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THE KURDISH Human Rights PROJECT Legal Review

Institut kurde de Paris

(2003) 3 KHRP LR
June 2003

KHRP
Kurdish Human Rights Project

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THE KURDISH HUMAN RIGHTS PROJECT

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

AIMS

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

METHODS

- Monitoring legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding hearings
- 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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KHRP LEGAL REVIEW

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Abbreviations

§	Section
CAT	United Nations Committee Against Torture
The Convention	The European Convention for the Protection Human Rights and Fundamental Freedoms
The Court	The European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	The Democratic Party
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 Workers' Party
UK	United Kingdom
UN	United Nations

Relevant Articles of the European Convention on Human Rights

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

Protocol No. 1 to the Convention

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

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Section 1: Legal Developments in the Kurdish Regions

Turkish Parliament adopts National Security Council law amendment[1]

On 17 January 2003, the Turkish Parliament approved a draft law amending the National Security Council (NSC) law, in line with a Constitutional amendment made on 3 October 2001. The Constitutional amendment was part of a package of legislative reforms, made in order to meet European standards of democracy, as set out in the EU Accession Partnership Agreement. That agreement stated, *inter alia,* that the NSC should align itself with its constitutional role as an advisory body to the government, and that civilian control over the military should be increased[2]. The 2002 Regular Report by the European Commission, which evaluated Turkey's progress towards fulfilment of the criteria, noted that though the NSC was formally an advisory body to the government, its opinions carried more weight than mere recommendations and that the military members were particularly influential[3].

With the amendment that passed Parliament, the deputy prime minister and justice minister will become NSC members, while the NSC decisions will be counted as "recommendations" only. The President, prime minister, defence, interior and foreign ministers, Chief of Staff, force commanders and NSC secretary are the current members of the council. The amendment's effectiveness will depend on whether the military will still have *de facto* control and whether calling decisions "recommendations" will have any practical effect.

Turkey orders therapy for police to combat torture[4]

As part of efforts to combat torture, the Turkish government has ordered policemen to undergo regular psychological therapy. The Interior Minister Abdulkadir Aksu renewed warnings that the government intended to crack down on security officials accused of torture and ill-treatment in detention centres. In calling for measures to reduce the tension inherent in some of the more sensitive jobs, notably riot units and interrogation centres, he ordered individual and group therapy to be undertaken with psychological counsellors at least once a month. The professed aim was to reduce stress that might come from the officers' professional environment, family or social and economic situation. The Minister also stated that training programs would be organised to inform police officers about recent legal reforms that grant additional rights to detainees and set out tougher anti-torture measures.

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Committee of Ministers adopts a Declaration and a Resolution on the European Court of Human Rights[5]

At a meeting of the Council of Europe's Committee of Ministers ("The Committee") on 6-7 November 2002, a declaration was adopted concerning the increased workload of the European Court of Human Rights. It expressed concern that the increase in the workload for the Court threatened to ultimately put at risk the effectiveness of the unique right of individual application. Having further considered the recommendations made by the Evaluation Group on the Court and of the Steering Committee for Human Rights, the Committee instructed the Foreign Ministers' Deputies to present a set of coherent proposals covering measures that could be implemented immediately and any possible amendments to the Convention. Priority was placed on preventing violations at the national level and improving domestic remedies; optimising the effectiveness of the filtering and processing of documents; and improving and accelerating the execution of judgments of the Court.

At the 822nd meeting of the Committee of Ministers' Deputies, a resolution was adopted which noted the increased practice of resorting to "friendly settlements" in order to resolve "repetitive cases or cases that do not raise any question of principle or of changes of the domestic legal situation". It considered that this was a viable method for alleviating the workload of the Court, and stressed the importance of giving further consideration in all cases to the possibilities of concluding friendly settlements.

Such friendly settlements would indeed be a method of decreasing the workload of the Court, but the resolution's inclusion of cases that do not raise any question of principle reveals the move of the Court towards a constitutional court, i.e. only ruling on cases that raise "substantial or new and complex issues of human rights law"[6]. A worrying consequence for applicants would be the possibility that the Court could strike out their complaints if a settlement offer was not accepted, even if the applicant did not consider the offer at all a remedy for his or her complaints.[7]

Progress report on the Joint NGO Response to proposals for reform of the European Convention of Human Rights

The European Convention on Human Rights[8] [the Convention] occupies a position of unique importance in the international protection of the rights of individuals, entitling both nationals and non-nationals from all of the 44 member states of the Council of Europe to petition directly the European Court of Human Rights [the Court] for a binding determination on the proper application of their human rights and fundamental freedoms. On 27 September 2001, the Evaluation Group to the Committee of Ministers on the European Court of Human Rights published a number of proposals pursuant to the goal of reducing the spiralling costs and

backlog of cases currently affecting the Court, which is the result of a 500 per cent rise in the number of applications between 1993 and 2000. The number of applications made annually now far exceeds 26,000. Many of the Evaluation Group's proposals have since been the subject of further examination by the Steering Committee for Human Rights (CDDH) and its specially designated sub-groups.

Whilst appreciating the need to reform the Court in order that it be capable of dealing with alleged violations quickly and effectively, the NGO Joint Response Group is concerned that some of the proposals would, if implemented, seriously damage the unique philosophy underlying the Council of Europe's mechanisms for the protection of human rights. Of particular concern within the Evaluation Group's initial recommendations were proposals to deny access to a full judicial hearing on the merits of the case to those applicants whose allegations are deemed either not to raise a 'substantial issue' under the Convention, or which are classified as 'repetitive' due to their similarity with a case already determined against the relevant signatory State. In the former instance, once the determination that the alleged violation is insufficiently serious has been made, the Evaluation Group suggested that the case be remitted for examination by the national authorities under the presumption that all State signatories would devise and properly implement a system for impartial re-evaluation of the applicants claim. Clearly this creates potential conflict between executive and judicial branches of national governance and raises the likelihood that victims will receive either a totally inadequate domestic remedy, or no protection at all. Similarly, repetitive cases would be 'frozen' by the Court, in reliance upon the relevant State providing an effective remedy to all similar applicants in response to the initial 'pilot' case in which the national authorities had been found in violation. Both of these proposals would represent a worrying devolution of responsibility from the European Court to those States in which violations are, often frequently, occurring.

The ongoing reports of CDDH sub-groups have introduced a number of positive departures from the proposals of the Evaluation Group and no longer suggest the remission of cases back to the national authorities. In particular the Swiss-German recommendations[9], which are now thought to be the most prevalent in the Steering Committee's final report to the Committee of Ministers, include welcome reassessments of how best to implement effective reform. For example, the proposal to amend Article 28 of the Convention to the effect that 'repetitive' cases would be decided, both on their admissibility and on the merits, by committees of three judges, would ensure that all applicants retain the right of effective individual petition whilst dramatically expediting the rendering of such judgments [which represent approximately 70 per cent of cases currently considered substantively by the Court].

The KHRP is among a number of NGOs that initially developed the Joint Response to the report of the Evaluation Group, both voicing great concern at those proposals that would

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significantly erode the right of individual access to the Court and suggesting alternatives which would help to address the very real problem of the Court's exponentially increasing workload. The Joint Response Group of NGOs has been welcoming of the Steering Committee's efforts to better balance the need for reform with the maintenance of the principles that render the Convention so effective.

However, with the Committee of Ministers scheduled to adopt proposals for reform at its meeting in May 2003, a number of concerns still remain. Most worrying is the continuing presence of proposals to amend Article 35 of the Convention so as to exclude from the Court's adjudication on the merits those cases which are deemed, in the language of the Swiss-German proposal, not to raise either a "serious question affecting the interpretation or application of the Convention" or "any other issue of general importance". This amendment is purportedly mitigated by the proviso that such cases would only be discarded by the Court if it was deemed that the applicant would not be placed at a "significant disadvantage" by a declaration of inadmissibility. Despite this addition, such an amendment would still represent a major conceptual shift in the role of the Court by depriving a potentially large number of applicants of a ruling on the compliance of national authorities with their international obligations. It would also limit the international exposure of institutional violations in circumstances where, to date, the applicant's complaint has only been the catalyst for a ruling on the states conduct and the just satisfaction of the individual has been a subsequent consideration. The importance of retaining comprehensive judicial scrutiny at the Council of Europe is further heightened by the recent accession to the Convention of a number of new member states that have not yet had the benefit of international jurisprudential assessment of the conformity of their domestic legislation with the principles of human rights.

Further, the implementation of such an amendment would give rise to a great deal of legal uncertainty as to the type and number of cases which would fall outside both the requirement of sufficient 'seriousness' and of 'significant disadvantage'. At present, cases deemed to raise a "serious question" under Article 30 of the Convention are those in which jurisdiction may be relinquished to the Grand Chamber. By implication, the proposed amendment to Article 35 would require that only those cases currently relinquished to the Grand Chamber would receive any examination on the merits. It is particularly hard to see the efficacy of a measure that fits so uneasily with the principles of the Convention and is so flawed in its textual ambiguity when noting that its probable effect would be limited to those substantive cases that are not deemed repetitive (as repetitive cases are already efficiently dealt with in the proposed amendment to Article 28 of the Convention). Based on the figures for 2001, such an amendment to Article 35 would reduce the substantive caseload of the judges to fewer than six cases per judge per year. Other worrying developments arising from the proposals include the increasing use of the non-consensual strike out procedure under Article 37 of the Convention,

whereby a 'friendly settlement' can be imposed upon a victim despite their contention that the offer of settlement by the state Government is wholly unsatisfactory. For a stark example see *Akman v. Turkey* [No. 37453/97, 26.06.01], in which the procedure failed to resolve the dispute as to why the applicant's son was fatally shot by security forces, and the Government was not required to give an undertaking that the incident would be investigated further[10].

The Joint Response Group, which is now supported by over 70 NGO signatories [see appendices] and an increasing number of academics and legal professionals, continues to advocate reforms that focus on reducing the number of applications to the Court through a greatly increased emphasis on systemic training within national authorities and major improvements in national measures to implement and remedy European Court judgments. It also strongly advocates the provision of adequate resources to, and enhanced consultation with, NGOs and human rights lawyers within member states. The Council of Europe should perform an invaluable contributory role to such improvements, through the provision of technical assistance and the regular review of national training programmes to ensure comprehensive and uniform implementation throughout member states.

During a Council of Europe Consultation Meeting with a number of NGOs on 17-18 February 2003, representatives of the Joint Response Group aired their concerns to those involved in the process of reform. The CDDH has since developed a Consolidated Draft of the proposals of its sub-committees. This most recent expression of the likely avenues of reform contains no substantive amendment of those proposals that would have a negative impact on individual's right of access to the Court. In particular, the proposal to amend Article 35 in the manner outlined above remains at present a prominent and very worrying aspect of the CDDHs draft recommendations.

To date the Court has established a diverse and impressive body of jurisprudence and it is the ability to give a full hearing to a diverse range of applicants that underpins its reputation as such a successful institution in the international protection of human rights. At a time where the Deputes of the Foreign Ministers of the Council of Europe have felt it necessary to adopt international guidelines on the compliance of anti-terrorism measures with human rights, the Joint Response Group will continue to support only those reforms that will ease the Court's caseload without damaging the essence of the right of individual petition.

Draft amending Protocol to the European Convention on the Suppression of Terrorism[11]

At its 111th Session on 6-7 November 2002, the Committee of Ministers approved a draft amending Protocol to the European Convention on the Suppression of Terrorism (ECST)[12].

The ECST is designed to facilitate the extradition of persons having committed acts of terrorism. The idea underlying it is that certain crimes are so odious in their methods in relation to their motives, that it is no longer justifiable to classify them as "political offences" for which extradition is not possible. To this end, it lists the offences that Parties undertake not to consider as political offences, namely acts of particular gravity, such as hijacking of aircraft, kidnapping and taking of hostages, the use of bombs, grenades or rockets. Moreover, the Convention empowers Parties not to consider as a political offence any act of violence against the life, physical integrity or liberty of a person. It is expressly provided that nothing in the Convention shall be interpreted as imposing an obligation upon a Party to extradite a person who might then be prosecuted or punished solely on the grounds of race, religion, nationality or political opinion.

In a summary of the Draft Protocol, the Secretariat stated that its main features were an extension of the list of offences to be "depoliticised"; an expansion of the discrimination clause, allowing refusal to extradite to a country where there is a risk of applying a death sentence, or a risk of being subject to torture or life imprisonment without parole; a simplified amendment procedure to allow new offences to be added to the list in the future; and the opening of the Convention to accession by countries with observer status to the Council of Europe.

The Secretariat acknowledged that the main problem with the ECST was the reservation regime, under Article 13. This allowed reservations by State Parties in respect of the core obligation to allow extradition for offences that cannot be regarded as political offences. A compromise solution proposed by the Draft Protocol limits the making of reservations to present State Parties only. Such reservations are to be valid only for three years, although it could be renewed for the same period. The obligation to extradite or prosecute has been strengthened so that whenever a State party refuses extradition on the basis of a reservation, it will have to submit the case to its competent authorities for the purpose of prosecution, and communicate the final outcome of the proceedings to the Council of Europe. Also, an active follow-up is to be set up so that the requesting State may take the issue of refusal to a follow-up committee and eventually to the Committee of Ministers which may issue a declaration on whether the refusal to extradite was in conformity with the Convention.

The Committee for the Prevention of Torture conducts its first visit to Azerbaijan[13]

A delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has recently carried out its first visit to Azerbaijan. The visit took place from 24 November to 6 December 2002 and was organised within the framework of CPT's programme of periodic visits for 2002.

During the visit, CPT's delegation focused its attention on the treatment of persons detained by the police, the situation of remand prisoners, the care provided to inmates suffering from tuberculosis, and conditions in military detention facilities. The delegation also visited a centre for forensic psychiatric assessment and two Border Guard establishments.

Azerbaijan ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 15 April 2002, entering into force on 1 August 2002. Over its years of activity in the field, the CPT has developed standards relating to the treatment of persons deprived of their liberty. These standards have been published in the brochure "The CPT Standards" (CPT/inf/E (2002) 1), available on its website at www.cpt.coe.int.

Council of Europe adopts International Guidelines on Human Rights and Anti-Terrorism Measures[14]

On 15 July 2002, the first international text on human rights and the fight against terrorism was adopted by the Deputies of the Foreign Ministers of the Council of Europe. The text opens by affirming the obligation on States to protect everyone against terrorism. In doing so States must nevertheless respect human rights and the rule of law. Therefore they must avoid any form of arbitrariness and any measures taken that restrict human rights must be "necessary and proportionate to the aim pursued" (Article 3). The guidelines state in absolute terms the prohibition of torture in all circumstances, irrespective of the nature of the acts a person is suspected of having committed (Article 4). Any interference in private life, such as the collection of personal data, must be governed by domestic law and be proportionate to the aim pursued and *may* (rather than must) be subject to independent supervision (Article 5). Any person arrested for terrorist offences must be informed of the reasons for his arrest and must be able to challenge the lawfulness of his/her arrest before a court (Article 7). Due to the nature of the fight against terrorism, the guidelines acknowledge the possibility of restrictions on the right of defence, in particular as regards access and contact with counsel and the use of anonymous testimony (Article 9). No person convicted of terrorist activities may be sentenced to death (Article 10). The guidelines acknowledge that persons who have been detained or convicted for terrorist activities may have more severe restrictions applied to them than other prisoners (Article 11), such as surveillance of correspondence, including those between counsel and the prisoner, and the placing of such prisoners in specially secured quarters.

Turkey signs Protocol banning death penalty in peacetime[15]

On 15 January 2003, Turkey signed Protocol No. 6 to the Convention, prohibiting capital punishment in peacetime. It was the last member state of the 44 members of the Council of Europe to sign the Protocol.

