THE KURDISH Human Rights PROJECT Legal Review

KHRP
Kurdish Human Rights Project

ISSUE 1

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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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EDITORIAL

This is the first edition of a new human rights journal which will be published by the Kurdish Human Rights Project (KHRP) twice a year.

Since 1996 KHRP has published reports on cases taken to the European Court of Human Rights (The Court). Starting with the case of *Akdivar v Turkey*, KHRP has published 12 case reports over the last seven years. As well as including copies of the decisions of the European Commission and European Court of Human Rights, these case reports have provided commentaries explaining the background to, and context of, the cases, which have concerned a wide range of human rights violations: extra-judicial killings; deaths in custody, village destruction; torture; disappearances and violations of the right to freedom of expression. The last KHRP Case Report was published in August 2002, covering the landmark judgment in *Sadak and others v Turkey*, concerning the removal from office of the Democracy Party MPs.

With the decisions of the European Court of Human Rights having become widely available on the internet, KHRP has decided to stop producing the case reports and to publish this journal in their place. The journal will therefore include summaries of and commentaries on cases taken by KHRP to the Court (as well as cases against Turkey, the journal will in future include Court cases brought against Armenia and Azerbaijan, both of which ratified the European Convention on Human Rights in April 2002). This will include reports on cases not only at the admissibility stage and the judgment, but also where possible at the earlier stage where a case is first 'communicated' by the Court to the Respondent Government. It is intended that the journal will incorporate a practical focus, providing lawyers in the region with clear guidance on how to be most effective in taking human rights cases.

The journal's scope will be wide-ranging, including legal human rights developments in the region in which KHRP operates, including Turkey, Armenia, Azerbaijan, Iran, Iraq and Syria. The journal will also incorporate important Court judgments against other Council of Europe states which have relevance to the 'KHRP region', as well as significant human rights developments within other regional and international human rights systems. For example, in this first edition, we have included the case concerning the dissolution of the *Refah* party in *Turkey*, as well as the important decision on jurisdiction in *Bankovic*, concerning the NATO bombing of the television station in Belgrade.

As we recognise that the dissemination of case reports and information on human rights in languages other than in English or French is still very limited, the journal will be published initially in both English and Turkish. It is also planned to publish future editions in Armenian and Azeri.

The format of the journal will be to cover new human rights developments in the first pages, followed by the case summary and commentary section, which will form the main part of the journal. There will also be occasional articles providing a more in-depth analysis of newsworthy topics written by members of KHRP's respected legal team, including lawyers and human rights commentators from the region itself.

In this first edition, we cover Court admissibility decisions and judgments from May 2000 to December 2001. A second edition to be published later this year will cover the period from December 2001.

ABBREVIATIONS SECTION

§ .....Section

AI .....Amnesty International

CAT .....United Nations Committee Against Torture

The Convention . . .The European Convention for the Protection of Human Rights and Fundamental Freedoms

The Court . . .The European Court of Human Rights

CPT .....The Council of Europe's Committee for the Prevention of Torture

DEP .....The Democratic Party

EU .....European Union

HADEP .....The People's Democracy Party

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 Worker's Party

UK .....United Kingdom

UN .....United Nations

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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 12:	Right to an effective remedy
Article 13:	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 injured party in event of breach of 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

1.

"Neither Friendly Nor a Settlement": THE CONSEQUENCES OF THE EUROPEAN COURT'S DECISION IN AKMAN v TURKEY

(By Jeremy McBride)

The European Court of Human Rights rightly has, like all courts, means to ensure that the list is not clogged up with cases no longer requiring its attention. Thus Article 37 of the Convention authorises it to strike out any case where there is no intention to pursue it, the matter has been resolved or 'for any other reason established by the Court' continued examination is no longer justified . The need for the first and second of these grounds can readily be appreciated but any concern about the seemingly far too open-ended nature of the third – whose use was intended by its drafters to be used only in circumstances comparable to the first two grounds - ought to be assuaged by the overriding obligation on the Court to continue the examination of a case 'if respect for human rights as defined by the Convention ... so requires'. This qualification on the power to strike out a case is essentially similar to the limitation on settlements between parties that can be accepted which in the past has ensured that a State cannot simply buy off an applicant but must also address the underlying human rights problem that has given rise to his or her application. However, confidence that this qualification will continue to be applied in an appropriately rigorous manner – whether in connection with an apparent settlement or any other supposed ground justifying a case to be struck out – has been severely shaken by the Court's rulings in three cases against Turkey, Akbay , Akman and I I, I S, K E and A Ö .

It was in the Akman case – which involved the application being struck out on Article 37's third ground because of a unilateral declaration by Turkey – that a marked change in the Court's approach first appeared. After its ruling in this case, the willingness of the applicants in the two other cases to 'accept' a similar declaration by Turkey comes as no surprise and the cases were thus struck out on the basis of there having been a 'friendly settlement'. Although all three rulings were taken by the Court's First Section, the new approach is one likely to have general support since a request to have the Akman case - and thus the basis for it being struck out - referred to the Grand Chamber for reconsideration pursuant to Article 43 has been refused .

The Akman case arose out of the killing of the applicant's son in the course of a search being conducted by police and security forces. The circumstances of the death were a matter of considerable dispute, with the applicant alleging that his son had been shot while being restrained in a different room from the rest of his family and Turkey claiming that the death occurred after its forces had been fired upon from the upper part of the house which was dark. These conflicting submissions led the Court to fix five days for taking evidence in Ankara but there were also unsuccessful efforts to reach a friendly settlement. However, just five days before the Ankara hearing, Turkey requested that the case be struck out because of its declaration that (a) it regretted the occurrence of individual cases of death resulting from excessive use of force as in this case, (b) it accepted that the

use of such force resulting in death was a violation of Article 2 and undertook to issue appropriate instructions and adopt all necessary measures – including the obligation to carry out effective investigations - to ensure that the right to life is respected in the future and *(c)* it offered to pay ex gratia GBP 85,000 to the applicant – intended to cover damages and legal expenses – in final settlement of the case. In its declaration Turkey drew attention to certain legal and administrative measures which were said to have resulted both in a reduction in the number of deaths occurring in similar circumstances to that of the applicant's son and in more effective investigations. It also suggested that supervision by the Committee of Ministers of the execution of judgments in this and similar cases was an appropriate mechanism for ensuring that improvements would continue to be made in this context.

As the Turkish declaration recognised, Akman is only one of an unduly large number of cases in which the use of excessive force by the security forces and/or the failure to carry out an effective investigation into allegations about the use of such force has been found to constitute a violation of Article 2. Moreover the circumstances in Akman may well not have been seen as raising any issues regarding the interpretation of the Convention that were particularly novel and an enforced settlement of the case might well be seen as a tempting way to save time for an over-burdened Court. However, although such a settlement might be appropriate where the outcome is that the applicant has ceased to be a victim and there is good reason for believing the underlying problem to have been satisfactorily addressed, it is far from clear that this was so in either Akman or the two subsequent cases.

In the first place the declaration's reference to excessive force did not actually resolve the dispute as to what had happened to the applicant's son; there is a world of difference between firing in circumstances where this was not the most suitable response and the deliberate killing of someone with a determined effort then to fabricate evidence as to what had occurred. Secondly the promise of more effective investigations does not actually entail an admission by Turkey that there was none in the present case (confirmation of which might have come from the hearing of witnesses), yet the absence of one is a quite discrete violation of Article 2 from that entailed by any death resulting from the use of excessive force. This is equally true of the declaration's failure to address the issue of whether or not Article 13 had also been violated; an affirmative conclusion is most likely given the absence of any remedy for the applicant and the obstacle to obtaining one created by the lack of an effective investigation Thirdly the declaration did not give any undertaking to try and investigate the circumstances of the case or even to consider whether it would be appropriate for criminal or disciplinary proceedings to be brought against the forces involved. Fourthly there is no basis for assessing the adequacy of the compensation proposed since the extent of the violation of the Convention has been obscured and the actual claims of the applicant must remain confidential since they were part of the friendly settlement negotiations. Fifthly the supposed acknowledgement by Turkey of a violation of the Convention would seem to be negated by its statement that the financial award was made 'ex gratia'. Finally, notwithstanding the Court's earlier rulings on killings by the security forces, it is far from clear that the reforms and undertakings by Turkey have satisfactorily resolved the problem with regard to control over the use of force in Turkey, let alone the investigation of abuses allegedly occurring there . The Court may have had the benefit of more detailed information during the friendly settlement negotiations but neither the fact that the death occurred when the initial cases concerned with killings

by the security forces were already well-advanced before the Strasbourg organs nor the apparent failure of the Turkish authorities to carry out an effective investigation into the circumstances giving rise to this application can really inspire much faith in due respect being accorded to Convention rights. Indeed Turkey in its own declaration seemed content with improvements continuing to be made which is hardly consistent with the immediate nature of the obligation to fulfil Convention's requirements. Furthermore the Court is itself well aware of the recurring nature of the violations brought before it and, even though it may be reluctant to find that these amount to an administrative practice, it ought perhaps to require much more than a good faith undertaking before expressing satisfaction that respect for human rights does not require either the facts of an application to be found or all aspects of it to be determined.

The Akman decision goes well beyond the suggestion of the Evaluation Group on the Court that applicants should be penalised for 'unreasonable' refusal of a settlement. While an enforced settlement might well be appropriate in 'clone' cases where the problem in a series of applications has been clearly resolved through a change in law or practice, it is unjust where the scope of the violation is disputed and the effectiveness of the supposed remedy is questionable. In effect the Court is passing the buck to the Committee of Ministers to ensure that Convention obligations are properly implemented. A tougher line by the latter would undoubtedly be appropriate but the Court, in refusing to adjudicate on the cases involving serious violations of the Convention in respect of which there has been no comprehensive acknowledgement of wrongdoing or the provision of effective remedies, has shown scant regard for the notion of rights and the rule of law. Further reliance on the Akman precedent may diminish the workload but could also lead to less effective protection in the long term, with resulting damage to the Court's credibility. Furthermore, if Turkey does not actually fulfil its undertakings, it may find itself pressed to exercise the power under Article 37 to restore cases such as Akman to the list.

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2.

Turkey's Candidature for Accession to the European Union

EU Accession Partnership Draft Agreement

On 10 December 1999, at the European Council Meeting in Helsinki, Turkey was accepted as a candidate for accession to the European Union. On 8 November 2000, the European Commission published its EU Accession Partnership Draft Agreement, which outlined the pre-conditions that Turkey must satisfy before accession negotiations could be commenced. Two of the main conditions related to border disputes in the Aegean and Turkey's unresolved situation with Cyprus. The third main pre-condition was Turkey's fulfilment of the "Copenhagen Criteria", as set out at the *Copenhagen European* Council in 1993 for all candidate states (http://europa.eu.int/comm/enlargement/intro/criteria.htm). These criteria require the candidate country to achieve:

1) the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;

3) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

The Accession Partnership outlined various short and medium term political goals, the medium term goals envisaged to take more than one

year to complete. These included:

1) a review of the Turkish Constitution and other relevant legislation, with a view to guaranteeing rights and freedom of all Turkish citizens as set forth in the European Convention for the Protection of Human Rights;

2) abolishing the death penalty and signing and ratifying Protocol No. 6 to the European Convention on Human Rights;

3) ratifying the International Covenant on Civil and Political Rights (ICCPR) and its optional protocol and the International Covenant on Economic, Social and Cultural Rights (ICESC);

4) lifting the remaining state of emergency in South East Turkey;

5) aligning the constitutional role of the National Security Council as an advisory body to the government, in accordance with the practice of EU member states;

6) ensuring cultural diversity and guaranteeing cultural rights for all citizens irrespective of their origin.

Although the document avoids any specific mention of Kurds or the Kurdish language, it does specify that citizens should have the right to mother tongue education in the medium term.

Turkey's National Programme of Action

On 19 March 2001 Turkey published its National Programme of Action (NPA), outlining the short and medium term reforms it planned to make in order to fulfil the Accession Partnership. It stated that Turkey would "review" the Constitution and other legislation in relation to, inter alia, Article 10 of the European Convention on Human Rights, the Act on the Establishment of Radio and Television Enterprises, the Act on Cinema, Video and Musical Works and legislation on the freedom of association and peaceful assembly. On the issue of the death penalty it reiterated that the death penalty was authorised by the Constitution and that its abolition would be "considered" by the Turkish Grand National Assembly (The Turkish parliament). On the issue of language rights the NPA asserted that Turkish was the official language of Turkey, stating further that "the free usage of different languages by citizens in their daily lives (author's italics)" is not prohibited, though this freedom cannot be "abused for the purposes of separatism and division. The role of the National Security Council would be reviewed to "define more clearly (its) structure and functions", while the State of Emergency would be lifted with "due regard to threat assessment".

European Commission's Regular Report

Each year the European Commission submits reports to the European Council, evaluating the progress each candidate state has made on fulfilling its Accession criteria. On 13 November 2001 the Commission published its latest "Regular Report on Turkey's Progress towards Accession". It noted, *inter alia*, the following changes :

On 3 October 2001, 34 constitutional amendments were made, including the establishment of criminal enforcement judges, responsible for reviewing complaints by prisoners regarding their rights; and that the selection of all members of the State Security Courts were to be from the civil judiciary.

The European Commission noted that there were still problems to be tackled in ensuring fair trials. It raised concerns over access to lawyers, the independence of the judiciary, and the inability, under the Code of Criminal Procedure, of reopening impugned proceedings or taking any other direct action to redress violations of the European Convention on Human Rights (other than of course taking an indirect action against the State for violations in which its responsibility was engaged).

Regarding the National Security Council, the Commission noted that, though its composition had been changed by increasing the number of civilian members from five to nine, the practical effectiveness of this amendment in increasing civilian control over the military would need to be monitored.

As regards human rights such as, *inter alia*, freedom of expression and peaceful assembly, the European Commission noted that a principle of proportionality had been introduced but also stated that any real improvement in the exercise of fundamental freedoms will depend upon the practical application of the law.

The European Commission noted that the revised constitutional limits on the application of the death penalty to cases of terrorist crimes and times of war were not in line with Protocol No.6 to the Convention, the signing of which was part of the Accession criteria.

Regarding pre-trial detention, the Commission recommended that the period be reduced to four days for offences falling under the competence of the State Security courts and in state of emergency provinces, as had been done for collective offences. At the moment, under emergency rule, a detainee can be held for up to ten days *incommunicado*.

The Commission noted in general that the "situation as regards torture and mistreatment has not improved... and still gives serious grounds for concern" (Regular Report, p.22). It noted the increased number of prosecutions of officials suspected of acts of torture or ill-treatment and raised concerns that sentences for such offences were often too light or suspended. It noted the report of the CPT blaming the disproportionate use of force by security forces for 32 deaths while carrying out a forced transfer of prisoners to the new F-type prisons (a system of one –person and three-person prison cells, differing from the traditional Turkish "dormitory style" prisons).

Regarding cultural and minority rights, the European Commission noted the amendments to the Constitution which abolished the provision forbidding the use of languages prohibited by law, i.e. Kurdish. But it also noted that changes in existing restrictive legislation and practices would also be needed in order to provide "effective protection". Also, RTÜK (Radio and Television High Commission) law continues to stipulate that all broadcasts must be in Turkish and no amendment was made providing for education in the Kurdish or any other minority language. It noted that though the Newroz "Kurdish New year" was celebrated in the South-east, it was banned in cities elsewhere, including Istanbul. It noted the continuing harassment of the pro-Kurdish People's Democracy Party (HADEP) by the authorities.

UPDATE:

On the 2 August 2002, the Turkish parliament passed a package of reforms, aimed at conforming to the EU Accession criteria. Thus the death penalty was abolished, to be replaced by life imprisonment without the possibility of parole. Also, broadcasts in the Turkish language were legalised and, subject to certain restrictive procedures, courses in the Kurdish language were to be allowed. These reforms will be commented on fully in the next issue.

[For the original reports, see http://europa.eu.int/comm/enlargement/turkey/docs.htm]

3. Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights

The accession of twenty new States, translation between 37 official languages and increased knowledge of the Convention has contributed to a 500% increase in the volume of applications between 1993 and 2000. As of July 2001, 18,292 registered applications were before the Court. On 7 February 2001, an Evaluation Group was established by the Council of Europe's Committee of Ministers and was composed of the President of the European Court of Human Rights, Luzius Wildhaber; Deputy Secretary General Krüger and was chaired by Ambassador Justin Harman of Ireland. On 27 September 2001, the Evaluation Group published a report, looking at how the Court

can continue to be effective, taking into consideration the backlog and increase in number of applications.

The Report identified five areas which needed reforming in order to maintain the Court's effectiveness, summarised below.

1. National Measures

The Evaluation Group stressed that the primary duty to protect fundamental rights and freedoms lies with the national courts and authorities, and it is at that level that protection can be secured most effectively. It recommended the introduction of procedures to ensure that national courts have the requisite status, authority and independence; a wider dissemination of information concerning the Court to national authorities, including the provision of translations of extracts from key judgments; the introduction of procedures for the re-opening of domestic proceedings after a finding by the Court of a Convention violation; and the introduction of information centres within States to ensure individuals are better informed and so prevent time-wasting applications.

2. Execution of Judgments

Although the Report acknowledged that in the vast majority of cases States do comply with the Court's judgment, it noted that non-compliance due to cultural ideas, political motives or pressure on parliamentary time was a fundamental flaw in the system. If measures are not taken by a State in compliance with an adverse Court judgment, a large number of identical or similar applications may result. The report recommended a special procedure allowing for the expedited treatment of such applications. The pending applications would be "frozen" by the Court for a given time, allowing the Committee of Ministers to exert special pressure on the Respondent State to take the necessary measures, thus reducing the need for the Court to consider purely repetitive applications. Currently, the last resort available to the Committee of Ministers in the event of non-compliance with a judgment is to adopt a strongly worded resolution for the Respondent State to take the necessary steps. The idea of imposing financial penalties was dismissed by the Report.

3. Measures to be taken in Strasbourg involving no amendment of the Convention

The Report considered a modification of the procedure relating to the registration of applications, noting the merits of the Reform Committee's proposal for conferring a new, non-dispositive role on designated Registry officials in respect of streaming applications. The officials would identify an application as falling within a category whose registration can be refused, or to certify it as inadmissible on one of the grounds set out in the Convention. Their conclusions would then be submitted to a Committee of three judges for approval. The Report recommended a more pro-active role for the Court in respect of "friendly settlements", and considered as an incentive imposing a penalty – such as depriving an applicant of part of his costs - where a reasonable settlement offer had been refused.

4. Resources

The Report noted that, aside from national budgetary constraints, merely increasing resources would not represent a panacea to the backlog as there is a "limit on the number of cases which 41[...] judges can examine in depth each year if quality is not to suffer". It recommended that the staffing needs of the Registry should be met and that supervisory structures should be reinforced. Adequate resources should be provided for the implementation of the IT programme and a decision on a new building for the Council of Europe should be made.

5. Measures Involving Amendment of the Convention

The Report's most significant proposals are stated here. It recommended that a provision should be inserted into the

Convention that would empower the Court to decline to examine in detail applications raising no substantial issue under the Convention. It recommended a study into the creation of a new and separate division for the preliminary examination of applications. It also considered that a mere revision of admissibility criteria would not go far enough, stating that the point had been reached where the Court could not continue to deal in the same way with all the applications, but had to reserve detailed treatment for those cases which warranted such attention. "What is required is a means of excluding from detailed treatment by the Court not only applications having no prospect of success but also those which, despite their having such prospects, raise an issue that is [...] of such minor or secondary importance that they do not warrant such treatment."

NOTE: *KHRP has been working with Amnesty International, Liberty, the AIRE Centre and other NGOS, to draft a response on behalf of NGOs to the report of the Evaluation Group. This response will be reported in Issue 2 of the Journal.*

[The full report, EG (Court) 2001, is available on the Council of Europe's web-page at http://www.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm]

4.

Amendments to the Turkish Constitution

On 3 October 2001, after a parliamentary debate and several revisions, the Turkish Parliament adopted a law (Law No. 4709) amending 34 articles of the Constitution, which entered into force on 17 October 2001. Turkey's current Constitution was adopted in 1982 when the country was under military rule. On 8 March 2001, the Accession Partnership priorities were formulated, with a view to prepare Turkey's accession to the European Union. On 19 March 2001, Turkey outlined a national program of steps to be taken to meet the Copenhagen political criteria, and decided to give priority to a review of the Constitution.

The new constitutional provisions adopted include amendments regarding the duration of police custody (Article 19) and the right to access legal counsel (Article 16), described by the Government as measures to combat torture and ill-treatment.

According to the Government, the amendment to Article 19 of the Constitution on "Personal Liberty and Security" has limited to 4 days the maximum length of police custody before a detainee is presented in person before a judge in the case of collective offences, and the Code of Criminal Procedure has been subsequently modified pursuant to this provision. However, the wording of Article 19 (5) allows for a different interpretation:

"The person arrested or remanded to prison shall be brought before a judge within 48 hours and in cases of offences committed collectively within four days, excluding the time it takes to send them to the court nearest to the place of detention. No one can be deprived of their liberty without the decision of a judge after the expiry of these periods. These periods may be extended under state of emergency, martial law or in times of war."

As Amnesty International highlights, detainees are currently frequently not registered for the first few days, which often brings the period of incommunicado detention to a week.

In addition, the law on the procedure before the State Security Courts was amended on 26 March 2002, in order to abolish the restrictions on the right of persons detained for alleged offences falling within the jurisdiction of these courts to meet their lawyer in private. Previously, detainees suspected of crimes falling under the scope of State Security Courts could only see a lawyer after four days; this period has now been reduced to 48 hours.

Although human rights organisations have welcomed these

amendments, there are still many concerns. The Constitutional amendments do not incorporate effective steps and mechanisms to prevent torture, and although the maximum length of police and gendarmerie custody have been reduced, it is far from being sufficient to prevent practices of torture and ill-treatment. For example, since *incommunicado* detention facilitates such practices, the Government has been urged to take steps to abolish it completely and to ensure that all detainees have immediate access to a lawyer.

UPDATE:

On August 2, 2002 the Turkish parliament passed a reform package – "The Harmonisation Law" – which aimed to bring its law into line with EU Accession criteria. These reforms included the abolishment of the death penalty and lifted certain restrictions on the use of the Kurdish language. These reforms will be commented on fully in the next issue.

[Amnesty International (AI)-index EUR 44/031/2001, News Service Nr. 80: Turkey: Letter to Justice Minister;

AI-index EUR 44/007/2002, published 01/01/2002: Turkey: Constitutional Amendments: Still a long way to go;

AI-index EUR 44/011/2002, published 19/02/2002: Turkey: "Mini-Democracy" law does not guarantee freedom of expression and freedom from torture.]

5.

