible *ratione temporis* (unanimously).

The Court recalled that, in accordance with the generally recognised rules of international law, the Convention only governs facts subsequent to the Convention's entry into force with regard to each Contracting Party (*Kadikis v Latvia*, No. 47634/99, 29.06.00). Accordingly, as regards Croatia, the Court was not competent to examine the application, in so far as it referred to facts occurring before the Convention's ratification on 5 November 1997.

The Court observed that the Constitutional Court's decision was given after the Convention had entered into force in Croatia, and that that decision addressed the same issue before the Court now, i.e. the applicant's right to freedom of expression. However, divorcing the Constitutional Court's decision from the events which gave rise to the present proceedings would amount to giving retroactive effect to the Convention, which would be contrary to the principles of international law.

The Court also considered that the applicant's dismissal was an instantaneous act, which did not give rise to any possible continuous violation of the Convention.

Commentary
This case is likely to be most relevant to applicants in States that have only recently signed to the European Convention, such as Armenia and Azerbaijan. In the instant case, the event had occurred in 1992 and was not an ongoing violation. However, in some circumstances where a continuous violation exists, a case that was previously declared inadmissible *ratione temporis* can be resubmitted.

Compensation

McCann v United Kingdom
(18984/91)
European Court of Human Rights, Judgment of September 27, 1995

Killing by members of the security forces of IRA terrorist suspects in Gibraltar – Article 2 (right to life) – compensation in cases concerning terrorism

Facts
Following intelligence information that the Provisional IRA (Irish Republican Army) were planning a terrorist attack on Gibraltar, SAS (Special Air Service) soldiers were sent to assist the Gibraltar authorities to arrest the IRA active service unit. The three suspects were subsequently shot and killed by members of the SAS.

Complaints
The applicants complained that the killings violated Article 2 of the Convention and claimed just satisfaction under Article 50.

Held
The Court held, by ten votes to nine, that there had been a violation of Article 2 of the Convention.

The Court held that £38,700 for costs and expenses incurred in the Strasbourg proceedings should be paid to the applicants.

The Court considered that, since the terrorist suspects had been intending to plant a bomb in Gibraltar, it was not appropriate to award financial compensation. Consequently the claim for

damages was dismissed; the claim for costs and expenses incurred in the Gibraltar inquest was dismissed; the remained of claims for just satisfaction were dismissed.

Commentary

The applicants had requested the award of damages at the same level as would be awarded under English law to a person who was unlawfully killed by agents of the State. They also asked, in the event of the Court finding that the killings were both unlawful and deliberate or were the results of gross negligence, for exemplary damages at the same level as would be awarded under English law to a relative of a person killed in similar circumstances.

The applicants claimed costs arising directly or indirectly from the killing, including the cost of relatives and lawyers attending the Gibraltar inquest and all the Strasbourg costs. These were solicitors' costs of £56,200 in respect of the Gibraltar inquest and £28,800 in respect of the Strasbourg proceedings. The government submitted that, in respect of the costs of the Gibraltar inquest, as a point of principle, the cost of the domestic proceedings, including the cost of the inquest, should not be recoverable, especially since the applicants legal representatives acted free of charge.

The Court agreed with the Government. Despite its finding of a violation of Article 2 of the Convention, the Court deemed it would be inappropriate to award damages to the relatives of terrorist suspects.

Despite the Turkish Government's frequent assertions that applicants in cases at the Court and their lawyers are members of the PKK, the Court has not applied the *McCann* reasoning. This may reflect that the Court took a particular view where the terrorist posed an *immediate threat* to civilians, whereas the Turkish Government typically asserts that an applicant was involved with terrorist activities in the past.

Section 3: Appendices

1. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances [3.5.2002]

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 – Abolition of the death penalty
The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Prohibition of derogations
No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3 – Prohibition of reservations
No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7 – Entry into force

1. 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 ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8 – Depositary functions
The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 4 and 7;
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 Vilnius, this 3rd day of May 2002, 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.

2. Withdrawal of Turkey's Derogation Under Article 5

Communication contained in a letter from the Permanent Representation of Turkey, dated 5 May 1992, registered at the Secretariat General on 5 May 1992 and withdrawn by a letter from the Permanent Representative of Turkey, dated 29 January 2002, registered at the Secretariat General on 29 January 2002.

I have the honour to refer to the Notice of Derogation and the Notice of Information made by the Republic of Turkey in conformity with Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on August 6, 1990 and January 3, 1991, respectively.

As most of the measures described in the decrees which have the force of law nos. 425 and 430 that might result in derogating from rights guaranteed by Articles 5, 6, 8, 10, 11 and 13 of the Convention, are no longer being implemented, I hereby inform you that the Republic of

Turkey limits henceforward the scope of its Notice of Derogation with respect to Article 5 of the Convention only. The Derogation with respect to Articles 6, 8, 10, 11 and 13 of the Convention is no longer in effect; consequently, the corresponding reference to these Articles is hereby deleted from the said Notice of Derogation.

Period covered: 05/05/92 - 29/01/02
The preceding statement concerns Article(s): 15

3. Council of Europe – Committee of Ministers' Interim Resolution Res DH(2002) 98: Action of the Security Forces in Turkey, Progress Achieved and Outstanding Problems

General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey listed in Appendix II (Follow-up to Interim Resolution DH(99)434)

(Adopted by the Committee of Ministers on 10 July 2002 at the 803rd meeting of the Ministers' Deputies)

The Committee of Ministers,

Under the terms of Article 46, paragraph 2 and former Articles 32 and 54, of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and to the Rules adopted for the application of these provisions,

Having regard to the forty-two judgments and decisions finding that Turkey is responsible for numerous breaches of the Convention relating notably to homicides, torture, destruction of property inflicted by its security forces and to the lack of effective domestic remedies against the State officers who have committed these abuses;

Bearing in mind a number of other cases involving similar complaints which were struck off the list by the European Court following friendly settlements or other solutions found, notably on the basis of the Government's undertaking to take rapid remedial measures;

Noting that most of the violations in the cases here at issue took place against a background of the fight against terrorism in the first half of the 1990s and recalling that each member State, in combating terrorism, must act in full respect of its obligations under the Convention, as set out in the European Court's judgments;

Recalling that, since 1996-1997, when the European Court adopted its first judgments relating to the violations of the Convention committed by the Turkish security forces, the Committee has consistently emphasised that Turkey's compliance with them must *inter alia* entail the adoption of general measures so as to prevent new violations similar to those found in these cases;

Recalling that the necessity of adopting such measures was considered all the more pressing as the judgments denounced such serious violations as torture, inhuman treatment, illegal killings, disappearances and destruction of property;