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A moratorium had existed in Turkey concerning the death penalty since 1984, and in August 2002 the Turkish Parliament had already passed national legislation banning the death penalty in peacetime. Therefore the signing of Protocol No. 6 was mainly a gesture of symbolic importance, demonstrating to the European Union its commitment to human rights as it awaits a review in 2004 of its proposed accession to the European Union.

The Committee for the Prevention of Torture examines Öcalan's conditions of detention[16]

A delegation of the Council of Europe Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT) visited Turkey from 17 to 19 February 2003. The delegation travelled to the prison on the island of Imralı, in order to interview Abdullah Öcalan, the prison's sole inmate and to hold consultations with two of his lawyers. The delegation has already visited the island twice, in 1999 and 2001 (the reports of which are available online: http://www.cpt.coe.int). This visit was made because of repeated reports of relatives and lawyers being denied access to the island. The CPT's delegation met the Regional Gendarmerie Commander of Bursa and the Chief Public Prosecutor of Bursa in order to discuss the means of ensuring Öcalan's right to receive visits from his relatives and lawyers is fully effective in practice.

European Council decide to delay accession of Turkey to the European Union[17]

At the Copenhagen European Council summit from 12 to 13 December 2002, it was decided that Turkey had not yet met the Copenhagen Criteria as regards human rights and the rule of law. In the Conclusions of the Presidency of the European Council, Turkey's efforts towards meeting the Copenhagen Criteria were welcomed, in particular through recent legislative packages (such as abolition of the death penalty in peace time, allowing Kurdish education in limited circumstances[18]), although it urged the new government to address shortcomings regarding the implementation of such reforms. Recalling that the Copenhagen political criteria require a candidate country to achieve the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the European Council decided that, if Turkey had met the required standards at the European Council summit in 2004, then accession negotiations would be opened.

OSCE's Human Rights Office launches training course for Azerbaijani border guards[19]

Starting from 24 October 2002, a group of 15 border guards (among them five women) from Azerbaijan will be trained at the Polish border guard's academy in Ketrzyn. The one-year programme has been organised and sponsored by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) as part of the Office's assistance to the reform of the Azerbaijani border system.

"The transition to a modern border management in line with international standards requires training and institutional reform", said Nadzeya Zhukava, ODIHR Migration Officer at the opening of the training course. "We feel that the far-reaching experience of the Polish Border Service, which has undergone transformation from a military structure to a border police, during the last ten years, is particularly relevant for Azerbaijan, this is why we decided to hold the training here."

The training at the Polish border guard's school will improve the professional skills of the border guards, familiarise them with relevant international human rights standards, and prepare them to train new recruits in their home country.

OSCE trains trainers on women's rights in Armenia[20]

An OSCE training session on women's rights on 2 September 2002 in Yerevan, Armenia, brought together 22 young women from all 11 *marzes* (Armenian regions).

The training was conducted by two Polish trainers from the National Women's Information Center in Warsaw and provided the Armenian women with theoretical and practical knowledge, including a valuable introduction to basic international human rights documents within the context of women's rights.

The initiative was implemented under the Office for Office for Democratic Institutions and Human Rights (ODIHR) project on *Training of Trainers on Women's Rights, Gender Equality and Women's Participation in Society*, which aims to raise awareness and to build training capacity on lobbying and advocacy on women's rights and equality issues in the regions of Armenia.

OSCE expresses concerns over the credibility of the Azerbaijan Referendum[21]

The OSCE has echoed the concerns of observers of the Referendum, held in the Republic of Azerbaijan on 24 August 2002. The Referendum concerned proposed amendments to the Constitution of the Republic of Azerbaijan. The proposed amendments were the main topic of a series of roundtable discussions, held in Baku between 1 and 20 August 2002, and were intended to promote widespread public awareness and discussion of the amendments to the Constitution, prior to the Referendum. The discussions considered, among other issues, proposed amendments to the election of the President of Azerbaijan and parliament (*Milli Majlis*), and amendments relating to public administration and the country's obligations arising from its ratification of the Convention.

Whilst the OSCE office was unable to participate in observing the balloting directly, it expressed concern over several parts of the referendum process. The Referendum Law appeared in some parts inadequate to provide the best basis for its purpose, in particular regarding participation of observers. It did not allow for the participation of journalists as observers and did not specifically include non-governmental organisations in that role. The OSCE also expressed dissatisfaction that the Law required a quorum of electorate participation, as this was perceived both as encouraging a boycott of the referendum – as a tool by those opposed to it – and provoking accusations of forced participation by those in favour.

Accusations of irregularities in the voting process were numerous, including reports of ballot stuffing, overt police presence and pressure on voters, multiple voting, use of supplementary voter lists and other forms of ballot-rigging. The OSCE considered such reports to be too numerous – and from such a wide variety of usually reliable, apolitical sources – to be ignored or dismissed.

It was therefore the belief of the OSCE Office that the process fell short of providing a credible and reliable means of eliciting the views of the population on the issues of the referendum.

Turkey ratifies the Optional Protocol to CEDAW[22]

On 29 October 2002 Turkey ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

CEDAW was adopted by the General Assembly in 1979 and came into force in 1981. Often described as the international bill of rights for women, the Convention defines discrimination against women in Article 1 as, "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field." The Convention spells out the basis for realising equality between men and women through ensuring women's equal access to, and equal opportunities in, political and public life – including the right to vote and stand for election – as well as education and employment. States parties agree to take all appropriate measures, including legislative and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. Turkey submitted its third periodic report at the 16th Session of the Committee on the Elimination of Discrimination Against Women (CEDAW), which took place from 13 to 31 January 1997.

Although CEDAW obliged State parties to take action to comply with its terms, it did not include a process for individual complaint. On 6 October 1999, the United Nations General Assembly adopted an Optional Protocol to the Convention, which enables women victims of sex discrimination to submit complaints to the Committee. It entered into force on 22 December 2000, following the ratification of the 10th State Party. By accepting the Optional Protocol, Turkey has recognised the competence of the Committee to receive and consider complaints from individuals or groups of individuals in cases where they have exhausted domestic remedies. It also creates an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights. Turkey is the latest State Party to ratify the Optional Protocol, bringing the total number of State Parties to 49 (as of 12 January 2003).

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UN Working Group on Arbitrary Detention to visit Iran[23]

The United Nations Working Group on Arbitrary Detention sent a delegation to Iran from 15 to 27 February 2003 at the invitation of the Government. On the agenda for the delegation, headed by Louis Joinet, with Vice-Chairperson Leïla Zerrougui, was the inspection of several detention centres including Isfahan, Shiraz, Theran and Yazd. The delegation met with members of the Ministry of Foreign Affairs, the Interior, Justice and Parliamentary affairs, as well as with members of the Judiciary, Penal and Revolutionary Courts and Supreme Court of Justice and authorities of the Attorney-General Office and prison system. Meetings were also held with human rights and non-governmental organisations. The Working Group was set up in 1991, and had carried out fact-finding missions to Bahrain, Bhutan, China, Indonesia, Mexico, Nepal, Peru and Vietnam. Visits have also been made to Australia, Romania and the UK to examine the handling of immigrants and asylum seekers.

Special Rapporteur visit to Turkey postponed[24]

Having requested to visit Turkey in December 2002, the Special Rapporteur of Violence against Women's mission has been postponed due to unforeseen circumstances.

Special Rapporteur visit to Iran being agreed[25]

Dates of the Special Rapporteur of Violence against Women's visit to Iran are currently being organised. Iran and Turkey have both offered a "standing invitation" to all Special Rapporteurs.

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Footnotes

1 Taken from *Turkish Daily News*, 17 January 2003.

2 "Accession Partnership" (8 November 2000), p. 11 (www.europa.eu.int).

3 "Regular Report on Turkey's Progress Towards Accession" COM(2002)700, p. 24.

4 AFP Press Release, 17 January 2003.

5 Declaration on "The Court of Human Rights for Europe", 111th Session of the Committee of Ministers, Strasbourg, 7 November 2002. Committee of Ministers' Resolution Res (2002) 59, 822nd meeting of the Minister's Deputies, 18 December 2002.

6 Evaluation Group Report, p.56, para. 98.

7 see J. McBride, *"Neither Friendly Nor a Settlement": The Consequences of the European Court's Decision in Akman v Turkey*, (2002) 1 KHRP LR, p. 8–10.

8 First opened for signature on 4 November 1950.

Protocol 11 entered into force on 1 November 1998, establishing a single court of human rights with compulsory jurisdiction over petitions from both member states and individuals.

9 Refer to Report of the CDDH 'Reflection Group' 12 December 2002 (CDDH-GDR (2002)012).

10 For details of the settlement, founded on a unilateral declaration by the Turkish Government, see "Neither Friendly Nor a Settlement" by Jeremy McBride in Issue 1 of the KHRP Legal Review.

11 Committee of Ministers, CoM(2002)181, 6 November 2002, European Convention on the Suppression of Terrorism, 27 January 1977.

12 CoM(2002)181, 6 November 2002.

13 CPT News Flash, 10 December 2002.

14 Council of Europe Press Release, 15 July 02.

15 Council of Europe Press Release, 15 January 2003.

16 Council of Europe Press Release, 19 February 2003.

17 European Council Presidency Conclusions, Doc. No. 400/02, Copenhagen 13 December 2002.

18 See (2002) 2 KHRP LR, p.29.

19 OSCE Press Release, 24 October 2002.

20 OSCE Press Release, 2 September 2002.

21 OSCE Press Releases: 29 July 2002, 26 August 2002.

22 A/57/L.23/Rev.1 CEDAW, adopted by General Assembly Resolution 34/180, 18 December 1979, Optional Protocol to CEDAW, adopted by General Assembly Resolution A/54/4, 6 October 1999.

23 United Nations Press Release, 14 February 2003.

24 United Nations Press Release, 14 February 2003.

25 United Nations Press Release, 14 February 2003.

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"Finishing Off" Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload[26]

Abstract:

It is widely agreed that the European Court of Human Rights is in crisis; a "victim of its own success", with an ever-increasing caseload and a backlog of over 18,000 applications pending. This article critically examines various proposals for alleviating the problem, as submitted by the Working Party on Working Methods of the European Court of Human Rights. The author argues that while it is clearly necessary to ensure that the Court functions as efficiently as possible, this should not be achieved at the expense of undermining the right of individual petition. In particular it is contended that eliminating "warning letters", transferring most decisions of inadmissibility to three-judge committees, expanding the grounds of inadmissibility, dispensing with giving reasons for declarations of inadmissibility, avoiding fact-finding hearings and pushing for friendly-settlements are all measures that undermine the very principle of democratic justice which lies at the heart of the Court's existence.

The Strasbourg system for the implementation of the European Convention on Human Rights is, by its own account, in crisis. Under various appellations groups of insiders are or have been studying the situation and presenting proposals. Some of these were for immediate implementation; others remain to be discussed for possible inclusion in a new Protocol amending the Convention. From the standpoint of the right of individual petition, some measures are innocuous but others are far-reaching in their implications. The latter should not be met with indifference, for they challenge the very core of the Strasbourg system of protection of human rights as it has developed during the late 20th century. The aim of this article is to raise the profile of the procedural changes which either have already taken place or are currently under discussion at Strasbourg and to reinforce the concerns which they have started to provoke outside the Court from those active in the human rights field.

My main focus will be on the *Final Report of the Working Party on Working Methods of the European Court of Human Rights* (hereafter the 'WP Report'),[27] which has so far received little attention from NGOs. The WP Report, dated January 2002, was produced by members of the Court and the Registry. It followed a first and a second report by the same party, produced in June and November 1999 respectively.[28] I shall also discuss the earlier *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (hereafter the 'EG

Report'),[29] composed at Strasbourg's highest level. Dated 27 September 2001, it was produced by the President of the Court, the Deputy Secretary of the Council of Europe and the Irish Ambassador to the Council of Europe.[30] The EG Report has provoked a tightly argued response from British NGOs.[31] The Steering Committee for Human Rights (CDDH), whose functions include the drafting of Council of Europe's legislation, is currently working on the amendment of the Convention.[32] The CDDH is still working out its position on what may eventually become Protocol 14.[33] If the latter comes into being it will obviously be the result of an agreement between the governmental parties to the Council of Europe. One need not wait for Protocol 14, however, to see major changes brought to Strasbourg judicial procedures. As announced in the WP Report, radical transformations, although never publicly debated, had been introduced *already* by the time this article was written in May 2002.

The crisis that is widely perceived to be affecting the Court is linked to the expansion of the Council of Europe in the 1990s. Council membership, and thus accession to the Convention,[34] has almost doubled since the fall of the Berlin Wall. So has the population who can nominally rely on the protection of the Convention, which currently encompasses about eight hundred million people.[35] The number of applications to Strasbourg had been steadily increasing since the inception of the system.[36] However, the exponential trend has acquired a new dimension in the recent past: about 4000 provisional files were opened in 1988; about 10,000 in 1994; 20,000 in 1999; 30,000 in 2001.[37] Two additional figures help reveal the enormity of the task: over 18,000 registered applications were pending before the Court at the end of July 2001;[38] the Court was receiving about 800 letters every day at the time the Evaluation Group submitted its report in September 2001.[39] The Reports predict that things will get 'worse'.

A recurrent theme in the corridors of the Strasbourg Court is that something must be done before the system crumbles beneath an unmanageable backlog.[40] Although some dissonant voices can be heard occasionally,[41] the Reports bear witness that the following question preoccupies most people working at the Court: how can we possibly deal with the ever-increasing casework? There appears to be a broad consensus that answers must be found fairly urgently, both in the short-term, through the immediate adoption of mainstreaming measures, and in the mid-term, through the adoption of a new Protocol which will revise the Convention as amended by Protocol 11 in 1998. A reform of the reform is undoubtedly on the cards.[42]

The word 'productivity' has entered the language of Strasbourg.[43] All the talk is of how the Court can dispose more speedily of the cases which keep arriving in greater and greater numbers. The Court, it is said, must rationalise its working methods 'while at the same time maintaining legal certainty and quality of judgments'.[44] How will the Court meet this challenge of allying 'productivity' and 'quality'? And what does 'quality' mean in this context?

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'Quality' can of course be assessed from a variety of perspectives.[45] In my opinion it should include respect for the principle according to which an applicant with a deserving case is assured that his or her case will be heard by the European Court of Human Rights.[46] The focus of this article therefore rests on certain proposals, already implemented or under discussion, which have the potential to affect the success of an application. Other changes that are not immediately significant in this respect are not discussed, though they substantially impact upon the internal organisation of the Court at one end of the spectrum[47] and upon the manner in which the Strasbourg Convention system of protection generally works at the other.[48]

The procedure in 1998-2001

To assess how particular changes may affect the right of individual petition, it is useful to recall their starting-point, as it were, i.e. the way the procedure was originally organised under Protocol 11.

1) The life cycle of a file: possible courses

In the three years since Protocol 11 came into force and the new Court was created, cases have been processed along lines inherited from the former Commission and the old Court.[49] The procedure described below is still, for the most part, current at the time of writing.[50] The text is nonetheless written in the past tense, so as to avoid switching between the present and the past with respect to the changes introduced recently.

Upon receipt of a letter from a person new to the system, the Registry opened a provisional file and sent what was called a P0, consisting of an application form and general comments on the Convention system.[51] A large proportion of correspondents were deterred at this stage; they never made contact with the Court again and the provisional file was eventually destroyed without any decision having been required upon it.[52]

The Registry registered the case if and when it received a completed application form from the applicant. It then sometimes entered in a dialogue with the applicant regarding its chances of success in being declared admissible. This took the form of the so-called warning letter or P2. After registration a decision was required regarding the case. This could take one of four forms: a declaration of inadmissibility, a decision to strike the case out of the list, a friendly settlement, or a Court's judgment on the merits of the case.