Council of Europe - Committee of Ministers' Interim Resolution ResDH(2001) 106 – Violations of Freedom of Expression in Turkey

(Adopted by the Committee of Ministers on 23 July 2001 at the 760th meeting of the Ministers' Deputies)

On 23 July 2001, the Committee of Ministers adopted a resolution condemning the repeated violations of freedom of expression in Turkey, with regards to 18 individual cases. The Committee recalled that in all these cases, the European Court of Human Rights had found breaches of Article 10 of the Convention, which guarantees freedom of expression. It also stressed the obligation of every State to comply with the obligations of the Convention and to abide by the judgments of the Court. The Committee declared that it was in particular concerned with the fact that in most of the cases, the convictions were still in the criminal records of the applicants and that the latter were still victims of restrictions of their civil and political rights.

Consequently, the Committee urged the Turkish authorities to take *ad hoc* measures to erase the outcomes of the applicants' conviction in these particular cases, and decided to resume consideration of these cases at each of its meetings until the adoption of the required measures by the Turkish Government. It also stressed the importance for Turkey to reform its Code of Criminal Procedure, as announced in September 1999 by its Minister of Foreign Affairs.

[Council of Europe web-site; Committee of Ministers; Resolutions; Human Rights; 2001; Resolution 106]

6.

United Nations Committee against Torture (CAT) Reviews Armenia's Report on the Implementation of the Convention against Torture

In November 2000, the United Nations Committee against Torture reviewed Armenia's second periodic report on steps the country had taken in line with the provisions of the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment. The Committee members raised particular concerns regarding the lack of

a clear definition of torture in domestic legislation, the system of compensation and rehabilitation for the victims of torture carried out by state agents. Other problems raised included the question of whether there had been instances of courts striking down evidence obtained under torture and whether those convicted of offences involving torture were eligible to fall under an amnesty.

[AI,MDE/24/003/2001, 09/04/2001, Public Statement, News Service Nr. 65]

7.

Armenia Submits a Report to the Committee on the Elimination of All Forms of Racial Discrimination

(This document contains the third and fourth periodic reports of Armenia, submitted in one document, due on 23 July 1998 and 2000 respectively).

The Armenian Government reiterated its commitment to the rule of law and the principle of universal equality, as laid down in Article 15 of its Constitution. It also added that it was pressing ahead with the process of democratic transformations, being a signatory to over 40 international human rights conventions and having reformed its judicial system. The Government underlined in particular the provisions of the Judicial Decisions (Enforcement Service) Act; the Criminal Code was then at the final stage of consideration, and a Human Rights Commission reporting to the President was established in April 1998, which dealt with cases involving the examination and restoration of infringed rights, and also acted to prevent human rights violations. The Coordinating Council of National Minorities was officially established on 12 March 2000, with the aim of protecting minority rights. Finally, it also recalled the adoption of the Refugee Act in March 1999, which outlined the eligibility criteria for refugee status in Armenia.

[Committee on the Elimination of Racial Discrimination – Reports Submitted by Armenia, due 2000. Ref: CERD/C/372/Add.3 – (Original 24 July 2001) 13 May 2002]

8.

OSCE/ ODIHR Survey on the death penalty: Armenia and Azerbaijan

Under the present Criminal Code of Armenia, 13 offences carry a possible death sentence. They include treason, espionage, terrorist acts, sabotage, crimes against the state, banditry, forgery or circulation of false money or securities, aggravated murder or rape, hijacking, and bribe taking. The military section of the Criminal Code provides for an additional 16 capital crimes in times of war. Although Armenia announced at the October 1998 UN Human Rights Committee hearings that a new Criminal Code completely abolishing the death penalty would come into force by 1 January 1999, the draft is still awaiting its final reading in parliament.

Following its accession to the Council of Europe, Armenia signed in January 2001 and ratified in June 2002 Protocol No. 6 to the Convention. While death sentences are still handed down regularly by Armenian courts, there is a *de facto* moratorium on executions in place, based on the President's constitutional authority to exercise pardon.

On 10 February 1998, the Parliament of Azerbaijan adopted a bill abolishing the death penalty for peacetime offences, following an initiative by President Aliyev. All death sentences were commuted to long-term imprisonment after the decision to abolish capital punishment.

The death penalty remains in force in the internationally unrecognised separatist enclave of Nagorno-Karabakh, and courts reportedly hand down death sentences. There are, however, no indications that executions are carried out.

[Survey (January 1998 – June 2001) published in September

2001 by the OSCE along with the ODIHR on the death penalty in the OSCE area, ODIHR Background Paper 2001/1]

9.

Turkey Reports to the Committee on the Rights of the Child

In its report of October 2001, Turkey reiterated its commitment to children's rights, and the importance of aligning its domestic laws and regulations with international standards. The Government highlighted the establishment of a High Council and subcommittees for monitoring and evaluating the rights of the child, for the purpose of enhancing the efficiency of the Social Services and Child Protection Agency. The Government also mentioned its efforts to increase social awareness, such as the creation of a Child Forum and the Campaign for the Introduction of the Rights of the Child, launched in November and December 2000. It also established commissions formed by children representing every segment of the society. In addition, a checklist is being prepared to monitor the implementation of the Convention on the Rights of the Child. The Government further recalled that it has signed and ratified the European Convention on the Exercise of Children's Rights on 9 June 1999 and 18 January 2001 respectively. The Government is also closely working with the International Labour Organisation and the International Programme on the Elimination of Child Labour on the Project for the Elimination of the Worst Forms of Child Labour, which has been implemented in the western part of the country since 1 September 2001. Finally, it described several provisions concerning special assistance and protection services to children deprived of a family environment, basic health and welfare of the children, and special protection measures, such as for children affected by armed conflicts or deprived of their liberty.

[Convention on the Rights of the Child – Committee on the Rights of the Child – Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Initial Reports of State parties due in 1997 – Turkey - CRC/C/51/Add.18 - 4 October 2001 (Supplementary Report to the 17 May 2001 report)]

10.

The Syrian Arab Republic Comments on the Concluding Observations of the Human Rights Committee

The Syrian Government reaffirmed that the laws in Syria reflected the provisions of the Constitution, which took into consideration the Articles of the Covenant on Civil and Political Rights (CCPR). The Government responded to the concerns of the Human Rights Committee regarding the fact that the Emergency Act is still in force in Syria. As regards this issue, the Government pointed out that Article 4 of the Covenant permits the proclamation of a state of emergency in times of public emergency which threatens the life of a nation.

In addition, the Government asserted that the death penalty was rarely enforced, the last execution being in 1987, and that it had not prohibited any non-governmental organisation from monitoring the human rights situation in the country.

The Government further responded to concerns of the Committee regarding the application of the Penal Code and the Code of Criminal Procedure, especially as regards fair trials in military courts.

[Comments by the Government of the Syrian Arab Republic on the concluding observations of the Human Rights Committee: Syrian Arab Republic – 28/05/2001, CCPR/CO/71/SYR/Add.1, 28 May 2001]

SECTION II-

CASE SUMMARIES AND COMMENTARY

EXTRA-JUDICIAL KILLINGS

[see also:

Issa v Turkey (Unknown Perpetrator Killing)]

AKMAN v TURKEY

(37453/97)

European Court of Human Rights

(First Section): Judgment (Striking Out) of June 26, 2001.

Facts

The applicant, Faysal Akman, is a Turkish national. According to him, on 20 January 1997, he opened the door to his home in Savur on police orders. Five members of the security forces entered and searched his house. At the request of one of the security force members the applicant called his son, Murat Akman, to the room. His son appeared holding his identity card. A member of the security forces looked at the card, threw it on the floor and began to shoot Murat with an automatic rifle. The applicant was being restrained and was taken to another room as the shooting occurred. He was subsequently allowed back into the room, where he saw the body of his son with an automatic rifle and bullet magazines lying on it. There were marks of gunfire on the walls of the room and money and a ring had been removed from Murat Akman's body.

The public prosecutor and the doctor went to the house and statements were taken from the applicant and his family. The applicant left Savur, fearing for his and his family's lives. He filed a complaint with the Chief Public Prosecutor of Savur, who subsequently told the applicant that the file was being sent to Diyarbakir State Security Court.

The Government submitted that in response to a terrorist attack on 19 January 1997, house searches were conducted by security forces early on the 20 January 1997. While searching the applicant's house the security forces were fired on from a bedroom in the house and they therefore fired back. In the bedroom they found the body of Musrat Akman with a loaded rifle next to him. On 27 January 1997 the Public Prosecutor of Savur made a decision of non-jurisdiction in respect of the alleged unlawful killing of Murat Akman, in favour of the Public Prosecutor of Diyarbakir State Security Court. As to the complaint against the members of the Security Forces, the Savur Public Prosecutor forwarded the file to the local administrative council, who issued a decision of non-jurisdiction on 24 December 1997.

Complaint

The applicant complained of violations of Article 2, 6, 8, 13, 14, and 18 of the European Convention on Human Rights.

The Government, in a letter dated 21 March 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 excessive force; accepted that such excessive force constituted a violation of Article 2; undertook to issue appropriate instructions and adopt all necessary measures to ensure that the right to life was respected; and offered to pay *ex gratia* £85,000 to the applicant which included legal expenses.

State parties due in 1997 – Turkey - CRC/C/51/Add.18 - 4 October 2001 (Supplementary Report to the 17 May 2001 report)]

The applicant requested the Court to reject the declaration, stressing its inadequacies; in particular its failure to refer to the unlawful nature of the killing and its failure to highlight the fact that his son was unarmed at the time of his killing.

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. The Court recalled that under Article 37 it could strike out an application at any stage of the proceedings if the circumstances led it to one of the conclusions specified under that Article. Having regard to Article 37(1)(c) 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 the examination of the application.

Commentary

This is the first case in which the Court has used Article 37 in striking out a case in this way, in response to a 'declaration' from the respondent Government, where the terms of the declaration are not accepted by the applicant. The applicant argued that the declaration wholly failed to resolve any of the key factual issues in dispute between the parties and was quite insufficient as an admission of responsibility by the authorities for the killing of the applicant's son.

The reasoning of the Court, that Turkey is well aware of its Convention obligations as a result of previous judgments, appears to deny the very right of individual application – that is, the right of individuals to seek redress at the European Court for violations of their Convention rights. It seems there are two factors at work here. First, there is the Court's overbearing workload of more than 20,000 pending cases, and secondly, there is the desire of the Turkish Government to attain membership of the European Union, and therefore to avoid damaging human rights judgments in Strasbourg. This has meant that Turkey has in the first place sought to conclude numerous cases by way of the 'friendly settlement' process, and where the applicant has not agreed, the Court has moved to end the cases through the Article 37 striking out route, even in the face of the applicant's express opposition. In the recent judgments of Togcu v Turkey (No.27601/95, 09.04.02) and T.A. v Turkey (No.26307/95, 09.04.02) – these will be reported in the second edition of KHRP Legal Review), 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. In these cases, as in Akman, 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 their 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.

AVŞAR v TURKEY
(25557/94)

European Court of Human Rights

(First Section): Judgment of July 10, 2001.

Facts

The applicant, Behçet Avşar, is a Turkish national and the brother of the deceased Mehmet Şerif Avşar. On 22 April 1994, five village guards and an ex-member of the PKK, Mehmet Mehmetoglu, allegedly came to the Avşar's family shop and took Mehmet Şerif Avşar to the gendarme headquarters. The guards had been sent to Diyarbakir by the Hazro gendarmes to take part in the apprehension of four other suspects. A seventh man, who acted with authority as a member of the security forces, also appeared on the scene. The family complained of the abduction to the authorities. On 7 May 1994 the body of Mehmet Şerif Avşar was found with two bullet holes to the head. In subsequent investigations, five of the individuals who had come to the shop on the day Mehmet gerif Avşar was taken away confessed to their involvement in the murder. A criminal prosecution was brought against the five village guards and Mehmet Mehmetoğlu on 5 July 1994. The proceedings culminated in the conviction of these six men by the Diyarbakir Criminal Court no.3 on 21 March 2000. One of the guards was convicted of murder and Mehmet Mehmetoğlu and the four others were convicted of abduction. They were sentenced to twenty years and six years and eight months' imprisonment respectively. However, during the initial proceedings, no steps were allegedly taken to identify, question or locate the seventh person who had been at the gendarmerie with Mehmet Mehmetoğlu and the village guards.

As the facts were disputed by the parties, the Commission appointed Delegates who took evidence in Ankara from 4 to 6 October 1999.

In addition, the Government submitted that it was premature to make any observations on the facts, as the decision of the Diyarbakir Criminal Court of 21 March 1993 was still subject to appeal to the Court of Cassation which has the power to require the first instance court to fill the gaps in the investigation or collect further evidence. Moreover, the Diyarbakir court had in its judgment notified the offence allegedly committed by one of the village guards to the public prosecutor, who will now carry out an investigation.

Complaints

The applicant complained of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

The applicant complained under Article 2 that his brother was arbitrarily killed while in the custody of security officials and that there was a failure by the authorities to protect his life and to carry out an effective investigation into his killing.

The applicant claimed that his brother was the victim of killing due to his identity as a Kurd, an indigenous group as well as a distinct minority. The ill-treatment which he suffered in addition to the discrimination on grounds of race was of such a nature and severity that it amounted to a violation of Article 3.

Regarding the investigation and criminal trial conducted into the killing of his brother, the applicant complained of violations under Articles 6 and 13. The applicant submitted that Article 6 applied to him on the basis that he was a participant through his family lawyer, and he submitted under Article 13 that there was no effective remedy for his complaints under Turkish law.

Finally, the applicant complained that his brother and family had been victims of discrimination contrary to Article 14.

Held

(1) There had been a violation of Article 2 of the Convention in respect of the death of Mehmet Şerif Avşar (by 6 votes to 1).

The Court recalled that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances.

The Court found that Mehmet Şerif Avşar was killed unlawfully and in circumstances falling outside the exceptions set out in the second paragraph of Article 2 by agents of the State, who made use of their position in forcing the applicant's brother to go with them. The Court therefore found the Government answerable for their conduct. In addition, the Court had already found that there was a lack of accountability of the security forces in south-east Turkey in or about 1993. Though there was a prosecution which resulted in the conviction of six people, the Court found that there had been a failure to investigate promptly or effectively the identity of the seventh person, the security official, and thereby to establish the extent of official knowledge of or connivance in the abduction and killing of the applicant's brother. The Court consequently concluded that the Government was liable for the death of Mehmet Şerif Avşar.

(2) There had been a violation of Article 2 of the Convention arising from the failure to carry out an adequate and effective investigation into the circumstances of Mehmet Şerif Avşar's killing (by 6 votes to 1).

The Court noted that although the gendarmes were almost immediately aware that Mehmet Şerif Avşar had been taken from his shop to the gendarmerie and of the identity of those involved, the village guards and Mehmet Mehmetoğlu were not taken into custody until 5 May 1994, twelve days later. The Court further noted that there was no convincing reason for entrusting the investigation of the incident to the central provincial gendarmerie, who was implicated in the course of events. In addition, there was no indication of any steps being taken during this stage of the investigation to identify or locate the seventh person. Concerning the public prosecutor's role, no investigative enquiry was issued beyond taking further statements from the suspects. The indictment relied heavily on the statements by the suspects, ignoring the accounts by the family concerning the seventh person. Finally, the proceedings in the Diyarbakir criminal court lasted over five years and ten months and the appeals are still pending.

The Court consequently concluded that the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Şerif Avşar and rendered recourse to civil remedies equally ineffective in the circumstances.

(3) There had been no violation of Article 3 of the Convention (unanimously).

The Court found that there was no evidence that the killing of Mehmet serif Avşar was racially motivated.

(4) There had been a violation of Article 13 of the Convention (by 6 votes to 1).

The Court noted that the applicant's complaint under Article 6 concerned essentially the delay in the criminal trial, and that the applicant was not a party in the

proceedings. The Court therefore found appropriate to consider the applicant's complaints under Article 13, which is broad enough to encompass all the issues raised by the applicant with regards to the investigation and trial.

The Court recalled that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. For the reasons set above at ***(2)***, no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2. The Court found therefore that the applicant had been denied an effective remedy and access to any other available remedies at his disposal, including a claim for compensation.

(5) There had been no violation of Article 14 of the Convention (unanimously).

The Court did not find sufficient evidence to justify that the applicant, his brother or other members of the family had been victims of intimidation based on their ethnic status or political opinions.

(6) The Court awarded £40,000 as pecuniary damages and £20,000 as non-pecuniary damages to be held on behalf of Mehmet Şerif Avşar's wife and children, and £2,500 as non-pecuniary damages for the applicant himself. (by 6 votes to 1).

(7) Dissenting Judgment

Judge Gölcüklü (Turkey) dissented in respect of Article 2, disputing the majority's opinion that the State failed to carry out an adequate and effective investigation into the circumstances of Mehmet Şerif Avşar's death. He further dissented in respect of Article 13, considering that no further issue arises under Article 13 where there is a finding, as by the majority here, of a violation of Article 2 under its procedural head.

Commentary

Apart from the violation of Article 13 and Article 6 of the Convention the Court held a violation of Article 2 of the Convention in respect of the death of Mehmet serif Avşar and in respect of the failure to carry out an adequate and effective investigation into the circumstances of his death. Nevertheless the key legal point of this case appears to be the violation of Article 2 of the Convention regarding the obligation to protect the right to life, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention".

As held in *Salman v. Turkey (No.21986/93, 27.6.2000, §100)* the burden of proof rests on the authorities to provide satisfactory and convincing explanation where the events in issue lie wholly within the exclusive knowledge of the authorities. In *Avsar v. Turkey Mehmet serif Avşar* was found killed after he had been taken away by armed men. Thus, the Court held here as well that the burden of proof rests on the state.

Article 2 of the Convention imposes the duty on the state to carry out an adequate and effective investigation into the circumstances of the death of Mehmet Şerif Avşar. These investigations have to be independent from those implicated in the events *(Öğur v. Turkey*, No.21954/93, 20.5.1999, §§91-92), effective *(Kaya v. Turkey*, No.22535/93, 28.3.2000, §§102-109) and prompt and reasonable *(Yaşa v. Turkey,* No.22495/93, 2.9.1998, §§102-104). The Court held that the fact that one suspect amongst several has succeeded in escaping the process of criminal justice does not automatically imply the failure of the State in investigating the case. The obligation under the procedural aspect of Article 2 of the Convention is one of means not results (Avşar *v. Turkey*, No.25657/94, 10.7.2001, §404). However, in this case the killing of Mehmet Şerif Avşar was carried out by instructions of a seventh man who was a member of the

security forces and acted with the knowledge and acquiescence of the State authority. Therefore, the Court held that the procedural obligation under Article 2 of the Convention must be regarded as requiring a wider examination. Although six perpetrators had been brought to justice, the State's investigation into the circumstances of the death of Mehmet Şerif Avşar did not fulfil the duty of wider examination.

The Court found that it was unsubstantiated that the killing of Mehmet Şerif Avşar was racially motivated. In *Cyprus v. Turkey* (No.25781/94, 10.5.2001, §§302-322) the Court held that the Greek Cypriots living in the Karpas area of northern Cyprus were subjected to inhuman and degrading treatment, in particular discriminatory treatment amounting to inhuman and degrading treatment. At the same time the Court requires that the discriminatory treatment has to attain a level of severity in order to amount to degrading treatment. Although the Court in Avşar *v. Turkey* does not give any reasoning it is likely that a violation of Article 3 of the Convention was denied because the applicant could not prove this level of severity beyond reasonable doubt. There might also have been a lack of motivation on the Court's part to make such a link.

Another remarkable point is the long description of the village guard system in the South-east of Turkey (Avşar *v. Turkey,* No. 25657/94, 10.7.2001, §§271-281) and its evaluation by the Court. The court acknowledged that village guards are regularly involved in anti-terrorist duties during which they act on their own initiative and without the presence of security officials (Avşar *v. Turkey,* No. 25657/94, 10.7.2001, §291).

Bankovic and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain Turkey and the United Kingdom

(52207/99)

European Court of Human Rights (Grand Chamber):

decision of December 12, 2001
(Admissibility)

Facts

The applicants (Vlastimir and Borka Bankovic, Zivana Stojanovic, Mirjana Soimenovski, Dragana Joksimovic, Dragan Sukovic) are all citizens of the Federal Republic of Yugoslavia (FRY). Vlastimir and Bora Bankovic applied on their own behalf and that of their deceased daughter, Ksenija Bankovic; Zivana Stojanovic applied on her own behalf and that of her deceased son, Nebojsa Stojanovic; Mirjana Stoimenovski applied on her own behalf and that of her deceased son, Darko Stoimenovski; Dragana Joksimovic applied on her own behalf and that of her deceased husband, Milan Joksimovic; and Dragan Sukovic applied in his own right.

On 23 March 1999, against the background of the escalating conflict in Kosovo between Serbian and Kosovar Albanian forces and the failure of the Serbian forces to comply with the demands of the international community and achieve a negotiated, political solution to the conflict, the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes on the FRY. Three television channels and four radio stations operated form the Radio Televizije Sribje (RTS) facilities in Belgrade. On 23 April 1999, just after 2.00 a.m., one of the RTS buildings was hit by a missile launched from a NATO forces' aircraft. Ksenija Bankovic, Nebojsa Stojanovic, Darko Stoimenovski and Milam Koksimovic were killed and Dragan Sukovic was injured. In total, sixteen people were killed and sixteen were seriously injured in the bombing of the RTS.

On 29 April 1999 the FRY instituted proceedings at the Internationcal Court of Justice (ICJ) against Belgium and nine other States concerning their participation in Operation Allied Forces. A request by the FRY under Article 73 of the Rules of Court of the ICJ was rejected by the ICJ on 2 June 1999

On 2 June 2000, the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) informed the UN Security Council of her decision not to open an investigation into Operation Allied Force.

Complaints

The applicants complained of violations of Article 2, 10 and 13 of the Convention.

The Governments disputed the admissibility of the complaints, contending that the application was incompatible *ratione personae* with the provisions of the Convention, because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. They also maintained that, in accordance with the "*Monetary Gold principle*" of the ICJ, the Court could not decide the merits of the case as it would be determining the rights and obligations of the United States of America, Canada and of NATO, none of whom were Contracting Parties to the Convention. (see *Monetary Gold Removed from Rome in 1943, ICJ Reports 1954, p.19, as applied in East Timor*, ICJ Reports 1995, p.90)

Decision

The court unanimously declared the application inadmissible.

Article 1 of the Convention states:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] Convention."

The Court considered that the essential question to answer was whether the applicants, as a result of an extra-territorial act (the bombing of the RTS), were capable of falling within the jurisdiction of the Respondent States. The Court was satisfied that the jurisdictional competence of a State is primarily territorial and that Article 1 of the Convention must be considered to reflect this ordinary notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.

The Court stated that the Convention operated in an essentially regional context and notably within the legal space of the Contracting States and that the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. The Court was not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.

In the light of that conclusion, the Court considered that it was not necessary to examine any remaining submissions of the parties, including whether the Court was competent to consider the case under the principles of the Monetary Gold judgment of the ICJ.