Recalling its Interim Resolution DH(99)434 of 9 June 1999, in which the Committee noted with satisfaction some progress in the adoption of such measures, while at the same time calling on Turkey rapidly to adopt further comprehensive measures mainly relating to :

- the reorganisation of the education and training of members of the security forces in order to ensure effective respect for human rights in the performance of their duties;

- the modification of the system of criminal prosecution of members of the security forces notably to ensure that prosecutors enjoy the necessary independence and means to conduct effective criminal investigations with a view to identifying and punishing the officials responsible for abuses;

- the effective compensation of victims of violations of the Convention;

- the development of the training of prosecutors and judges in human rights so that they ensure effective respect of the Convention by security forces;

New information provided by the Turkish authorities (see Appendix 1)
Having examined the information provided by the Turkish authorities concerning the measures taken since the adoption of Interim Resolution DH(99)434, as set out in Appendix 1;

Considering with interest the most recent report of the European Committee for the prevention of torture (CPT), which was published on 24 April 2002 with the Government's authorisation, concerning the CPT's visit in Turkey in September 2001;

Assessment of the Committee of Ministers
Noting with satisfaction that, following the adoption of Interim Resolution DH(99)434, Turkey has pursued and enhanced its reform process with a view to ensuring that its security forces and other law enforcement authorities respect the Convention in all circumstances and thus prevent new violations;

Noting in particular the Government's efforts effectively to implement the existing laws and regulations concerning police custody through administrative instructions and circulars issued to all personnel of the Police and *Gendarmerie*, which, *inter alia*, provide for stricter supervision of their activities (see paragraphs 4-6 of the Appendix I);

Noting furthermore with satisfaction the progressive lifting of the state of emergency in South-East Turkey and the Government's withdrawal on 29 January 2002 of its derogation from certain of its obligations under the Convention (Article 15), thus making the latter fully applicable in Turkey, including in the remaining state of emergency regions;

Considering also the recent constitutional and legislative amendments in particular those which limit to 4 days the maximum periods of detention before persons accused of collective offences are presented to a judge, and those which introduce the right of access to a lawyer after a maximum period of 48 hours in police custody in cases of collective offences committed in the state of emergency regions and falling within the jurisdiction of the State Security Courts (see paragraphs 7-8 of Appendix 1);

Concerned however at the continuing existence of new complaints of alleged torture and ill-treatment as evidenced notably through the new applications lodged with the European Court;

Noting in this connection that, in its above-mentioned report, the CPT, whilst noting a gradual improvement as regards the treatment of persons detained by the police in Istanbul, also draws attention to the considerable number of allegations of serious forms of ill-treatment reported in South East regions and

to the continuing existence at certain police stations in these regions of interrogation facilities of a highly intimidating character;

Stressing therefore the need to further reinforce the procedural guarantees against torture, notably by lifting restrictions on the right of persons detained on suspicion of collective offences falling under the jurisdiction of the State Security Courts to see their lawyer during the first two days of custody;

Stressing furthermore that the efficient prevention of fresh abuses by security forces requires, in addition to the adoption of new texts, an effective change of attitude and working methods by members of the security forces, effective civil remedies ensuring adequate compensation as well as effective criminal prosecution of those officials who commit violations of the Convention similar to those at issue in these cases;

Noting with concern that, three years after the adoption of Interim Resolution DH(99)434, Turkey's undertaking to engage in a global reform of basic, in-service and management training of the Police and *Gendarmerie* remains to be fulfilled and stressing that concrete and visible progress in the implementation of the Council of Europe's Police Training Project (see paragraphs 9-12 of Appendix 1) is very urgent;

Noting with interest, however, that, as from October 2001, the period of basic training in Police schools has been extended from 9 months to 2 years and that the Turkish authorities intend to introduce, in connection with the Council of Europe's Police training project, comprehensive human rights training as a part of the new curriculum;

Noting with interest the new Council of Europe/European Commission Joint Initiative established in cooperation with the Turkish authorities for the human rights training of Police and *Gendarmerie*;

Noting, as regards the issue of domestic civil remedies, the continuing development of the administrative courts' practice of ensuring rapid reparation by the State of damage caused as a consequence of the security forces' operations and that a bill for extra-judicial reparation of such damages has been prepared by the Government in order to offer a simplified alternative to court proceedings;

Noting, furthermore with interest, the potential deterrent effect of new provisions in Turkish law enabling the State to claim back from the officials found responsible for torture and ill-treatment any just satisfaction paid in accordance with the European Court's judgments;

Stressing that an effective remedy entails, under Article 13 of the Convention, a thorough and effective investigation into alleged abuses with a view to the identification of and the punishment of those responsible, as well as effective access by the complainant to the investigative procedure;

Regretting therefore that repeated demands for the reform of Turkish criminal procedure to enable an independent criminal investigation to be conducted without prior approval by the State's prefects have not yet been met;

Concerned that recent official statistics (see paragraphs 21-25 of Appendix 1) continue to demonstrate that, where crimes of torture or ill-treatment are established, they are sanctioned by light custodial sentences, which are frequently converted into fines and, in most cases, subsequently suspended, thus confirming the persistence of the serious shortcomings in the criminal-law protection against abuses highlighted in the European Court's judgments;

Stressing therefore the need rapidly to establish and apply a sufficiently deterring minimum level of prison sentences for personnel found guilty of torture and ill-treatment and welcoming the envisaged reform of the Turkish Criminal Code on this point (Articles 243 et 245);

Stressing furthermore the need for enhanced and comprehensive training of judges and prosecutors so as to allow them to give direct effect to the requirements of the Convention as set out in the European Court's case law;
Conclusions of the Committee of Ministers

Welcomes Turkey's recent enhanced efforts which have resulted in the adoption of various important reforms necessary to comply with the above-mentioned judgments of the European Court;

Calls upon the Turkish Government to focus its further efforts on the global reorganisation of the basic, in-service and management training of Police and *Gendarmerie*, building notably on the efforts deployed in the framework of the Council of Europe's Police training project, with a view to achieving, without

delay, concrete and visible progress in the implementation of the major reforms which were found necessary;

Urges Turkey to accelerate without delay the reform of its system of criminal prosecution for abuses by members of the security forces, in particular by abolishing all restrictions on the prosecutors' competence to conduct criminal investigations against State officials, by reforming the prosecutor's office and by establishing sufficiently deterring minimum prison sentences for persons found guilty of grave abuses such as torture and ill-treatment;

Strongly encourages the Turkish authorities to pursue and develop, in particular in the context of the new Council of Europe/European Commission Joint Initiative, short and long-term training strategies for judges and prosecutors on the Convention and the European Court's case-law, including wider dissemination of translated judgments to the domestic courts, rapid adoption and implementation of the legislation on the Turkish Academy of Justice and inclusion in its curricula of in-depth courses on the Convention;

Calls upon the Turkish Government to continue to improve the protection of persons deprived of their liberty in the light of the recommendations of the Committee for the prevention of torture (CPT);

Invites the Turkish authorities regularly to keep the Committee of Ministers informed of the practical impact of the measures taken, notably by providing statistics demonstrating effective investigations into alleged abuses and adequate criminal accountability of members of the security forces;
Decides to pursue the supervision of the execution of the present judgments until all necessary measures have been adopted and their effectiveness in preventing new similar violations has been established.