The majority of registered applications were declared inadmissible or struck out of the list.[53] Inadmissibility could be declared either by unanimous decision of a Committee of three judges or by judgment of a Chamber of seven judges.[54] The latter judgment could be adopted by majority, but the exact pattern of voting was not disclosed.

If declared admissible, the case normally came before the Court for a decision on its merits. The Court could be constituted as either a Chamber of seven judges or a Grand Chamber.[55] Exceptions consisted of cases struck out of the list after having been declared admissible and cases in which the parties reached a friendly settlement.

2) The involvement of the Registry

Much of the work done by the European Court of Human Rights was carried out, not by the judges, but by Registry staff. In 2001 the Registry comprised about 200 case-processing staff, just under half of whom were lawyers.[56] In the words of the EG Report, they were responsible 'for dealing with correspondence, examining applications and preparing files and documents thereon for the attention of the judges'.[57] The involvement of the Registry was apparent at all stages of the procedure.

The Registry alone was responsible for dealing with provisional files. Each new file was assigned to a case lawyer. The involvement of the Court started at registration, with the allocation of the case to one of the four Sections of the Court[58] and the appointment of a judge-rapporteur from within this Section.[59] From then on the case lawyer continued to work under the instructions of the rapporteur. Many rapporteurs left case lawyers to work more or less alone; a few were prepared to discuss with them directly the course to give to the case.[60]

After a preliminary examination of the case, the rapporteur decided whether the case should be dealt with by a Committee or by a Chamber.[61] Decisions by the Committee or by the Chamber were based on the rapporteur's note.[62] This note was in practice drafted by the case lawyer, 'quality-checked' by the lawyer's superior, and then transmitted to the rapporteur for his or her observations. The text of the judgment was similarly written by the case lawyer and submitted to this 'quality check' before transmission to the judge-rapporteur.[63]

As can be seen the bulk of the work undertaken at the European Court of Human Rights was effected by Registry staff working under the instructions of judges-rapporteurs who acted, as it were, as intermediaries between individual case lawyers (and their superiors) and the Court (constituted in Committees, Chambers or Grand Chambers). The EG report observes: '[D]elays in processing applications derive not so much from a shortage of time on the part of judges as from difficulties encountered by the Registry in preparing files for judicial consideration'.[64] An increase in Registry staff has already taken place; further increases are planned.[65]

Recent proposals

This next section reviews the procedural changes that have recently been introduced or are currently under discussion at Strasbourg.[66] It does so by following the sequence of the various possible stages in the procedure.

1) A more effective Registry

Given the input of the Registry into the work of the Court, it is not surprising that the idea behind many proposals is 'to attach greater procedural effect to work already carried out by the Registry staff so as to make their contribution more time- and cost-effective'.[67] Proposals which fall into this category include:

i The elimination of 'provisional files';
ii. The near-total abolition of 'warning letters';
iii. Delaying the appointment of the judge-rapporteur until the Chamber stage;
iv. The specialisation of lawyers;
v. The use of minutes as the sole record of Committee decisions.

None of these measures required the Convention to be amended, which is not to say that they have not given rise to lengthy debate within the Court. Measures (i), (ii) and (v) were introduced on 1 January 2002;[68] (iv) is a matter of practice; (iii) is awaiting necessary amendment of the Rules of Court.

The first measure is sensible. As the WP Report indicates the distinction between 'provisional files' and 'registered applications' did not make sense to the public. Since 1 January 2002, the first written contact by the applicant generates a file, numbered in numerical sequence by year (1/2002, 2/2002, etc.). The elimination of provisional files means that the Registry is saved the task of physically transferring files from a yellow to a pink cover after registration (the colours which used to be respectively assigned to provisional files and registered applications).[69] Under the new regime, if no application form is received, the file is destroyed when one year lapses from the date of the Registry's last communication with the applicant without response.[70] This would appear to consist in a drastic reduction from the previously applicable period of four years,[71] although one would need to collect evidence on returned applications before assessing the practical impact of the measure for applicants.

The second measure, effectively skipping the 'warning letter' stage, falls in line with the general move towards standardising correspondence. It may seem fairly innocuous on paper, but will probably have the practical effect of eliminating applicants who would have been successful under the old system. This is presumably the reason why some lawyers opposed the proposal to do away altogether with warning letters.[72] A compromise was reached by accepting warning letters 'in individual cases, but only in unusual circumstances and with the approval of the Head of Unit of the Registry'.[73] Normally therefore, the Registry must now refrain from 'entering "negotiations" with the applicant as to the application's prospects of success unless that would appear to be a useful exercise'.[74] This departure from previous practice is said to be due to the risk that the system would be 'arbitrary and different for different cases and different countries' if case lawyers were free to choose whether or not to send warning letters.[75]

There is no point in denying this risk. At the same time it is regrettable that elimination of the risk is only achieved at the cost of refusing to offer potentially decisive information. The ultimate aim, to help the Court to reduce its backlog, undoubtedly can be achieved by this measure, as it can be expected to limit the number of applications 'treatable' by the Court. The cost of the measure from the perspective of potential applicants, however, needs to be appreciated.

The third measure, delaying the appointment of the rapporteur until the Chamber stage, has not yet been introduced. If it is, although it may seem drastic on paper, it could bring very little change in practice. The WP report explains that a Registry note (quality-checked by the Section or Deputy Section Registrar) will replace what used to be the rapporteur's note. Assuming that the case lawyer already does most if not all of this work anyway, the practical effect of the measure appears close to insignificant. Judges would retain their decision-making powers in Committee cases. The only shift is that they would cease to be formally responsible for supervising the work of case lawyers. There is agreement that Committee cases present little legal interest but constitute a large proportion of the Court's caseload.[76] By removing the involvement of judges until the final decision stage, not much seems to be lost.[77] Moreover, as the WP Report does not fail to note, the physical transfer of hundreds of files to rapporteurs and back is avoided.[78]

Measure (iv) aims to ensure that case lawyers specialise more than they do at present. The WP Report explains: '[O]n the one hand, ... in respect of States from which the Registry ha[s] more than one lawyer, cases should more frequently be divided between the lawyers on the basis of the subject-matter of the complaint ... On the other hand, in respect of States from which the Registry did not have any lawyers [sic], cases should be concentrated on one lawyer who [is] proficient in the language of the State concerned and familiar with its legal system'.[79] This seems a sensible solution, especially in regard to the 'language problem'[80] experienced in the Council of Europe, which currently incorporates no less than thirty-seven national official languages.[81] Applicants can communicate with the Registry in any one of these languages until the case is declared admissible, at which point the procedure continues in one of the two official languages of the Court, namely English or French. It is heartening to note that the Evaluation Group has felt unable to endorse the suggestion that this current practice be altered.[82]

Measure (v) now means that the decision of the Committee is recorded in the minutes without taking the form of a separate document, so that there is no 'decision document' available to the public.[83] The applicant is informed of the decision in a letter written in a short and standardised form in his or her own language.[84] Only in exceptional circumstances can an individualised text be sent to the applicant, in either English or French. The text must have been included in the Registry's note and have been approved by the Committee of three judges.[85] This new practice is worrying. Its significance is better examined in the context of the increase in the number of Committee decisions and is discussed below.

2) A more focused Court

A number of proposals relate to procedures before the Court, most notably:

i. Having decisions of inadmissibility normally made by Committees (a), possibly consisting of 'assessors' in the future (b);
ii. Reviewing the grounds for inadmissibility;
iii. Ensuring transparency in the allocation of cases to Sections and judges-rapporteurs;
iv. Encouraging the adoption of friendly settlements through 'sanctions';
v. Avoiding fact-finding hearings;
vi. Avoiding the holding of public hearings in Chamber cases;
vii. Adopting an 'expedited procedure' for 'clone' cases.

Proposals (i, a), (iv) and (vii) were made in the Working Party's Second Report and have already been implemented; (iii), (v) and (vi) are a matter of practice; as for (i, b) and (ii), they require an amendment of the Convention and are under discussion by the Steering Committee for Human Rights (CDDH).

Proposal (i): Inadmissibility to be decided in Committees, possibly consisting of 'assessors' in the future

In its second report the Working Party recommended that cases where inadmissibility was proposed in the rapporteur/Registry's draft decision should first come before a Committee unless there were special reasons for submitting it to a Chamber.[86] In its final report the Party noted that '[v]ery few inadmissible cases are now decided by Chambers'.[87] Let us recall that inadmissible Committee decisions are now simply minuted and are no longer the object of a separate document; they are communicated to the applicant in a standard letter.[88] There is thus no record of the reasons that motivated the decision of inadmissibility. This is a serious development, worrying on more than one count. First, the applicant will not be informed of the exact reasons for the rejection of his or her application, subsumed in a general formula. Second, practicing lawyers within the Council of Europe will not be in a position to follow the Court's case law with regard to admissibility. Third, scholars will be impeded in their critical assessment of the work of the Court. As I have argued elsewhere, decisions of inadmissibility are crucial to any evaluation of the Strasbourg system for the protection of human rights.[89] This transformation denies that inadmissible decisions have legal and political value. While this may be true in cases of admissibility for purely technical grounds (such as the six-month limit), it is highly problematic with respect to the 'manifestly ill-founded' ground[90] and also to others that require interpretation (such as the quality of 'victim' and the requirement to exhaust national remedies). In the absence of differentiated treatment with regard to the various grounds of inadmissibility, this new measure may be said to contravene principles of democratic justice.

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The Evaluation Group envisages a Court consisting 'of two divisions, the first composed of elected judges and the second – with responsibility for preliminary examination of applications – composed of appropriately appointed independent and impartial persons invested with judicial status (who would be designated as "assessors" or some other suitable title)'.[91] A number of questions about the re-introduction of a two-tier system (which some have called a 'Commission redivivus') arise of course, as the EG Report acknowledges. These chiefly concern the manner of appointment and the role of the assessors, the division of labour within the Registry, but also the repercussions of the creation of such a second division for what would become the first division of the Court (which may no longer require as many judges as now sit, nor full-time sessions).

In due course these questions undoubtedly will generate long and heated discussion. Nonetheless they somehow appear as details. Whatever answers are supplied will merely follow the adoption of the crucial step – now a *fait accompli* – of adopting decisions of inadmissibility as part of a big and fast-processing judicial factory line, which is not even required to provide judicial motivation. My view is that the battle is already lost. If this is too pessimistic an assessment, then the fight must concentrate on convincing the Court to produce an individualised text in not too exceptional 'exceptional circumstances'. To limit the damage, a parallel fight must be led to resist other developments in store, designed to extend the grounds of inadmissibility.

Proposal (ii): Reviewing the grounds of inadmissibility

The proposal to amend the grounds of inadmissibility presently listed in the Convention under Article 35 is still vague. It might take the form – legally different from an admissibility criterion – of allowing the Court to decline to examine an application that does not raise a 'substantial' issue under the Convention. Ultimately it relates to the debate currently taking place at Strasbourg as to whether it is desirable or not to make the Court more 'constitutional'.

The WP Report notes that it examined the question of 'whether it was possible for the Court to declare applications inadmissible simply because they were of minor importance'.[92] It answered that the existing interpretation of the 'abuse of the right of petition' criterion does not permit a rejection on this ground and that the 'manifestly ill-founded' criterion covers a different situation. The Working Party nonetheless thinks that 'a more restrictive interpretation of the notion of "victim" might be possible'.[93] The WP Report refrains from making proposals as it considers that 'the matter should be taken up in another context'.[94] These last words refer implicitly to the leading role that the Committee of Ministers will be expected to take in an eventual revision of the Convention.

The view of the Working Party echoes that expressed by the Evaluation Group a few months previously. It is worth quoting the EG Report at length:

> 92. ... What is required is a means of excluding from detailed treatment by the Court not only applications having no prospects of success but also those which, despite their having such prospects, raise an issue that is, in the view of the Court, of such minor or secondary importance that they do not warrant such treatment.
>
> To the objection that such a solution would deprive some victims of violation of the Convention of protection, the Evaluation Group would reiterate that the primary responsibility for applying Convention standards lies with domestic courts and authorities. More basically, the Group would reply that the point has been reached at which a difficult choice has to be made: either the Court continues to attempt to deal in the same way with all the applications that arrive (in which event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose ..., warrant such attention. ...
>
> 93. The Reflection Group set up by the Steering Committee for Human Rights proposed that the Court might be given wider possibilities to reject applications, by raising the admissibility threshold through the introduction of additional or reformulated admissibility criteria. Concurring with this approach, the Evaluation Group has come to the view that a provision should be inserted in the Convention that would, in essence, empower the Court to decline to examine in detail applications which raise no substantial issue under the Convention. ...

Like the Working Party, the Evaluation Group remarks that it does not constitute the appropriate body to make concrete proposals. It therefore continues by offering no more than three general points. First, it proposes that in determining what is or is not 'substantial', the issue of whether domestic remedies are available should be considered.[95] Second, it notes that every application will still need to be studied, namely by case lawyers who will have to determine whether the application raises a substantial Convention issue.[96] Third, it says that it is concerned by what happens to the author of an application that is not accepted for detailed treatment and states that the issue must be carefully studied 'with a view to devising a mechanism whereby States would agree that such an application be remitted back to their authorities for reconsideration: this would be of particular value where no effective domestic remedy was originally available'.[97] The Group concludes this paragraph with another proposal:

'In similar vein, procedures might also be established whereby States would agree that, where an application has been certified as admissible and manifestly well-founded [a new concept proposed by the Evaluation Group][98], the individual concerned would be entitled to obtain redress from a designated national authority'.[99]

The first proposal is paradoxical: if national remedies are available, there is no need to introduce an inadmissibility criterion in terms of lack of substance; it should suffice to give a new emphasis to the 'exhaustion of national remedies' criterion. The second point is partly intended to stress that this proposal does not constitute 'a panacea for the workload problems'.[100] It could also be read as a reassurance that all cases will be studied. The entire discussion above, however, suggests that this study will tend to be cursory. The third point, if correctly implemented, would be perfectly acceptable. It would be in line with the principle of subsidiary protection increasingly stressed as enshrined in the Convention.[101] It would require, however, the creation of a system that guaranteed the eventual availability of a national remedy.[102] The final proposal is in the same vein and is similarly acceptable. An important question nonetheless arises in relation to the last two points: what happens when the promised national remedy turns out (or is claimed by the applicant) not to be available or not to do its remedial job properly? There should be a mechanism by which the applicant can turn either to the Court for a verdict that the Convention has been violated or to the Committee of Ministers for a request that the execution of the implicit finding of a violation be supervised.

To date, proposals to revise the admissibility criteria remain vague. It is impossible to predict exactly what will come out of the current revision process. What is highly likely is that some amendment will take place, which will have the effect of closing the system to more applicants than presently.[103] If these rejected cases are returned to national systems for the allocation of a proper national remedy, nothing will be lost; one could even say that there is much for everyone to gain. However this view may prove too optimistic. One cannot help but fear that some applicants simply will be barred from protection by the system.[104] If so, it will mean that applicants rather than states will pay the price for the absence of proper implementation of the Convention at national level.

Proposal (iii): the transparent allocation of cases to Sections and rapporteurs

The issue of the assignment of applications to Sections and rapporteurs has attracted the attention of the Working Party.[105] As far as Sections are concerned, the Working Party endorses the current principle according to which applications should be assigned to the Section in which the national judge sits, except in relation to those States against which there are a disproportionately high number of applications.[106] The Working Party suggests various ways

of effecting cross-Section distribution, its aim being 'to achieve transparency and to avoid any suspicion regarding the assignment of cases to Sections'.[107] As transparency and automaticity did not seem to characterise the system in the past, these recommendations are welcomed.