Commentary

A number of interesting points about the interpretation of the Convention was raised by this case, reflected in the decision of the Chamber of the First Section of the Court to decline jurisdiction and refer the case to the Grand Chamber.

The main argument of the applicants centred around the interpretation of Article 1 of the Convention, specifically of exactly who fell within the jurisdiction of the Contracting Parties and therefore of the Convention. Firstly, the Court recalled that any interpretation of the Convention must be done according to the rules set out in the Vienna Convention 1969 (see *Golder v United Kingdom*, No. 4451/70, 02.02.75, §29). Thus it had to ascertain the meaning of

"within their jurisdiction" in the context of and in the light of the purpose of the Convention and by taking account of any relevant rules of international law. The Court also held that any preparatory materials *(travaux preparatoires)* could be consulted with a view to confirming the meaning of any phrase left "ambiguous or obscure" or "manifestly absurd or unreasonable" after applying Article 31 of the Vienna Convention.

The applicants tried to argue that the Article 15 derogation supported their case that the Convention had extra-territorial applicability as, in their interpretation, "war" and "public emergency" covered such situations whether inside or outside the territory of the Contracting State. The Court rejected this argument, stating that the existing UK and Turkish derogations related to internal conflicts only and that State practice since the application of the Convention lacked any apprehension of extra-territorial responsibility in extra-territorial actions, as no derogations had been applied for in such actions.

Using the Cyprus cases as authority, *(Loizidou v Turkey*, No. 15318/89, 23.03.96 *(preliminary objections); Loizidou v Turkey,* No. 15318/89, 18.12.96 (Merits) and *Cyprus v Turkey* [GC],No. 25781/94, 10.05.2001) the applicants tried to argue that the positive obligation under Article 1 to secure Convention rights extended in a manner proportionate to the level of control exercised in any given extra-territorial situation. Thus, just as the Court found that Turkey had "effective overall control" over the Northern part of Cyprus and therefore were obliged to extend the rights under the Convention to them, the applicants argued that as the Respondent Governments had effective control over the FRY's airspace, then they were obliged to extend the Convention rights to those affected by the Respondent Governments' acts. The Court considered that such an argument went so far as to render the words "within their jurisdiction" in Article 1 superfluous and devoid of purpose. The Court also pointed out that the situation in Northern Cyprus was entirely different from this case. There the inhabitants from Northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards they had previously enjoyed under Cyprus as a Contracting State, due to Turkeys effective control of that territory; whereas here the people of FRY did not previously enjoy Convention rights. There have been two other cases involving actions in extra-territorial situations, relied on by the applicants and which have both been declared admissible by the Court – namely in *Issa and Others v Turkey,* (No. 31821/96, 30.05.00) and *Öcalan v Turkey,* (No.46221/99, 14.12.00), both discussed in this issue. However, the Court stated that the issue of jurisdiction was not raised in either of these decisions and that the merits of the cases were still to be decided. It remains to be seen whether the issue of jurisdiction will be raised and discussed in the judgments

GÜL v TURKEY

(22676/93)

European Court of Human Rights, (Fourth Section):

Judgment of December 14, 2000.

Facts

The applicant, Mehmet Gül, is a Turkish national and businessman living in Bozova. The application was brought on behalf of himself and his deceased son, Mehmet Gül. On 7 March 1993 the Provincial Governor authorised a search operation in the town of Bozova after the gendarme commander received a telephone call naming three to four terrorists in the town and their addresses. Mehmet Gül, the son of the applicant, was not named as one of the terrorists. Police officers knocked on the door of Mehmet Gül, the applicant's son, at 1.00 a.m on 8 March 1993. As Mehmet Gül opened the door officers fired

between 50 and 55 shots at him. The applicant and his family took him to hospital, where he was declared dead on arrival.

On 18 April 1995, criminal proceedings were brought against the police officers concerned but neither the applicant, nor his family were informed, nor were they invited to take part. On the basis of statements on file and the officers' evidence, the policemen were acquitted on 9 December 1996.

The Government argued that on the night in question security forces arrived at Mehmet Gül's house to arrest terrorists believed to be inside. After they knocked on the door announcing themselves, the door suddenly opened, a shot was fired and then the door was closed again. The security forces fired at the lock as the door had jammed, causing the accidental death of the applicant's son. Two guns were found on the premises.

The Commission held a fact finding hearing, the results of which were set out in its report of 27 October 1999. The Commission found the testimonies of the officers lacking in reliability and credibility. It did not find that any verbal warning was given to those inside the flat. The gun that Mehmet Gül was alleged to have fired had no traces of blood on it and no steps were taken to discover a strike mark from the alleged gun shot. No photographs were evidenced with the guns at Mehmet Gül's premises.

Complaints

The applicant complained of violations of Article 2, 6 and 13 of the Convention.

The applicant alleged that the police officers had violated Article 2 of the Convention by unjustifiably firing at and killing his son. He also complained under Article 2 that no effective investigation had been conducted into the circumstances of the murder.

The applicant complained that he was excluded from participating in the criminal trial of the officers, contrary to Article 6 of the Convention.

The applicant complained that by being excluded from the criminal trial he was deprived of an effective remedy within the meaning of Article 13 of the Convention.

The Government argued that the applicant's son was killed accidentally and without negligence. It submitted that clear warnings were given when the officers knocked at the door and that the officers' reaction was not disproportionate to their being fired at first. It claimed that the criminal prosecution and trial of the police officers provided an effective remedy in respect of the applicant's allegations.

Held

The Court accepted the facts as established by the Commission.

(1) There had been a violation of Article 2 of the Convention arising from the shooting of the applicant's son (unanimously).

The Court recalled that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranked as one of the most fundamental provisions of the Convention, to which no derogation is permitted. Together with Article 3 it also enshrined one of the basic values of the democratic societies making up the Council of Europe and as such its provisions had to be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also required that Article 2 be interpreted and applied so as to make its safeguards practical and effective.

The Court recalled that Article 2 covers not only intentional killing but also the situations when it is permitted to "use force", which may result as an unintended outcome in the deprivation of life. Any use of force must be no more than is "absolutely necessary" for the achievement of one of the purposes set out in sub paragraphs (a) to (c) of Article 2. The use of "absolutely necessary" in the text of the Article indicated that a stricter test of necessity must be employed from that normally applicable when determining whether State action was

"necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Therefore the force used must be strictly proportionate to the achievement of the permitted aims.

Use of force by State agents in pursuit of one of the aims set out in paragraph 2 of Article 2 may be justified when it is based on "honest belief which is perceived for good reasons to be valid at the time but subsequently turn out to be mistaken"*(McCann and Others v UK,* No.18984/91, 27.09.95)

The Court held that the assertion that Mehmet Gül had first fired a pistol shot lacked credibility and that therefore the firing of at least 50-55 shots at the door was not justified by any reasonable belief of the officers that their lives were at risk. Their reaction in firing on an unseen target in a residential block was grossly disproportionate and could not be regarded as "absolutely necessary" for the purpose of defending life.

Alleged lack of care in the Planning and Control of the Operation

The Court made no separate finding of a violation as regards this aspect of the case

Alleged lack of assistance in obtaining medical treatment for Mehmet Gül.

The Court found it inappropriate, on the facts of the case, to reach any separate finding of a violation.

(2) There had been a violation of Article 2 arising from the inadequacy of the investigation (unanimously).

The Court reiterated that the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1, required by implication that there should be some form of effective investigation when individuals have been killed as a result of force. Taking into account the fact that the applicant was not called as a witness or invited to take part in the proceedings and that expert reports that assumed the officers' accounts were the correct ones were included as the sole expert evidence, the Court found that the authorities had failed to conduct an adequate and effective investigation into Mehmet Gül's death.

(3) There had been a violation of Article 13 (by 6 votes to 1). The Court recalled that the effect of Article 13 is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" and to grant appropriate relief. The remedy must be "effective" in practice as well as in law. Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to compensation, a thorough investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. The Court found a lack of circumspection in taking statements, a failure to conduct a *post mortem* and establish the circumstances surrounding the death, and a failure to collect essential forensic evidence from the scene.

(4) The Court awarded £35,000 for the deceased's loss of earnings, to be held for his son's widow and dependants. The Court awarded £20,000 to be held by the applicant for Mehmet Gül's widow and dependants, and £10,000 for the applicant himself, for non-pecuniary damage; and £21,000 for costs and expenses (unanimously).

***(5)* Dissenting Opinion**

Judge Gölcüklü (Turkey) dissented in respect of Article 13, stating that where there is a finding of a violation of Article 2, no separate issue arises under Article 13 since Article 2 takes account of the fact that there has been no effective enquiry or investigation into the incident. He also dissented on the award for costs being paid into the applicant's London bank account.

Commentary

In reply to the Government's preliminary objection that remedies had not been fully exhausted, either by the applicant instigating a civil action or joining the criminal proceedings as a party, the Court observed that it was essential to

apply Article 35 with flexibility, without excessive formalism and with regard to the individual case. Therefore, although it was in theory open to the applicant to bring a civil action against the three officers, the Court held that the applicant's claim of the defective nature of the investigation into the incident effectively deprived him of any prospect of obtaining a remedy. Neither was the Court satisfied that the burden lay on the applicant to find out whether the Supreme Administrative Court at some further date had intervened to quash a decision not to prosecute the police officers. It was the authorities' responsibility to inform the applicant that a prosecution had been ordered to provide him with the opportunity of joining as a civil party.

As the complaint under Article 6 - that the applicant was excluded from participating in the criminal trial - was inextricably bound up with the more general complaints about the inadequacy of the investigative procedures, the Court considered it more appropriate to deal with the complaint under Article 13 alone.

In such a case as this where death may or may not have been caused intentionally, it is important to remember that the Court does not fulfil the functions of a criminal court as regards the allocation of degree of individual fault. Therefore, for the purposes of upholding rights within the Convention, the Court did not find it necessary to determine whether the police officers had formulated the intention of killing, or acted with reckless disregard for the life of Mehmet Gül.

UNKNOWN-PERPETRATOR KILLINGS

AKKOÇ v TURKEY

(22947/93 and 22948/93)

European Court of Human Rights (First Section):

Judgment of October 10, 2000.

Facts

The case originated in two applications against Turkey lodged with the European Commission of Human Rights on 1 and 22 November 1993.

The applicant, Nebahat Akkoç, is a Turkish national. Mrs. Akkoç was a former teacher and former head of the Diyarbakir Branch of the Education and Science Workers Union, Eğit-Sen. On 31 October 1992, she gave an account to the Diyarbakir Söz newspaper of a meeting which had taken place on 27 October 1992 between the applicant and a delegation of Eğit-Sen and the National Education Director. She stated that the teachers were verbally abused, harassed and in some cases assaulted by the police. On 14 May 1993, the Diyarbakir Provincial Education Disciplinary Committee decided, as a penalty for the statement made to the newspaper without permission, to suspend the promotion of the applicant to a higher grade of teacher for a year. The decision was confirmed by the Diyarbakir Administrative Court. After two appeals to the Supreme Administrative Court, the disciplinary sanction imposed on the applicant was annulled on 17 February 1999.

The applicant's husband, Zübeyir Akkoç, was of Kurdish origin and also a school teacher who was involved in the Eğit-Sen trade union. He was shot and killed (along with a fellow teacher) on his way to work on the morning of 13 January 1993. No classical autopsy was carried out. Prior to her husband's death, the applicant had reported death threats to the public prosecutor but her complaints were ignored. The applicant's husband had been detained by the police on several occasions prior to his death. When Mrs. Akkoç was detained in February 1994, members of the security forces allegedly told her that they had killed her husband. The public prosecutor opened a file into the killing, classifying it as an unknown perpetrator killing. On 27 March 1997, the prosecutor issued an indictment against Seyithan Araz, who was subsequently acquitted on 23 September 1999.

The applicant also alleged that she had been tortured in police custody from 13 to 22 February 1994. During her ten days in custody in the Anti-Terror Department, the applicant claimed to have been subjected to various forms of ill-treatment and torture, including sexual abuse and psychological pressure. On 18 February 1994, the applicant signed a statement drawn up by the police, stating that she was a member of the PKK and that she had made an application to the Commission about her husband's murder. On 22 February 1994, the applicant and 16 other detainees were taken by police officers to the emergency ward of the Diyarbakir State Hospital, where a doctor signed a report stating that they had not suffered any physical blows. A public prosecutor, whom she informed about the circumstances of her detention, ordered her release. On 30 October 1995, the applicant went to the Ankara Treatment Centre of the Human Rights Foundation, where she was diagnosed with chronic post-traumatic stress disorder.

In addition, the applicant claimed that the public authorities interfered with her right of individual petition, arising out of three

periods of detention, 13 to 22 February 1994, 26 to 27 September 1995 and 14 October 1995.

The Government disputed the facts of this third part of the case, arguing that the applicant's evidence was unreliable and inconsistent.

Complaint

The applicant complained of violations of Articles 2, 3, 10, 13 and former Article 25 (now 34) of the Convention.

The applicant complained under Article 10 that the disciplinary proceedings brought against her in respect of her press statement violated her right to freedom of expression.

She also complained of violations of Article 2 and 13 with regards to the killing of her husband by an unknown perpetrator and the lack of an effective investigation into the killing.

Finally, referring respectively to Article 3 and former Article 25, she claimed that she was tortured and ill-treated by the police during her detention in custody, and that she was intimidated in relation to her pending application before the Commission.

Held

(1) There had been no violation of Article 10 of the Convention (unanimously).

The Court found that the applicant had used the available and ordinary means of redress against the disciplinary sanctions imposed on her, which had resulted in the penalty being annulled. Although the Court recognised that the length of time which it had taken to achieve this was significant, the Court did not find it an ineffective remedy.

(2) There had been a violation of Article 2 of the Convention arising from the failure to safeguard Zübeyir Akkoç's life (unanimously).

The Court recalls that the first sentence of Article 2*(1)* requires the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the rights to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.

In the present case, it was not established beyond reasonable doubt that any State agent or person acting on behalf of the State authorities was involved in the killing of Zübeyir Akkoç. The question to be determined was whether the authorities failed to comply with their positive obligation to protect him from a known risk to his life. With respect to that question, the Court found that Zübeyir Akkoç, a teacher of Kurdish origin, engaged in trade union activities perceived by the authorities as unlawful and against the State interest, was at a particular risk, and that the authorities were aware of that fact. Moreover, the Court found serious defects in the implementation of criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces, in particular in the south-east region during this period, which undermined the effectiveness of criminal law protection, permitting or fostering a lack of accountability of members of the security forces for their actions.

The Court concluded that the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Zübeyir Akkoç and, accordingly, that there had been a violation of Article 2.

The Court also found that the authorities failed to carry out an effective investigation into the circumstances of the killing, in violation of Article 2 (unanimously). The Court found that the State's

investigation into the teacher's murder was insufficient and noted in its decision that the investigation into the murder lasted a mere 12 days, with only one statement having been taken at the crime scene. In addition, no investigation was made into the possible sources of the threats made against the applicant and her husband prior to the shooting.

(3) There had been a violation of Article 13 of the Convention (by 6 votes to 1).

The Court noted that the authorities had an obligation to carry out an effective investigation into the circumstances of the killings of the applicant's husband. For the reasons set above, no effective criminal investigation could be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2. The Court found therefore that the applicant had been denied an effective remedy in respect to the death of her husband and access to any other available remedies at her disposal, including a claim for compensation.

(4) There had been a violation of Article 3 of the Convention (unanimously).

The Court found that there had been a breach of Article 3 of the Convention in relation to the applicant herself, who, during her ten day period of detention, was blindfolded, stripped, beaten, forced to listen to blaring music and subjected to electric shocks, hot and cold water treatment and psychological torture in the form of threats made about the possible ill-treatment that might befall her children.

(5) There had been a violation of former Article 25 (1) (now 34) of the Convention (unanimously).

The Court accepted the findings of the Commission that the applicant was questioned during her detention from 13 to 22 February 1994 about her application. Given that the applicant was the victim of torture during these interrogations, the Court found that the applicant must have felt intimidated in respect of her application to the Commission. This constituted undue interference with her petition to the Convention organs and therefore the respondent State had failed to comply with its obligations under former Article 25.

(6) The Court awarded the sum of £35,000 for pecuniary damage. As regards non-pecuniary damage, it awarded £15,000 in respect of Zübeyir Akkoç, to be held by the applicant as surviving spouse and £25,000 for the applicant himself. The Court also awarded £13,648.80 (less the amount awarded for legal aid) for costs and expenses. (unanimously).

(7) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of Article 2, disputing the majority's opinion that the State failed in its duty to protect the life of Zübeyir Akkoç.

He further dissented in respect of Article 13, considering that no further issue arises because the findings on Article 2 take into account that there had been no effective investigation nor any adequate proceedings after the incident.

Finally, he dissented regarding the compensation awarded for pecuniary damage on the basis that the Government was not directly responsible for the death of the applicant's husband.

Commentary

Notably, the Court did not hold a breach of Article 10 of the Convention, although the Commission Report of 23 April 1999 expressed the opinion that there had been a violation. The Court held that despite the fact that it took the applicant over five years to achieve redress against the disciplinary sanction imposed on her, the length of time had not deprived the domestic remedy of efficacy *(Akkoç v Turkey,* Nos.22947/93 and 22948/93, 10.10.2000, §67). She could not show any concrete financial loss or other prejudice.

Furthermore, the material,

which had been presented to the Convention Organs, is of interest. Apart from a Commission Report (23.4.1999), the applicant lodged a copy of the Susurluk report, which was produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. It was intended to describe certain events which had occurred, mainly in south-east Turkey, and which tended to confirm the existence of unlawful dealing between political figures, Government institutions and clandestine groups.

The applicant also provided a report from 1993 into extra-judicial or unknown perpetrator killings by a Parliamentary Investigation Commission of the Turkish Grand National Assembly.

In addition, the Court took into consideration two public statements and one report from October 1997, issued by the European Committee for the Prevention of Torture (CPT). The CPT has carried out seven visits to Turkey between 1990 and 1997, but the reports on these visits, save that of October 1997, have not been made public until early this year, since such publications require the consent of the State concerned. In November 2001 the Turkish Government authorised the publication of all reports on visits by the CPT to Turkey (see Press Release of the CPT, 8.11.2001).

ISSA AND OTHERS v TURKEY (31821/96) European Court of Human Rights, (First Section):

Decision of May 30, 2000 (Admissibility)

Facts

The applicants, six women from northern Iraq brought their applications on behalf of themselves and their relatives who were killed in the hills surrounding their village.

On 1 April 1995, the applicants learnt that the Turkish army was in their area carrying out military activities. On the morning of 2 April 1995 a party of eleven shepherds (including four of the applicants) set off for the hills with their flock. The party eventually came across Turkish soldiers who, after having insulted and beaten them, separated the men from the women. The four applicants returned to the village and told the other villagers what had happened. In the meantime the two other applicants had gone to search for their husbands and had come across the soldiers and the men. They were however forced to turn back. Later, villagers accompanied by members of the Kurdistan Democratic Party (KDP), went to a nearby Turkish military unit in Anshki and asked the officer in charge to release the shepherds so they could fetch their sheep from the hills. The officer first claimed to know nothing about the shepherds. Then he promised the representatives of the KDP that the shepherds would be released. The officer later denied that the shepherds had been detained but warned the men not to look for them.

On 3 April 1995 the Turkish army withdrew from the area. Soon after, the villagers found the corpses of five of the shepherds. Their bodies had been shot several times and were badly mutilated with ears, tongues and genitals missing. Two days later the bodies of the two other shepherds were found in similar states of mutilation.

The Government confirmed that an operation of the Turkish military took place in northern Iraq between 19 March 1995 and 16 April 1995 but claimed that army records did not show the presence of Turkish soldiers in the area indicated by the applicants. They also claimed that that there was no record of a complaint made.

Complaints

The applicants complained of violations of Articles 2, 3, 5, 8, 13, 14 and 18 of the Convention.

The applicants complained of a violation of Article 2 on account of the intentional deprivation of life not attributable to any of the exhaustive purposes listed, alternatively attributable to a use of

unlawful acts of war; a violation on account of the failure to initiate legal proceedings and of the inadequate protection in domestic law.

The applicants further complained of a violation of Article 3 in respect of their relatives' rights under Article 3 on account of the infliction of mutilation, which if they were alive at the time, would constitute torture. They further invoked Article 3 in respect of their own rights on account of the severe distress caused by the infliction of mutilation which was also degrading to their religious beliefs, and by the unacknowledged detention of their relatives; and finally the ill-treatment inflicted on four of the applicants when stopped by the soldiers.

They also complained under Article 8 of the unjustifiable interference in family life caused by the killing of the applicant's relatives; under Article 13 of the lack of any independent national authority before which these complaints could be brought with prospect of success; under Article 14 on account of discrimination in the enjoyment of their rights under Articles 2, 3 and 8 of the Convention and finally under Article 18 on account of lack of good faith in the implementation of international obligations.

Decision

The Court unanimously declared the application admissible.

The Court rejected the Government's arguments that the applicants had not complied with the six-month time limit and that they had failed to exhaust domestic remedies. The Court considered that the case raised complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole.

Commentary

The Court declared the application admissible although the applicants had failed to exhaust potential domestic remedies in Turkey (Article 35§1 of the Convention). It is well established under the Convention that the existence of remedies must be sufficiently certain, in practice and in theory. Therefore, the Court must take into account the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Aksoy v. Turkey*, No.21987/93, 18.12.1996, §§51-52).

As the applicants are shepherds from northern Iraq the Court stated that they were financially and physically unable to access the judicial mechanism of Turkey, a foreign country. Moreover, the Court noted that even after the communication of the case to the Government the Turkish authorities failed to conduct an investigation into the events.

The future of the case depends on the interpretation of the term "jurisdiction" in Article 1 of the Convention. According to Article 1 of the Convention Contracting States must secure the rights and freedoms to "everyone within their jurisdiction". These words do not imply any limitation as to nationality, but primarily as to territory (see *Bankovic and others v. Belgium and 16 other Contracting States*, No.52207/99, 12.12.01, admissibility decision, § 67). In exceptional cases the Court has accepted that the acts of Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. In *Loizidou v. Turkey*, No.15318/89, 18.12.1996; and in *Cyprus v. Turkey*, No.25781/94, 10.05.2001, the Court noted that detailed military control over the northern parts of Cyprus could engage the responsibility of Turkey under the Convention. However, this responsibility was denied in the case of *Bankovic and others v. Belgium and 16 other Contracting States* (No. 52207/99), which concerns the bombing of the Former Republic of Yugoslavia (FRY) by the NATO members, as the Court held that the Convention was not designed to be applied throughout the world. Furthermore, the Court

could not agree on the necessity of avoiding a gap or vacuum in human rights' protection, which has been the case in the *Cyprus* cases. The situation in Iraq may not resemble the situation in Cyprus nor in FRY. If successful on the merits, this case is likely to mean a development of the Court's interpretation of the meaning of "jurisdiction".