4. Harmonization Law (no. 4771) Adopted by the Turkish Grand National Assembly, 3rd August 2002

The crucial reforms include the abolition of the death penalty – except in times of war or threat of war – and the granting of certain cultural rights to Kurds. There are eleven significant Articles:

Article 1

Article 1(a) of the Harmonisation Law commutes death penalties into sentences of heavy life imprisonment, excluding "death penalties envisaged for crimes committed in the time of war or during the imminent threat of war." The heavy life imprisonment shall continue until their death (Article 1(b)).

Article 2

Article 2 amends Article 159 of the Turkish Penal Code, which makes it an offence to insult or vilify "the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government or the military or security forces of the State or the moral personality of judicial authorities", or to "overtly curse the laws of the Turkish Republic or the decisions of the Grand National Assembly". Article 2 of the Harmonisation Law states that it is no longer an offence to make "written, oral or visual expression of thought made only for criticism, without the intention to insult or deride the bodies or institutions".

Article 2 also creates new penalties for the smuggling and trafficking of migrants.

Article 3

Article 3 of the Harmonisation Law amends Article 11 of Law No. 2908 on Associations. It stipulates that associations established in Turkey seeking to undertake activities abroad, or foreign associations seeking to undertake activities in Turkey, require the permission of the Council of Ministers upon the proposal of the Ministry of Interior, in consultation with the Ministry of Foreign Affairs. The permission is granted "in cases where international cooperation is deemed to be useful," and, in the case of foreign associations, "reciprocal".

However, the Council of Ministers, Ministry of Interior and Ministry of Foreign Affairs may terminate the activities of an association where it co-operates with activities that are contrary to Turkish laws or "national interests".

It also provides for the creation of a Department of Associations and a Register of Associations.

This article will enter into force on 3 August 2003.

Article 4

Article 4(a) provides that foundations are permitted to acquire and dispose of real property.

Article 4(b) stipulates that associations in Turkey can be established abroad or become members of foreign foundations with the permission of the Council of Ministers, the Directorate General of Foundations, the Ministry of Interior and the Ministry of Foreign Affairs.

Article 5
Article 5 stipulates that foreigners seeking to organise a meeting or demonstration require the permission of the Ministry of Interior. The local authority must be informed at least 48 hours in advance where foreigners seek to address a crowd or to carry posters, placards, pictures, flags, inscriptions or equipment.

Article 5(b) stipulates that co-ordinators of a meeting must all sign a notice, which is to be submitted to the local authority at least 48 hours before a meeting.

Articles 6 and 7
Articles 6 and 7 state that, where Turkey has been found in violation of the ECHR by the European Court of Human Rights, and where the violation is of such a character that it cannot be compensated for as provided by Article 41, the applicant or his/ her legal representative may apply to the Court of Appeal for a retrial within a year of the Court's judgment.

This will come into effect on 3 August 2003 (Article 13).

Article 8
Article 8 amends Law No. 3984 on the Establishment and Broadcasting of Radio Stations and Television Channels and provides that, "there may be broadcasts in the different languages and dialects used traditionally by Turkish citizens in their daily lives." However, "such broadcasts shall not contradict the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation."

It also provides for the creation of a right to privacy, and prohibits incitements to violence or racial hatred.

Article 9
Article 9 stipulates reduced penalties for several existing offences under the Press Act.

Article 10
Article 10 provides further specification of the duties and competences of the police. It specifies the measures required to authorise searches on individuals, their vehicles, personal documents and belongings.

Article 11
Article 11 amends the Law on Foreign Language Education and Teaching to allow the establishment of "private courses... to enable the learning of the different languages and dialects used traditionally by Turkish citizens in their daily lives." However, "such courses

cannot be against the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation."

5. NGOs' Response to the Report of the Evaluation Group on the European Court of Human Rights

NGOs' response to the Report of the Evaluation Group

We, the undersigned NGOs, submit the following response to proposals to reform the European Court of Human Rights by the Evaluation Group on the European Court of Human Rights, in its report published on 27 September 2001.

We consider that in assessing proposals to reform the European Court of Human Rights, the overriding principle should be that the Court must provide applicants with an effective and accessible remedy in respect of violations of the European Convention. In order to do so, the Court, including the Registry, must be adequately resourced. The Court must be in a position to provide binding determinations of the merits of individual cases where it is alleged that a Contracting State has failed to comply with its obligation to secure the rights and freedoms established by the Convention. This also requires transparency both of the process and the outcome, and that there should not be unlimited judicial discretion.

1. It is recognised that the increasing number of individual applications which are being lodged with the European Court of Human Rights (European Court) has already been detrimental to the effectiveness of the Court and that accordingly further reforms to the system are needed. In reforming the European Court mechanisms, the right of individual application, which the Court has acknowledged to be at the heart of the European Convention system, must not be restricted or weakened. Indeed, it should be strengthened, *inter alia*, by the speedier resolution of applications. We therefore welcome the Evaluation Group's basic premises that (a) there should be no reduction in the substantive Convention rights; (b) the right of individual petition must be preserved in its essence; and (c) the Court should dispose of applications within a reasonable time, whilst maintaining the quality and authority of its judgments.

2. The proposals by the Evaluation Group for making additional amendments to the European Convention on Human Rights itself are predicated on the need to reduce the workload of the Court. We consider it to be imperative that the essential right of individual application should not be impaired by the pressures created by an increasing number of (alleged) human rights violations across the 41 Convention

states. The solution to this problem is to reduce the number of human rights violations in the Convention states, rather than to weaken the Court's mechanism for providing remedies to applicants. Accordingly, we are concerned about proposals that the Court be empowered to decline to examine in detail "applications which raise no substantial issue under the Convention" and proposals for the expedition of "applications that do not warrant detailed treatment". We consider that applicants must not be denied effective access to justice at the European Court. In the majority of cases declared admissible this will require a binding determination by the Court of the substantive merits of the application, together with an adjudication on reparation (including compensation and costs).