The issue of the appointment of rapporteurs proved more controversial. The Working Party notes that the current practice is normally for the judge national to act as rapporteur in Chamber cases, but not in Grand Chamber cases.[108] A Sub-Group to the Working Party thought that the time had come to change the practice of appointing the national judge as rapporteur, since Chamber cases are now restricted to those which a Committee has not declared inadmissible *de plano*. In the words of the Sub-Group:

> It is of course and [sic] advantage in many respects to have the national judge as Rapporteur. He/she can more easily check the facts in the file. The reasons are linked to efficiency. As Rapporteur, he/she can also prepare the decisions on his/her own, thereby alleviating the task of the case lawyer. Nevertheless, it adds to the element of objective impartiality and it gives a correct signal to the outside if the national judge is not, as a principle, Rapporteur in Chamber cases. ... [Moreover] the national judge may feel freer, if he/she is not the Rapporteur.[109]

The Working Party rejected the proposal by the Sub-Group that Chamber cases should normally be assigned to a judge who is not the national judge (the exception being the cases raising issues of a repetitive kind, such as 'length cases').[110] The Working Party nonetheless regretted the practice, revealed by statistics, that the national judge is almost always appointed rapporteur in the cases against some States.[111] Its proposal is that the issue be subjected to further examination by a new group or working party, possibly with a view to capping the percentage of cases that should be assigned to the national judge.[112]

To an outsider who grew accustomed to hearing that the identity of the judge-rapporteur is a confidential matter,[113] the inclusion of the discussion on the appointment of rapporteur in the WP Report represents a welcome step. At the same time the fact that the rapporteur is generally the national judge in Chamber cases is somewhat disturbing. Does the more immediate understanding of the legal situation by the national judge and the attendant saving of resources really justify his or her appointment as rapporteur? Is there not conversely a danger that the rapporteur will understand only too well the legal and social situation and may not be able to step back from it? The study by Fred J. Bruisma and Matthijs de Blois on the voting attitude of the national judge does not suggest that these questions must be answered in the affirmative.[114] Nevertheless the Court has often been criticised for its deferential attitude to national states.[115] The Sub-Group was right to observe that the conflation of judge-rapporteur and national judge is unlikely to appeal to the outside world.

Proposal (iv): Encouraging the adoption of friendly settlements through "sanctions"

The EG Report flags the 'increasing possibility of disposing of applications by the conclusion of a settlement', which can 'involve substantial budgetary savings for the Court, especially where a fact-finding hearing would otherwise have been necessary'[116] (this phrase is an oblique reference to Turkish cases alleging a violation of Article 2 or 3 of the Convention). The EG Report suggests that '[i]ncentives for applicants to settle' could be reinforced by the Court 'depriving them ... of part of their costs in cases where they had declined a settlement offer deemed by the Court to be reasonable'.[117] It continues: 'Alternatively, the Court could dispense with the applicant's consent in striking an application out of the list if, for example, his/her refusal to accept a settlement offer was unreasonable'.[118]

The suggestion appears sensible on paper, but is bound to be problematic in reality, depending as it does on a judgment on the 'reasonability' of the settlement offered. The NGOs' response to the EG Report expresses concern that the Court felt it appropriate to strike out of the list, without the applicant's consent, the *Akman* v *Turkey* case by judgment of 26 June 2001.[119] The case concerned the fatal shooting of the applicant's 22-year old son allegedly by Turkish security forces. The NGOs note that the Court's judgment 'failed to resolve the dispute as to what happened to the applicant's son, and that it failed to refer either to the obligation under Article 2 to provide an effective investigation into the incident or the obligation under Article 13 to provide an effective remedy'. The NGOs express concern 'that the respondent Government ... gave no undertaking to attempt to investigate the circumstances of the case or to consider whether criminal or disciplinary proceedings should be brought'.[120] This has led Matthew Happold to criticise the decision in a case-note entitled 'Letting States get away with murder'.[121] For him, the Court in effect permits the State unlawfully to kill its citizens providing that it pays to do so – in this particular case, Turkey had offered £ 85,000 in compensation.[122] Happold further notes that 'the court avoided a long and arduous fact-finding hearing and (possibly) another subsequent hearing on the merits'. As can readily be seen, the power in striking out a case from the list brings the Court high gains in terms of time and costs. However, the price to pay in terms of human rights protection efficiency and judicial credibility is far from negligible.

Proposal (v): Avoiding fact-finding hearings

This point is touched upon immediately above, which demonstrates that the changes taking place at Strasbourg should not be viewed in isolation, but treated as part of the same inexorable logic. Philip Leach, Legal Director of the Kurdish Human Rights Project (KHRP), has no doubt that the Court is cutting the number of fact-finding hearings it undertakes (a

role it assumed following the demise of the Commission).[123] The EG Report confirms this trend when it notes, with implicit approval, that 'the Court restricts its fact-finding to exceptional cases'.[124] This practice has tremendous implications, as the worrying judgment of 21 February 2002 in *Matyar* v. *Turkey* highlights.

In this case the applicant was alleging that security forces operating in South East Turkey had destroyed his home (as well as the rest of his village) on 23 July 1993 and that he had been intimidated and tortured after he lodged his application at Strasbourg. The government disputed the facts. Over eight years after the contested events, the Court ruled that a fact-finding investigation would not assist in resolving the issues given the length of time that had elapsed.[125] The facts thus remained disputed. This led the Court to find that there was insufficient evidence to corroborate the allegations made by the applicant. The Court ruled that the Convention had not been violated. Significantly, the ruling was not to the effect that it had been established that the facts alleged by the applicant had *not taken place*, but that it was *not established* beyond reasonable doubt that they had taken place.[126] The one is obviously very different from the other.

The *Aydin* v. *Turkey* judgment, of 25 September 1997, offers a telling contrast to *Matyar*. This particular *Aydin* case was brought by a young woman of Kurdish origin who reported that, in the context of Turkish operations against PKK members, she had been taken one morning to gendarme headquarters with her father and sister-in-law, separated from the latter, and maltreated and raped in the course of a detention which lasted over a period of three days. The Commission went on a fact-finding hearing and found her account credible, despite some inconsistencies and inconclusive medical reports.[127] The majority of the Court accepted the facts as established by the Commission.[128] It concluded to a violation of Articles 3, 13 and 25 of the Convention.

The absence or ineffectiveness of domestic remedies leaves cases like *Matyar* and *Aydin* unprocessed at domestic level. It therefore becomes crucial for these cases to be processed at international level, however limited their legal interest. This typically will require that facts be determined.[129] But fact-finding takes time, and the Court does not have the time for that – either due to its backlog or because it does not find the task appropriate to its high office.

If *Matyar* were to set a precedent,[130] this would mean that the most serious violations of human rights, involving torture, extra-judicial executions, 'disappearances', village destructions and the like, which currently take place within the jurisdiction of the Council of Europe in Turkey (in the South East) and in Russia (in Chechnya)[131] could routinely escape from attracting a verdict of violation by the Court.[132] The result would be that human rights are the least protected when they are the most blatantly violated. This paradox would make a joke of the Strasbourg system of human rights protection. It would hold potentially disastrous political consequences.

If the Court abandons the pursuit of fact-findings hearings, the credibility of the system demands that another institution be set up with the resources, ability and authority to conduct such missions, like the Commission used to do.

Proposal (vi): Fewer public hearings in Chamber cases

When I first consulted case files in the Strasbourg archives, I wondered if the documents I was examining had been copied to every single individual judge who sat on the Chamber allocated to the case. I came to the conclusion that if this ever had been the practice, it must have stopped quite a few years ago. As we have discussed, even the transfer of the file from Registry to judge-rapporteur is now seen as a burden, which the suppression of the rapporteur at Committee stage could possibly alleviate in the future. In Chamber cases, the reality is that judges make their decision on the basis of the rapporteur's note, to which are annexed the memorials of the parties (no longer translated into the second Strasbourg official language). It is doubtful that letters from applicants would be transmitted to all the judges who are to decide on the case. They are simply on file in the archives – and not translated any more. This is the backdrop against which we need to evaluate the tendency of the new Court to restrict as far as possible – and normally to half an hour per party to the case – the holding of public hearings in Chamber cases.

The justification for avoiding public hearings is that they add little, if anything, to the memorials of the parties, as the legal representatives tend to repeat orally what they have already submitted in writing. Presented in such a fashion, the argument holds: public hearings are costly both in terms of money and resources, and rarely useful. However the trend to restrict may be regrettable from the perspective of the applicant. By definition, the very possibility of grabbing the attention of the Court during the hearing, of stressing a particular point or argument, is eliminated when no hearing is held. It should be noted that the holding of a public hearing remains the norm in Grand Chamber cases.

Proposal (vii): an expedited procedure for 'clone' cases

Much of the caseload before the Court consists of cases alleging a violation of the guarantee inserted in Article 6 (1) of the Convention that trials take place 'within a reasonable time'. Italy, for a long time the principal accused in respect of 'lengthy procedures',[133] has been joined by other states as habitual defendants. These 'length' cases hardly present any legal interest,[134] but nonetheless need to be processed. Neither the passing of the Pinto Act in Italy nor the recent finding by the Court in *Kudla* v. *Poland* that a lengthy procedure constitutes a violation not

only of 6 (1) but also of Article 13 of the Convention can be expected to resolve the problem of having to monopolise resources for these uninteresting cases, even if they alleviate it.[135] It is not surprising, therefore, that the Working Party has paid attention to this issue. It recommends the adoption of an expedited procedure, under which admissibility and merits are determined in a single judgment, in respect to all length cases.[136] It further recommends that this procedure be adopted in 'cases in which the Court has to apply well-established case law after a test case, including first cases against a given country'.[137] This is a sensible proposal. Once implemented the measure should lead to a significant reduction in the caseload of the Court, without anyone, and certainly not the applicant, having to suffer.

Conclusion: The raison d'être of the Court in question

To simplify, since 'the reform of the reform' is on the cards, two views have emerged at Strasbourg as to the general direction the Court should take. According to the first, the Court should stop spending its time on unworthy cases; it must be allowed to concentrate on legally 'deserving' cases. According to the second view, the raison d'être of the Strasbourg Court is precisely that it will hear any case, from anyone who claims to be a victim of the Convention; there are no unworthy cases (except of course those which traditionally have been declared inadmissible).[138] One may presume that the camp holding the former view will not win all for which they hoped, while the camp holding the second view will not lose completely the Strasbourg 'acquis' of being, in the words of an approving insider who wishes to remain anonymous, a 'street-corner court'.[139]

The Evaluation Group writes:

[A] vital consideration must be to ensure that judges are left with sufficient time to devote to what have been called 'constitutional judgments', i.e. fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law, are of particular concern for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication.[140]

The inclusion of the words 'sufficient time' is highly significant. These two words are probably meant to reassure both camps: the passing of 'constitutional' judgments is not presented as the only task of the Court, but the reforms are nonetheless meant to free up time for this task.

Among these reforms, some are undoubtedly to be welcomed, such as the abolition of the distinction between provisional file and registered application and the introduction of an expedited procedure in clone cases. These measures contribute to the streamlining of procedures without any adverse effect for the applicants. The increased reliance on the Registry, which may lead to the abolition of the judge-rapporteur at Committee stage, demonstrates that the proceedings are not as 'judicial' as the public may think, but may not

affect significantly the practice developed at Strasbourg over the years. The continued principle of appointing the judge national as rapporteur in Chamber cases can only be met with ambivalence, even if the promised transparency in the allocation of cases to Sections and rapporteurs is welcomed.

The most unfortunate development is the apparent intention to go through and close 'undeserving' cases quickly, whatever the implications. It is difficult to suppress the impression that the best course for a case is increasingly viewed as the one which permits to decide it – and too often to finish it off – the fastest.[141] The near-total abolition of 'warning letters' from the Registry and the re-routing of inadmissibility decisions to Committees (possibly to be composed of 'assessors') participate in this trend. The same is true of the absence of publication of motivation for inadmissible decisions taken by Committees, whatever the ground on which inadmissibility is declared, which leaves a gaping hole in the public record of the Court's case law. The invitation to increase the number of cases struck out of the list is worrying, to say the least. The practice of avoiding fact-finding hearings leads to the paradox that the Convention system may well offer least protection in the cases which concern the most serious violations of human rights; it must be stopped. The cutting down on public hearings is probably regrettable. As for the expected revision of admissibility criteria, it gives cause for great concern.[142] While Strasbourg cannot be criticised for not attempting to address the problem at its roots, there are obvious dangers to radical solutions.[143]

It is all very well for the Court to say that is has too many applicants, but surely this is exactly why it was created in the first place. The current evident drive towards the adoption of a constitutional stance would be acceptable, if this meant the establishment of clear and coherent general guidelines, which the states were then able to follow.[144] By contrast what seems to be envisaged at the highest level – not necessarily with lower-level approval – [145] is a Court that would be more or less free to choose the cases with which it deals. If this inclination were followed to its logical conclusions, it would constitute a drastic, regrettable, and possibly dangerous transformation of the European Court of Human Rights of the 20th century.[146] One must hope this will be resisted successfully.

Footnotes

26 This is a reprint of an article originally published in the *European Human Rights Law Review* (2002, issue 5, pp. 604-623). One footnote has been added. The author thanks Bill Bowring, Amanda Collins, Matthew Happold, Emily Haslam, Philip Leach and Françoise Tulkens for useful comments on a draft of this article. She also gratefully acknowledges financial support by the Leverhulme Trust which awarded her a Research Fellowship to work on a project entitled 'Problematizing Human Rights: The European Convention in Question'. She came across the Report of the Working Party on Working Methods during a research visit at Strasbourg in April 2002. The reading of this Report prompted her to write this article, which is also informed by discussion of procedural issues with a limited number of members of the Court and of the Registry. The usual disclaimers apply.

27 The main title of the WP's final Report is *Three Years' Work for the Future* (Strasbourg: Council of Europe).

28 In the wake of the WP Report, a Standing Committee has been established to monitor the Court's work and to propose further changes. This committee has not yet reported. New Rules of the Court are also expected, during the summer 2002 at the earliest and hopefully (in Strasbourg's perspective) before the end of 2002.

29 Published by the Council of Europe (Strasbourg) in 2001.

30 Luzius Wildhaber, Hans-Christian Krüger and Justin Harman respectively. The latter acted as the Chairman of the Evaluation Group. On the origins of the Evaluation Group, see A. Mowbray, 'Proposals for reform of the European Court of Human Rights', (2002) *Public Law*, 252-64, at 252-53.

31 'NGOs' response to the Report of the Evaluation Group', dated 25 January 2002 and reproduced in the latest *Newsline* of the Kurdish Human Rights Project (issue 17, spring 2002, pp. 8-9). By 9 May 2002, the response was undersigned by the AIRE Centre, Amnesty International, the British Institute of Human Rights, Human Rights Watch, JUSTICE, the Kurdish Human Rights Project, the Law Society of England and Wales, Liberty and eighteen other NGOs. See also John Wadham, 'What Price the Right of Individual Petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights', (2002) EHRLR 169. On 20 May 2002 the British Institute of Human Rights organised a half-day seminar entitled 'Reform of the European Court of Human Rights: What might the Evaluation Group Report mean for human rights protection in Europe'. Alastair Mowbray (above note 30, p. 264) commends the British government for having initiated a consultation exercise on the Report's recommendations, including a seminar in February 2002 in which NGOs representatives were invited to participate. In its most recent *Newsline* (above, this note, p. 13), the KHRP similarly talks of this meeting as having initiated a 'useful dialogue' between the UK Foreign Office and NGOs.

32 See Mowbray, above note 30, 263-64.

33 But the Activity Report, dated 14 June 2001, of the Reflection Group on the Reinforcement of the Human Rights Protection Mechanism – set up by the CDDH – is annexed to the EG Report, pp. 79-85.

34 The two processes used to be separate, but were linked in the 1990s. Robert Harmsen, 'The European Convention on Human Rights after Enlargement', (2001) 5 *International Journal of Human Rights* 19.