KOKU v TURKEY

(27305/95)

European Court of Human Rights, (First Section):

Decision of June 26, 2001 (Admissibility)

Facts

The application was brought by Mustafa Koku on behalf of himself and his deceased brother Hüseyin Koku. Prior to his death, Hüseyin Koku had been arrested and detained on suspicion of involvement with the PKK. Criminal proceedings had been initiated against him but he was acquitted for lack of evidence and released. Shortly after joining the People's Democracy Party (HADEP), Huseyin Koku was allegedly persecuted by the authorities and received death threats. He subsequently disappeared and his body was later found in April 1995 decapitated and dismembered. The applicant alleged that agents of the State were responsible for Hüseyin Koku's death.

Complaints

The applicant complained of violations of Articles 2, 3, 5, 6, 13 and 14 of the Convention.

The applicant alleged that he and his brother had been victims of a violation of Article 2 of the Convention on account of the intentional deprivation of life. He also submitted that the authorities failed to protect his brother's right to life adequately by not initiating legal proceedings to identify the persons responsible for his death.

Invoking Article 3, the applicant submitted that his brother had been subjected to torture in police custody and that he himself had suffered as a result of his brother's disappearance and the lack of an effective investigation into the death.

As to Article 5, the applicant claimed that his brother was unlawfully detained and was not brought promptly before a judicial authority.

He also complained under Article 6 of the failure to initiate proceedings, resulting in the denial of effective access to court; under Article 13 of the lack of independent national authority before which these complaints could be brought with any prospect of success; and under Article 14 in conjunction with Articles 2, 3 and 6 arising from an administrative practice of discrimination on grounds of race or ethnic origin.

The Government argued that there were strong reasons to believe that Hüseyin Koku was killed by a member of the Elma family for revenge for the affair he had had with Mrs. Cennet Elma. It further argued that the investigation into the death of Hüseyin was pending before the Potürge Public Prosecutor and that the applicant had therefore not exhausted criminal and civil domestic remedies within the meaning of Article 35 of the Convention.

Decision

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

With regard to criminal law remedies the Court acknowledged that in assessing the effectiveness of the inquiry, regard must be given to the time element involved in the case which forms a central part of Mustafa Koku's complaints under Article 2 and 13 of the Convention. It therefore joined the preliminary objection in this respect to the merits.

For a civil action to be brought under domestic law, the person believed to have committed the tort must be identified. In the present case that person had not yet been found. The Court therefore dismissed the Government's preliminary objection in relation to civil remedies.

Commentary

See commentary below for Yilmaz.

YILMAZ v TURKEY

(35875/97)

European Court of Human Rights (Second Section):

Decision of June 12, 2001. (Admissibility)

Facts

The application was brought by Sirin Yilmaz on behalf of himself, his deceased spouse, Sariye Yilmaz, and his family. The applicant and his family lived in the Bayirli (Karincak) village attached to the Lice district. In June 1996, following an order from the Lice Gendarme Station commander for all the villagers from the Bayirli to leave their village, a process of intimidation was begun by banning car travel to and from the village, confiscating property and livestock and placing a food embargo on the village for two or three months.

On 7 October 1996 a clash broke out between the PKK and the security forces. Shrapnel from an artillery shell struck the applicant's wife in the abdomen. The applicant's wife died as she was being taken to the Lice health clinic.

As the applicant and his relatives were returning to the village they were stopped by security forces. The senior lieutenant wrote a report stating that the applicant's wife had been struck by artillery fire and had died as a result of her wounds, but refused the applicant's request for an autopsy. On 8 October 1996 a captain from Lice came to the village who also refused a request for an autopsy but stated that he would forward the senior lieutenant's report to the prosecutor.

On 10 October 1996 the applicant refused to sign a petition, prepared by the commander of the Lice Gendarme Station, which would blame the PKK for his wife's death. On 16 October 1996 the applicant filed petitions with the offices of the Diyarbakir District Governor and the State of Emergency Region Governor, requesting an investigation into his wife's death and compensation from the authorities. On 19 October 1996 the applicant filed a petition with the Diyarbakir State Security Court. He was also told by the Lice Public Prosecutor that no report had been received from the Gendarme station. In the Populations Office *(Nüfus Müdürlü_ü)* the applicant found documents prepared by the Gendarme Station blaming the PKK for his wife's death. On 26 October 1996 the applicant was offered monetary compensation of 15 million Turkish lira. On 5 November 1996 the applicant filed petitions with the offices of the Minister of Internal Affairs and the Minister of Foreign Affairs, to which he received no replies.

The Government argued that on 7 October 1996 a group of terrorists attacked the security forces. The terrorists subsequently tried to escape through the Bayirli village where they fired at the houses and wounded the applicant's wife, who later died from the wounds. Statements from the villagers were taken stating that the PKK had come to the village requesting assistance and had fired on the villagers.

Complaints

The applicant complained of violations of Articles 2, 3, 6, 8, 13, 14, 18 of the Convention and Article 1 of Protocol 1 to the Convention.

The applicant complained under Article 2 that his wife was killed by artillery shells that were fired by security forces and also that the national authorities did not carry out an effective investigation into the death of his wife.

Invoking Article 3 the applicant submitted that he had been subjected to inhuman and degrading treatment by the security forces as they tried to intimidate the villagers in to evacuating their village by confiscating property, banning car travel to and from the village and creating a food embargo.

The applicant complained under Article 6 and 13 that there

existed no effective domestic remedy since his complaints had not been dealt with effectively and that he cannot have his civil rights determined as there had been no investigation into the incident.

Invoking Article 8 the applicant submitted that the killing of his wife, and the interference with his way of life, produce and livestock, was a violation of his right to family life.

Under Article 1 of Protocol No.1 to the Convention, the Applicant submitted that he was deprived of the peaceful enjoyment of his possessions and that he had to leave his village as a result of a State practice in the south-east of Turkey.

Relying on Article 14 in conjunction with Articles 2, 3, 6, 8 and 13 and Article 1 of Protocol No.1 to the Convention, the applicant complained that he and his family were subjected to discrimination on grounds of their ethnic origin.

The applicant finally alleged that the policy of the Turkish authorities in allowing the military to suppress problems by the forced evacuation and destruction of villages was a violation of Article 18.

The Government argued that the applicant had failed to exhaust domestic remedies within the meaning of Article 35. An investigation concerning the death of the applicant's wife had been opened and was still ongoing at the time of the application to the Commission. It would also have been possible for the applicant to seek compensation before the administrative courts under Article 125 of the Constitution. The applicant could alternatively have lodged a civil action for damages sustained through unlawful conduct. Also, if the alleged acts were committed by military personnel, the latter could have been prosecuted under the Military Criminal Code.

The Government also submitted that the application had been submitted out of time as it was introduced more than six months after the events complained of.

Decision

The Court unanimously declared all the applicant's complaints admissible and unanimously joined to the merits the question concerning the effectiveness of the criminal investigation and the issue relating to the six months rule.

The Court considered that the exhaustion of domestic remedies rule obliges applicants to use the remedies that are normally available and sufficient in the domestic legal system to obtain redress for the breaches alleged, but not that recourse should be had to remedies which are inadequate or ineffective. As regards a civil action for damages the person who allegedly committed the tort must be identified, a fact still unknown in the present case. As regards an action in administrative law, the Court noted that the obligation of a Contracting State under the Convention to identify and punish those responsible for breaches would not be satisfied by the mere award of damages. It is therefore not of the opinion that the applicant was required to bring civil and administrative proceedings.

As regards the alleged failure of the applicant to file a criminal complaint the Court noted that under Turkish law this is not a condition for the opening of a criminal investigation into unlawful killing and that, in the present case, such an investigation was in fact opened ex officio. Therefore the Court is not of the opinion that the applicant was required to make a further explicit filing of his complaint. As to whether the criminal investigation can be regarded as effective the Court considered that this question cannot be answered at this stage as it is closely linked to the substance of the complaints and therefore should be joined to the examination of the merits.

Regarding the six months rule, the Court considered that the question cannot be answered at this stage because it is linked to the question of whether the criminal investigations were effective remedies and therefore must also be joined to the examination of the merits.

As to the merits of the case the Court concluded that the application was not manifestly ill-founded

within the meaning of Article 35§3 of the Convention.

Commentary

In *Koku* the Government maintained that the application was inadmissible since the applicant had failed to exhaust domestic remedies within the meaning of Article 35 of the Convention. The Court noted that there was a pending inquiry into the events of the present case and mentioned that the effectiveness of the inquiry depended on the time element involved. In this respect the Court considered that the Government's preliminary objection as to the criminal procedure raises issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention and therefore, joined these to the merits.

In *Yilmaz* the Court noted that, regarding the applicant's alleged failure to file a criminal complaint, under Turkish law, this is not a condition for the opening of a criminal investigation into a suspected unlawful killing. The question whether or not the criminal investigation at issue could be regarded as effective for the purposes of the Convention could not be answered at that stage of the proceedings, since it was closely linked to the substance of the applicant's complaint. Both admissibility decisions deferred the issue of exhaustion of domestic criminal remedies to the merits decision as the Court did as well in regard to the six-months rule.

DEATH-
IN CUSTODY

[see also:

Taş v Turkey (Disappearance)

Koku v Turkey (Unknown Perpetrator Killing)]

TANLı v TURKEY

(26129/95)

European Court of Human Rights (Third Section):

Judgment of April 10, 2001

Facts

This application was brought by Mustafa Tanlı, a Kurdish farmer living in the village of Örtülü, on behalf of himself and his deceased son, Mahmut Tanlı. On 27 June 1994, gendarmes arrived in the village to carry out a search and left with the applicant's son. On 29 June 1994 the applicant was taken to the police station, where he was informed that his son had died of a heart attack after becoming agitated when being questioned about his involvement in the PKK. The applicant maintained that his son did not suffer from any illness and had probably died from torture. On 28 June 1994 an autopsy was carried out which reported no signs of bruising. On 29 June 1994 Mahmut Tanlı's body was delivered to Ulusoy police station. The applicant alleged the body was covered in bruises, with a large incision running down the left breast, which the police claimed was the result of an operation when Mahumut Tanlı had a heart attack. On 29 June 1994 the applicant made a statement to the Doğubeyazit branch of the IHD and also lodged a written petition with the chief public prosecutor, complaining of the suspicious nature of his son's death and the inadequacy of the post mortem examination. The applicant requested a further autopsy, but later withdrew the request. On 3 August 1994, proceedings were brought against the three police officers who had been interrogating Mahmut Tanlı when he died. The body was exhumed but the Istanbul Forensic Institute could not reach any findings due to the deterioration of the body. On 14 May 1996 the court found that the cause of Mahmut Tanlı's death could not be established and the officers were acquitted.

Complaint

The applicant complained of violations of Articles 2, 3, 5, 13, 14 and 18 of the European Convention on Human Rights.

Invoking Article 2 the applicant complained that his son was unlawfully killed in custody by police officers during interrogation. He also complained that no effective investigation had been conducted into the circumstances of the murder.

The applicant alleged that there was a violation of his son's rights under Article 3, due to the torture he suffered while in custody. The applicant also alleged a violation of Article 3 due to the failure to carry out an effective investigation into the allegations of torture and in respect of the anguish and distress suffered by the applicant in the face of the authorities' complacency.

The applicant alleged that there were violations of his son's rights under Article 5, submitting that his son's detention was not carried out by a procedure prescribed by law and was without any lawful justification permitted under the Article. The Government's failure to create, maintain and produce adequate documentation in relation to the arrest amounted to a violation of the "lawfulness" requirement. He also alleged there had been a breach of Article 5§2 as his son had not been informed of the reasons for his arrest, nor had he been brought promptly before a judge, contrary to Article 5§3.

The applicant submitted that there had been a breach of Article 13 as he had been denied access to an effective domestic remedy.

Invoking Article 14 and Article 18, taken together with Articles 2, 3, 5 and 13, the applicant submitted that the circumstances of the case illustrated the discriminatory policy pursued by the authorities against Kurdish citizens.

The Government made a preliminary objection to the application, submitting that the applicant had introduced his application before the Court before the conclusion of the domestic proceedings and that domestic remedies had existed and were shown to have worked effectively. It also submitted that there was no evidence proving the allegation that the applicant's son was ill treated and killed by agents of the State, pointing to the initial autopsy report as evidence. Furthermore it submitted that the investigation into the death was prompt, thorough and effective and that it was the applicant who had withdrawn his request for a further autopsy. As regards the allegations of torture the Government pointed to the lack of any concrete evidence, stating that the incision on the body and other marks were due to the autopsy. Regarding the violation of Article 5, the Government submitted that the security forces had reasonable suspicion to arrest Mahmut Tanlı due to his alleged involvement with the PKK.

Held

The Court dismissed the preliminary objection as the domestic proceedings had by then come to a conclusion. It resolved that the Government's submission that the domestic remedy was adequate and effective would be better examined under the substantive provisions of the Convention.

(1) There was a violation of Article 2 as regards the death of Mahmut Tanlı (by 6 votes to1).

The Court reiterated that Article 2, which safeguards the right to life, ranked as one of the most fundamental provisions of the Convention, to which no derogation is permitted. Together with Article 3 it enshrined one of the basic values of the democratic societies making up the Council of Europe. The text of Article 2 covers not only intentional killing but also situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life.

Any use of such force may be no more that "absolutely necessary" for the achievement of one of the lawful purposes set out in subparagraphs (a) to (c) of Article 2. The Court noted that the authorities are under a duty to protect people in custody and thus when a person dies in custody the authorities

are under a particularly stringent obligation to account for that person's treatment. While the standard of proof is that of "beyond reasonable doubt", the Court held that such proof may follow from the co-existence of sufficiently strong and clear inferences or of unrebutted presumptions of fact. The Court found that the *post mortem* procedure was defective and therefore the Government had failed to provide an explanation for Mahmut Tanlı's death during custody and thus the responsibility of the State was engaged.

(2) There was a violation of Article 2 regarding the failure of the authorities to conduct an effective investigation into the circumstances of the death of Mahmut Tanlı (unanimously).

The Court reiterated that the obligation to protect the right to life under Article 2, read in conjunction with Article 1, required by implication that there should be some form of effective official investigation when individuals had been killed as a result of the use of force. The mere fact that the authorities were informed of a death in custody gave rise *ipso facto* to an obligation to carry out an effective investigation into the circumstances surrounding the death. This would, where appropriate, involve an autopsy, which would provide a complete and accurate record of possible signs of ill treatment and injury. The Court noted that the initial *post mortem* report was not carried out by qualified forensic pathologists. As to the Government's argument that the applicant had withdrawn his consent to a second autopsy, which could have remedied the defects, the Court observed that the public prosecutor did not require such consent.

(3) There was a violation of Article 13 of the Convention (unanimously).

The Court reiterated that Article 13 required a domestic remedy to deal with an "arguable complaint" and provisions for appropriate relief. The remedy required must be "effective" in practice as well as in law. Given the fundamental importance of the protection of the right to life, Article 13 required, in addition to the payment of compensation, an effective investigation leading to the identification and punishment of those responsible for the deprivation of life. The Court observed the shortcomings of the initial *post mortem* examination, which undermined the effectiveness of the domestic criminal proceedings brought against the three officers.

(4) There was no violation of Article 3 of the Convention regarding the allegations of torture (unanimously).

The Court observed that the Government had not provided a plausible explanation for Mahmut Tanlı's death while in custody. However, unlike *Salman v Turkey* (no. 21986/93, 27.06.00) there were no marks on the body consistent with the application of torture techniques. The bruising may have been caused by *post mortem* changes to the body and therefore the Court found no evidence, apart from the unexplained cause of death, to support a finding that acts of torture were carried out.

(5) There was no violation of Article 3 of the Convention regarding the failure to carry out an effective investigation into the allegations of torture.

The court considered that this complaint would be better evaluated under Article 13.

(6) There was no violation of Article 3 of the Convention regarding the anguish and distress suffered by the applicant.

Though the Court acknowledged the profound suffering caused to the applicant by his son's death, it could find no basis for finding a violation of Article 3 in this context, the case-law relied on by the applicant referring to cases of disappearance only.

(7) There had been no violation of Article 5 of the Convention (unanimously).

The Court reiterated the fundamental importance of the rights of individuals to be free from arbitrary detention and stressed that any deprivation of liberty must not only have been effected in law, but must also be in keeping with the purpose of Article 5, namely to minimise the risks of arbitrary detention. In order to minimise such risks, Article 5 provided a corpus of substantive rights intended to ensure judicial scrutiny and secured the accountability of the authorities for

that measure.

The Court observed that there were no elements which would enable it to reject the Government's finding of a list of PKK supporters, which included the applicant's son's name, as a manifest fabrication. Therefore the Court were not satisfied that the security officers had acted without reasonable suspicion that Mahmut Tanlı had committed a criminal offence. The Court was not persuaded that "unlawfulness" had been made out on the grounds of a lack of proper documentation, as the applicant had made no request for the custody records to be provided. The Court considered it not possible to establish what information may have been given to Mahmut Tanlı prior to his death and therefore it was not possible to infer, due to the absence of written proof, that reasons for his arrest were not given, contrary to Article 5§2. As Mahmut Tanlı died some 24 hours after being taken into custody, the Court also considered it was mere speculation to assume that a violation of Article 5§3 would have inevitably occurred.

(8) There was no violation of Articles 14 or 18 of the Convention. On the basis of the facts established in this case, the Court did not find that the applicant had substantiated his allegations that his son was the deliberate target of a discriminatory policy on account of his ethnic origin, contrary to Article 14; or that there was a violation of Article 18, due to Mahmut Tanlı being the victim of restrictions contrary to the purpose of the Convention.

(9) The Court awarded *£38,754.77* for pecuniary loss and *£20,000* non-pecuniary loss, to be held by the applicant for Mahmut Tanlı's widow and daughter; £10,000 for non-pecuniary loss suffered by the applicant; and *£9,760* for costs and expenses.

(10) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of the substantive aspect of *Article 2*. He asserted that it defied all logic to draw a positive conclusion (that the State was responsible for Mahmut Tanlı's death) from the only negative material fact established (that there was a lack of thorough investigation). It was his opinion that the only issue raised under Article 2 related to the procedural aspect of Article 2, i.e. lack of an effective investigation.

Regarding Article 13, Judge Gölcüklü opined that, where the Court finds a violation of Article 2 in its procedural aspect, no separate issue arises under Article 13 as a violation of Article 2 takes into account that there has been no effective inquiry.

Regarding the award of compensation for pecuniary damage, he asserted that the Court's calculation on the basis of actuarial tables was merely speculative.

Commentary

Although in cases of "disappearance" the Court has sometimes found a violation of Article 3, regarding the suffering of the applicant in not knowing the whereabouts of the *disappeared* person (see Taş, No.24396/94, 14.11.00 and Çicek, No. 25704/94, 27.02.01 below), as this case demonstrates, the Court is unwilling to consider a breach of Article 3 as regards the suffering of an applicant in relation to the *death* of a family member where State responsibility is engaged. Article 3 was raised in a relation to the death of relatives in *Issa v Turkey*, No.31821/96, 30.05.00, (see above), but the judgment is still being awaited.

Article 5 provides a number of rights to ensure that a person is not arbitrarily detained. One of these rights is that a person shall not be "unlawfully" detained. From this case it would seem that, if the applicant wishes to raise ineffective documentation as evidence of the unlawfulness of his detention, he should make efforts to obtain documentation in relation to that detention, irrespective of whether he believes they would be provided or not.

The applicant, referring to previous judgments of the Court and to evidence from UN agencies and non-governmental organisations, alleged that there was an official tolerance of violations of Article 13 and an official practice of discrimination due to ethnic origin, in violation of Article 14 and 18. However, the Court seems reluctant to find an official practice of any violations of any of the Articles and seems satisfied in finding individual instances of breaches, thus avoiding any potential political controversy.

DISAPPEARANCE

AKDENIZ AND OTHERS v TURKEY

European Court of Human Rights,

(Second Section),
Judgment of May 31, 2001

Facts

In October 1993 security forces carried out a massive operation around the Alaca village in the region between Kulps, Mus and Lice. At the time, terrorist activity was a major concern in this area. A large number of villagers from this region were picked up and taken away either to be used as a guide to the soldiers or were detained in camps for questioning about involvement with the PKK. It was during this operation that eleven men, detained in custody at a camp in Kepir on about 13 or 14 October, later went missing. These eleven men were tied up, kept outside during the day and at night and were in a state of some distress and apprehension. On 16 or 17 October 1993 the detainees at the Kepir camp were released all except the eleven men. When they were last seen they were detained under guard by security forces. The operation ended on or about 24-25 October 1993.

The applicants are close relatives of the eleven men that went missing. They approached numerous authorities in the region, sometimes alone or in small and varying groups, seeking to find out what happened to their relatives. They were not successful in obtaining any information. The Commission held a fact finding hearing.

Complaints

The applicants alleged that their relatives had disappeared after they were detained by soldiers during an operation in October 1993. The invoked Articles 2, 3, 5, 13 and former Article 25 (now 34) of the Convention.

The applicants invoked Article 2 alleging that their relatives had disappeared after being detained by the security forces and that it could be presumed that they were dead in circumstances for which the authorities were liable. They also complained that no effective investigation had been conducted into the circumstances of those deaths.

The applicants alleged that their relatives had been victims of treatment contrary to Article 3 of the Convention. They further alleged that the disappearance of their relatives caused them such a degree of suffering as to constitute inhuman and degrading treatment.

The applicants complained that the disappearance of their relatives in detention disclosed a violation, in numerous aspects, of Article 5 of the Convention.

The applicants further asserted that they had been denied access to an effective domestic remedy and alleged a breach of Article 13.

Finally the applicants complained that they had been subject to serious interference with the exercise of their right of individual petition, in breach of former Article 25 § 1 of the Convention.

Held

(1) There had been a violation of Article 2 *(6 votes to 1)*

In deciding that the eleven men could be presumed dead, the Court took into consideration the fact that over seven years had elapsed since the eleven men had been placed in detention, the lack of any documentary evidence relating to their detention and the inability of the Government to provide a satisfactory and plausible explanation as to what happened to them. The Court also observed that in the general context of the situation in South-east Turkey in 1993, it could by no means be excluded that an unacknowledged detention of such persons would

be life threatening. Accordingly the liability for the deaths was attributable to the Respondent Government.

The Court also decided that there had been a violation of Article 2 on account of the failure of the authorities of the Respondent State to conduct an effective investigation into the circumstances of the death of the eleven missing men

(2) There had been a violation of Article 3 as regards the applicants' relatives (6 votes to 1).

The Court, having accepted the Commission's version of the facts, found that the treatment suffered by all but one of the eleven men reached the threshold of inhuman and degrading treatment and therefore there had been a violation of Article 3.

(3) There was no violation of Article 3 as regards the applicants (6 votes to 1).