3. We support the proposition that various measures be taken at national level in order to improve the domestic implementation of the Convention. However, we do not support cases being remitted back to national authorities in the manner suggested by the Evaluation Group Report. The Evaluation Group's proposals that (i) applications not accepted for detailed treatment by the European Court be remitted back to national authorities for reconsideration and (ii) that applications certified as being admissible and manifestly well-founded could be redressed by national authorities, would require the prior creation in each Convention state of effective systems to provide such redress. It is suggested that this will create difficulties for most Convention States, not least where the highest domestic court has already made a decision that the Convention has not been violated. Such procedures are likely to create conflict between the roles of the executive and the judiciary. Moreover, in view of the number and nature of previous adverse Court judgments against certain States, we have serious doubts that some States would be willing and able to establish such systems. The obvious danger arising from these proposals is that applications could be held in limbo and that applicants would be unable to obtain an effective remedy for human rights violations either from the national authorities or the European Court (see also paragraph 2 above).

4. An expansion of the existing friendly settlement process, as envisaged by the Evaluation Group, which could be seen as a convenient means of reducing the Court's caseload, must not be to the detriment of the individual right of application (including determinations of the merits of most cases). We consider that the striking out of applications under Article 37 of the Convention should be regarded as a wholly exceptional procedure. The suggestion that an applicant's consent could be dispensed with in striking an application out of the list should be rarely, if ever, invoked. This would require a clear admission of liability by the respondent Government in the particular circumstances of the applicant's case, and could only apply where the applicant's position is manifestly unreasonable. There would have to be a rigorous

consideration by the Court of the respondent Government's settlement offer and a careful assessment as to whether the offer provides as full a remedy as is appropriate in the circumstances. This must include a detailed consideration of the nature of the application and the substance of the alleged Convention violation(s), as well as the extent of any admission of responsibility and undertakings by the respondent Government. It is suggested that the Court must also ensure that any such undertaking is sufficiently specific (in relation to both the measure which the State has agreed to adopt and the timetable for its implementation) to enable the Committee of Ministers effectively to supervise its enforcement. Finally, the Court should set out its reasons in full for any such decision. We note with concern the use of the striking out procedure without the applicant's consent in *Akman v Turkey*, Judgment of June 26, 2001, in the context of a right to life case concerning the fatal shooting of the applicant's son by the Turkish security forces. We are concerned that the Court's judgment in *Akman* failed to resolve the dispute as to what happened to the applicant's son, and that it failed to refer either to the obligation under Article 2 to provide an effective investigation into the incident or the obligation under Article 13 to provide an effective remedy. It is also of concern that the respondent Government in the *Akman* case gave no undertaking to attempt to investigate the circumstances of the case or to consider whether criminal or disciplinary proceedings should be brought. We consider that the striking out of such a case in those circumstances fails to ensure "respect for human rights" as required by Article 37 and risks damaging the Court's credibility.

5. It is acknowledged that the Court's fact-finding hearings may be time-consuming and expensive, however, in exceptional cases, we consider that such procedures are essential to the Convention system and must be continued. Such hearings have been conducted in complex and serious cases where there has been no or inadequate investigations by the national authorities, accordingly it is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention which creates the need for the Court to hold fact-findings hearings. There are particular situations, such as allegations concerning torture or death in custody raising issues under Articles 2 and/or 3 of the Convention, where it is the state, rather than the applicant, which has the capability to obtain and/or preserve essential evidence. Where the state fails in its duties in this respect, the case may only be capable of authoritative resolution by the hearing of oral evidence. Where the national authorities fail to conduct such independent, impartial and thorough hearings, the European Court should do so. Given that the burden of proof falls essentially on the applicant to establish her/his case, to deny an applicant an oral hearing in some circumstances would be significantly to disadvantage the applicant.

6. For the reasons set out in the Report of the Evaluation Group, we do not support the creation of regional human rights tribunals throughout Europe (with the Strasbourg court becoming a tribunal of last instance) or the use of preliminary rulings on Convention issues at the request of national courts. However, we consider that the use of both advisory opinions on Convention issues, provided by the Court at the request of national courts (under Article 47) and the inquiry process (under Article 52) could make significant contributions (in the long term) to the process of establishing the extent of certain Convention violations by particular States, and having them remedied by the national authorities, thereby reducing the number of applications being made to the Court. We suggest that consideration should be given to using these mechanisms more frequently and systematically.

7. In accordance with the principle reflected in the European Court's own jurisprudence, applicants are entitled to expect their cases to be determined by a court, and not by administrative officers. Therefore, we are opposed to the investing of judicial status on members of the Registry who have not been elected as judges, such that the system could be subject to criticism that it lacks the appropriate appearance of independence and transparency.

8. We consider that human rights training and the provision of technical assistance are fundamental elements in improving the implementation of the Convention at national level. We recommend that a more systematic human rights training programme be devised and implemented by the Council of Europe, in conjunction with national authorities, international agencies and NGOs (both pre- and post-ratification of the Convention). Training programmes aimed at public authorities (including law enforcement authorities) would achieve a reduction in the number of Convention applications, and training programmes for those who represent potential European Court applicants would be likely to reduce the number of applications submitted which are declared inadmissible. We also consider that the domestic implementation of the European Convention is impeded by judgments not being available in both official Council of Europe languages, and that further consideration should be given to making judgments available in a wider range of languages used in Contracting States.

9. Allowing applicants to communicate with the Court in the early stages of an application in their own language, and without an obligation of being legally represented, are both important elements in ensuring effective access to justice, particularly as legal aid may not be available from domestic authorities for the preparation of applications to the European Court. Thus the Evaluation Group's

rejection of the proposal that legal representation of applicants should be compulsory at all stages of Convention proceedings is welcomed, as is the rejection of any alteration of the current practice of permitting the use of any of the 37 national official languages in proceedings prior to admissibility.

10. We consider that the national authorities should be urged to provide adequate resources to lawyers and non-governmental organizations in order for them to assess and provide initial advice in respect of potential Convention applications. This should include the provision of legal aid by the national authorities. In addition to improving access to justice to the European Court (see paragraph 2 above) this would have the effect of weeding out more misconceived applications. National authorities should also be urged to establish national human rights institutions, such as Human Rights Commissions, in accordance with the Paris Principles, to promote an awareness and understanding of the importance of adhering to Convention rights and to support and bring court proceedings where appropriate.

11. The adequate financial resourcing of the Court is vital for its continued credibility and effectiveness. It is in particular necessary to ensure that there is an adequate number of Registry officials, who should be given reasonable security of tenure. It is noted that the total budget of the European Court of Human Rights is only a quarter of the budget of the European Court of Justice. It is essential that Contracting States show greater commitment to the European Court system, not only by following the Council of Europe's substantive recommendations, for example that there should be improvements in the provision of effective domestic remedies, but also by providing the Court with sufficient resources and ensuring prompt implementation of its judgments.