35 EG Report, p. 18, para 15.

36 This motivated the discussions in the 1980s which eventually led to the adoption of Protocol 11. When the latter came into force in November 1998, the 'new Court' was installed and the 'old Commission' ('European Commission of Human Rights') continued to operate for a transitional period of one year. See Andrew Drzemczewski and Jens Meyer-Ladewig, 'Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol 11, Signed on 11 May 1994', (1994) 15 *Human Rights Law Journal* 81; Paul Mahoney, 'Speculating on the Future of the Reformed European Court of Human Rights', (1999) 20 *Human Rights Law Journal* 1.

37 WP Report, back cover.

38 EG Report, p. 26.

39 WP Report p. 7, para 6; EG Report, p. 22.

40 See e.g. WP Report, p. 19, para 48.

41 Some people working at the Court do not appear convinced that the EG Report presents – to borrow the terms of an academic – "an authoritative exposition of the current and future caseload crisis facing the Court' (Mowbray, above note 30, p. 262). To give an example, I have it heard said that 'numbers in themselves do not say anything; they fabricate false certainties'. This remark was meant to imply that it may be possible for the Court to deal with the applications it receives without having to undergo absolutely fundamental changes, detrimental to the right to individual petition. After giving the example of the hundreds of letters which the Court receives each day, many of which require very little attention, its author insisted that a *serious* examination of current needs, beyond the mere brandishing of statistics, is essential.

42 And can be said to have been so ever since Protocol 11 came into force. See Mahoney above note 18; Mowbray above note 30, p. 252.

43 This is particularly striking in the EG Report (see e.g. the title p. 26). This has led to, amongst other things, the set up of clear targets as to the maximum period of time which should elapse between the various stages through which a case is processed (WP Report, p. 21, paras 55-60; p. 25, para 86 2.).

44 WP Report, p.3.

45 The question of the ideal role of the Court is obviously crucial. Until now it has been treated implicitly rather than explicitly. It would benefit from an in-depth theoretical debate to highlight the attendant inevitable controversies. Current procedural changes may well have the effect of putting such a debate to the fore.

46 See also Wadham, above note 31.

47 These include the complication resulting from all cases pending before the old Court having to be heard by a Grand Chamber and the implications of changes in the composition of the four Sections of the Court, and, at a different level, the length of judicial office.

48 Two important chapters of the EG Report concern national measures (Chapter VI) and the execution of judgments (Chapter VII).

49 WP Report, p. 7, para 3. For more details, see Luke Clements, 'Striking the Right Balance: The New Rules of Procedure for the European Court of Human Rights', (1999) 3 EHRLR 266.

50 For more details, see Philip Leach, *Taking a Case to the European Court of Human Rights* (London: Blackstone, 2001).

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51 This stage was nonetheless skipped if the first correspondence consisted in a well-drafted application, in which case registration (the next stage in my presentation) immediately occurred.

52 For example over 31,000 provisional files were opened in 2001 but fewer than 4,000 cases were registered. The WP Report speaks of 60% of provisional files registered as formal applications to the Court (p.7, para 6).

53 Just under 9,000 applications were declared inadmissible or struck off the list in 2001 (Survey of Activities, 2001, p. 29).

54 There were three standard compositions for Chambers and three compositions for Committees within each of the four Sections of the Court (WP Report, p. 10, para 22).

55 Articles 30 and 43 of the Convention define the jurisdiction of the Grand Chamber.

56 For the exact figures as at 1 February 2001, see EG Report, p. 20, para 18. The Registry is divided into sixteen applications units (WP Report, p. 11, para 26).

57 EG Report, p. 20, para 18. See also WP Report, p. 11, para 26.

58 On this organisation see Andrew Drzemczewski, 'The Internal Organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber', (2000) EHRLR 233.

59 The President of the Section to which the case was allocated appointed the judge-rapporteur. In practice the decision was taken by the Section Registrar (WP Report, p. 33, para 94).

60 Interviews with two case lawyers in September 2001.

61 As acknowledged by the WP Report p. 12, para 34.

62 As implied by the WP Report, p. 26, para 86, point 5. 'In 1990 the former Commission decided to use standard forms in all Committee cases, accompanied by a "rapporteur's note" on the basis of which the Committee would decide the case' (Sub-Group B Report, WP Report, p. 71)

63 WP Report, p. 11, para 27.

64 EG Report, p. 46, para 69; see also p. 53, para 87. This is why the Evaluation Group rejected an increase in the number of judges sitting at the Court as a partial solution to the problem of the expanding case law (ibid.).

65 EG Report, p. 20, para 18; WP Report p. 8, para 10.

66 The first proposals considered here emerged in June 1999 from the Working Party's first report. This article considers proposals aired up to January 2002, when the Working Party submitted its final report.

67 EG Report, p. 43, para 59.

68 As for the first measure, see WP Report, p. 41, para 127, point 1. As for the second and fifth measures, it was felt that their introduction did not necessitate a formal change in the Rules of the Court. It is nonetheless possible that the new Rules will reflect the changes they have introduced (see above note 10).

69 WP Report, Annexe 1, pp. 76-80, points 1 and 12.

70 Ibid., p. 41, para 127, point 3.

71 Ibid., p. 26, para 86, point 4.

72 Ibid., p. 42, para 130.

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73 Ibid., p. 42, para 130.

74 Ibid., p. 41, para 127, point 2.

75 Ibid., p. 41, para 127, point 2.

76 Ibid., p. 42, para 129.

77 See nonetheless the view expressed by the Sub-Group, WP Report, pp. 73-74, para 6 d) 1.

78 Sub-group, WP Report, p.84, para 12.

79 WP Report, pp. 20-21, para 54.

80 Ibid., p. 20, para 52.

81 One note of caution, however, is in order. My understanding is that the Court would envisage the ideal situation to be one in which it could hire case lawyers in a way that reflects the number of applications originating from the various countries of the Council of Europe. Accordingly a rise in applications from one country would give rise to the hiring of one or more additional case lawyers from that particularly country. Inversely, however, a decrease in applications would lead to the lay off of case lawyers from this second country. A complete match between applications and case lawyers is of course impossible to achieve. Trying to achieve even a partial match may have negative implications in terms of security of employment for members of the Registry. While a short-term contract is perfectly acceptable especially early in a career, resorting to short-term contracts on a longer basis is problematic. Apparently some case lawyers are already hired on repetitive short-term contracts.

82 EG Report, p. 41, para 55. The same is true of the recommendation not to make legal representation obligatory before the case is declared admissible (ibid.).

83 WP Report, p. 44, para 138.

84 Ibid., p.41, para 127, point 4.

85 Sub-group, ibid., p. 74, para 6 e).

86 Ibid., p. 23, para 77.

87 Ibid., p. 27, para 86, point 6.

88 On the form this letter will take, see ibid., Annexe 4, pp. 85-86.

89 Marie-Bénédicte Dembour, 'The Cases that Were not to Be: Explaining the Dearth of Case Law on Freedom of Religion at Strasbourg', in Italo Pardo (ed) *Morals of Legitimacy: Between Agency and System* (Oxford: Berghahn, 2000), pp. 205-227.

90 As the EG Report implicitly suggests, the term 'manifestly' may too often have turned to be a misnomer (p. 54, para 92).

91 Ibid., p. 56, para 98.

92 WP Report, p. 22, para 65.

93 Ibid., para 66.

94 Ibid., para 67.

95 EG Report, p. 55, para 94.

96 Ibid., para 95.

97 Ibid, pp. 55-56, para 96.

98 Ibid., p. 43, para 58.

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99 Ibid, p. 56, para 96.

100 Ibid, p. 55, para 95.

101 This principle (reiterated in the preface of the EG Report, ibid., p. 7) guides the measures discussed by the Evaluation Group for human rights training in the member states and the new stress on the need to ensure judgments are properly executed by member states (both excluded from the scope of this article, as explained above, note 23).

102 Wadham (above note 31, p. 173) and the NGOs' response (above note 31, para3) express similar concern.

103 The array of measures being implemented without the need to revise the Convention could be found to be sufficient to deal with the expanding case law. This possibility, however, may be too theoretical. Considering that the process of revising the Convention has been set in motion, it is unlikely that it will be stopped since the envisaged revision should further restrict the right of individual petition and thus be to the advantage of governments.

104 For an argument that too many applications were declared inadmissible even under the old system, see Kristina Morvai, 'The Construction of the Other in the European Human Rights Enterprise: A Narrative about Democracy, Human Rights, the Rule of Law and my Neighbour Uncle Blaze', in Jim Bergeron and Peter Fitzpatrick (eds), *Europe's Other* (Ashgate: Aldershot, 1998), pp. 330-37.

105 WP Report, pp. 35-39, paras 105-126.

106 These states currently include first and foremost Italy, Turkey and Poland, but also Bulgaria, France, Russia, the Slovak Republic and the United Kingdom, and other states, depending on how the influx of applications is counted (ibid., pp. 36-37, paras 112-118). At the time of the Working Party's second report, cases from Turkey, Italy and Poland represented 20 %, 15 % and 10 % respectively of all the Court's pending registered applications (ibid., p. 24, para 81).

107 Ibid. p. 36, para 113.

108 The appointment of the rapporteur is officially the responsibility of the President of Section. In practice, the appointment is made by the Registry.

109 WP Report, Appendix 3, p. 68, point 3. b) iii).

110 Ibid. p. 37, para 119.

111 Ibid., p. 37, para 120; for concrete examples, ibid. pp. 62-63.

112 Ibid., p. 37, para 120.

113 My experience of Strasbourg is limited. Lawyers who have long represented applicants at Strasbourg tell me they knew that the judge-rapporteur was generally the national judge.

114 'Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights', in (1997) 15 *Netherlands Quarterly of Human Rights.*

115 See e.g. Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), esp. 204; Eric Heinze, 'Review of *Unité et Diversité: Notions autonomes et marge d'appréciation dans la jurisprudence de la Cour européenne des droits de l'homme* by Elias Kastanas', (2000) 63 MLR 155; Timothy H. Jones, 'The Devaluation of Human Rights under the European Convention' (1995) *PL* 430.

116 EG Report, p. 44, para 62.

117 Ibid.

118 Ibid, pp. 44-45, para 62.

119 Above note 6, para 4.

120 Ibid.

121 *New Law Journal*, 14 September 2001, at 1323.

122 For a similar judgment since *Akman*, see *Haran* v. *Turkey*, judgment of 26 March 2002.

123 This impression is confirmed by budgetary figures. 469,000 euros had been appropriated (i.e. set aside) for fact-finding hearings in the 2001 budget, but only 22,009 euros – i.e. less than 5 % of the appropriation – were eventually spent on fact-finding hearings in 2001. My thanks go to the internal auditor Paul Ernst for discussing some aspects of the budget with me.

124 EG Report, p. 45, para 63.

125 Para 7 of the judgment.

126 As to what happened in the village on 23 July 1993, the Court states that it is in no position to establish 'whether the village guards entered the village in pursuit of terrorists and shot in defence or to stop the terrorists' flight, or whether the entered the village to wreak some kind of retaliation on its inhabitants' (para 121). As to the alleged attack on the applicant's home, it states: 'The Court does not find sufficient, consistent or reliable evidence to establish, to the necessary degree of proof, that the village guards or gendarmes damaged the applicant's home and property as alleged' (para 128).

127 Para 40 of the judgment.

128 Para 73 of the judgment.

129 As the EG Report admits (p. 22, para 22).

130 The Court already followed a similar approach in its *Sabutekin* v. *Turkey* judgment, adopted on 19 March 2002.

131 Thousands of applications are currently pending against Russia. As of 2 August 2002, hardly any of these cases had been processed: only thirty-five decisions of admissibility and two judgments (*Burdov* of 7 May 2002 and *Kalashnikov* of 15 July 2002) had been adopted. The slow rate at which cases arising out of the conflict in Chechnya are examined is particularly worrying. Several of these cases were communicated in April 2000, but have not given rise to date to any admissibility decision (personal communication with Bill Bowring). Applicants of Russian cases involving allegations of serious violations of human rights in Chechnya fear the application of a 'Matyar reasoning'.

132 The KHRP observes: 'If the Court's new policy is not to hold [fact-finding] hearings, but to rely only on the available documentation, it is going to be increasingly difficult for applicants to establish their cases "beyond reasonable doubt" as the Court requires them to do. Where the absence of sufficient documentation is due to the failure of the domestic authorities to investigate such serious incidents, there is a real risk that the effect of the Court's approach will be to reward States for failing to investigate these cases in the first place' (editorial of its spring 2002 *Newsline*, above note 31, p. 2).

133 Alastair Mowbray notes that the 417 judgments delivered by the Court between January and August 2000 included 248 judgments in respect of Italy, the vast majority of which found a violation of Article 6 (1) of the Convention (*Cases and Materials on the European Convention on Human Rights*, London: Butterworths, 2001, p. 307).

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134 Not surprisingly, 'straightforward cases concerning the alleged excessive length of domestic procedures' form the fourth 'bottom' category in the judgments' classification in four categories on the basis of legal importance established by the Evaluation Group (EG Report, p. 29, para 32).

135 On *Kudla*, see Jean-François Flauss, 'Le droit à un recours effectif au secours de la règle du délai raisonnable: Un revirement de jurisprudence historique', (2002) *Revue trimestrielle des droits de l'homme* 179.

136 WP Report, p. 45, para 142 and p. 46, para 147, point 1. (1). The Evaluation Group briefly discussed the idea of imposing financial penalties on States which remain in violation of the Convention, but rejected it. Wadham finds the idea worth pursuing (above note 31, pp. 171-72).

137 Ibid., point 1. (2).

138 It is arguable, however, that even 'traditionally' the boundary between worthy and unworthy cases was drawn in too exclusive a manner. See Morvai's critique, above note 104.

139 '[T]he right of individuals to seek redress before the Court [is] the distinctive and unique achievement of the Convention system', says the Reflection Group set up by the Steering Committee for Human Rights when it addresses the question of the 'apparently contradictory objectives' of enabling the Court to concentrate on new and/or serious issues while maintaining access to the Court by individuals (EG Report, p. 80).

140 EG Report, p. 56, para 98.

141 'It should be a priority to increase the number of finally decided cases, not least because if the backlog increased substantially, difficulties would be created in the future' (WP Report, p. 19, para 48).

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Tim Otty
Barrister, Counsel of Öcalan

Öcalan v Turkey – the most important Strasbourg decision for decades?

On 12 March 2003 the European Court of Human Rights gave judgment in the case of brought by the Kurdish leader Abdullah Öcalan against Turkey. The Court found that Mr Öcalan's human rights had been violated in a series of respects. As well as safeguarding Mr Öcalan against any risk of execution and holding that his trial had been substantively unfair in a series of respects the case also established a number of important principles of law likely to have a far reaching impact far beyond the facts of his case. The case was assisted throughout by the Kurdish Human Rights Project and its legal team[147].

The background

On 15 February 1999 Abdullah Öcalan was apprehended by Turkish security forces operating at Nairobi airport in Kenya. He was transported back to Turkey by plane and imprisoned on Imralı island near Bursa, the sole prisoner on the island guarded by more than 300 commandos. He was charged with separatism and after a trial lasting some 8 weeks was convicted and sentenced to death. His appeals at the domestic level failed and, as a result, he pursued his application to Strasbourg. The legal team which was assembled to represent Mr Öcalan was drawn from both the KHRP's legal team and from the Century Law Office in Turkey.