The Court stated that whether or not the family members should be considered victims depended on the existence of special factors which gave the suffering of the applicant a dimension and character distinct from the emotional distress which could be regarded as inevitably caused to relatives of a victim of a serious human rights violation. The Court referred to the special factors laid out in the *Çakici v Turkey* No. 23657/94, 08.07.99, §§98-99. These included the proximity of a family tie- a certain weight being attached to the parent-child bond - the particular circumstances of the relationship and the extent to which the family member witnessed the events in question and other factors. The Court further emphasised that "the essence of such a violation concerns the authorities' reactions and attitudes to the situation when it is brought to their attention." The Court was not satisfied that this case disclosed the special circumstances referred to in the *Çakici* case and did not consider that the applicants could claim to be a victim of the authorities' conduct to an extent which disclosed a breach of Article 3 of the Convention.

(4) There had been a violation of Article 5§1 of the Convention (unanimously).

The Court reiterated the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals to be free from arbitrary detention at the hands of authorities. The Court noted that its reasoning and findings in relation to Article 2 left no doubt that the detention of the applicants' relatives was in breach of Article 5, considering that they were held at Kepir for at least a week, after which they disappeared. The authorities failed to provide a plausible explanation for their whereabouts and fate after that date. Furthermore the investigation carried out by the domestic authorities into the applicant's allegations was neither prompt nor effective. The Court regarded with particular seriousness the lack of any entries in official custody records in respect of the victims' detention.

(5) There had been a violation of Article 13 of the Convention (6 votes to 1).

The Court reiterated that Article 13 guaranteed the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms.

The Court found the applicants had an arguable complaint that their relatives had disappeared after being taken into custody and that the authorities had failed to conduct an effective investigation into the events as required by Article 13. Accordingly the Court found that the applicants had been denied an effective remedy in respect of the disappearance and death of their relatives and thereby access to any other available remedies at their disposal, including a claim for compensation.

(6) There had been a violation of former Article 25 (now Article 34) of the Convention (6 votes to1).

The Court reiterated the importance for the effective operation of the system of individual petition 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. The circumstances of each case should be examined in order to determine whether or not pressure had been exerted on the applicants. The applicants had been questioned by the police and public prosecutors about their applications. The Court found that they must have felt intimidated by these contacts with the authorities, which went beyond an investigation of the facts underlying their complaints.

(7) The Court awarded the sums of *£12,000 and £35,000* for pecuniary damage. As regards the missing men the Court awarded the sum of *£20,000* to each applicant to be held by them for the widow and children of the missing men. As regards the applicants themselves the Court took into account the gravity of the violations and equitable considerations in awarding *£2,500* to each applicant.

(8) Dissenting opinion

Judge Fischbach (Luxembourg) dissented in respect of Article 3, disputing the majority's finding that the applicants' situation did not satisfy the conditions laid out in the *Çakici* case.

Judge Golcüklü (Turkey) dissented in respect of Article 2, disputing its applicability in favour of Article 5. He also dissented in respect of Article 3, disputing the majority's finding that the applicants and victims had suffered inhuman and degrading treatment. He also dissented in respect of Article 13, stating that where the Court finds a violation of Article 2 in its procedural aspect, no separate issue arises under Article 13 as the same facts are at issue. Finally he contended the award of a sum for pecuniary damage.

Commentary

In assessing the disputed factual evidence, the reliability of the witnesses was the crucial issue. The Court, here as elsewhere, found the witnesses for the applicants to be more credible than those for the Government, giving evidence consistent with supporting documentary evidence. In *Tanlı v Turkey* above, No.26129/95, 10.04.01, a case concerning a death while in custody, the Court could not find any evidence of torture on the actual body and therefore could not find a violation of ***Article 3.*** In this case, though the bodies of the applicants' relatives were not found, the Court was able to conclude, from the evidence of eye-witnesses, that the applicant's were subjected to inhuman and degrading treatment.

Judge Fischbach dissented in finding a violation of Article 3. He considered that this case did meet the criteria set out in *Çakici v Turkey,* No. 23657/94, 08.07.99, §§ 98-99. Regarding the closeness of proximity between the applicants and the victims, Judge Fischbach drew attention to the fact that, though the applicants may not all have been in a parent-child relationship with the victims, they were all in the same situation of expectancy, anxiety and distress, exacerbated by the authorities' indifference and insensitivity. Thus he seems to be interpreting the criteria as, not just an objective analysis of the relationship, but also in terms of the actual subjective feelings generated by that relationship. Regarding the condition of whether the applicants were witnesses to the events in question, although Judge Fischbach acknowledged that only one applicant was a direct witness, he noted that a number of the applicants were caught up with the military action and had been detained by the authorities.

AYDIN AND OTHERS v TURKEY

(28293/95, 29494/95, 30219/96)

European Court of Human Rights

(First Section): Judgment of July 10, 2001 (Friendly Settlement).

Facts

The applicants, Kasim Aydin and his siblings and mother, are Turkish citizens living in Dürüt in Tunceli Province. At the beginning of October 1994 military operations took place in Tunceli Province. The applicants' husband and father, Müslüm Aydin decided to stay in the village to tend his beehives, while the rest of his family left for Hozat during the operations. On 11 October 1994 Kasim Aydin returned to Dürüt to find his family home and possessions burnt and his father missing. According to other villagers he had been taken by soldiers. On 14 October 1994 Kasim Aydin filed a petition with the Public Prosecutor of Hozat. On 24 February 1994 the complaint was transferred to the local Administrative Council, who concluded on 26 April 1995 that no complaint could be conducted since the security forces concerned could not be identified. An investigation into Müslüm Aydin's disappearance was opened by the Malatya State Security Court in 1998, and was still pending.

Held

The Court decided to strike out the application under the friendly settlement procedure (unanimously).

On 10 April 2001 the Court received a declaration from the Government stating its regret in relation to the events that led to the disappearance of Mr Müslüm Aydin and its acceptance of the fact that the unrecorded deprivation of liberty and insufficient investigations into the allegations of disappearance constituted violations of Articles 2, 5 and 13 of the Convention. It undertook to issue appropriate instructions and adopt all necessary measures to ensure that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out. It offered to pay *ex gratia* to the applicant £68,000 with a view to a friendly settlement.

On 25 April 2001 the Court received a declaration from the applicants' representative taking note of the Government's declaration and acknowledging this to be a full and final settlement of their claims. The applicant also undertook not to refer the case to the Grand Chamber under Article 43(1) of the Convention.

Commentary

This is a case in which the applicant and respondent Government were able to reach agreement on the terms of its settlement, pursuant to Articles 38-39 of the Convention and Rule 62. It is to be contrasted with recent cases which have been struck out by the Court under Article 37 on the basis of a 'declaration' from the Government, but which was not accepted as sufficient by the applicant (see *Akman v Turkey* above, No.37453/97, 26.06.01).

The friendly settlement process can be advantageous to both governments and applicants. The process can enable governments to avoid damaging Court judgments, by settling cases before they reach the merits stage. This means, however, that there is a danger that Governments could seek to avoid resolving systematic human rights problems simply by paying off individual applicants.

For applicants, the process can represent an opportunity to achieve measures which go further than the Court could order in an ordinary merits judgment. For example, it may be possible for applicants to seek and obtain an undertaking from the government through the friendly settlement process to amend the relevant law – that is not something that of course the European Court could

order as part of a judgment.

The settlement terms in this case do not resolve what happened in this case, and perhaps more importantly, it does not include any specific undertaking on the part of the government to investigate the case or change any relevant law or practice. There may be particular reasons why this applicant decided to settle on these terms, but it would be possible for similarly-placed applicants to insist on much more focused terms which could then be monitored by the Committee of Ministers, which has the duty of supervising the enforcement of judgments under Article 46§2 of the Convention. The terms which can be achieved in any particular case will of course depend upon the willingness of both parties to negotiate. The recent rash of striking out decisions under Article 37 (see *Akman* above) may suggest, however, that applicants risk having their cases struck out where they do not agree with terms which the Court considers reasonable.

ÇIÇEK V TURKEY

(25704/94)

European Court of Human Rights (First Section):

Judgment of February 27, 2001

Facts

The application was brought by Mrs Hamsa Çiçek, on behalf of herself and her two sons and grandson, Tahsin, Ali Ihsan and Çayan Çiçek respectively. On 10 May 1994 the applicant alleged that soldiers from the Lice District Gendarmes Headquarters raided her village in Dernek. They ordered the villagers to gather outside and collected the identity cards of the male villagers. The women and children were ordered to return and, according to other male villagers, the applicant's sons, Tahsin and Ali Ihsan Çiçek, and four other male villagers were taken into custody. On the third day of custody the four male villagers were released and were surprised to find the applicant's sons missing as they had been told that they had been released the previous day.

The applicant was told by witnesses that on 27 May 1994 the applicant's grandson, Tahsin's 16 year old son Çayan Çiçek, was taken away by security forces. The applicant made several applications to the Lice District Gendarme Headquarters in search of her sons and grandson but, partly due to her inability to speak Turkish, was told they could not help. Her daughter Feride Çiçek also submitted verbal petitions to the Diyarbakir Public Prosecutor and was told that the applicant's sons and grandson were not in custody.

The Government maintained that the applicant's sons and grandson were not taken into custody by the security forces and denied that an operation had been conducted in Dernek on 10 May 1994. They referred to custody records that did not mention the names of the applicant's sons or grandson. They argued that there were strong grounds to believe that they had moved to Syria.

The Commission held a fact finding hearing but the case was transmitted to the Court on 1 November 1999 before the Commission had completed its examination of the case.

Complaints

The applicant complained of violations of Articles 2, 3, 5, 13, 14 and 18 of the European Convention on Human Rights.

Invoking Article 2, the applicant complained that her sons' disappearance occurred in a life threatening context, in circumstances engaging the responsibility of the State. She also alleged that

there had been no adequate investigation into the circumstances behind the disappearance.

Relying on Article 3, the applicant complained that the fact of her sons' disappearance must have exposed them to acute psychological torture, especially taking into consideration the existence of a high incidence of torture of detainees.

The applicant also submitted that the suffering she had endured due to the disappearance of her two sons at the hands of security forces constituted inhuman and degrading treatment contrary to Article 3 in respect of herself.

The applicant complained that the fact that her sons' detentions were unacknowledged meant they were deprived of their liberty in a manner contrary to Article 5.

Relying on Article 13 the applicant complained that the domestic authorities failed to conduct an effective investigation into her sons' disappearance.

Relying on Article 14 in conjunction with Articles 2, 3, 5 of the Convention the applicant alleged that, due to her Kurdish origins, the violations of her Convention rights were discriminatory.

The applicant also complained under Article 14 in conjunction with Article 13 that she was deprived of the ability to make or pursue a complaint, and therefore an effective remedy, due to the failure of the Turkish authorities to make adequate provisions for the use of the Kurdish language before domestic judicial officers.

The applicant also alleged violations of the Convention in respect of the disappearance of her grandson.

The Government argued that no issue could arise under Article 2 or Article 5 as the applicant had not substantiated her claims that her sons had been detained by the security forces. It contended that there was no causal link between the applicants' suffering and the alleged violation of her sons' rights. It also denied the factual basis of the allegation under Article 3 in respect of the applicant's sons. It maintained that it had commenced a full scale investigation into the applicant's allegations and therefore had not breached Article 13. The Government submitted that the official language of Turkey was Turkish and that judicial authorities must use an interpreter whenever a complainant cannot speak the Turkish tongue.

Held

As the Commission had not completed their examination of the facts the Court evaluated the evidence of the parties as presented. It concluded that the evidence of the applicant and villagers was consistent whereas the witnesses of the Government failed to substantiate their claims. The Court accepted the facts as set out above and did not accept as fact that the applicant's sons were released from custody.

(1) There had been no violation of the Convention in respect of the disappearance of the applicant's grandson (unanimously).

The Court observed that the evidence concerning this issue was inconsistent and it further noted that the applicant was neither able to give the names of the witnesses who told her about her grandson's arrest, nor able to bring them before the Commission delegates to give oral evidence. The Court had no evidence that there had been an operation on the day of Çayan Çiçek's alleged arrest. Thus the Court found that there was insufficient evidence to substantiate the applicant's allegation.

(2) There had been no violation of Article 3 of the Convention in respect of the applicant's sons (unanimously).

The Court recalled the fact that ill-treatment must attain a minimum level of severity to fall within the provision. It was the practice of the Convention organs to require a standard of proof "beyond reasonable doubt" that ill-treatment of such severity occurred. The applicant had not presented any specific evidence that her sons were indeed the vic

tims of ill-treatment in breach of Article 3, nor had she substantiated the claim that her sons were the victims of an officially tolerated practice of disappearances.

(3) There had been no violation of Article 14 of the Convention taken together with Articles 2, 3, 5, and 13 (unanimously).

The Court observed that Turkish legislation provided the assistance of an interpreter to persons who do not speak Turkish and the fact that the applicant had never alleged that she had been refused the assistance of a translator. The Court also noted that the applicant's daughter had filed petitions with the assistance of a lawyer from the Diyarbakir Human Rights Association.

(4) There had been a violation of Article 2 of the Convention in respect of the applicant's sons and as regards their presumed death (by 6 votes to 1).

The Court recalled from the case of *Timurtas v Turkey,* (No. 23531/94, §§82-83), that whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention, will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody.

The period of time which had elapsed since the person was placed in custody was a relevant factor to be taken into account and in this case a period of six and a half years had elapsed with no news of the applicant's sons' whereabouts. Furthermore, the two brothers were taken to a detention centre by authorities for whom the State is responsible. Also, the fact that the two brothers were separated from the other villagers suggested that both were identified as persons under suspicion and, in the context of the situation in south-east Turkey in 1994, it cannot be excluded that the unacknowledged detention of such a person would be life threatening. For these reasons the Court was satisfied that the applicant's sons must be presumed dead and consequently the responsibility of the respondent State was engaged.

(5) There had been a violation of Article 2 of the Convention in respect of the applicant arising from the inadequacy of the investigation (unanimously).

The Court reiterated that the obligation to protect life under Article 2 of the Convention, read in Conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", required by implication that there should be some form of effective official investigation when individuals had been killed as a result of the use of force.

The Court noted the length of time it took before an official investigation got underway and the manner in which relevant information was ignored. Furthermore there was no evidence to suggest that the public prosecutors made an attempt to inspect the veracity of the information contained in the custody ledgers

(6) There had been a violation of Article 3 of the Convention as regards the applicant (unanimously).

The Court had previously held that the suffering occasioned by violations of the Convention must attain a certain level before treatment can be considered as inhuman and that the assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects *(Çakici v Turkey*, No. 23657/94, 08.07.99, §§98-99)

It recalled that the applicant and her daughter had made several applications to the authorities following Tahsin and Ali Ihsan Çiçek's disappearance and the fact that the applicant had received no news of her sons for almost 6 years and had been living in fear

that they were dead. It took into regard the fact that the applicant was the mother of victims of grave human rights violations in finding that the uncertainty suffered by her would have undoubtedly cause her severe mental distress and anguish.

(7) There had been a violation of Article 5 of the Convention in respect of the applicant's sons (unanimously).

The Court recalled that in its previous case-law it had stressed that any deprivation of liberty must not only have been effected in conformity with national law but must equally be in keeping with the very purpose of Article 5, that is protecting an individual from arbitrary detention. The Convention reinforced an individual's protection by guaranteeing a corpus of substantive rights which were intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act (see *Kurt v Turkey,* No. 27276/97, 25.05.98, §§122 –123).

The Court stressed that the unacknowledged detention of an individual is a complete negation of these guarantees and a grave violation of Article 5. It noted the failure of the public prosecutor to follow up the applicant's allegations. It concluded that the authorities had failed to offer any credible and substantiated explanation for the whereabouts of the applicant's two sons after they were detained in the village and had thus failed to discharge their responsibility to account for them.

(8) There had been a violation of Article 13 of the Convention in respect of the applicant (by 6 votes to 1)

The Court recalled that Article 13 guaranteed the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint. The remedy required must be "effective" in practice as well as in law.

Where the relatives of a person have an arguable claim that a person has disappeared at the hands of the authorities, an "effective" remedy entailed, 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 for the Convention violation.

The public prosecutor had a duty under Turkish law to carry out an investigation into allegations of unlawful deprivation of liberty but had only taken a superficial approach which was tantamount to undermining the effectiveness of any other remedies that may have existed.

(9) It was not necessary to examine whether there had been a violation of Article 18 (unanimously).

(10) The Court awarded £5,000 on an equitable basis for pecuniary damage for loss of income in respect of each of the applicant's sons, to be held by the applicant for her son's heirs; £20,000 for non-pecuniary damage for each of the applicant's sons, to be held by the applicant for her son's heirs; £10,000 for the applicant for non-pecuniary damage; £10,000 for costs and expenses on an equitable basis.

(12) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of Article 2, stating that there was no evidence which established beyond reasonable doubt that the applicant's sons had met their deaths while in custody. He also dissented in respect of Article 13, stating that once a violation of Article 2 had been found on the ground that no effective investigation had been conducted into the alleged acts, then no separate question arose under Article 13 as the same facts were at the origin of the complaints under both Articles 2 and 13. Lastly, he dissented in the application of Article 41, stating there was no justification for awarding the heirs of the applicant's sons compensation for pecuniary damage as the deaths were established merely on a presumption and not beyond all reasonable doubt.

Commentary

Although Judge Maruste agreed with the majority in finding a violation of Article 2, he was unable to agree with the conclusive finding that the applicant's sons were dead. He found the evidential basis too weak to conclude that they were, beyond reasonable doubt, killed by the authorities while in detention or at some subsequent stage. He did not believe it was legally correct to equate death and disappearance and suggested that it would be more appropriate to qualify the situation as a disappearance for which the Government was responsible. He pointed to the fact that "disappearance" is a recognised category in international law. (See also the case of *Taş v Turkey* below, where the Court found a violation of Article 2 in relation to a "disappearance".)

The main disputed facts before the Court were whether or not an operation was actually carried out in the applicants' village and whether or not the victims were taken into custody or not. The Court's main method for assessing whether a statement was true or not was whether that statement corroborated with other evidence. Thus, the fact that the Government's witnesses could not substantiate their claims by stating with precision where the operation did take place if not in Dernek village, or who took part in such an operation, destroyed their credibility. On the other hand, the consistency of the statements of a number of villagers proved invaluable in supporting the applicants' claim. Statements which were stereotyped and related the same story in exactly the same terms were treated with caution and no weight was attached to them (§129). The Court did not treat the fact that there were no custody records for the victims as irrefutable evidence that they were not taken into custody, as they had already previously found that a person could be taken into custody without there being a record (see *Çaciki v Turkey*, No 23657/94, §97). Also, according to the gendarme's statements, there was a difference between detaining suspected persons and putting them into custody and signing them on the custody ledger, the period between these two acts being called a "period for observation", which can be prolonged by up to 24 hours and which the gendarmes acknowledged was not a logged event. Noting that such an "unofficial" period of detention threw further doubt on the accuracy of the custody records, while acknowledging the consistency of the statements of co-detainees of the victims, the Court found as a true fact that the victims had been taken into custody.

ŞARLI v TURKEY

(24490/94)

European Court of Human Rights (First Section):

Judgment of May 22, 2001.

Facts

The applicant, Cemile Şarli, is a Turkish national. At the time of the events, she was living with her family in Ulusoy, in the Tatvan region of Southeast Turkey. On 24 December 1993, six armed men, allegedly from the security forces, took away her son Ramazan Şarli and daughter Cemile Şarli. The applicant's children have not been seen since. Mrs Şarli also claimed that Mahmut Sakar, the lawyer who took down the statement which formed the basis of her application to the European Court, was prosecuted by the Turkish authorities specifically for his involvement in the application.

The facts are disputed by the Government, which claims that the armed men who abducted the applicant's children were PKK terrorists. The Government also alleged that Ramazan and Cemile Şarli had been aiding and abetting the terrorists, and that it had become necessary for the PKK to kidnap them once their identity became known. In addition, the Government claimed that the applicant's children subsequently

joined the PKK in the mountains, and that they were executed by the PKK when they tried to leave.

Complaint

The applicant complained of violations of Articles 5, 13 and former Article 25 (now 34) of the Convention.

The applicant claimed that the disappearance of her son and daughter, and the failure of the authorities to carry out a prompt and effective investigation into her arguable claim that the security forces had abducted and detained two of her children was a breach of Article 5.

The applicant also complained under Article 13 that no effective remedy had been provided. She alleged that the investigation by the Tatvan public prosecutor had been very brief, and that it had failed to obtain significant evidence and clarify inconsistencies. In addition, the applicant maintained that there was in or around 1993, in southeast Turkey a practice of denial of effective remedies for serious human rights violations, in aggravated violation of Article 13 of the Convention.

Finally, the applicant complained that there had been a serious interference with the exercise of her right of individual petition, amounting to a breach of former ***Article 25***(1) of the Convention.

Held

(1) There had been no violation of Article 5 of the Convention (unanimously).

The Court recalled that it had accepted the Commission's assessment of the facts, namely, that it had not been proved beyond reasonable doubt that Ramazan and Cemile Şarli were taken away by members of the security forces and therefore that any detention occurred for which the authorities may be held liable. Consequently, the Court did not find it appropriate to consider whether the investigation violated the guarantees laid down in Article 5.

(2) There had been a violation of Article 13 of the Convention arising from the failure to provide an effective remedy (by 6 votes to

1). The Court reiterated that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.

Considering the facts, the Court found that the applicant may be regarded as having an arguable complaint that her son and daughter had disappeared after allegedly being taken into custody. However, the investigation by the Tatvan public prosecutor only lasted eighteen days, and no statements were taken from the two eyewitnesses to the incident. Moreover, the information that the Government claimed to have received from two ex-PKK members captured by the security forces had not been communicated to the public prosecutor in charge of the investigation. The Court subsequently concluded that no effective criminal investigation had been conducted in accordance with Article 13.

Concerning the alleged violation of Article 13 arising from the practice by the authorities in southeast Turkey, the Court, having regard to its findings in (2) above, did not find it necessary to determine whether the failings identified in this case were part of a practice adopted by the authorities.

(3) There had been a violation of former Article 25 of the Convention (by 6 votes to 1).

The Court reiterated that it is of the utmost importance for the effective operation of the system

of individual petition instituted by former Article 25 that applicants or potential 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.

The Court found that the pursuit by the authorities of a criminal charge against the applicant's lawyer, concerning a petition drawn up for the purposes of an application to the Strasbourg organs, must be considered an interference with the applicant's rights of individual petition, incompatible with the Respondent State's obligations under former Article 25 of the Convention.

(4) The Respondent State was to pay the applicant, within three months, £ 5,000 in respect of compensation for non-pecuniary damage, and FF 18,000 in respect of costs and expenses (by 6 votes to 1).