List of signatories to the NGOs' response to the Report of the Evaluation Group (at 28 November 2002)

1. ACCEPT (Romania)
2. AIRE Centre
3. Amnesty International
4. APADOR-CH (The Romanian Helsinki Committee)
5. Armenian Association on Human Rights and Democracy
6. Association for European Integration and Human Rights (Plovdiv, Bulgaria)
7. Association for Rehabilitation of Torture Victims – Center for Torture Victims (Sarajevo, Bosnia and Herzegovina)
8. Azerbaycan Insan Huquqlarini Mudafie Merkezi (The Human Rights Center of Azerbaijan)
9. Bar Human Rights Committee of England & Wales
10. British Institute of Human Rights
11. British Irish RIGHTS WATCH
12. Bulgarian Lawyers for Human Rights
13. Chechnya National Committee
14. Committee on the Administration of Justice
15. Danish Section of Save the Children
16. Danish United Nations Association
17. European Centre, Albania
18. European Roma Rights Center
19. Fair Trials Abroad
20. Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture (FI.ACAT)
21. Fédération Internationale des Assistants Sociaux (FIAS/ Bern)
22. Fédération Internationale des Ligues des Droits de l'Homme (FIDH)
23. Folkekirkens Nødhjælp, Denmark
24. Fondation Marangopoulos pour les droits de l'homme (FMDH/Athens)
25. Glasnost Defense Foundation
26. Greek Helsinki Monitor
27. Human Rights Association of Turkey
28. Human Rights Commission of the Republic of Ireland
29. Human Rights Information and Documentation Centre (Georgia)
30. Human Rights Watch
31. INQUEST
32. Institut Robert Schuman pour l'Europe
33. International Bar Association of Armenia Advocates

34. International Helsinki Federation for Human Rights
35. Interights
36. Italian Helsinki Committee
37. IWGIA (International Work Group for Indigenous Affairs), Denmark
38. JUSTICE
39. Kurdish Human Rights Project
40. The Law Society of England and Wales
41. Lawyers Committee for Human Rights
42. The Leo Kuper Foundation
43. Liberty
44. Lobby für Menschenrechte e. V.
45. MAZLUMDER (Organization of Human Rights Solidarity for Oppressed People) (Turkey)
46. Medical Foundation for the Care of Victims of Torture
47. Medical Rehabilitation Center for Torture Victims (Greece)
48. Minority Rights Group – Greece
49. Moldovan Helsinki Committee for Human Rights
50. Northern Ireland Human Rights Commission
51. Nottingham University Human Rights Law Centre
52. OMCT – World Organisation Against Torture
53. Pat Finucane Centre
54. Pax Christi International
55. Physicians for Human Rights UK
56. Red Barnet (Save the Children), Denmark
57. Resource Centre of Moldovan Human Rights NGOs
58. Save Chechnya National Committee
59. Stichting Chechnya Justice Initiative
60. Swedish Helsinki Committee for Human Rights
61. TOHAV (*Toplum ve Hukuk Ara?t ırmalar ı Vakf ı)* [Foundation for Legal and Social Studies, Turkey]

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1 Recommendation 1247 (1994) of the Parliamentary Assembly.

2 The list of commitments is not confined to those mentioned above.

3 The time-frame, as outlined by the Parliament Assembly, during which Armenia should undertake this commitment is three years after accession.

4 Article 15 of the ECHR.

5 Article 45 is the derogation clause applying to the rights with the exception of several articles, including the right to life under Article 17 of the Constitution.

6 Amnesty International (AI) 2000 Annual Report.

7 The existing Criminal Code dates from 1961.

8 Article 56 (1) states: "Life imprisonment may be inflicted for such especially serious offences, which have been accompanied by intentional taking of the life of a person in aggravating circumstances. (2) Persons sentenced to life imprisonment shall serve it in special security reformatories or in jail. (3) Life imprisonment may not be inflicted upon women, as well as any person who has not attained the age of eighteen at the time of commission of the crime".

9 *Ireland v. UK*, Judgment of 18 Jan. 1978. Application 5310/71.

10 Francis Jacobs and Robin White, "*The European Convention on Human Rights*", 2nd ed., Oxford: Clarendon Press, 1996.

11 *Ibid.*, 50.

12 Amnesty International Report-2000, "*Torture and ill-treatment*". 80 officers had been prosecuted for illegal actions. 34 were convicted for abuse of power and 2 have been convicted for causing suicide.

13 *Ibid.*

14 The report is available under: http://www.state.gov/g/drl/rls/hrrpt/2000/eur/index.cfm?docid=672.

15 Velu, "The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications", in A. Robertson, *Privacy and Human Rights*, Manchester, 1973.

16 *Dudgeon v.UK*, Judgement of 22 Oct.1981, Series A, No. 45; (1982) 4 EHRR.

17 *Scheuten v.FRG, App. 6959/75.*

18 See Opinion No. 221 (2000) of the Parliamentary Assembly.

19 Armenian Constitution, Article 23.

20 Cf. U.S. State Department, Human Rights Country Report on Armenia 2000.

21 *Ibid.*

22 Human Rights Watch, Annual Report 2000.

23 Amnesty International, Annual Report 2000.

24 Concluding observations of the Committee on the Elimination of Racial Discrimination: Armenia.

23/08/2002. CERD/C/61/CO/1. See also 'Armenia Submits a Report to the Committee on the Elimination of All Forms of Racial Discrimination', (2002) 1 *KHRP LR* p.14.

25 Report to the Georgian Government on the Visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 18 May 2001, CPT/Inf (2002) 14

26 'Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)', available: **www.cpt.coe.int/en/reports/inf2002-08en.htm** [2002, October 2].

27 'Preliminary Observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Turkey from 21 to 27 March 2002 and Response of the Turkish authorities'.

28 9 April 1990, Imset and Yildiz, p.11.

29 U.S. Department of State: Turkey Country Report on Human Rights practices for 1997.

30 The Evaluation Group report, EG (Court) 2001, is available on the Council of Europe's website at **http://www.cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm**

31 See also Case summaries at p.75.

32 The author prepared this study in a consultant capacity for the Council of Europe. The organisation has authorised its present publication in the (2002) 2 KHRP Legal Review, while retaining the exclusive publication and reproduction rights over this study. For an account of earlier law of the Convention, see C. Warbrick, "The European Convention on Human Rights and the Prevention of Terrorism", (1983) 32 **International and Comparative Law Quarterly** 82; for an account of national laws, see A Vercher, **Terrorism in Europe** (1992); for an assessment of recent proposals, see Amnesty International, **Rights at Risk** ACT30/001/2002. The study was completed in January 2002 and it has not been up-dated, however see, **"Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism"** (2002).