The issues in the case fell into three broad areas: the challenge to the death penalty imposed upon Mr Öcalan; the challenge to the circumstances of his apprehension in Kenya and his conditions of detention on Imralı island; and the challenge to the fairness of the domestic proceedings which he had faced. Each of these areas, on their own, raised hugely important questions of international human rights law. The fact that they arose in a single case made this one of the most significant cases to come before the Strasbourg Court in many years. The extraordinary nature of the case was also reflected in the admissibility hearing held in Strasbourg in November 2000. Normally these hearings are dry affairs attended and the Court chamber is empty save for the judges and the legal teams retained by the parties. In the Öcalan case the hearing room was packed with more than 300 spectators and the press room filled with a similar number. Outside the Court an estimated 15,000 Kurdish refugees had congregated from all over Europe to demonstrate their support for Mr Öcalan and it was reported that another 3,000 counter-demonstrators had been flown in by the Turkish Government as counter-demonstrators.

147 The KHRP team included Sir Sydney Kentridge QC, Mark Muller, myself, and Gareth Peirce and that based in Turkey was led by Hasip Kaplan and Dogan Erbas.

As the case proceeded and cleared the admissibility hurdle the Turkish Government took steps to abolish the death penalty for all crimes committed in times of peace and as a result of this change in the law in October 2002 Mr Öcalan's death sentence was formally commuted to one of life imprisonment without parole. It is widely believed that this reform was in part motivated by the arguments by then already deployed by the Applicant on the question of the legitimacy of the death penalty. Following commutation the Government wrote to the Court inviting it to dismiss all of the complaints relating to the death penalty as no longer relevant. As will be explained below, that invitation was rejected by the Court.

The death penalty

The arguments

The Applicant contended that the death penalty imposed upon Mr Öcalan violated Articles 2 and 3 of the Convention and amounted to inhuman and degrading treatment. The Turkish Government sought to meet this argument by reference to three matters: first it contended that the exception to the right to life set out in the second sentence of Article 2 of the Convention – which referred to the death penalty – presented an insuperable textual barrier to the Applicant's arguments; secondly it relied upon the recognition of the potential for the continued existence of the death penalty in time of war or imminent threat of war in Article 2 of Protocol 6; and thirdly it cited the example of the United States of America claiming that this showed that the death penalty can form a proper part of a criminal justice system in a civilised and democratic country.

The Applicant argued in response that each of these arguments was flawed. It was said first that the Government's reliance on the wording of Article 2 was unsustainable as Article 3 is unqualified and permits of no exceptions and it would require a distortion of the words "*inhuman and degrading*" to find the death penalty compatible with the prohibition contained in Article 3. Secondly the Court had expressly held in the earlier decision of *Soering v United Kingdom* that the wording of Article 2 was *not* conclusive of the issue as to whether or not the death penalty violated Article 3 and had instead expressly found that practice subsequent to 1950 "*could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 and hence remove a textual limit on the scope for evaluative interpretation of Article 3*". The Applicant contended that precisely that process had now occurred. Thirdly the Government's reliance on Article 2 of Protocol 6 was entirely misplaced. Protocol 6 represented merely *one* yardstick by which the practice of the signatory states might be measured and the evidence showed that all 43 members of the Council of Europe had, either "*de jure*" or "*de facto*", proceeded beyond the requirements of the Protocol and effected total abolition of the death penalty for all crimes in all circumstances. There was no reason why as a matter of legal theory the signatory States should not be capable of abolishing the death penalty both by abrogating the right to rely upon the second sentence of Article 2(1) of

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the Convention by their practice and by formal recognition of that process in the signature or ratification of Protocol 6. The history of the drafting of Protocol 6 showed that it should not in any event be taken as involving any implicit recognition of the legitimacy of the death penalty in any circumstances. The wording of Article 2 of Protocol 6 could not even theoretically assist the Turkish Government in this case in circumstances where the Government does not aver that there had been either a war or the imminent threat of war in Turkey. Fourthly and as to the question of United States law and practice the Applicant contended that far from supporting the Government's position the law and practice relating to the death penalty in the United States of America in fact pointed in the other direction and illustrated quite clearly that the death penalty can have no proper place in a civilised system of justice. It was submitted that the Government's reliance on the law and practice of the United States was misplaced for five principle reasons: In so far as the Applicant's case was based on the existence of a regional customary principle in international law against the death penalty the example of the United States of America was irrelevant; it was wrong to view the death penalty as consistently in use right across the United States. The vast majority of executions had occurred, and continued to occur, in a small number of states. The operation of the death penalty in the United States had proved deeply flawed in a series of fundamental respects and in fact illustrated the injustice and inhumanity inherent in any recourse to the death penalty. There was now a clear momentum in the United States of America in favour of moratoria and abolition rather than in favour of the continued use of the death penalty. And finally there were numerous examples of judges and courts in the United States of America recognising the importance of evolving standards of decency and rejecting the legitimacy of the death penalty.

The Judgment

The Court rejected the Government's preliminary argument that the death penalty issues could be set on one side because of the commutation of the Applicant's sentence which had in the end occurred. It went on to make some of the strongest statements made by the Court in condemnation of the death penalty. By a majority of 6 to 1 (with the Turkish judge dissenting) the Court ruled that "*it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2*" and that the death penalty "*is no longer seen as having any legitimate place in a democratic society*". The Court found it unnecessary to rule formally on whether the death penalty in and of itself violated Article 3 of the Convention because it held, on the facts here, that Article 3 was undoubtedly violated in circumstances where (as shall be explained below) it had been imposed following a manifestly unfair trial and that as such the mere imposition of the death penalty followed by the years on death row preceding formal commutation necessarily engaged and violated Article 3. Given the strength of the Court's general statements as set out above, however, there seems little doubt as to what its ruling would have been had a formal decision on the question of whether any recourse to the death penalty was permissible been required. Indeed any

ruling other than one to the effect that the death penalty in and of itself violated Article 3 would have put the Court at odds with all the other bodies of the Council of Europe.

Arbitrary detention and conditions of detention

This represented one of the most politically controversial aspects of the case. The Applicant contended that he had been the victim of a deliberate strategy involving a number of states to drive him outside the European Union to a country where he could be readily abducted and denied his asylum and habeas corpus rights. He contended that against this background his detention in Kenya by the Turkish security forces could not be categorised as "lawful" and that his rights under Article 5(1) of the Convention had been violated.

Once again the Turkish Government took a preliminary objection contending that as the relevant events had occurred outside Europe the Court had no jurisdiction to investigate them. The Government relied upon the earlier decision of *Bankovic and Others v Belgium and Others* to urge the Court to take a narrow view as to what was justiciable. In *Bankovic* the Court had held that the Respondent States could not be said to have jurisdiction over events in Serbia and that the case therefore fell outside the scope of the Convention. Once again, however, the Government's preliminary objections were dismissed. The Court held that the *Bankovic* decision was distinguishable and that where a State's agents took an individual into exclusive custody that was sufficient to establish jurisdiction for Convention purposes regardless of where that detention occurred. This aspect of the Öcalan case may well have far reaching consequences for those currently detained in Camp X-Ray at Guantanamo Bay or at Baghram airbase. The US Courts have to date rejected complaints made on behalf of the detainees on the basis that they are outside the scope of the protections afforded by the US Constitution. If the US Supreme Court could be persuaded to follow the approach of the European Court in *Öcalan* that obstacle to the complaints would fall away.

Notwithstanding the decision as to justiciability, however, the Court went on to find that it had not been established beyond reasonable doubt that the detention was unlawful. This was because the involvement of Kenyan individuals was said to have indicated Kenyan consent to the operation of the Turkish security forces on Kenyan soil and so it could not be said that any violation of Kenyan sovereignty had been involved. This finding was reached despite the fact that the Kenyan Minister of Foreign Affairs had said, in terms, that the Kenyan Government had had no knowledge that Turkish security forces were present on their soil and that the Applicant's representatives had sought a fact-finding hearing to establish the true position.

The Court did however go on to find that the State had violated Mr Öcalan's rights under both Articles 5(3) and 5(4) of the Convention and the judgment in this respect represents one of the best summaries of the Convention case law in respect of both Articles.

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Another significant issue upon which the Applicant was unsuccessful related to the conditions of his detention. It was argued on his behalf that solitary confinement and an inability to communicate with anyone other than his gaolers and – to which he had now been subjected for some four years – amounted to inhuman and degrading treatment contrary to Article 3. This seemed a strong argument as the Committee for the Prevention of Torture had reported that these conditions could not be allowed to continue. The Court ruled, however, that while it "shared the concerns" of the Committee the level of suffering experienced by Mr Öcalan had not reached a sufficient level of severity to engage Article 3. Oddly perhaps it did not rule at all on the Applicant's alternative contention that these conditions – even if not severe enough to engage Article 3 – clearly did engage and violate Article 8. The Court has, however, left open the possibility of a further application in respect of the conditions of detention if these remain unchanged.

Fairness of the domestic proceedings

On this area the Court accepted each of the principal complaints raised by the Applicant and went on to rule, crucially, that the defects in the trial process were not simply technical in nature but led inexorably to the conclusion that the trial had not been a fair one. In doing so the Court emphasised the sacrosanct nature of lawyer / client communications, the structural flaws in the Turkish State Security Court and the wholly inadequate facilities offered to the defence team. The judgment also contains some very strong observations of general application as to the critical nature of fair trial rights in capital cases. The logical conclusion of these findings is, of course, that Mr Öcalan is now arbitrarily detained. His detention is only purportedly justified on the basis of his conviction and the sentence imposed upon him but the European Court has now ruled that that conviction and sentence followed a grossly unfair trial. Unless and until the Turkish State announces an intention to re-try Mr Öcalan the only possible justification for his detention has necessarily fallen away and his detention must be unlawful.

Conclusion

Mr Öcalan has achieved a resounding victory in respect of some of the most jealousy guarded of Convention rights. It remains to be seen, however, whether the attitude of the Turkish Government will dictate that this victory remains, for him, a moral one or whether a serious effort to attempt to meet the responsibilities which the judgment entails will be made. The initial signs were not encouraging with the Government denouncing the judgment as "not thoroughly considered" and one of the trial judges asserting that the Court had employed "double standards". From the perspective of international law, however, and regardless of the Government's response the case will have significant ramifications for the proper approach to death penalty, arbitrary detention and unfair trial challenges for years to come.

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Footnotes

142 This is also the conclusion of Wadham, above note 31, esp. p. 172.

143 In a political economy perspective, it is moreover ironic (or is it?) that the goal posts are being changed just as the population of the Eastern and Central European countries can start to avail themselves to the Strasbourg system of protection. While for many years lawyers from Western European countries could learn how to play the system by receiving advice as it were directly from Strasbourg (including through warning letters and examination of inadmissibility decisions), training of lawyers from Eastern and Central European states is now a matter to be tackled at national level.

144 This is the particular conception of constitutional court which Harmsen supports when he discusses the implication of the accession of Central and Eastern European states to the Strasbourg system of protection (above note 34). I fear this conception may not correspond to future developments.

145 It is important to stress that most procedural changes currently taking place at Strasbourg are likely to be controversial within the institution itself. That this is the case is indicated for example by the divergent views expressed by the Working Party and its sub-groups. Paul Mahoney, Registrar of the Court, concluded his talk at the British Institute on Human Rights on 20 May 2002 (see above note 31) by emphasizing that he had expressed personal views, which were not necessarily shared by the rest of the Court.

146 See also Wadham, above note 31, p. 174.

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Armenia's accession to the Council of Europe is premature – Armenia fell short of Article 10

The Media and Freedom of Speech

Two basic laws regulate the media in the Republic of Armenia – the Law on Press and Mass Media and the Law on Television and Radio of 2000. There is no specific law regulating the access to information. Despite the fact that the media laws and the Armenian Constitution provide for the right to receive information, the absence of a specific law on access to information inhibits the scrutiny of public authorities. The Law on Press and Mass Media does not meet international legal standards. It resulted in the Council of Europe requiring Armenia to adopt a new law within one year of its accession to the Council. Nevertheless, the elaborated draft law, which has not yet been adopted, is considered by experts to be very restrictive to freedom of expression and media, as well as to the right of access to information.

The allocation of radio and television broadcasting licenses in Armenia is often considered not to be worth the effort. However, broadcasting is permitted on the basis of licenses obtained from the licensing competition, where the decisive voice belongs to the National Commission on Television and Radio (with an exception for Cable Network). Under the requirements of the Council of Europe, the licensing authority must be an independent body. Paragraph 12 of the Resolution 1304 of the Parliamentary Assembly of the Council of Europe adopted 26 September 2002 specifically states, "The Assembly notes that the allocation of radio and television broadcasting licenses gave rise to strong protests in April 2002; it calls on the authorities to amend the law on broadcasting without delay, taking into account the recommendation made by the Council of Europe."[118] Thus, the Council of Europe requested that Armenian authorities amend the Law on Television and Radio 2000 without delay. By referring to amendments, the Parliamentary Assembly intends to stop the practice whereby the President of Armenia appoints the members of the Radio and TV Commission. This is specifically mentioned in the document 9640 of the Parliamentary Assembly on the Freedom of Expression in the Media in Europe.[119] Paragraphs 22 to 25 report on the violations of free speech in Armenia. Paragraph 24 states, "the law on radio and television broadcasting passed in October 2000 and amended in 2002 was also found to be not satisfactory by Council of Europe experts…in particular, so far as both the National Commission and the Council of Public Television are directly appointed by the President. In Resolution 1304 on the honouring of obligations and commitments by Armenia the Assembly called on the authorities to amend the law without delay". However in Armenia, the members of the Commission and the Council of Public TV are still being assigned and appointed by the President. The Commission

members were last assigned in March 2001. It is important to note that the head of the Commission staff, David Harutunyan, is the brother of the adviser to the President, Alexander Harutunyan, while the chairman of the Commission, Grigor Amalyan is his childhood friend. Despite the requirement of the Resolution 1304 to amend the law "without delay", the Commission continues to act and organise licensing competitions.

On 2 April 2002 the National Commission on Television and Radio (NCTR) withdrew the license of independent TV companies "A1+ and Noyan Tapan" to broadcast on 37 and 35 decimeter channels. On 3 April 2002 the US Embassy in Armenia came out with a statement expressing its concern over the situation around "A1+". The statement says, "the decision to pass the 37th decimeter channel to "Sharm" company prejudices the future of free and independent press in Armenia". On 4 April 2002 police officers guarding the court building did not allow Rusanna Amirjanyan, a journalist of the "A1+" TV Company to enter the courtroom because of the company's loss of license. Ruzanna Amirjanyan's explanation that the information sought was for publication on the company's official website was completely ignored by the police officer.

On 5 April 2002 the Helsinki Association (a human rights organisation) appealed to the Council of Europe, OSCE, the European Union, the US Congress and the Department of State, expressing its concern over the effectiveness of democratic reforms in Armenia. In particular, the Helsinki Association found the "A1+" TV Company incident to be an attack on freedom of expression. On 10 April 2002 in the statement signed by Armenian Public TV Network, "Prometevs", "Armenia", "Shant", "Ar", "Erevan" TV companies; Armenian Public Radiobroadcast; "Hayastani Hanrapetutyn", "Azg", "Armyanskij Mir", "Golos Armenii", "Respublica Armenii", "Novoje Vremya", "Vremya" newspapers; "Arminfo" and "De Facto" news agencies, the signatories stated that "...the freedom of speech in Armenia is not threatened and there is no obstacle for the work of Media". Those who signed this statement later conveyed their apologies by indicating that the management misled them into signing the statement. Later it was discovered that the management of the "Shant" TV Company signed the above statement as a result of coercion and threats such as, "You must be accorded a license in April. Think about it".