(5) Dissenting Judgment

The Judge Gölcüklü (Turkey) dissented in respect of Article 13, disputing the majority's opinion that the State had failed to conduct an effective criminal investigation. He also argued that there had been no interference in the applicant's right of individual petition and therefore that just satisfaction should not be awarded.

Commentary

The Commission went out of its way to state the fact that it could not say, beyond reasonable doubt, that the State was responsible for their abduction did not mean that they thought the PKK were responsible.

On the law, the Commission held, by majority, that there was no violation of Article 5. This was surprising since the case-law following *Kurt v Turkey*, (No.28276/97, 27.05.98), established that there is an obligation to investigate a claim that the State had detained people, as part of the protection against arbitrary detention.

Without giving reasons, the Court just said that it did not think it appropriate to consider whether the investigation violated the guarantees of Article 5; in other words, they followed the majority opinion of the Commission. This is surprising since, only 10 days before, the Grand Chamber in *Cyprus v Turkey*, (No.25781/97, 10.05.01), said that the failure to investigate what happened to the missing in northern Cyprus constituted a violation of ***Article 5***, even though there was no evidence as to whether or not they had in fact been detained.

TAŞ v TURKEY

(24396/94)

European Court of Human Rights (First Section):

Judgment of November 14, 2000.

Facts

The application was brought by Besir Taş on behalf of himself and his deceased son, Muhsin Taş. On 14 October 1993, during an operation in the Cudi district of Cizre, the applicant's son was shot in the knee by security forces. He was transferred the same day by gendarmes to şirnak, where a hospital note recorded that he received treatment for his injury. No further records existed to indicate where Muhsin Taş was held after his treatment, although a custody period of 15 days was granted by the public prosecutor on 14 October 1993 and a further period of 15 days on 29 October 1993.

On 18 November 1993, following efforts to see his son, the applicant was told that his son had escaped from the security forces while being taken into the Gabar mountains to reveal PKK shelters. The applicant told the Cizre public prosecutor that he did not believe this and that he believed his son was tortured and killed. The public prosecutor took no investigative action in relation to either the applicant's fears or to the alleged

escape of a prisoner. The file was transferred to the şirnak Public Prosecutor on 7 December 1995, who ceded jurisdiction to the şirnak Administrative Council on 28 August 1996 after preliminary enquiries. An inspector was appointed who concluded on 12 February 1998 that it was not possible to establish the identities of the officers who had signed the gendarme report on the 9 November 1993 alleging the escape of Muhsin Taş, due to the failure to keep records, changes in military personnel and the destruction of records.

The Government argued that they believed Muhsin Taş escaped from the security forces to re-join the PKK and that thus it was not for them to prove that he was still alive and give an explanation of his whereabouts. They relied on the evidence of two ex-PKK members or "confessors" who substantiated the Government's claim.

The Commission held a fact finding hearing and found it highly unlikely that Muhsin Taş would have been able to walk or run on the day of the alleged escape due to his injury and found the 15 minute time frame given on the report to cover the escape, discovery and search implausible. It found the evidence of the two government witnesses to be unreliable and not credible in parts.

Complaint

The applicant complained of violations of Articles 2, 3, 5,13 and 18 of the Convention.

The applicant complained under Article 2 that no plausible explanation was given for his son's disappearance while in custody and that in the circumstances it could be presumed he was dead in circumstances for which the authorities were liable. He also complained that there had been no effective investigation into the circumstances of the murder.

The applicant alleged that there had been a violation of Article 3 in respect of his son as the failure to give the necessary medical treatment for his injury and the length of his incommunicado detention amounted to torture or inhuman and degrading treatment.

The applicant submitted that there had been a violation of Article 3 in respect of himself as the disappearance of his son caused him such a degree of suffering as to constitute inhuman and degrading treatment.

Invoking Article 5, the applicant alleged that the disappearance of his son while in custody engaged the responsibility of the authorities to provide a credible explanation, which they failed to do.

The applicant alleged that the authorities did not conduct an effective or adequate investigation into his son's disappearance, thus violating Article 13.

The applicant also alleged that there existed in Turkey an officially tolerated practice of inadequate investigations into suspicious deaths, thus aggravating the breaches of Articles 2 and 13.

Held

The Court accepted the facts as established by the Commission and confirmed the Commission's finding that the Government had fallen short of their obligations to furnish all necessary facilities to the Commission in its task of establishing the facts.

(1) There had been a violation of Article 2 of the Convention as regards the presumed death of Muhsin Ta_ (by 6 votes to 1).

Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention depends on all the circumstances, in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody *(see Timurtas v Turkey*, No. 23531/94,§§ 82- 83).

The period of time elapsed since the person was placed in custody is a relevant factor and the passage of time may therefore

affect the weight to be attached to other elements of circumstantial evidence. The Court observed the lack of reliable custody records and the lack of credibility of the report alleging the escape of Muhsin Taş. The Court drew very strong inferences from the lack of documentary evidence relating to where Muhsin Taş was detained and from the inability of the Government to provide a satisfactory and plausible explanation as to what had happened to him.

For the above reasons the Court found that Muhsin Taş must be presumed dead following his detention by the security forces and consequently the responsibility of the State for his death is engaged. Noting that the authorities had not accounted for what had happened during Muhsin Taş's detention it followed that liability for his death was attributable to the respondent Government.

(2) There had been a violation of Article 2 arising from the inadequacy of the investigation (unanimously).

The Court found that the investigation was neither prompt, adequate nor effective. The Court recalled that initially no investigative steps were taken and even when such steps were taken two years later it was not done with any determination.

(3) There had been no violation of Article 3 of the Convention as regards Muhsin Ta_ (unanimously).

The Court observed that the applicant's son had received prompt and effective medical treatment for his injury and that the lack of records as to his subsequent care was an insufficient basis to conclude that he was a victim of treatment contrary to Article 3. The Court did not consider it appropriate to consider under this provision the effect the *incommunicado* detention might have had on Muhsin Taş.

(4) There had been a violation of Article 3 of the Convention as regards the applicant (unanimously).

Whether a family member is a victim of treatment contrary to Article 3 depends on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation *(Çakici v Turkey,* No.23657/94, §§98-99). Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the family member's involvement in attempts to obtain information and the manner in which the authorities responded to enquiries. The Court took into account the close father-son tie and the indifference and callousness of the authorities' reactions to the applicant's concerns.

(5) There had been a violation of Article 5 of the Convention (by 6 votes to 1).

The Court's case law stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. Any deprivation of liberty must not only have been effected in conformity with national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. The unacknowledged detention of an individual is a complete negation of the Article 5 guarantees. Article 5 also required the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has not been seen since being taken into custody. The investigation by the domestic authorities was neither prompt nor effective and the court regarded with particular seriousness the lack of any official record in respect of Muhsin Taş's detention.

(6) There had been a violation of Article 13 of the Convention *(by 6 votes to 1)*

Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms. The remedy must be "effective" in practice as well as in law, in particular its exercise must not be unjustifiably hindered by the acts of omissions of the respondent State. The Court has previously held that Article 13 can require, in addition to the payment of compensation, a thorough investigation capable of leading to the identification and punishment of those responsible for violations of the Convention. As the Court found that the authorities had failed in their obligation to protect the life of the applicant's son, the applicant was entitled to an effective remedy, but the Court did not find an effective investigation was conducted.

(7) It was not necessary to examine whether there had been a violation of Article 18 (unanimously).

(8) It was not necessary to determine whether the failings identified above are part of a practice adopted by the authorities (unanimously).

(9) The Court awarded £20,000 to be paid to the applicant in respect of his son, by way of compensation for non-pecuniary damage (6 votes to 1); £10,000 to be paid to the applicant in respect of compensation for non pecuniary damage (6 votes to 1); and £14,795 to be paid to the applicant in respect of costs and expenses.

(10) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of Article 2, stating that as death had not been proven beyond a reasonable doubt, Article 2 should not be applicable. With regard to Article 13, Judge Gölcüklü considered that where a breach of Article 2 had been found, no separate issue arose under Article 13, as Article 2 took into account the fact that there had been no effective enquiry into the incident. With regard to the application of Article 41, Judge Gölcüklü found the sums awarded exorbitant in comparison with similar cases and also did not believe that the sum awarded for costs should be paid into a London bank account as the applicant was a Turkish national living in Turkey.

Commentary

As this case highlights, the Court is willing to find a breach of Article 2, even without the existence of a body, if there is sufficient circumstantial evidence to point to death in circumstances where the responsibility of the authorities is engaged. On the other hand, merely the lack of medical records is an insufficient basis to conclude that treatment must have been given contrary to Article 3.

Where the alleged offence is committed by a civil servant during the course of his duties, then under Turkish law the Administrative Council would have jurisdiction over the preliminary investigation, which would then decide whether to prosecute or not (The Official Conduct Act). In order for an investigation to be effective, the investigative body must be independent. The Court does not believe that the use of Administrative Councils to investigate allegations of unlawful killings complies with such a requirement, as Administrative Councils are under the authority of the Governor, who is also administratively in charge of the security force under investigation (See *Gülec v Turkey*, No.21593/93, 27.07.98, §§80-88; *Oğur v Turkey*, (No.21594/93, 27.05.99, §§91-92).

The case of Kurt v Turkey, (No. 27276/97, 25.05.98), does not establish any general principle that a family member of a "disappeared person" is a victim of treatment contrary to Article 3. The Court emphasised that the essence of such a violation does not lie in the fact of the disappearance, but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. The Court has been more unwilling to consider a violation of Article 3 regarding the suffering caused to an applicant in relation to the death, as opposed to the disappearance, of a family member (see Tanlı v Turkey below, No.26129/95, 10.04.01).

TORTURE AND INHUMAN & DEGRADING TREATMENT

[See also:

Akdeniz and Others v Turkey (Disappearance)

Akkoç v Turkey (Unknown Perpetrator Killing)

Aydin and Others v Turkey (Disappearance)

Taş v Turkey (Disappearance)]

Ayaz (Ercan) v Turkey *(44132/98)*

European Court of Human Rights (First Section):

Decision of June 6, 2000 (Admissibility)

Facts

The applicant, Ercan Ayaz, is a Turkish national of Kurdish origin, born in 1965. At the time of his detention, he was living and studying in Berlin as a foreign student. On his way from Germany to Iraq, Mr. Ayaz was stopped in Istanbul airport, where he was arrested by the police and subsequently detained by the anti-terrorist section of the Security Directorate in Gayrettepe (Istanbul). While in detention, the applicant was allegedly beaten and insulted. He was released on 4 August 1993. On 6 August 1993, a doctor from the Human Rights Foundation examined Mr. Ayaz, who immediately lodged a domestic complaint, which was dismissed on 18 May 1995 due to lack of evidence.

Complaint

The applicant complained of violations of Articles 2, 3, 5, 6, 13, 14 of the Convention and of a violation of Article 2 of the Fourth Protocol of the Convention.

The applicant complained of a violation of Article 3 of the Convention. He asserted that he had been ill-treated by the policemen during his custody, and in particular that he had been beaten and threatened with death. He also complained under Article 3 of having been subjected to inhuman and degrading treatment while in custody, not being allowed any contacts with a lawyer or a relative and being put into an unsanitary cell without blanket.

Under Article 2 of the Convention, the applicant claimed that he had been threatened with death.

He also asserted that his relatives had not been informed of the reasons why he had been put in custody, contrary to Article 5(2) of the Convention.

The applicant further complained of a violation of the principle of the presumption of innocence, laid down in Article 6(2).

In addition, referring to Article 13, he complained of the lack of an effective appeal procedure before a national Court that would have enabled him to lodge a complaint regarding his allegations of ill-treatment.

The applicant also claimed to have been ill-treated because of his Kurdish origins, contrary to Article 14, together with Articles 2 and 3 of the Convention.

Finally, the applicant complained of a violation of Article 2 of the Fourth Protocol of the Convention. He believed that his arrest could not constitute any necessary restriction on his right to liberty of movement and freedom to leave a country, for the reasons that it was unlawful and he was not charged with any

criminal offence.

Decision

(1) The Court ruled inadmissible the complaints under Article 2, 5, 6, 14 of the Convention and Article 2 of the Fourth Protocol of the Convention. The Court reviewed the applicant's grievances and noted that the applicant had been informed of the possible obstacles regarding the admissibility of his complaints. The Court did not find any violation of the rights and liberties guaranteed under the Convention or its Protocols.

(2) Regarding the alleged violations of Articles 3 and 13 of the Convention, the Court decided it was not in a position to pronounce itself on the admissibility of the complaints and considered it essential to inform the defendant Government of this part of the allegation. The case as regards complaints under Article 3 and 13 was therefore adjourned.

Commentary

The Court declared most of the alleged violations of the Convention in the application inadmissible. The review of the torture allegation (Article 3 of the Convention) and of the alleged violation of the right to an effective remedy (Article 13 of the Convention) were adjourned, since the defendant Government had not yet been informed of these grievances of the applicant under Article 54 (3) (b) of the Rules of Procedure of the European Court.

BERKTAY V TURKEY

(22493/93)

European Court of Human Rights, (Fourth Section)

Judgment of March 1, 2001

Facts

The applicants, Hüseyin and Devrim Berktay (who are father and son) are Turkish nationals. They were born in 1949 and 1976 and live in Diyarbakır. On 3 February 1993, Devrim Berktay was arrested by police on suspicion of involvement in terrorist activities. He was taken to his house where police officers were already carrying out a search for prohibited publications. Hüseyin Berktay and his wife were not permitted to be present. A few minutes later they heard the screams of their son but were prevented from going to him by the police officers. A policeman then told them that their son had jumped off the balcony, four floors up. The first applicant took his unconscious son to hospital where he was told that he needed further treatment. Despite this news the police insisted he first accompany them to the police station where he was forced to sign a statement incriminating his son. The second applicant was under intensive care for four days and in a coma for at least 26 days. Following the incident the first applicant complained to the Public Prosecutor and asked for an investigation to be conducted.

Complaint

The applicants complained of violations of Articles 2, 3, 5, 13 and former Article 25 (now 34) of the Convention.

The second applicant alleged that the police officers violated Article 2 of the Convention when they pushed him from the balcony and later once more when they deliberately delayed his father from taking him for urgent treatment. The applicants both allege that the authorities failed in their duty to investigate the incident adequately.

The second applicant alleged that the actions of the police officers, having caused his fall, amounted to inhuman treatment. He also claimed that the fact that the authorities had not properly investigated the incident was in itself a violation of Article 3. The first applicant also claimed to be a victim of inhuman and degrading treatment as a result of the distress he had been caused by the police officers' acts in forcing him to sign a document incriminating his son before being able to take him for further urgent treatment.

The applicants alleged that the authorities did not conduct an effective or adequate investigation, thus violating Article 13 of the Convention.

The second applicant alleged that he was arbitrarily deprived of his liberty by the police officers who detained him at his home through violent means.

The applicants claimed that they were intimidated and harassed by the respondent state and were thus deprived of their right to individual petition as guaranteed under former Article 25 of the Convention.

The events of February 3, 1993 were disputed by the parties. The Court however clearly established that the second applicant was lead on to the balcony by the officers to look for a document and was under their control at the time of the incident which caused his injuries.

Held

(1) There had been no violation of Article 2 of the Convention (unanimously).

The Court recalled that Article 2 safeguarded the right to life and set out the circumstances in which deprivation of life could be justified; that it ranked as one of the most fundamental provisions in the Convention and therefore admitted no derogation. Furthermore Together with Article 3 of the Convention it also enshrined one of the basic values of the democratic societies making up the Council of Europe and as such its provisions had to be strictly construed. The Court also stated that the object and purpose of the Convention as an instrument for the protection of individual human beings required that its provisions be interpreted and applied so as to make its safeguards practical and effective.

The Court recalled that Article 2 was not exclusively concerned with intentional killing but also extended to situations where it was permitted to use force which could result in an unintentional deprivation of life. The Court however stated that the use of force could be no more than was absolutely necessary for the achievement of one of the purposes set out in sub-paragraphs a) to ***c).*** The use of this term indicated that a stricter and more compelling test needed to be employed from that normally applicable when determining whether State action was "necessary in a democratic society" under paragraph 2 of Articles 8 to 11. Therefore the force used had to be strictly proportionate to the achievement of the aims pursued.

The Court was not persuaded that the acts of the police officers when searching the applicant's home at a time when the second applicant was under their control were of a type or degree that amounted to a violation of Article 2 of the Convention. Furthermore, no separate question arose in that connection regarding the alleged delay in providing the second applicant with necessary medical attention

In the light of that conclusion and the facts of the case, the Court considered that it was unnecessary for it to examine the allegations under Article 2 of the Convention that the authorities had failed to discharge their obligation to protect the second applicant's right to life or to carry out an effective investigation regarding the use of force.

(2) There had been a violation of article 3 of the Convention as regards the second applicant (unanimously).

The Court recalled that Article 3 enshrined one of the most fundamental values of a democratic society. It stated that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibited in absolute terms torture and inhuman or degrading treatment or punishment. Furthermore, unlike most of the substantive clauses of the Convention it made no provision for exceptions or derogation even in the event of a public emergency threatening the life of the nation.

The Court stressed that people in police custody were vulnerable

and the authorities had a duty to protect them. States were morally responsible for all detained persons, since such persons were entirely in the hands of police officers. When only the authorities were aware of all or part of the events concerned, as was the case with people held under their control in custody, any injury to such persons during that period gave rise to a strong factual presumption. It was therefore incumbent on the Government to provide a reasonable explanation as to how the second applicant's injuries had been caused. However, the Government had confined themselves to referring to the outcome of the domestic criminal proceedings in which decisive weight had been attached to the police officers' account that the second applicant had thrown himself from the balcony.

The Court reiterated that the authorities were accountable for persons under their control. On the basis of all the evidence before it, the Court therefore found that in the circumstances of the case the respondent State was responsible for the injuries caused by the second applicant's fall while under the control of six police officers. It stated that the investigative imperatives and the indisputable difficulties that arose in the fight against crime, and particularly the fight against terrorism, could not justify any reduction in the protection of an individual's physical integrity.

(3) There had been no violation of Article 3 as regards the first applicant (unanimously).

Having examined the circumstances of the case taken as a whole, the Court held that it had not been established that the treatment concerned had attained the minimum level of severity required by Article 3 of the Convention.

(4) There had been a violation of Article 13 of the Convention (unanimously).

The Court found that all the versions of the incident offered by the police officers contained discrepancies on important details. Despite that troublesome fact, the criminal court had not carried out an investigation. Nor had it sought to hear evidence from the police officers or the complainants' version of the incident; it had relied instead entirely on the explanations of the three police officers and, while noting that the second applicant had been in the custody of the defendant officers just before his fall, had acquitted them without any further explanation on the ground that there had been no causal link between their actions and the second applicant's injuries. Thus, irrespective of whether or not they would have succeeded in persuading the criminal court that the police had committed a fault, the applicants had been entitled to an explanation in adversarial proceedings from the police regarding their acts or omissions.

Consequently, the Court found that the applicants had been deprived of an effective remedy satisfying the requirements of Article 13 regarding their allegations against the police officers.

(5) There had been a violation of Article 5 of the Convention *(by 6 votes to 1)*.

Referring to its findings on the evidence concerning the second applicant's arrest and detention, the Court noted that the evidence on the case file did not allow it to conclude that there was ground for reasonable suspicion. Furthermore, since the Government had furnished no evidence apart from the arrest warrant as grounds for suspecting the second applicant of an offence, their explanations did not satisfy the minimum requirements of Article 5 § 1 (c). Under those circumstances, the Court did not consider that the deprivation of Devrim Berktay's liberty while his home was being searched had been " prescribed by law" or was attributable to " reasonable suspicion of [his] having committed an offence". Consequently, there had been a violation of Article 5 § 1 of the Convention.

(6) There had been no violation of former Article 25 of the Convention (unanimously).

The Court considered that there was insufficient evidence for it to conclude that the authorities

of the Respondent State had intimidated or harassed the applicants in circumstances intended to cause them to withdraw or modify their application or in any other way hinder them in the exercise of their right to individual petition.

(7) The Court awarded the sum of *£55,000* to the second applicant for physical and moral damage and the sum of *£2,500* to the first applicant for moral damage and awarded them the sum of *£12,000* in respect of their costs and expenses.

(8) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of Article 5, disputing the majority's finding that there was no reasonable suspicion to arrest Devrim Berktay.

Commentary

The Court held no violation of Article 2 of the Convention, although the second applicant's fall from the balcony happened during the time police officers were searching his home. The Court was not persuaded that the acts of the police officers were of a type or degree that amounted to a violation of Article 2 of the Convention. The Court recalled that in the present case the second applicant had not died. This does not exclude an examination of the applicant's complaints under Article 2 of the Convention, since the Court had examined complaints under this provision where the victim had not died as a result of impugned conduct *(see Osman v. United Kingdom,* No. 23452/94, 28.10.1998, §§115-122; *Yasa v. Turkey,* No. 22495/93, 2.9.1998, §§92-108; *L.C.B.* v. *United Kingdom*, No.23413/94, 9.6.1998, §§ 6-41. These three cases concerned only the positive obligation on the State to protect the life of the individual from third parties or from risk of illness under the first sentence of Article 2 §1 of the Convention. The Court considered however that physical ill-treatment by state officials which does not result in death may disclose a breach of Article 2 of the Convention only in exceptional circumstances. The criminal responsibility is not in issue in the proceedings under the Convention (see *McCann and Others v. United Kingdom*, No. 18984/91, 27.9.1995, §173). Nevertheless, the degree of force and the aim behind the use of force may be relevant in assessing whether state officials caused injury without causing death. Therefore, the Court held that this assessment of the criminal responsibility is incompatible with the object and the purpose of Article 2 of the Convention. Subsequently, in almost all cases where a person is assaulted or maltreated by state officials, their complaints are to be examined instead under Article 3 of the Convention (see *Ilhan v. Turkey,* No. 22277/93, 27.6.2000, §§75-76). Thus, the Court held in this case no violation of Article 2 of the Convention, but a violation of Article 3 of the Convention in regard to the fall of the second applicant from the balcony.

ÖCALAN v TURKEY

(46221/99)

European Court of Human Rights (First Section):

Decision of December 14, 2000
(Admissibility)

Facts

The applicant is a Turkish national, born in 1949, and is the leader of the Worker's Party of Kurdistan ("The PKK"). He is currently in custody in İmralı Prison. On 9 October 1998 he was expelled from Syria and, after being refused political asylum in Italy, he travelled to Kenya. On 15 February 1999 he was arrested in Nairobi and was transferred to Turkey and İmralı Prison. On 22 February 1999 the public prosecutor at the Ankara National Security Court took a statement from the applicant, who confirmed the activities of the PKK and his role as its leader. On 23 February 1999 the applicant appeared before a judge who ordered that he should be detained pending trial. Between 15 February 1999 and 24 April 1999, when the trial began, the applicant had 12 interviews with his lawyers. According to the

applicant, restrictions were placed on the interviews which were also monitored and videoed. On 2 March 1999, delegates of the CPT visited the applicant and reported that he was in good health and that the applicant had stated that he had not suffered ill -treatment.