33 International Convention on the Suppression of Terrorist Financing, GA Res.109 (1999). See A Aust, "Counter Terrorism – a New Approach", (2001) 4 **Max Planck Yearbook of United Nations Law** 285.

34 In such cases, international humanitarian law will apply also. It is not possible to deal with its application in this paper. See below, n.51. Also for reasons of space, there is no treatment of the admissibility of cases.

35 See further, K Koufa, "Terrorism and Human Rights: Progress Report", Sub-Commission on the promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/31.

36 Governments have sometimes made reference to Article 17, eg Freedom and Democracy Party (OZDEP) v Turkey (1999-IV) para 47 and Refah Partisi (Prosperity party) v Turkey (31/07/2001) para 85 but the Court has not found an occasion to rely on Article 17 in any case involving terrorism. In McCann v United Kingdom below, n.54 para 219, the Court did take into account that the deceased were members of a terrorist organisation when deciding not to award any pecuniary satisfaction under (then) Article 50.

37 C Gearty, **Terror** (1991).

38 United Communist Party v Turkey (1998-I) 1, para 45: Refah Party, above n.36, paras 43-44.

39 Malone v United Kingdom A/82 (1984) paras 67-68.

40 Huvig v France A/176B (1990) paras 29-35. For the effective right of access to a court more generally, see Golder v United Kingdom A/18 (1975).

41 Klass v Germany A/28 (1978) para 48.

42 See "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice", (1998) 19 **Human Rights Law Journal** 1-36.

43 Brannigan and McBride v United Kingdom A/258B (1993) para 43, referring to the margin of appreciation under Article 15.

44 Golder v United Kingdom above n.40 para 36.

45 See McCann v United Kingdom, below n.54.

46 X and Y v Netherlands A/91 (1985).

47 A/25 (1978) para 149.

48 Osman v United Kingdom(1998-VIII) 3124, para 121 - not shown that "police knew or ought to have known that the lives of the Osman family were at **real and immediate risk...**" (emphasis added).

49 W v United Kingdom 32 DR 190.

50 Ocalan v Turkey App.No.46221/99: the Court made an indication of interim measures asking Turkey not to carry out any death penalty on Ocalan until the Court had examined his complaints under the Convention. The Court found that the admissibility of Ocalan's complaints under Article 2, Article 3 and Article 2 together with Articles 5, 6 and 14 could be resolved only with its consideration of the merits.

51 See A Reidy, "The Approach of the European Commission and Court of Human Rights to international humanitarian law", (1998) **International Review of the Red Cross** 513.

52 Andronicou and Constantinou v Cyprus (1997-VI) 2059.

53 McKerr v United Kingdom (04/05/2001) para 110.

54 McCann v United Kingdom A/324 (1995) para 156 (training includes setting appropriate rules of engagement).

55 Id, para 150; paras 202-213.

56 Ergi v Turkey (1998-IV) 1751, para 79.

57 Id, para 81.

58 Above n.54 para 200.

59 In McKerr, above n.53 and its associated cases, the Court would not get into an investigation of the actual circumstances of the killings, leaving it in the first instance to still unfinished civil proceedings before national courts, paras 119-121.

60 For instance, Kaya v Turkey (1998-I) 297.

61 Above n.53 para 109.

62 Ergi, above n.56 para 82.

63 Ilhan v Turkey (2000-VII) para 63.

64 Gulec v Turkey (1998-IV) 1698, para 81; Ergi v Turkey above n.56 para 83.

65 Mahmut Kaya v Turkey (2000-III) paras 106-107.

66 Id, para 87.

67 Ogur v Turkey (1999 - III) 519 para 92.

68 For an even more detailed breakdown and an analysis of all the "Turkish" cases, see C Buckley, "The European Convention on Human Rights and the Right to Life in Turkey", (2001) 1 **Human Rights Law Review** 35 (which also includes treatment of the problem of disappearances, pp.55-64).

69 McKerr above n.53 para 117.

70 In addition to the cases already referred to, see, for example, Avsar v Turkey (10/07/2001) paras 285-372 for an elaborate inquiry into the facts.

71 See Committee of Ministers, Interim Resolution DH(99)434 – Human Rights, Action of the Security Forces in Turkey: Measures of a General Character, 9 June 1999.

72 McKerr, above n.53 para 160.

73 For a good but critical account of the case law, see M Evans and R Morgan, **Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** (1998), pp.69-105.

74 Brannigan, above n.43, paras 61-66.

75 Ireland v United Kingdom, above n.47 para 163. M Addo and N Grief, "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?", (1998) 9 **European Journal of International Law** 510.

76 See the descriptions of treatment amounting to torture in Aydin v Turkey (1997-VI) 1866, paras 73, 80-87 (rape by an official while in detention) and Aksoy v Turkey (1996-VI) 2260, paras 39-40, 61-64 ("Palestinian hanging").

77 Chahal v United Kingdom (1996-V) 1831, paras 73-74: "...Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and...its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question...".

78 Above n.47, paras 96-104, 106-107, 165-168.

79 McCallum v United Kingdom AS/183 (1990); Ensslin et al v Germany 14 DR 64 (1978); Krocher and Moller v Switzerland 34 DR 24 (1983).

80 Keenan v United Kingdom (03/04/2001) para 115.

81 McFeeley v United Kingdom 20 DR 44 (1980) but a State is not obliged to give in to a prisoner's demand which is not required by the Convention.

82 Selmouni v France (1999-V) 149 para 79 – need for an effective investigation; need for a criminal prosecution where the facts warrant it – Egmez v Cyprus (21/12/2000) para 71.

83 Selmouni. above n.82 para 87.

84 Ribitsch v Austria A/336 (1995) para 34.

85 Peers v Greece (19/04/2001) para 61.

86 Tyrer v United Kingdom A/26 (1978).

87 Kotalla v Netherlands 14 DR 238 (1978).

88 Soering v United Kingdom A/161 (1989).

89 See also Drozd and Janousek v France and Spain A/240 (1992) para 110 – States must refuse co-operation if conviction results from a "flagrant denial of justice".

90 Ahmed v Austria (1996-VI) 2195.

91 Bensaid v United Kingdom (06/02/2001) para 34.

92 Compare Convention Relating to the Status of Refugees, 1951, 1968, Articles 1(F), 32, 33(2). See H Lambert, "Protection against Refoulement in Europe: Human Rights comes to the Rescue", (1999) 48 **International and Comparative Law Quarterly** 515.