The announced competition that resulted with the withdrawal of the broadcasting license from the two independent TV companies is an infringement of Articles 5, 8, 24 of the Republic of Armenia's Constitution, Article 52 of RA Civil Code, Article 48, 49 of the RA Law on Television and Radio and Article 159 of RA Civil Procedure Code. Consequently, Resolutions 11 to 24 of the NCTR concerning the announcement of TV and Radio licensing competitions on 19 February 2002 are void. Instead of focusing on a single frequency the NCTR should have announced competition on all vacant frequencies. The "A1+" efforts to challenge the

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Commission's decision at the domestic courts were unsuccessful. The courts dismissed the claim on the grounds of possessing insufficient legal basis. The "A1+" claim is currently pending before the European Court of Human Rights.[150]

The Commission announced a subsequent licensing competition in November 2002. The application of "Noyan Tapan" TV (NT) company was rejected by the Commission on the basis that the application was not properly completed. In particular, the Commission found that the "NT" failed to specify the particular channel in its application form. It is important to note that the law does not make this a requirement for filing the application (see Article 49). The "NT" applied to the Economic Court disputing the Commission's refusal to take the application. The Court ordered the Commission to stop the competition until the dispute is resolved. The Court of First Instance ruled in favour of "NT". The NCTR appealed the decision at the higher court in December 2002. On 17 January 2003 the Court of Cassation ruled in favour of "NT" and ordered the Commission to resume the competition procedures. The Commission duly announced 30 January 2003 as the date of the competition. A few days before the scheduled date, the Commission had to suspend the competition for the second time. This time the reason for the suspension was an order from the Economic Court in connection with the claim filed by five TV companies a few days before the competition. The companies were disputing the basis of the Commission's refusal to return their applications for amendments. The dispute is still pending at the Economic Court. The repeated suspension of competition raised concern among the population and human rights defenders. Many experts came to the conclusion that the suspensions were the result of a government plot against "A1+" and "NT" to minimise their chances for obtaining a license, or to suspend their broadcasting until after the Presidential elections in February 2003 and Parliamentary elections in May 2003.

Print media may be closed for a period of three months under Article 11 and for six months under article 12 of the RA Law on Media. The NCTR is empowered to withdraw the licenses from TV and radio companies under article 55 of the same law.

Several media agencies in Armenia are controlled and unofficially regulated by political figures, political parties and business representatives. In light of this situation, the dismissal of a journalist is not difficult. It is important to note that the Minister of Defence unofficially controls the "Golos Armenii" (in Russian) and "Hayots Ashkhar" (Armenian World) newspapers, as well as the "Prometevs" and "Armenia" TV companies.

It is worth mentioning that Russian-language newspapers such as "Golos Armenii" and "Novoje Vremja" are known for their pro-governmental stance. The newspapers "Hayastani Hanrapetutyun" and "Respublica Armenia" (founded by National Assembly) are financed by the State budget.

Censorship is prohibited by the Constitution. No single provision of the media laws provides for censorship, though the "Unacceptability of freedom of speech abuse" in Article 6 of the RA Law on Media might and should be considered as containing some elements of censorship. In practice, censorship exists unofficially both in oppositional and pro-governmental or state-run media. For example, there has not been a single case where the Public TV has granted airtime to the representatives of political opposition. Neither has the pro-governmental media issued or reported human rights infringements, including statements issued by Helsinki Association concerning such matters. Conversely, newspapers such as "Golos Armenii", "Hayots Ashkhar", "Azg" (Nation – printed by the Ramkavar Azatakan party) and "Erkir" (Country – printed by the ARF Dashnaktsutyn party) often criticise the activities of Helsinki Association. The Chairman of the Helsinki Association, Mikael Danielyan, is often accused of being a so-called "parasite" and a "Western spy".

It has been more than a year since CNN started broadcasting English language programs in Armenia on a regular basis. In addition, four Russian TV channels broadcast regularly. *The Times* and Russian newspapers and magazines are available at kiosks. Those who are willing to regularly receive foreign news can subscribe to a respectable magazine or a newspaper.

The present Criminal Code provides for punishment for libel by six years imprisonment under Article 131, and for slander, a term of up to 1 year under article 132 applies. On 10 September 2002 the Court of First Instance of the city of Vedi, Ararat region, dismissed defamation charges against Djanik Adamyan and Emma Petrosyan. The charges were brought by the prosecution for "libel propagation" and "assistance in libel propagation" towards the President of Armenia Robert Kocharyan. On the night of 12 July 2002, Adamyan pasted 12 copies of self-composed poetry on buildings' walls in Vedi, in which he indirectly blamed the President of Armenia for complicity in the terrorist acts of 27 October 1999. On 14 July 2002 Adamyan and Sahakyan, who typed 14 copies of the poetry, were arrested. Sahakyan was released under a promissory note not to leave his place of residence, while Adamyan spent two months and one week in a pre-trial detention facility. He was released after members of the Council of Europe monitoring group were informed about the criminal action during their visit to Armenia. The Helsinki Association provided Adamayan with a defence lawyer, Hovanes Arsenyan, who declared during the court proceedings that there was an insufficient legal basis for the libel action. The relevant provision on "libel" permits the initiation of defamation action only on the basis of a complaint from the injured party. However, the President of Armenia Robert Kocharyan, the victim in this case, did not appeal to the Prosecutor's office and was not invited to the court as an injured party. Furthermore, the Prosecution defined the conduct of Adamyan as a "public crime" while the Criminal Code defines libel as a crime against personality. He was released after members of the Council of Europe monitoring group were informed about initiation of the criminal action during their visit to Armenia. The prosecutor subsequently declared that the prosecution dropped the accusation charges "because of a change of circumstances".[151]

On 8 November 2002 the Court of First Instance of the Centre and Norq Marash district of Yerevan, led by judge Gayane Karachanian, ruled to force the "Taregir" (Chronicle) electronic edition to publish reparation concerning the article entitled "The Cost of Blood". The article suggested that the brother of the Georgian citizen of Armenian descent Pogos Pogosyan, who was killed in a cafe in Yerevan on 25 September 2002, accepted a bribe in the region of $90,000 from the accused, who was the Presidential bodyguard and was later found to be the murderer of Pogosyan. (Arutjunian was eventually sentenced to one year on probation for "involuntary manslaughter"). It also noted that information about the money allegedly given to Pogosyan in order to ensure that he did "not oppose the scenario of the judicial session" was received through the member of the Supreme Council, the "ARF Dashnaktsutiun" political party. The Pogosyan brothers were members of this party. The individual through whom the money was transferred wished to remain anonymous. The article ended with the following words: "We are not apt to consider this critical information as unconditional truth, yet we think it's our duty to report what we have". The defendant in this case was Lilit Seyranian, the journalist who prepared the publication. She refused to disclose her source of information on the basis that the safety of the source of information would be jeopardized as long as the accused A. Harutyunyan remained at large.[151] In the meantime, the deceased brother remained dissatisfied at his failure to find out the source of the information. He believed that the article compromised the authority of the ARF Dashnaktsutiun and averred that he would appeal the Court decision to the prosecution in order to initiate criminal charges, given that there was evidence of calumny.

On 24 October 2002 the Court of Appeal of Armenia started proceedings on an appeal brought by journalist Larisa Parlemuzian against the decision of the Court of First Instance of Alaverdi town (Lori Region) of 5 October 2002. Parlemuzian was charged for an article entitled "Traces of Euro Repair Washed Away by Water" (issued by "Aravot" newspaper, 20 June 2002), wherein she discussed the major embezzlement by Alaverdi town outpatient clinic medical personnel Chief Svetlana Karyan. During the journalistic investigation, Parlemuzian discovered that the medical personnel chief appropriated 2 million AMD out of the sum paid by the patients for medical service, and 540 thousand AMD out of clinic personnel salary fund (1$ = 580 AMD). According to the article, Karyan was unlawfully paid for issuing death certificates (as of 1 March 2002 issuing death certificates is free). The article also alleged Karyan's involvement in the disappearance of 50 million AMD allocated from the state budget to cover the expenses of the reconstruction of the clinic's building. (1$ = 580 AMD). The medical personnel chief brought a lawsuit against the journalist under Article 19 of the RA Civil Code ("honour and dignity"). The regional prosecutor's office called the journalist several times requesting an explanation. Later the prosecution initiated a criminal action on the fact basis of embezzlement, but all charges were dropped due to the absence of corpus delicti. Taking into consideration the prosecutor's decision the Court of First Instance ordered the journalist to issue an apology. The Court of Appeal overturned the decision of the Court of First Instance.

On 22 October 2002 at about 8.30 pm, an unknown person threw an explosive (later identified by law-enforcement agencies as RDG – 42 or 45) at the Deputy of the Caucasus Press Institute in downtown Yerevan. Journalist Mark Grigorjan suffered physical injuries of various degrees. After examining the scene of the crime, a law-enforcement representative made the assumption that Mark Grigoryan was not the aim of the assault and could have been injured accidentally. On 23 October 2002 Mark's colleagues stated that the victim considered the incident to be an assassination attempt because of his professional activities. According to them, Mark Grigorjan had recently been paying more attention lately to investigating the newly-created Institute. Another theory is that Mark Grigoryan was working on an article commissioned by a British publication, on the third anniversary of a terrorist attack of 27 October 1997. In the wake of the event, the Prosecution of the Centre and Norq-marash District of Yerevan initiated a criminal case under Articles 15-99 of the RA Criminal Code regarding "attempted murder".

On the evening of 28 December 2002 the chairman of the Board of Directors of Armenian Public TV Tigran Nagdalyan was shot dead in the entrance of his parents' house. A criminal action was brought in view of the incident under the first clause of Articles 61 and the first clause of Article 232 of RA Criminal Code – act of terrorism and unlawful storage, possession and use of weapon and ammunition.

On 24 October 2002 the Court of First Instance of Norq-Marash District of Yerevan started court proceedings for the indictment of the Turkish TV company NTV correspondent Murad Bodjolian under the first Clause of Article 59 of the RA Criminal Code ("parricide"). Before proceedings started, Mr. Hovhannes Arsenyan, the defence lawyer of Mr. Bojolyan (Mr. Arsenyan was represented by the Helsinki Association) made a motion to immediately cease the criminal prosecution and release his defendant. He claimed that according to the facts of the case, Bodjolyan's home phone line had been tapped since 1999 whereas in compliance with the legislation, such or similar operational activities gain permission only after initiation of criminal action, but never vice versa (the criminal action against him was initiated only in January 2002). The Deputy Prosecutor General Mr. Aghvan Hovsepjan declared that the special task force officers of the prosecution had acted rather by internal orders than under the existing legislation. The judge dismissed the motion and started the lawsuit. On 16 December 2002 the judge of Court of First Instance of Centre and Norq-Marash District of Yerevan sentenced the correspondent of the Turkish TV Company NTV, Murad Bodjolyan to ten years' imprisonment with expropriation, finding him guilty under Article 59 of the RA Criminal Code. The basis for the decision was an alleged transfer of information classified as state secret. During the proceedings the defence presented publications from the media from which Bodjolyan had supposedly picked up state secret information. Those publications contained topics such as the political situation in Armenia and Nagorno-Kharabakh, the social and economic situation,

budget, human rights, Russian military bases, and the Kurdish community in Armenia. "Yes, the Prosecution actually has no evidence that Murad Bodjolyan informed Turkish Intelligence services about state secrets, but the prosecution considers Bodjolyan a dangerous criminal and appeals to the Court to sentence him to 11 years' imprisonment," said the prosecutor Aram Amirdjanyan during his closing statement of 10 December 2002.

Print media agencies have two printing-houses, but the monopoly of print distribution belongs to a public joint-stock company, Haymamul (Armpress). The price of print disbursement is irrespective of their political orientation. A regularly scheduled issue of oppositional "Aravot" daily newspaper was confiscated on 31 October 2002. According to Aram Abrahamjan, Chief Editor, it was only in the morning that he learnt that 450 copies in circulation did not appear in the kiosks. The newspaper was printed during the night in the "Tigran Metz" printing-house, then taken out by the periodical's distributor agency, "Haymamul" PCJSC (Public Closed Joint-Stock Company), but the newspaper did not reach its destination. "Haymamul" has not revealed who ordered the withdrawal of the circulation. In A. Abrahamjan's opinion, there were two articles in the issue that could have irritated the authorities. One was the coverage of the lawsuit against Murad Bodjolyan, charged by the prosecution of espionage for Turkey. The other, entitled "Abuse by Relatives of Prime-Minister", was about the privatisation of a number of facilities by close relatives of the Armenian Prime Minister Andranik Markarian in a suburb resort of Yerevan – Tzakhkadzor.

There are several internet providers in Armenia. Their functioning entirely depends on Armentel, the telephone network monopoly in Armenia. Ninety percent of shares belong to the Greek company OTE, and the remaining 10 per cent belong to the Government of Armenia. Armentel regularly increases the tariffs in order to exert a similar control over the field of internet services. On 26 June 2002 the officers of Armentel security service sealed up the premises of Arminco, the largest internet provider in Armenia, where the main servers of the ISP were stored. The director of Armentel did not comment on this action. The main server was damaged after the 27 June 2002 blackout in Armenia, which resulted in a four-day internet connection outage for all websites for which the internet access was provided by Arminco. On 25 June 2002 the General Director of Armentel Nikos Ergulis (a Greek citizen) accompanied by security guards, smashed into the room leased by Arminco Ltd and began searching the premises without any explanation. Shortly afterwards they left the premises. The next day the Arminco employees found the office was sealed up again. Meanwhile, the internet providers have refused to give any information about the presence of any special search device on the server, which enables them to search and locate the correspondence of subscribers at the request of the intelligence services. A similar decree was adopted by the Ministry of Communication in December 2001. According to this decree, such search mechanisms must be obtained from the provider company.

Religious Freedoms

Under the requirements of the RA Law on Freedom of Conscience and Religious Organisations all religious organisations have to register in order to obtain legal status in Armenia. One of the requirements is to have at least 200 members in order to be eligible for registration. The registration is conducted by a state-run body on religious affairs under the auspices of the Government. This body is quite loyal to those religious organisations whose ideology is in line with Armenian Apostolic Church. For example, the Jehovah's Witnesses religious organisation has made six unsuccessful attempts to register since 1995. Every time, the organisation is forced to provide information that is not required by the Law on Freedom of Conscience and Religious Organisations. In September 2002 the state body for registration demanded a statement expressing the official position of the organisation on issues such as family, education, health, civil duties and human rights (none of which are demanded by the law).

As provided by law, all religious organisations enjoy equal rights after the registration process is completed. Under the Law on Value Added Tax, all religious organisations are tax-exempt if engaged in commercial activities. There has been no official case of confiscation throughout 2002, however around 80 kg of literature is amassed in the Armenian Customs storehouse, having been confiscated from the Jehovah's Witnesses in 2002.

Only the history of the Armenian Apostolic Church has been introduced as a new subject in several Armenian schools.

On 17 April 2002 the Cassation Court of Armenia ruled in favour of Levon Margaryan, a member of the Jehovah's Witnesses, who had been charged for "impingement on the rights and freedoms of citizens under the pretext of religious freedoms" under Article 244 part 1 of the RA Criminal Code. The Court of Cassation thus overturned the decisions of the Court of First Instance of 18 September 2001 and the Court of Appeal of 7 March 2002. The case was precipitated by charges brought by the regional prosecution of Armavir against Mr. Levon Margaryan, who was the dean of the Jehovah's Witnesses organisation in the town of Metsamor. The basis for the legal proceedings was, according to the investigator, the involvement of 12 children in the religious practices of the organisation, while the organisation was not registered at the Council on Religious Affairs. Margarian's lawyer, Rustam Khachatrian (a member of the advocates' group of the Helsinki Association) stated that all the children attending the religious services had obtained written permission from their parents. Article 244 of the Criminal Code, which is the legal basis for this lawsuit, had not been applied for the last twenty years. The Cassation Court established that Levon Margarian's religious activities as a Jehovah's Witness could not be defined as a criminal offence, and that his activities were protected by the Constitution, which guarantees the freedom of worship.