On 24 April 1999 the public prosecutor at the Ankara National Security Council accused the applicant of carrying out activities for the purpose of bringing about the secession of part of the national territory and sought the death penalty under Article 125 of the Criminal Code. The applicant indicated his wish to "work for peace and fraternity and achieve that aim within the Republic of Turkey". He observed that, though he had originally envisaged an armed struggle for the independence of the population of Kurdish origin, his aim had altered and was limited to claims of autonomy or a recognition of the Kurd's cultural rights within a democratic society.

On 18 June 1999, Turkey's Grand National Assembly amended Article 143 of the Constitution and excluded military members from National Security Courts. Following similar amendments on 22 June 1999 the military judge hearing the applicant's case was replaced by a civilian judge.

On 29 June 1999 the Ankara National Security Court found the applicant guilty of carrying out acts designed to bring about the secession of part of Turkey's territory and sentenced him to death. The applicant's lawyers appealed on points of law. In a judgment delivered on 25 November 1999 the Court of Cassation affirmed the original judgment in every respect.

Complaints

The applicant complained of violations of Articles 2, 3, 5, 6, 7, 8, 9, 10, 13, 14, 18 and 34 of the Convention.

Invoking Article 2, the applicant complained that a death sentence amounted to an infringement of the right to life and submitted that execution by hanging was a particularly cruel punishment. The applicant pointed out that the Contracting States, through the practice they had been following for fifty years, had abolished the exception provided for in the second sentence of Article 2. Also under Article 2, the applicant complained that he had been sentenced to death by a body which could not be regarded as a "court" within the meaning of that provision.

The applicant further alleged a potential violation of Article 2, taken together with Article 14, in that execution of the death penalty would be discriminatory given that it was clear Government policy no longer to carry out such sentences.

The applicant complained under Article 3 that he had been subjected to inhuman or degrading treatment by agents of the State as they had abducted him in Kenya and had blindfolded, handcuffed and drugged him during his transfer to prison in Turkey; he had been taunted by guards in the aircraft in order to humiliate him; and he had had been kept in isolation while in İmralı prison.

Invoking Article 5 the applicant complained that he had been deprived of his liberty unlawfully, as the requirements for extradition had not been complied with; that he had been the victim of an abduction which could not be regarded as a lawful arrest; that he had not been brought before a judge who was independent and impartial; that he had not been brought "promptly" before a judge; that he had not been informed of the reasons for his arrest; that he had not been able to take proceedings by which the lawfulness of his detention could be decided; and that he had no right to compensation for the excessive length of his detention.

The applicant complained under Article 6 that his unlawful arrest had prejudiced the fairness of his trial; that his case had not been heard by an independent and impartial tribunal as a military judge had taken part in the proceedings and that the replacement civilian judge had already taken a

part in the proceedings; that the replacement of the military judge by a civilian judge one week before judgment meant that the court was unlawfully constituted; that the circumstances in which his trial had been conducted, especially the negative portrayals of the applicant by the media and politicians, deprived him of the benefit of a fair trial; that he had not been informed promptly and in detail of the nature and cause of the accusation against him; that he had not had adequate time and facilities for the preparation of his defence; that his right to legal assistance had been infringed; that he had been unable to make a satisfactory choice of witnesses due to restrictions with his lawyers and only reluctant disclosure of the prosecution's documentation.

Under Article 7 the applicant alleged that he had been sentenced by a court which was not established by law, nor independent and impartial, to a penalty which it was no longer the practice of the State to enforce.

Invoking Article 8 the applicant complained that the conditions of his arrest and detention had entailed an unjustified interference in his private and family life.

Relying on Articles 9 and 10 of the Convention, the applicant alleged that the death sentence, given to penalise his political activities, was not "necessary" within the meaning of the second paragraphs of those provisions.

Referring to the complaints above, taken together with Article 13 of the Convention, the applicant alleged that the National Security Court had neither examined nor allowed his requests to have restrictions on his defence removed and defence witnesses examined.

The applicant alleged a violation of Article 14, given that his detention and conviction were measures taken only on account of his political opinions and ethnic origins.

Under Article 18, the applicant complained that the State had prosecuted and convicted him in the context of its campaign against the PKK, but not in pursuance of one of the objectives set out in the Convention.

The applicant alleged that his right to submit an application to the Court under Article 34 had been infringed as his representatives in Amsterdam (Ms Prakken and Ms Böhler) had been unable to contact him after his arrest, and also due to the Government's failure to reply to the Court's request for information.

The Government made a preliminary objection as to the admissibility of the case, stating that Ms Böhler was not authorised by the applicant to act as his representative.

As regards Article 2, the Government submitted that the death penalty was clearly provided for within Article 2 under certain circumstances. As regards Article 3, the Government submitted that the applicant had not suffered ill treatment and had never been in solitary confinement.

Regarding Article 5§4, the Government made a preliminary objection that the applicant had failed to exhaust domestic remedies as to his arrest or length of custody. As regards the lawfulness of the applicant's deprivation of liberty, the Government maintained that the applicant had been arrested in accordance with law and following cooperation between Turkey and Kenya. The Government also submitted that the applicant had been brought "promptly" to a judge as, under Turkish law, the length of custody of a person suspected of terrorism could be extended to seven days.

Regarding Article 6, the Government submitted that the applicant had had a fair trial as it was held in public, the applicant was able to participate fully in the hearings and his representatives were given an opportunity to take full photocopies of the State's case file. The Government submitted that the independence of the National Security Court was maintained as the military judge was removed following legislative change and that the attendance of substitute judges at hearings was a provision in the rules of criminal procedure.

Regarding Article 34 the Government submitted that the refusal to grant the applicant's representatives access to Turkey was an administrative decision based on the representatives' campaigning against Turkey, adding also that at that time neither of Ms Prakken nor Ms Böhler had special authority to represent the applicant before the court.

Decision

The Court dismissed the Government's preliminary objection to the admissibility of the application, stating that Ms Böhler was appointed either directly or through the applicant's other representatives.

(1) The complaint under Article 5§2 was declared inadmissible.

The Court noted that the applicant had been wanted by the Turkish authorities for a considerable time as the leader of the PKK, an illegal organisation under Turkish law, and that the accusations against him had been clearly set out in previous warrants and on the Interpol "red notice".

(2) The complaint under Article 5§5 was declared inadmissible.

The Court noted that this complaint had been submitted more than six months after the event complained of and was therefore inadmissible.

(3) The Court declared admissible, by a majority, the remainder of the applicant's complaints and joined to the merits of the case the Government's preliminary objection of failure to exhaust domestic remedies.

Commentary

The applicant made an interim application to the Court under Rule 39 of the Rules of Court, which is an application for the Court to request the Respondent State not to carry out a particular sentence, in this case to stay the execution of the applicant, pending the outcome of the main application. Accordingly, on 30 November 1999, the Court requested the Government to stay the execution and on 12 January 2000, the Turkish Prime Minister announced that the applicant's file would be transmitted to the Turkish Grand National Assembly (the Turkish parliament, which is empowered to approve or disapprove the enforcement of the death penalty) when the proceedings before the Court were over.

Although Öcalan has been sentenced to death by the Ankara National Security Court, such a sentence has not been carried out in Turkey since 1984. The Turkish Government has been under pressure to abolish the death penalty, as part of the criteria for its accession to the European Union. Whether or not such reforms do take place, and their effect on the judgment of the Court on the present case, will be keenly awaited.

UPDATE:

On the 2 August, 2002, the Turkish parliament passed a package of legal reforms which included the abolishment of the death penalty. It was replaced with life imprisonment with the possibility of parole, although capital punishment could still be used in times of war or during the "imminent threat of war". These reforms will be commented on fully in the next issue.

DESTRUCTION OF HOMES/ PROPERTY

[see also:
Yilmaz v Turkey *(35875/97)*
(Unknown Perpetrator Killing)]

Ateş (Hüseyin) v Turkey *(28292/95)*
& Karakoç (Erdal) v Turkey *(28294/95)*

European Court of Human Rights (First Section):

Decisions of May 30, 2000 (Admissibility)

Facts

The applicants are respectively Hüseyin Ateş, a Turkish national, born in 1939 and Erdal Karakoç, a Turkish National, born in 1967. On 4 October 1994 military operations started in the region of Tunceli. On 7 October 1994, military units from the security forces allegedly arrived in the applicants' village of Kozluca and set up a camp around it. The Gendarme Station Commander told the villagers to vacate their houses and leave the village. Two days later, after having collected their possessions, the applicants and their families left for Hozat. The applicants had to leave behind their harvested crops. After the inhabitants had left the village, the soldiers burnt down the houses. The applicants and their families subsequently lived in Hozat in a small room provided by the Municipality, with no kitchen, no hot water, no central heating, and with two toilets and one bathroom for thirteen families. Both applicants were unemployed and therefore did not have any income. Moreover, none of the applicants received any compensation from the authorities.

The facts are disputed by the Government, which claimed that the village was attacked and burnt down by PKK terrorists. In addition, the Government asserted that the applicants Hüseyin Ateş and Erdal Karakoç received financial aid amounting respectively to 30,451,000 and 24,131,000 Turkish liras for food, heating and health expenditures, and that at the time of the procedure instituted, the aid was still continuing.

Complaint

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

The applicants complained under Article 1 of Protocol No. 1 that their right to peaceful enjoyment of their possessions was breached on account of the forced evacuation of they and their family from their home and the destruction of their houses and possessions by the security forces. They also added that they were deprived of access to and use of their land.

The applicants complained that the treatment they and their family suffered from amounted to inhuman and degrading treatment, and was therefore a violation of Article 3. In addition, the applicants maintained under Article 5 of the Convention that the arbitrary evacuation of them and their family from their village and the destruction of their property were violations of their right to liberty and security of person.

The applicants complained of a violation of Article 6 on the grounds that they were unable to claim a remedy for the violations they had suffered on account of the lack of investigation against those responsible.

The applicants also claimed under Article 8 that the destruction

of their home and property by the security forces constituted a violation of their right to respect for their private and family life.

The applicants complained under Article 13 that they had not been provided with an effective remedy to the violations they had suffered from. They further submitted that the Deputy Governor, by misstating their complaint and by asserting that they were not entitled to compensation, had ensured that there could be no effective remedy for the purposes of Article 13.

The applicants also alleged that they and their families had been victims of a violation of Article 14, in conjunction with the abovementioned Articles, on account of their ethnic origin and Alevi belief.

Finally, the applicants complained of a violation of Article 18 since Turkish authorities had allowed the military to employ unlawful methods to suppress problems which included evacuation and destruction of villages in southeast Turkey.

Decision

The Court unanimously declared the applications admissible.

The Court concluded that the applications were not manifestly ill founded within the meaning of Article 35§3 of the Convention, and did not find any grounds for declaring them inadmissible.

Commentary

In both cases the Government submitted that the applicants failed to exhaust domestic remedies available to them within the meaning of Article 35 §1 of the Convention, the rule of exhaustion.

The Court held that the application of this rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties had agreed to set up. Therefore, Article 35§1 must be applied with some degree of flexibility and without excessive formalism. The particular circumstances of each case have to be taken into account, e.g. the Court must review the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicants.

Furthermore, the Court reiterated that when an individual formulates an arguable claim in respect of destruction of property, torture or killing involving the responsibility of the State, the notion of an "effective remedy", in the sense of Article 13 of the Convention, 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 by the complainant to the investigative procedure *(see Mentes and Others v. Turkey, No. 23186/94, 28.11.1997 § 89; Aksoy v. Turkey, No. 21987/93, 18.12.1996, § 98; Kaya v. Turkey, No. 22729/93, 19.2.1998, § 107).*

The Court does not consider that a remedy before the civil or administrative court can be regarded as adequate and effective of the applicant's complaints (see *Ateş V Turkey* No.28292/95, 30.5.2000). In both cases criminal investigations into the destruction and evacuation of the applicants' village were terminated. Thus, the Court held that there was no requirement for the applicants to make further explicit requests in regard to criminal complaints. The Government's preliminary objections were dismissed.

BILGIN v TURKEY

(23819/94)

European Court of Human Rights (Second Section):

Judgment of November 16, 2000.

Facts

The applicant, Ihsan Bilgin, is a Turkish national. He was born in 1960 and lives at present in Batman. At the time of the facts, he was living in

Yukarigören, a hamlet attached to the village of Güzderesi in the Province of Diyarbakir.

According to the applicant, on 28 September 1993, a large number of gendarmes arrived in Yukarigören, looking for Faysal Alpan, who was suspected of PKK activities. They set fire to the harvested tobacco and apprehended 11 or 12 persons in Güzderesi. They also damaged and broke the applicant's furnishings, windows and various household goods in his house. In the late summer or autumn of 1994, the gendarmes returned to Yukarigören and set fire to the houses in the hamlet. The gendarmes' activities were conducted under the orders and responsibility of the Commander of the Çatakköpr_ gendarmerie station and the Commander of the Silvan District gendarmerie station. The gendarmes of both units were engaged in a series of raids and operations in 1993 and 1994 in Yukarigören and Güzderesi, aimed at forcing its inhabitants to leave.

The facts were disputed by the Government, which stated that at the time of the alleged events, there were many PKK activities in the region and that according to the military authorities, no operation had been conducted in or around Güzderesi at the time. On 4 June 1998, the Provincial Administrative Council found that there was insufficient evidence in support of the allegations made against the Commanders.

Complaint

The applicant complained of violations of Articles 3, 8, 13, 14, 18, Article 1 of Protocol No. 1, and former Article 25 (now Article 34).

The applicant claimed that the interference with his home and private and family life was so serious that it amounted to inhuman or degrading treatment, as prohibited under Article 3.

Regarding the deliberate destruction of his home and possessions by the security forces, the applicant complained of violations of Article 8 of the Convention and Article 1 of Protocol No. 1.

The applicant also claimed that, as regards his complaints under the Convention, no effective remedy in southeast Turkey was available as required by Article 13.

Furthermore, the applicant complained under Articles 14 and 18 that the destruction of his home and possessions illustrated the discriminatory policy pursued by the authorities against persons of Kurdish origin and the existence of an authorised practice.

Finally, the applicant complained that, on 9 August 1995, he was taken to the Çatakköprü gendarmerie station where he was questioned about his application to the Commission and forced to sign a statement purporting to retract his application. He claimed that this amounted to a violation of former Article 25 of the Convention.

Held

(1) There had been a violation of Article 3 of the Convention (unanimously).

The Court recalled that Article 3 of the Convention enshrined one of the fundamental values of a democratic society. Even in the most difficult circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms treatment contrary to this provision. The Court also recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.

Regarding the circumstances of the facts, the Court considered that the destruction of the applicant's home and possessions must have caused him suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 of the Convention.

(2) There had been a violation of Article 8 of the Convention and Article 1 of Protocol No. 1 (unanimously).

The Court found it established that the security forces destroyed the applicant's home and possessions. This deprived the applicant and his family of their livelihood and forced them to leave Yukarigören. The Court found that these acts constituted grave and

unjustified interferences with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions.

(3) There had been a violation of Article 13 of the Convention (unanimously).

The Court considered that the nature and gravity of the violations complained of under Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1 had implications for Article 13. The Court recalled that where an individual has an arguable claim that State agents have purposely destroyed his or her home and possessions, the notion of an "effective remedy" entails an obligation on the respondent State to carry out a thorough and effective investigation.

However, the Court noted defects in the implementation of criminal law in south-east Turkey in the first half of the nineties, which undermined the effectiveness of criminal law protection during this period, thereby fostering a lack of accountability of members of the security forces for their actions. In addition, the Court found that the scope of the investigation at issue appeared to have been limited to offences allegedly committed on specific dates indicated by the applicant, i.e. 28 September, 13 October and 23 November 1993. The possibility that the events complained of by the applicant, who is illiterate, might in fact have occurred on other dates did not appear to have been taken into consideration, whereas the initial obviously crucial question in any investigation of an alleged offence is not when it has occurred but whether or not it has occurred at all. The Court further noted that no attempts had been made to obtain evidence from other gendarmes attached to the Çatakköprü gendarmerie station.

Consequently, the Court found that the proceedings at the Administrative Council could not be regarded as a thorough or effective investigation as required by Article 13, and that thereby access to any other remedies, including a claim for compensation, had also been denied.

(4) There had been no violation of Articles 14 and 18 of the Convention (unanimously).

The Court considered that there was insufficient evidence for it to conclude that the destruction of the applicant's home and possessions illustrated a discriminatory policy pursued by the authorities against persons of Kurdish origin and the existence of an authorised practice.

(5) There had been a violation of former Article 25 of the Convention (unanimously).

The Court recalled that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 that applicants or potential 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.

The Court found that, when the applicant was questioned at the Çatakköprü gendarmerie station about his application to the Commission, this was not based on an instruction from the public prosecutor, but apparently on the gendarmerie command's own initiative. The Court noted that the fact that the questioning at issue was made by an official of those authorities allegedly directly responsible for the events complained of in the present case was incompatible with the effective operation of the system of individual petition. Consequently, the Court found that the Government had failed to comply with their obligation not to hinder in any way the effective exercise of the right of petition, as laid down in former Article 25 of the Convention.

(6) The Respondent State was to pay the applicant £12,000 for pecuniary damage and £10,000 for non-pecuniary damage, and the applicant's representative £21,500 less FF 13,445, in respect of costs and expenses (unanimously).

Commentary

See the commentary on *Dulas v Turkey* below.

Dulaş v Turkey

(25801/94)

European Court of Human Rights, (First Section):

Judgment of January 30, 2001.

Facts

The application was brought by Zubeyde Dulaş, a Turkish national living in Istanbul. On 8 November 1993 the gendarmes from Hazro carried out a search in the applicant's village of Çitlibahçe, intending to look for and take into custody a person they believed would have information about a kidnapping. The applicant was forced to leave her house and it and about fifty other houses were burnt. After the departure of the gendarmes, the village was left in ruins and the villagers were forced to leave. The applicant and other villagers went to the Human Rights Association and made a statement. On 10 October 1995 the applicant was summoned to the public prosecutor and asked to make a statement concerning her application to the European Commission of Human Rights.

The Government argued that the operation concerned an investigation into the kidnapping and killing of teachers and an imam; that the applicant had made no complaint to the public prosecutor, only making a statement after she was summoned by the public prosecutor. The Hazro Administrative Council began an investigation and found the claims unsubstantiated. The Government also submitted that the applicant's statements were inconsistent and implausible.

The Commission held a fact finding hearing and concluded that Lieutenant Altınoluk as a witness for the Government was inconsistent and contradictory, whereas the applicant and the villagers were on the whole consistent and credible.

Complaint

The applicant complained of violations of Articles 3, 8 (together with Article 1 of Protocol No. 1), 13 18 and 25 Convention.

Invoking Article 3, the applicant submitted that being forced from her house, then being expelled from her village to leave her destitute, amounted to inhuman and degrading treatment.

Invoking Article 8 and Article 1 of Protocol 1 to the Convention, the applicant alleged that the burning of her home, property and possession represented a violation of her right to respect for private and family life and home and her right to peaceful enjoyment of property. The applicant alleged that the expulsion from her village constituted separate and additional violations of Article 8 and Article 1 of Protocol 1 to the Convention.

The applicant alleged that the authorities did not conduct an effective or adequate investigation into his son's disappearance, thus violating Article 13.

The applicant alleged that the enforced evacuation of 2-3 million people from villages in south-east Turkey disclosed an arbitrary exercise of power in deliberate breach of the rights guaranteed under the Convention and therefore constituted a violation of Article 18.

The applicant also alleged there existed in Turkey an officially tolerated practice of destroying villages and failing to provide effective remedies, thus aggravating the breaches of which she was the victim.

The applicant also complained under former Article 25 that, due to being questioned about her application to the European Court of Human Rights, she had been subject to serious interference with the exercise of her right of individual petition.

The Government made a preliminary objection that the applicant had failed to use or exhaust any of her domestic remedies under Article 35 before

applying to the European Court of Human Rights.

Held

The Court accepted the facts as established by the Commission.

The Court rejected the Government's preliminary objection. The Court emphasised that the rule of exhaustion of domestic remedies must be applied with flexibility and recognised that the rule is neither absolute nor capable of being applied automatically. The Court recalled that, despite the extent of the problem of village destruction, there appeared in previous cases no example of compensation having been given to victims and a general reluctance on the authorities' part to admit this type of practice. The Court found that it had not been demonstrated with sufficient certainty that effective and accessible domestic remedies existed for the applicant's complaints and thus concluded that special circumstances existed which dispensed the applicant from the obligation to exhaust domestic remedies.

(1) There had been a violation of Article 3 of the Convention (unanimously).

The Court reiterated that Article 3 enshrined one of the fundamental values of democratic societies. Even in the fight against terrorism the Convention prohibits in absolute terms torture or inhuman or degrading treatment. The assessment of the minimum level of severity depends on all the circumstances of the case. Taking into account the applicant's age (70), the circumstances surrounding the destruction of her house and the fact that the authorities gave no assistance to her in her plight, the Court concluded that she had suffered from inhuman treatment.

(2) There had been violations of Article 8 of the Convention and Article 1 of Protocol No. 1 (unanimously).

The Court found that the applicant's house and property had been deliberately destroyed by the security forces and that there was no doubt that these acts constituted violations of the above Articles.

(3) There had been a violation of Article 13 of the Convention (by 6 votes to 1).

The Court reiterated that the effect of Article 13 is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The remedy required must be "effective" in practice as well as in law. Where there is an arguable claim that an individual's home and possessions have purposefully been destroyed by State agents, ***Article 13*** requires in addition to the payment of compensation a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the violations.

Although the Government argued that the applicant failed to take any administrative, civil or criminal complaints, the Court found that it had not been established with sufficient certainty in the circumstances that such remedies would provide any effective prospect of redress. The public prosecutor referred the case to the Administrative Council, which the Court has previously found cannot be regarded as an independent body. No thorough or effective investigation was therefore conducted into the applicant's allegations.

(4) It was not necessary to examine whether there had been a violation of Article 18 (unanimously).

(5) It was not necessary to consider whether the failings identified are part of a state practice (unanimously).

(6) There was a violation of the former Article 25 (now Article 34) of the Convention (unanimously).

The Court reiterated that it was of the utmost importance that applicants should be freely able to communicate with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify

their complaints. "Pressure" includes not only direct coercion but also other indirect improper acts designed to dissuade or discourage applicants from pursuing a Convention remedy. Regard must be had to the vulnerability of the applicant and his or her susceptibility to influence. The Court was not satisfied that the public prosecutor's interview related solely to his duty to collect information for the purpose of his own investigation but trespassed into verifying the authenticity of the applicant's application

(7) The Court awarded pecuniary damage of £12,600 (under the separate heads of £5,000 in respect of her loss of her house; £4,000 in respect of other property and livestock; £3,000 for loss of income; and £600 for costs of alternative accommodation); non-pecuniary damage of £10,000; and costs and fees of £14,900.