93 Above n.46 para 79.

94 Id, para 88.

95 For instance, under any of the suppression conventions or the UN Convention against Torture.

96 Anti-terrorism, Crime and Security Act 2001, ss.21-23.

97 United Kingdom, Statutory Instruments SI 2001 No.4032, **The Human Rights Act 1998 (Amendment No.2) Order 2001.**

98 House of Commons, House of Lords (UK), Fifth Report of the Joint Committee on Human Rights, Session 2001-02,
Appendices to Minutes of Evidence, Joint Opinion prepared for JUSTICE by David Anderson QC and Jemmima
Stratford...; Opinion of David Pannick QC prepared for Liberty...

99 Nivette v France App.No.44190/88, 14 December 2000.

100 See, for example, the United Kingdom legislation, above n.96.

101 Lawless v Ireland A/3 (1961).

102 On the Diplock Courts, see J Jackson and S Doran, **Judges without Juries** (1995).

103 Above n.101.

104 McVeigh et al v United Kingdom 25 DR 15 (1981).

105 Fox, Campbell and Hartley v United Kingdom A/182 (1988) para 42.

106 Id, para 41.

107 Beginning with the Prevention of Terrorism Act 1974, s.12.

108 Brogan v United Kingdom A/145B para 48.

109 Id para 59-62.

110 Brannigan and McBride v United Kingdom A/258B (1993) para 66.

111 Caballero v United Kingdom 08/02/2000.

112 Quinn v France A/311 (1995) para 48.

113 Chahal, above n.77 para 117.

114 Murray (John) v United Kingdom A/300A (1994).

115 See McFeeley, above n.50; C Walker, "Irish Republican Prisoners: Political Detainees, Prisoners of War or Common Criminals?" (1984) 19 **Irish Jurist** 189.

116 See D Harris et al, **Law of the European Convention on Human Rights** (1995), pp.230-239.

117 Incal v Turkey (1998-IV) 1547.

118 Id, para 72.

119 There is a hint in Incal, above n.117, that the Court has concerns about inappropriate cases being heard by special courts, para 72.

120 Kavanagh v Ireland No.819/1998, CCPR/C/71/D/819/1998.

121 For an example from a civil case, see Tinnelly and McElduff v United Kingdom (1998-IV) 1633. This is one example of what is a pervasive issue in counter-terrorism action, to what extent may national security considerations defeat the rights of individuals, see I Cameron, **National Security and the European Convention on Human Rights** (2000).

122 On witnesses, see below, n.110.

123 Allenet de Ribemont v France A/308 (1995), establishing first, that Article 6(2) may be breached by statements of politicians and police officers (and not only judges), para 37, and second, that the actual statements constituted an assertion of guilt and were in breach of Article 6(2), para 41.

124 Salabiaku v France A/141A (1988); R v DPP ex p Kebilene [1999] 3 WLR 175 (HL) (United Kingdom).

125 Murray (John) above n.114, para 47.

126 Id, para 52.

127 Magee v United Kingdom (06/06/2000) para 34.

128 Heaney and McGuiness v Ireland (21/12/2000) para 55.

129 See C Campbell, "Two Steps Backwards: the Criminal Justice (Terrorism and Conspiracy) Act 1998", (1999) **Criminal Law Review** 941, 946-955.

130 Edwards v United Kingdom A/247B (1992) para 36.

131 Rowe and Davis v United Kingdom (16/02/2000) paras 60-67. The judgment is important because non-disclosure of evidence was a substantial component in many miscarriages of justice in terrorist trials in the United Kingdom.

132 Cf AM v Italy (25/10/2001), paras 23-28, where the Court held that the admission of evidence obtained in the United States in a trial in Italy deprived the defendant of his rights to a fair trial (but treating it as a violation of Article 6(3)(d), rather than a breach of equality of arms).

133 Van Mechlen v Netherlands (1997-III) 691, para 58.

134 Doorson v Netherlands (1996-II) 446, para 72.

135 Rowe and Davis, above n.131 para 62.

136 PG and JH v United Kingdom (25/09/2001) para 73.

137 SW v United Kingdom, CR v United Kingdom A/335B,C paras 34-36, 32-34; and see Streletz et al v Germany (22/03/2001) paras 56-76, holding that the interpretation of a justification (or defence) under national law to avoid excusing conduct in violation of Article 2 of the Convention was not a breach of Article 7(1).

138 Ecer and Zeyrek v Turkey REF para 29.

139 C Warbrick, "The Structure of Article 8", (1998) **European Human Rights Law Review** 32.

140 Kopp v Switzerland (1998-II) para 72.

141 Klass v Germany above n.10; Leander v Sweden A/116 (1982).

142 In Huvig v France, above n.40, the Court held that a general judicial power to authorise investigatory measures which had been used to permit telephone-tapping was sufficiently precise to constitute "law", when read with subsequent judicial decisions but that it failed the "quality" test of "law" because the national law provided no safeguards against abuse of the power, para 34-35.

143 See, for example, United Communist Party of Turkey v Turkey, above n.38 paras 45-47, 59 and Aksoy v Turkey, above n.76 para 70 for the Court's understanding of "democratic society" and the relevance of a background of terrorism to the exercise of the margin of appreciation.

144 For a recent statement and application of the principles, see Boultif v Switzerland (02/08/2001) paras 46-56.

145 Klass v Germany, above n.41 paras 51-60.

146 Note the doubts of Judge Pettiti, concurring in Kopp, above n.140, about the adequacy of the controls of secret surveillance in many Convention States.

147 Austria v Italy (1963) 6 Yearbook of the European Convention on Human Rights 740 (Commission).

148 Khan v United Kingdom (12/05/2000) para 37 (the only evidence against the defendant had been obtained in breach of the Convention but the Court held that Khan's conviction did not violate Article 6.); cf Teixeira de Castro v Portugal (1998-IV) (no fair trial, entrapment).

149 Handyside v United Kingdom A/24 (1976) para 49.

150 See Lehideux and Isorni v France (1998-VII) 2864.

151 Mutatis mutandis, there will be the same inquiries into "law" and "aim" as discussed above under Article 8.

152 Vogt v Germany A/323 (1996) para 61 – dismissal of civil servant (school teacher) for failing to reaffirm her loyalty to the Constitution not "proportionate" to any security concern. However, in Jersild v Denmark A/298 (1994) para 34, the Court did regard it as relevant that the producer of a TV programme which included racist remarks had dissociated himself from the comments.

153 Refah Paritisi (Prosperity Party) v Turkey above n.36 para 47. The judgment was by four votes to three.

154 Purcell v Ireland 70 DR 262, 277-78.

155 See United Communist Party of Turkey, above n.38 paras 54, 56 (no evidence that Party's programme was a threat to Turkish society or that it advocated a violent solution to the claims of the Kurds); Socialist Party v Turkey (1998-III) para 46 (no call for violence); Freedom and Democracy Party (OZDEP) v Turkey above n.36 para 40,46 (Court finds nothing that can be considered "a call for violence").

156 Security Council Resolution 1383 (2001).

157 AGOSI v United Kingdom A/108 (1986), para 54.

158 Phillips v United Kingdom (05/07/2001) paras 35, 53.

159 Id, para 46.

160 Id, para 54.

161 See Klass v Germany, above n.41 para 64: Silver v United Kingdom A/61 (1983) para 113; Powell and Rayner v United Kingdom A/172 (1990) para 33.

162 Harris, et al, above n.116 pp.450-458.

163 For instance, Gul v Turkey paras 100-102.

164 Ergi, above n.56 para 98.

165 See P van Dijk and G J H van Hoof, **Theory and Practice of the European Convention on Human Rights** (3rd ed. 1998), pp.666-678.

166 Raimondo v Italy A/281A (1994); cf Guzzardi v Italy A/39 (1980).

167 Anti-Terrorism etc Act (the UK is not a party to the Fourth Protocol).

168 Becker v Denmark 4 DR 215 (1975).

169 Lawless v Ireland (Merits) A/3 (1961)

170 Aksoy v Turkey, above n.76 para 70.

171 Brannigan v United Kingdom, above n.43 para 47.

172 Though the British government did not consider that it would need to rely on an emergency legislation to justify extended detention until the Court found otherwise in Brogan.

173 Chahal v United Kingdom, above n.77 para 131.

174 Id, para 59.

175 Above n.43 paras 58-60.

176 Id, paras 63-65.

177 Aksoy, above n.76 paras 71-84.

178 Harris et al, above n.116 pp.462-488.

179 Belgian Linguistics case (Merits) A/6 (1968).

180 Ireland v United Kingdom, paras 228-232 (finding no discrimination between Loyalist and Republican terrorists in the use of internment powers).

181 Above n.105 para 28.

182 Act No. 4744 was adopted in February, 2002, and Act No. 4748 was adopted in March, 2002.

183 (London: Kurdish Human Rights Project, June, 2002).

184 See the KHRP Language Report, *supra*, at pp. 21-24, for a fuller discussion; much of the information in this paragraph is drawn from this report.

185 The KHRP Language Report, *supra*, at p. 21. Turkey is already a party to the ECHR, and as noted, the Accession Partnership made separate reference to the ICCPR and the ICESCR.

186 See the KHRP Language Report, *supra*, at p. 22, *et seq.*

187 Law Regarding Publications in Languages other than Turkish, No. 2932, of 19 October, 1983. This law effectively only permitted the use of Turkish and "the first official language of states recognised by the Turkish State", and since Kurdish was not such a language, its use was not permitted. See the KHRP Language Report, *supra*, at p. 31, 41.

188 The RTUK Law is available on-line at: http://www.rtuk.org.tr/ying3984.htm.

189 KHRP Language Report, *supra*, at pp. 44-45. It should be noted that the prohibition on the use of Kurdish was itself not complete. In practice, broadcasts of songs in the Kurdish language have been permitted, at least in recent years. What was not permissible prior to the August Reform Package, however, was the use of Kurdish as the language through which the programming itself was carried out.

190 Indeed, the recognition here of the development of the Turkish language as a basic element of national unity and integrity is particularly problematic, given provisions in both the RTUK Law and other legislation such as the Anti-Terror Law and the Penal Code which effectively prohibit activities which threaten national unity and integrity. This provision in the RTUK should arguably have been amended to make clear that the use of other languages and dialects traditionally used by Turkish citizens in their daily lives should not, in itself, be considered to constitute a threat to the national unity and integrity of the Turkish State.

191 As reported by the New York Times, 21 November, 2002, "Turkey Allows Broadcasting of Kurdish-Language Shows", by the Associated Press.

192 As reported by Sabah, 18 September, 2002, "Kurdish Courses Forbidden to Those Who Do Not Know Turkish", by Samil Tayyar.

193 This article prohibits written or spoken propaganda, meetings, assemblies and demonstrations which are aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation.

194 This article provides for the prosecution of anyone who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions.

195 This article provides the basis for the imprisonment of anyone who overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the Ministries or the military or security forces of the State or the moral personality of the judicial authorities. It should be noted that Article 2(A) of the August Reform Package amended article 159 of the Penal Code to clarify that written, oral or visual expressions of thought made only for the criticism, without the intention to insult or deride the bodies or institutions listed in Article 159, will not be punished, thereby arguably limiting somewhat the scope for prosecutions under Article 159.

196 For example, paragraph (a) of Article 4 provides that broadcasts shall not violate the existence and independence of the Turkish Republic and the territorial and national integrity of the State, among other things, paragraph (b) provides that broadcasts shall not instigate the community to violence, terror, ethnical discrimination or shall not incite hate and hostility by making discrimination in the community in terms of the diversities of the social class, race, language, religion, sect and territory or shall not give rise to feelings of hatred in the community, and paragraph (e) provides that broadcasts shall not violate the national and moral values of the community and Turkish family structure. To this, Article 8(B) of the August Reform Package added a new paragraph (v) which provides that broadcasts shall not encourage the use of violence or incite feelings of racial hatred. Incidents in which these provisions, as well as those in the Anti-Terror Law and the Penal Code, have been used to effectively limit Kurdish broadcasters are set out at pp. 41-47 of the KHRP Language Report, *supra.*

197 See the KHRP Language Report, *supra*, at pp. 35, 36.

198 As reported by Voice of America, "Turkey Moves Toward Creating Private Kurdish Courses", Ankara, 18 September, 2002.

199 As reported by Sabah, 18 September, 2002, "Kurdish Courses Forbidden to Those Who Do Not Know Turkish", by Samil Tayyar, *supra.*

200 *Ibid.*

201 See the KHRP Language Report. It is still not possible to get any public services, including those of fundamental importance such as health care services, through the medium of Kurdish. Kurdish speakers are effectively prevented from using their language in the legal system, even when they speak no Turkish, in violation of existing Turkish commitments under international instruments such as the European Convention on Human Rights. Kurdish is completely prohibited in the field of political activities, also arguably in violation of existing Turkish commitments.

202 Op. cit. *'NGOs Response to the Report of the Evaluation Group on the European Court of Human Rights'.*

203 Op. cit. *'The Necessity of Fact-Finding Hearings in Cases of Gross Human Rights Violations'.* '

204 Op. cit. *'Striking out – Dissent revealed amongst European Court judges'.*

205 Op. cit. '*Striking out – Dissent revealed amongst European Court judges*'.

206 Op. cit. 'The Necessity of Fact-finding Hearings in Cases of Gross Human Rights Violations'

Notes

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 the countries of the former Soviet Union
- 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, the 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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