(8) Dissenting Opinion

Judge Gölcüklü (Turkey) dissented in respect of Article 13, stating that the significant omissions of dates made it difficult to have a precise understanding of the case for the purposes of examining the complaint under Article 13. He also dissented in finding a violation of Article 13 as the applicant had taken no steps before the national courts to have the alleged violations remedied.

Commentary

Both cases concern village destructions in south-east of Turkey and in both cases fact-finding hearings took place in Ankara in early 1997. Both judgments prove the importance of the Court's fact-finding hearings since they were successful in regard to the Court holding breaches of Articles 3, 8 of the Convention, Article 1 of Protocol 1, Articles 13 and former 25 (now 34) of the Convention. In Dulaş v Turkey, a Commission Report was released on 6.9.99 (former Article 31 of the Convention), which expressed unanimously that there had been a violation of Article 8 and 13 of the Convention and Article 1 of Protocol 1.

Especially in cases which concern allegations of very serious human rights abuses and in cases where there has been no investigation, or no adequate investigation by the responsible domestic authorities, fact-finding hearings are very important. In the above mentioned cases no effective domestic remedies had been open to the applicants (see Bilgin v. Turkey, No.23819/94, 16.11.2000, §§110-125; Dulaş v. Turkey, No.25801/94, 30.1.2001, §§ 62-69) and therefore, investigations into the destructions of the applicants' homes did not take place. The fact-finding hearings of the Court gave the applicants the chance to prove their allegations. These facts finally led to the judgment of the Court that gross human rights violations had taken place and damages had to be awarded. The difficulty in establishing violations of the Convention when the Court declares that a fact finding hearing would "not effectively help in resolving the issues" is evidenced in Matyar v Turkey, (No.23423/94, 21.02.02). With no fact finding hearing the Court could not establish to the requisite standard of proof that the events alleged had actually occurred (this case will be commented on fully in the next issue).

FREEDOM - OF EXPRESSION

See also:

Akkoç v Turkey (Unknown Perpetrator Killing)

Refah Partisi (The Welfare Party) and Others v Turkey

Toguc and others (Freedom of Association)]

KALIN (ÖZKAN) v TURKEY *(31236/96)*

European Court of Human Rights, (Third Section):

Decision of September 4, 2001
(Admissibility)

Facts

Özkan Kalin is a Turkish national who resided in Istanbul. In 1991 the Public Prosecutor initiated criminal proceedings against him in respect of two articles published by the weekly newspaper Yeni Ulke (New Land), of which he was the editor. He was charged under Articles 6 and 8 of the Anti-Terrorism Law of 1991 with "publishing declarations of terrorist organisations" and "issuing propaganda aimed at attacking the unity of the State". One of the articles reported on hostilities in Botan, the other was a report about a press release from the European office of the Kurdistan Workers Party (PKK).

In the first case, the Istanbul State Security Court acquitted the applicant, finding that the contents of the article did not disclose evidence of intention to make separatist propaganda. The State Prosecutor appealed and the Court of Appeal reversed the decision of the State Security Court, holding that the photograph that accompanied the article would incite people to hatred. The State Security Court then found him guilty of an offence under Article 312 of the Penal Code and sentenced him to two year's imprisonment and a fine. The applicant was also initially acquitted of the charges in the second case, and again was subsequently found guilty and sentenced, this time to a fine, by the State Security Court.

Complaint

The applicant complained of violations of ***Articles 6, 7, 10 and 14*** of the European Convention.

The applicant argued that his right to a fair hearing by an independent and impartial tribunal under Article 6 had been violated. He also complained that he had been punished according to a law that was not clearly defined in contravention of Article 7, and that he had been punished for articles he had published in violation of his right to freedom of expression under Article 10. He further complained of discrimination in the enjoyment of these rights and invoked Article 14 combined with Articles 6 and 10.

Decision

The Court declared the application admissible, since it rejected the Government's objection regarding the six-month time limit.

Commentary

The Court pointed out that the six-month period cannot start to run until the applicant has effective and sufficient knowledge of the final domestic decision. Thus, the date of the domestic judgment is not the relevant date, as long as the applicant has no notice of the judgment. Furthermore, it is for the State which relies on the failure to comply with the six-month time-limit to establish the date when the applicant became aware of the final domestic decision (see *Baghli v. France*, No. 34374/97, 30.11.1999, §31).

FREEDOM OF ASSOCIATION

REFAH PARTISI (THE WELFARE PARTY) AND OTHERS v TURKEY

(41340/98; 41342/98; 41343/98; 41344/98)

European Court of Human Rights (Third Section):

Judgment of July 31, 2000.

Facts

The applicants, Necmettin Erbakan, Sevket Kazan and Ahmet Tekdal were MPs of the Welfare Party ("Refah"), a political party founded on 19 July 1983, which was also an applicant. The results of the 1995 General Election made Refah the largest political party in the Turkish parliament, with 158 seats out of a total of 450. On 28 June 1996, Refah came to power by forming a coalition with the True Path (Dogru Yol) Party. On 21 May 1997, Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a "centre" (mihrak) of activities contrary to the principles of secularism. In support of his application, he referred to acts and remarks by leaders and members of Refah, including Necmettin Erbakan, Refah's Chairman; Ibrahim Halil Çelik, a Refah MP; and Sevket Yilmaz, a Refah MP and Minister of Justice. Such acts and remarks, it was alleged, supported the replacement of a secular political system with a theocratic regime based on Islamic Sharia law. Refah's representatives argued that the principle of secularism implied respect for all beliefs and that Refah had shown such respect in its political activity. They also asserted that the prosecuting authorities had merely cited extracts from Necmettin Erbakan's speeches, thus distorting them and taking them out of context. As regards the statements or acts of other members of Refah, Refah's representatives observed that none of these acts or statements constituted criminal offences.

On 9 January 1998, the Constitutional Court ruled that the second paragraph of section 103 of the Law on the Regulation of Political Parties was unconstitutional and declared it null and void. That provision provided that, for a political party to be considered a "centre" of activities contrary to the principles of the Republic, its members had to be convicted of criminal offences. It pointed out that, following the repeal of Article 163 of the Turkish Criminal Code, activities contrary to the principle of secularism no longer carried criminal penalties and therefore section 103 of the Law on the Regualation of Political Parties was no longer meaningful. Following this ruling, on 16 January 1998 the Constitutional Court dissolved Refah on the ground that it had become a "centre of activities contrary to the principles of secularism", basing its decision on sections 101(b) and 103 (1) of Law No. 2820 on the Regulation of Political Parties. It held that, while political parties were the main protagonists of democratic politics, activities by them incompatible with the rule of law could not be tolerated. It observed that the rules of Sharia were incompatible with a democratic regime and that intervention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic regime. With reference to arguments that dissolving Refah would be in breach of the Convention, it held that, where a political party pursued activities

aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, such supra-national rules authorised that party's dissolution. As an additional measure, the Constitutional Court stripped the applicants and two other Refah MPs of their status as MPs and banned them from becoming members of any other political party for five years.

Complaints

The applicants complained of violations of Article 9, 10, 11, 14, 17 and 18 of the Convention; and Articles 1 and 3 of Protocol No. 1 to the Convention.

Invoking Article 11, the applicants alleged that Refah's dissolution and the prohibition barring its leaders, including the applicants, from holding political office had infringed their right to freedom of association.

The applicants also complained that the said dissolution and prohibition also infringed the right to freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). They also alleged that they were victims of discrimination, as prohibited under Article 14; that the State had infringed Article 17 by dissolving a political party and thus abused its right to freedom of association.

Invoking Article 1 of Protocol No. 1 to the Convention, the applicants alleged that the confiscation of Refah's assets and transfer to the Treasury breached their right to peaceful enjoyment of possessions.

The applicants complained, under Article 3 of Protocol No. 1 to the Convention, that their removal from political office breached their right to be freely elected and represent their constituency.

Although the Government accepted that Refah's dissolution and accompanying measures amounted to an interference with the applicants' exercise of their right to freedom of association, it argued that the interferences was prescribed by Turkish law, that the measures were taken in pursuit of several legitimate aims as prescribed in Article 11 of the Convention, and that they were necessary in a democratic society for the achievement of those aims.

Held

(1) There had been no violation of Article 11 of the Convention (by 4 votes to 3).

The Court observed that Refah's dissolution would not be a violation of Article 11 if that action was "prescribed by law", pursued one or more legitimate aims and was "necessary in a democratic society" for the achievement of those aims.

The Court noted that all the parties had agreed in their written and oral observations that the interference with their rights had been "prescribed by law" and thus saw no reason to disagree with their assessment on this point.

Taking into account the importance of the principle of secularism for the democratic system in Turkey, the Court considered that Refah's dissolution pursued a number of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

In relation to whether the party's dissolution was "necessary in a democratic society", the Court stated that Article 11 must also be considered in the light of Article 10, as the protection of opinions and the freedom to express them is one of the objectives of the freedom of association. For a political party to campaign for a change in the law, while enjoying the Convention rights, the Court took the view that two conditions had to be fulfilled:

i) the means used to that end must in every respect be legal and democratic; and

ii) the change proposed must itself be compatible with fundamental democratic principles.

Therefore a political party whose leaders incited recourse to

violence, or proposed a policy which infringed the rights and freedoms afforded under democracy, could not lay claim to the protection of the Convention against penalties imposed for those actions.

Regarding the applicants' argument that Refah had not proposed reform of Turkey's constitution, the Court reiterated that it cannot be ruled out that the programme of a political party may conceal objectives and intentions different from those that they proclaimed; thus the contents of the party's official statements must be compared with its actual actions of taken as a whole. Although the Court acknowledged that Refah's leaders did not, in government documents, call for the use of force as a political weapon, they did not take prompt practical steps to distance themselves from those Refah members who had pµublicly referred to such force.

The Court's task was to look at the interference complained of and determine whether the measure met a "pressing social need", whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced to justify the action were "relevant and sufficient".

Regarding whether there was a "pressing social need", the Court noted that it was not inconceivable that a theocratic regime could be established in Turkey, taking into account its relatively recent experience with such a regime under the Ottoman Empire and that the majority of the Turkish population was Muslim. The Court observed that the main issue was whether Refah had become a "centre of anti-secular activities" and noted that the grounds cited by the Constitutional Court for the party's dissolution could be classified into three categories, namely

i) those which tended to show that Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief.

The Court considered that such a societal model could not be considered compatible with the Convention system, firstly because it would do away with the State's role as the guarantor of individual rights and freedoms; and secondly because such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms.

ii) those which tended to show that Refah wanted to apply Sharia law to the Muslim community.

The Court held that Sharia law was the antithesis of democracy in that it was based on dogmatic values and was the opposite of the supremacy of reason and of the concepts of freedom, independence and the ideal of humanity developed in the light of science. Principles such as pluralism in the political sphere or the constant evolution of public freedoms had no place in it. The Court considered it difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia.

iii) those based on references made by Refah members to jihad (holy war) as a political method.

Although it was not disputed before the Court that Refah had so far pursued its political ends by legitimate ends, in the offending speeches its leaders alluded to the possibility of force in order to overcome various obstacles for gaining and retaining power. The Court considered that Refah's political aims were neither theoretical or illusory, taking into consideration the fact that the speeches and policy statements cited by the Constitutional Court dated from the time when Refah had obtained significant results in the general and local elections; and because in the past political movements based on religious fundamentalism had been able to seize political power and set up the societal model they advocated.

Consequently, the Court considered that the penalties imposed on the applicants met a "pressing social need".

As to whether the interferences complained of were proportionate to the legitimate aims pursued,

the Court reiterated that that dissolution of a political party accompanied by a temporary ban on its leaders from exercising political office was a drastic measure and could only be legitimate in the most serious of cases. The Court noted that they had just found that the measures did meet a "pressing social need" and also observed that only five of Refah's MPs were removed from parliamentary office and that the remaining 152 members continued to sit in parliament. Accordingly the Court considered the measures were proportionate to the legitimate aims pursued and that the grounds cited by the Constitutional Court to justify Refah's dissolution and the temporary forfeiture of the MP's parliamentary mandate were "relevant and sufficient".

(2) As the applicants' complaints under Articles 9, 10, 14, 17 and 18 of the Convention were based on the same facts as those examined under Article 11, the Court did not consider it necessary to examine them separately (unanimously).

(3) The Court did not find there was cause to examine separately the applicants' complaints under Articles 1 and 3 of Protocol No. 1 to the Convention because the measures complained under those Articles were secondary effects of Refah's dissolution, which the Court had already found did not breach Article 11 (unanimously).

(4) Dissenting Opinion

Judges Fuhrmann (Austria), Loucaides (Cyprus), and Sir Bratza (United Kingdom) jointly dissented on the majority's finding of no violation of Article 11. They stated that the dissolution of Refah and the deprivation of the applicants' membership from the Turkish parliament was a disproportionate restriction on their freedom of association. They noted that Refah was the fifteenth political party to be dissolved by the Turkish Constitutional Court and the fourth in a succession of cases before the Court *(United Communist Party of Turkey and Others* No.19392/92, 30.01.1998; The Socialist Party and Others, No.21237/93, 25.05.98; *Freedom and Democracy Party* v Turkey (OZDEP), No.23885/94, 08.12.1999). The dissenting judges noted that in this case, unlike the previous ones, Refah was a well-established party and commanded the largest number of seats in the Turkish parliament and was, at the commencement of the dissolution proceedings in June 1997, the governing party in power.

The judges considered the individual merits of each of the incidents relied on by the Constitutional Court in dissolving the party and found that, individually, none could justify the dissolution of the party. Therefore they considered that there was a lack of compelling evidence to suggest that Refah, whether before or after entering into Government, took any steps to realise political aims that were incompatible with Convention norms.

Commentary

The central principle upon which three judges dissented was that of proportionality. They considered that the dissolution of a major party, which had been established since 1983 and had been the governing party at the beginning of the dissolution proceedings, was a disproportionate response to statements made by individual members of the party which were not even part of that party's official policy or constitution. The dissenting judges were not convinced by the majority's argument that, as only five members of Refah were stripped of their parliamentary functions, leaving the remaining 152 members to continue their parliamentary functions, the measure was proportional . They pointed out that it was Refah itself which was the principal applicant, and that it was the party's rights of association which were primarily at issue. Whatever the effect of the party's dissolution on its members, the effect on the party itself could not be more serious, its identity being destroyed and its property confiscated.

The dissenting judges also pointed out that there was nothing in the way Refah was formed or in

its constitution to indicate that the party was anything other than democratic, although they acknowledged the majorities' finding that a party's programme may conceal objectives different from those officially proclaimed. But they considered that, where the grounds relied on by the Constitutional Court do not relate to the programme of the political party, but rather to actions or statements of individual leaders or members of the party, particularly convincing reasons had to be shown to justify a decision to dissolve the whole party, particularly where, as in the present case, the statements and acts were isolated events over a period covering six years.

The dissenting judges also considered that it was of importance that none of the applicants were ever prosecuted for any of the acts or statements complained of. Although they acknowledged the repeal of section 163 of the Law on Political Parties which had made it an offence to carry out actions contrary to the principle of secularism, the judges noted that several of the acts and statements relied on by the Constitutional Court dated back prior to the section's repeal. Therefore the fact that none of them had been prosecuted was not irrelevant, as the majority had found.

The recent judgment of *Sadak and Others v Turkey*, Nos.25144/94, 26149/95 to 26154/95, 27100/95, 27101/95, 11.06.02, also concerned the dissolution of a political party (this will be reported on fully in the next issue). Although in that case it was found that the Government had violated the Convention rights, this case differed as it centred around the right of the party to freely associate, whereas in *Sadak* and *Others*, the central issue was that of Article 3 to Protocol 1 of the Convention, the right to free elections of the individual MPs. It is also significant that this case has been accepted for referral by the Grand Chamber of the Court, under Article 43 of the Convention. The Grand Chamber only accepts cases which raise "a serious question affecting the interpretation or application of the Convention... or a serious issue of general importance", thus highlighting the value the European Court puts on the rights to freely associate and express one's views, rights without which democracy suffocates. As the applicants only lost this case by one vote in the present judgment, the result of the Grand Chamber's judgment is awaited with anticipation.

TOGUC AND OTHERS

(26149/95; 25144/94; 26150/95; 26151/95; 26152/95; 26153/95; 26154/95; 27100/95; 27101/95)

European Court of Human Rights (Third Section):

Decision of 30 May 2000 (Admissibility)

Facts

The applicants (Nizamettin Toguc, Selim Sadak, Remzi Kartal, Zubeyir Aydar, Naif Gunes, Ali Yigit, Sedat Yurttas, Mahmut Kilniç, Mehmet Hatip Dicle, Sirri Sakik, Orhan Do_an, Leyla Zana, Ahmet Türk,) are Turkish nationals and were MPs of the Democratic Party (DEP), a political party founded on 7 May 1993. On 2 November 1993 the Attorney General applied to the Constitutional Court for the dissolution of the DEP, alleging that the party, through its members making statements that were likely to undermine the integrity of the State and the unity of the nation, had infringed the principles of the Constitution and the Law on Political Parties. On 2 March 1994 the applicant's Dicle and Do_an were arrested as they were leaving Parliament, and on 4 March 1994 the same happened to Sakik, Türk and Zana. The President of the Parliament prevented the arrest of Yurttas and Sadak, who remained in the building. On 16 June 1994 the Constitutional Court ordered the dissolution of DEP, on the grounds that it undermined the territorial integrity of the State and the unity of the nation. It also deprived all the applicants of their parliamentary mandate as an incidental measure to the dissolution of DEP. The applicants Toguc, Gunes, Kilinc, Aydar, Yigit and Kartal, fearing for their safety, left for Brussels. On 1 July Sadak and Yurttas voluntarily surrendered to police custody. The Ankara State Security Court sentenced Sakik to three years imprisonment, under Article 8 of the Anti Terrorism Law No. 3713 for separatist propoganda; 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 quashed the sentence of Yurttas and Turk but confirmed the sentences imposed on the other applicants .

Complaints

The applicants complained of violations of Articles 5, 6, 7, 9, 10 and 14 of the Convention; and Article 1 and 3 of Protocol 1 to the Convention.

Invoking Article 5, the applicants Dicle, Dogan, Sadak, Sikik, Turk, Yurttas and Zana complained about the irregularity of their being kept in custody, insofar as this involved exclusively the deprivation of their parliamentary mandate by the constitutional court.

The applicants complained under Article 6 that they did not enjoy a fair trial before the Constitutional Court because their rights of defence were restricted in that procedure.

Invoking Article 7 the applicants alleged that they had been punished for actions that they had not committed.

Invoking Article 9 and 10, the applicants complain of a violation of their right to freedom of thought and expression.

Invoking Article 14, in conjunction with Articles 9 and 10, the applicants complained that they were victims of discrimination based on their political opinion and ethnicity.

The applicants alleged a violation of Article 1 of Protocol 1 to the Convention, due to being deprived of their parliamentary remuneration.

The Court of its own accord also ruled that there was a question of the applicants' right to free elections being violated, under Article 3 of Protocol 1 to the Convention.

The Government argued that

the deprivation of the applicant's parliamentary mandate was a consequence linked to the dissolution of a political party and could by no means be confused with a sanction within the meaning of a criminal accusation as provided by Article 6§1 of the Convention. It also maintained that, even if the deprivation of the mandate was to be considered an interference, it was a legitimate measure as provided by Article 84 of the Constitution, and therefore came within paragraphs 2 of Articles 9, 10 and 11 of the Convention. As regards Article 14, the Government pointed out that the Turkish judicial system prohibits all manner of discrimination and further observed that a number of MPs of Kurdish origin were represented in Parliament. The Government also argued that, as the applicants had not invoked Article 3 of Protocol No.1, the Court could not have examined the issue *ex officio.*

Decision

(1) The Court declared the complaint under Article 5 inadmissible (unanimously).

The Court observed that this complaint was essentially the same as that introduced by other cases put forward by the same applicants (25142/94, 27099/95, 25143/94, 27908/95 concerning the applicants Sadak and Yurtta). It therefore followed that this part of the case No. 25144/94 must be rejected applying Article 35 §§(2)(b), (4) of the Convention.

(2) The Court declared the remaining complaints admissible (unanimously).

The Court observed that its jurisdiction depended upon the limits of the "case", which are fixed by the decision on admissibility. The Court noted that it could deal with every question of law and fact that arose before it and therefore, as Article 3 of Protocol No.1 was connected to the complaints under Articles 9, 10 and 11 of the Convention, it fell within its jurisdiction.

As regards the substance of the applicants' complaints the Court considered that they raised serious issues of law and fact, the determination of which should depend on an examination of the merits of the application, and that therefore the complaints were not manifestly ill founded within the meaning of Article 35 §3 of the Convention.

Commentary

This case concerns rights and freedoms which go to the very heart of the principle of democracy: the right of the electorate freely to chose people to represent them in parliament. The applicants in this case were all lawfully elected members of the Turkish Grand National Assembly who, following the dissolution of their party (the Democracy Party) by the Constitutional Court, suddenly lost their positions as MPs. The judgment may therefore have profound political consequences. All of the former MPs who were applicants in this case are Kurdish and represented a large section of Turkey's Kurdish minority in the South-east. Those who did not leave Turkey still remain in prison there.

This is not the first time that lawful political parties critical of the Turkish government have been dissolved by the Constitutional Court, and that such suppression of dissent has been subsequently condemned by the European Court. Successful Strasbourg applications have also previously been brought under Article 11 of the Convention by the United Communist Party of Turkey (TBKP), the Socialist Party, the Freedom and Democracy Party (ÖZDEP), and the People's Labour Party (HEP) *(United Communist Party of Turkey and Others v Turkey*, No.19392/92, 30.01.98; Socialist Party and Others v Turkey, No.21237/93, 25.05.98; *Freedom and Democracy Party v Turkey*, No.23885/94, 08.12.99; *Yazar, Karatas, Aksoy and the Peoples Labour Party v Turkey*, No.22723-5/93, 09.04.02). In a case brought by the Welfare Party *(Refah Partisi* and *Others v Turkey*,

Nos.41340/98, 41342-4/98, 31.07.01), the European Court found no violation of Article 11 by the slim margin of four votes to three, but at the time of writing this case had been accepted for review by the Grand Chamber of the Court which will produce a further judgment in due course (see above for a commentary on the case)

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 the Court's judgment on the merits of this case, particularly on Article 3 of Protocol 1 (the right to free elections) will be keenly awaited.

UPDATE:

On the 11 June, 2002 the Court delivered its judgment (Selim Sadak and Others v Turkey, *Nos.25144/94, 26149-54/95, 27100/95, 27101/95, 11.06.02) finding a violation of Article 3 of Protocol No.1 to the Convention. The judgment will be reported on in the next issue.*

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 including emergency 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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