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On 20 April 2002 Karen Grigorov, an unbaptised proclaimer of the Jehovah's Witnesses, was attacked by Ter Tirayr (Father of Tirayr), the clergyman of the "Surb Sargis" church in the presence of a policeman. The incident happened in the centre of Yerevan, close to the aforementioned church. K. Grigorov and Liana Ter-Hakobyan (also an unbaptised proclaimer) were talking with a woman in the street not far from the church and gave her one of the treatises of the Jehovah's Witnesses teaching. A policeman came up to them and asked what they were saying. Ter Tirayr arrived, following the policeman cried out loud, "Stop cheating people!" and hit Grigorov in the face. When the victim bent down to pick up his glasses, the clergyman started beating him in the head. The policeman preferred not to interfere. Ter Tirayr confirmed the presence of the policeman and said, "We won't let Masonry, pan-Islamism and Zionism spread in Armenia". According to the information from the press centre of the Jehovah's Witnesses, representatives of the organisation have been assaulted on four other occasions. As usual, the victims prefer not to bring any claims concerning the assaults for fear of the non-effectiveness of the measures takes by state law-enforcement authorities as demonstrated following similar incidents.

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In two other incidents the courts ruled in favour of plaintiffs where the respondents were Jehovah's Witnesses. The first was the divorce case of Olga Kirakosyan, and the second was a property dispute case of Naira Kegyan.

In compliance with the commitments undertaken before the Council of Europe, Armenia must adopt the law on alternatives to military service within three years of its accession to the Council. The law must meet the Council of Europe's standards. Before adopting the law, Armenia must pardon all conscientious objectors from military service. Contrary to this commitment, the courts in Armenia continue to sentence members of the Jehovah's Witnesses to imprisonment. During 2002, a total of 37 men were convicted under the first clause of Article 75 of the RA Criminal Code – "objection to military service". In November 2002, the Court of Appeal extended the sentence of Arthur Grigoryan and Karen Abajyan from one year to two and a half years. The proceedings were initiated based on petitions filed by the prosecution. Presently, there are 17 Jehovah Witnesses passing various terms in jail for conscientious objection to military service. The four others are in pre-trial detention facilities awaiting court proceedings.

The draft law is elaborated by a standing commission on defence, national security and internal affairs issues at the Parliament led by Vahan Hovanisyan (member of the national-socialist ARF Dashnaktsutyun party), who has been active in upholding the concept of alternative service for the last four years. In Hovanisyan's opinion, those who prefer alternative service to military service must do the dirtiest work in the army.

Homosexuality

There is currently no statute in the national legislation prohibiting discrimination of homosexuals.

The first clause of Article 116 of the current Criminal Code provides for five years' imprisonment for homosexuality. Since 2001, nobody has been convicted under this provision. The above-mentioned Article has been removed from the draft of the new Criminal Code. The public attitude towards homosexual persons is clearly negative. Even human rights activists are unwilling to deal with this problem. In addition to this, some of them even deny homosexuality exists in Armenia. The removal of the Article from the Criminal Code is merely the discharge of the commitments undertaken before the Council of Europe. In many instances homosexuals have been taken to police departments and pressed into paying bribes, or providing the names of other homosexuals. However, after the Helsinki Association gave publicity to those cases, there was no record of such incidents throughout 2002. Nevertheless, a new problem has emerged for homosexuals. During the military draft homosexuals sometimes reveal their sexual orientation during the course of the medical examination. If this is the case, the doctor conducting the medical examination gives a diagnosis of homosexuality and assigns the draftee to a mental hospital for further medical examination. Based on the results of the examination the doctors exempt the draftee from military service with a diagnosis of either "split personality" or "sexual perversion". These allegations were reported by Mamikon Hovsepyan (20) and Misak Kocharyan (18) during their visit to the Helsinki Association. According to them, while in the draft-office, they were taken by force to all other rooms to make an example of them. The draft officer subsequently informed their parents and their school, where the young brother of M. Kocharyan was a student. There is a secret order to prevent homosexuals from joining the army, which leads to disorder. In one case a soldier was heavily beaten by other soldiers for concealing his sexual orientation. There have also been instances in which soldiers have refused to eat from common dishes used by homosexuals. In one case, the soldiers of another military unit refused to enter the mess-room, and demanded a replacement of all dishes. Even if the individual reveals his sexual orientation, he may often not be permitted to sit with his fellow soldiers, and he may be forced to remain permanently on duty carrying out the most menial of tasks. The situation is even worse in military units located on occupied territories. Soldiers there live in houses abandoned by the Azerbaijanis, while homosexuals dwell in separate suburban houses. They are routinely beaten up and raped. If a homosexual person needs treatment as a result of such abuse, he may not even be taken to a medical unit because of the so-called "code of honour" that exists within military units.

Footnotes

148 The full text of the Resolution is available at http://assembly.coe.int/Documents/AsoptedText/ta02/ERES1304.htm.

149 The full text of the Document 9640 is available at the Parliamentary Assembly website http://assembly. coe.int/.

150 See the Parliamentary Assembly report 9640, para.22.

151 See Defining Defamation; research done by "Article 19". The principle 4 (b) (3) specifically provides that state authorities, including the prosecution, should not take part in the initiation or prosecution of criminal defamation cases, even if the party is the senior public official. The document is available at www.article19.org/docimages/714.htm.

152 The request of the judge to disclose the source of information was in contradiction with the principles of the Recommendation 2000/7 of the Council of Europe. The document is available at http://cm.coe.int/ta/rec/2000/2000r7.htm.

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Mahmut Vefa[154]
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Legal review of Ilısu (Hasankeyf) Dam and Evacuated Villages

A. Introduction

I believe there should be a debate regarding the data in the Impact Assessment Report concerning the Ilısu dam and hydroelectric power station compiled by the DSI [State Water Concern] and the way the problem of evacuated-burnt villages was set out. This report, whilst promulgated as the government view, approached the question of the evacuated/burnt villages in the area of the project virtually as if this was a normal event. Quite apart from the fact that this report did not go into how this problem would be resolved, the property rights of the people concerned were also ignored, a fact which was virtually presented as a successful outcome for the authorities.

On examination of the structure of the report the following topics are investigated under the heading of **Bio-physical environment**: climate and hydrology geology, underground resources, flora, fauna, water supply and quality; while under the heading **Social environment** the following topics are examined: cultural heritage and archaeology, other uses of agriculture and soil, population, administration, public health, while topics such as bio-physical impact, social impact and environmental impact are looked at under the heading **Impact assessment**. We will not refer to a majority of the topics listed above, bearing in mind the technical characteristics of the report and our sphere of expertise.

We shall make evaluations regarding the topics listed under the heading **Social impact**, i.e. re-settlement of population, units of settlement to be affected, number of persons affected, number of persons who could make an application to take advantage of compulsory purchase or right of re-settlement.

In compiling this evaluation we shall endeavour to set out the problems of evacuated villages in the region as a whole and the Ilısu dam and Hydroelectric power station in particular, the property problems of people living in this area and the victims of cadastral and compulsory purchase activities.

154 Former General Secretary of the Diyarbakır Bar Association, currently member of the Board of the Diyarbakır Bar Association. This article was submitted to the UK Government during its consultation period for the Ilisu Dam project. Its subsequent reproduction in a Turkish legal journal led to the indictment of the author for allegedly "insulting the Turkish state".

B. Village burning and evacuation measures, causes and results

The problem of villages-units of settlement evacuated and burned as a result of the 15-year environment of conflict continues to be topical and is continuing to create a large group of injured parties. In this context democratic mass organisations have been unable to be a power to resolve the problems of millions of people or even to identify the problems and submit plans to resolve these problems in concert with national or international bodies. It will be appropriate to look at the historical reasons and make a brief assessment of the current position in order to illustrate the seriousness of the situation.

1. Village Evacuation Measures – Southeast (Region under State of Emergency) – Causes and results: Due to Turkey being situated in the Middle East there are many ethnic groups, and people of different religions and sects. Since its foundation, that is since 1923, the military-bureaucratic edifice governing the country has promoted a long term, comprehensive, widespread "TURKIFICATION" campaign as part of efforts to create a homogenous nation in the country. This campaign has continued without letting up until the present day. As a result of this many ethnic group and religious minorities were either assimilated (Bosnians, Adjarian Georgians etc) or were forced to leave the country (Greeks of Asia Minor, Armenians, Yezidis etc). However, despite these efforts at forced assimilation the Kurdish ethnic group/people, who constitute a large population in the country and resident in the south east of the country, have put up great resistance, rebelling against the central government on many occasions. In a report published by the Turkish General Staff the number of Kurdish rebellions was given as 28. The armed conflict launched by the Kurdistan Workers' Party (PKK) in 1984 was called the 29th rebellion by many in the media and others.

The armed clashes that began in the border regions of the Southeast gradually began to spread throughout the whole of the region and even into area of the Mediterranean and Black Sea region close to areas of Kurdish population. This spread from 1990 onwards led to the conflict being described as a "low-intensity war". As a result of these clashes more than 30,000 people died according to official figures.

With the broadening of the clashes and their development towards a mass structure resulted in a change in the strategy of preventing clashes with traditional gendarme forces, replacing this with an all out campaign of counter attack to prevent incidents. The normal administrative structure was abolished in a large part of the region and a State of Emergency Region established. This Regional Governate is itself an unlawful structure, binding 23 provincial administrations to itself against the clashes. Its powers, in additions to those invested in it at its inception, were increased by Decrees with the Force of Law. One of these decrees, no. 435, authorised the evacuation of villages. Within this framework central governments concentrated on two forms of activity from 1990 onwards, believing that operations against the PKK forces would not be successful. These were:

a) the rapid arming of the local people residing in a scattered way in the region as village guards under the Temporary Village Guard system to be used against the PKK

b) the speedy evacuation and burning of villages, hamlets and single isolated houses whose inhabitants did not become village guards

It was thus calculated that without the necessary support base amongst the people the PKK militants would not be able to shelter in the area and would be annihilated in operations. These are the fundamental underlying reasons for the evacuation and burning of around 3,500 villages and hamlets in this part of the country. Villages began to be evacuated in 1990 in line with the above strategy. Approximately 3-4 million people were forcibly displaced from the region. Hardly any villages or hamlets without village guards remained in the region. Impartial sources that may be consulted in this regard are reports of the Human Rights Association IHD and Human Rights Foundation. Both organisations are independent NGOs.

The incidents of evacuation/burning of villages began in 1990, reached a peak in 1993-94-95 and still continue in a reduced way. Villages whose inhabitants were suspected of assisting PKK members were evacuated or burnt in line with the decision of Gendarme post commanders or village guards without any reason being given. This evacuation and burning was carried out without any rules and with no compensation being paid, villages and hamlets that, in the phrase of the armed forces and village guards were "not pro-government", were evacuated.

When in 1994/95 these incidents reached such dimensions that they were impossible to conceal the authorities had to admit their existence, claiming they were being perpetrated by PKK members. However, independent sources, people in the region and injured parties have insistently pointed out that this number of villages have been evacuated and burnt by the security forces and village guards.

A reply by the Interior Minister to a question in parliament in 1995 gave the following totals of evacuated and burned villages by province:

Province	Evacuated		Displaced	
	Village	Hamlet	Household	Population
Batman	37	54	1,880	13,839
Bingöl	150	194	7,151	44,540
Bitlis	76	95	2,878	21,896
Diyarbakır	115	196	7,580	43,420
Elazığ	8	6	531	3,522
Hakkari	38	93	2,736	21,713
Mardin	184	58	6,772	38,200
Muş	30	65	2,177	16,100
Siirt	86	82	4,624	31,437
Şırnak	96	110	7,686	45,184
Tunceli	154	657	4,437	22,407
Van	8	64	1,141	8,643
Total:	**982**	**1,674**	**49,593**	**310,921**

The above data is that announced by the Interior Minister and covers up to 1995. Village evacuation/burning has continued after that time. The most recent reports of the Human Rights Foundation of Turkey indicate the number of villages and hamlets as at least 3,500. A report by the IHD has given a figure of 3,246.

According to research carried out by the Migration Research Commission of the Turkish Parliament 2,663 units of settlement have been evacuated. All these reports and documents are sufficient to clearly demonstrate that a systematic, conscious, centralised administrative practice of village evacuation/burning was carried out by the government in the Southeast of Turkey.

2. Measures of Village Evacuation/Burning – Domestic Legal Situation

> Article 125 of the Turkish Constitution states: "Recourse to judicial review shall be open against all actions and acts of the administration... the administration shall be liable to compensate for damages resulting from its actions and acts." This provision covers administrative responsibility.

Additionally, there is also a provision regarding criminal responsibility. Article 369 of the Turkish Penal Code contains the following provisions: "Whoever sets afire and partly or completely burns buildings or other structures, harvested or standing crops or grains... , shall be punished by heavy imprisonment from 3 to 6 years." Articles 370 and 371 contain similar provisions. Article 516 also contains a provision envisaging prison sentences of 1 to 3 years for those who damage property. Although this is the legal position in the event of the person committing the act being a public official the implementation of the laws becomes almost impossible.

First and foremost in order for public servants to be put on trial for committing these offences the obstructive provisions of the Law on Trial of Public Servants of 4 February 1329 [1913] has to be overcome, which is almost impossible. In order for a prosecutor to initiate a prosecution the superior of the public servant has to give permission. This permission is called "May be taken to court". Without this permission a court or prosecutor cannot carry out an investigation. (Article 4 of Law on Trial of Public Servants) In order to prove the non-functioning of this legal situation it is necessary to look at the structure of the law. The person granting permission and the person who is to be tried work in the same public institution. In the previous process provincial and district administrative councils made the decision as to whether a public servant should be tried. Again, public servants made the decision. Just as none of these officials were jurists they also did not have the guarantee of a judge. It is obviously impossible that these persons would give permission for the trial of soldiers and village guards who were party in an environment of conflict in which thousands of people died.

In addition to this one of the powers given to the Regional Governor is that of evacuating villages. Article 8 of Decree with the Force of Law no. 430 of 16 December 1990 states: "No criminal, financial or legal responsibility may be claimed regarding the actions of any Regional Governor or provincial governor within the boundaries of the State of Emergency Region. No application may be made to any legal authority for this purpose." Consequently, Regional or provincial governors ordering the evacuation or burning of villages within the boundaries of the State of Emergency Region are not legally responsible. On most occasions there is no need for this as authorities do not feel the need to even examine complaints regarding public servants. All those who have been Regional Governor have denied evacuating any villages. In the region where 3,500 villages have been evacuated/burnt not one state official has been tried. Despite it being stated in the report of the Migration Research Commission of the Turkish Parliament that 80 units of settlement had been completely or partially evacuated the people concerned have not been able to bring a case to court despite all their efforts. In this regard the testimony of former Regional Governor Doğan Hatipoğlu to the Commission is instructive. He said that "There was generally a lack of co-ordination between authorities, we would usually be informed that a village was being evacuated at the time or shortly after when informed by the villagers of mayor, no one addressed the questions of who was doing the emptying or why."

Although this is the case an insufficient amount of research has been carried out in this field. It has yet to be established exactly how many villages, hamlets and single dwellings have been evacuated, how many people have been displaced, to which parts of the country they moved or what problems they faced. Of course there are reasons for this but none of these should be deemed a sufficient excuse.

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C. Villages evacuated and burnt within the area of the Ilısu Dam and Hydroelectric Power Station Project and legal problems

1. The number of burnt and evacuated villages and units of settlements within the area of the project

The Ilısu Dam and Hydroelectric Power Station Project affects the provinces of Batman, Siirt, Şırnak, Diyarbakır and Mardin. It should not be forgotten that Mardin, Siirt and Şırnak in particular were the centre of the 15-year conflict. Consequently, it is a fact that most of the villages in the area have been evacuated. In the report it is stated that 50 of 82 entirely affected units of settlement were evacuated and burnt while 38 of 101 partially affected units of settlement were evacuated. Thus 88 of 183 units of settlement that will be affected by the project have been evacuated/ burnt. Although there is no exact data it is apparent that there are more evacuated units of settlement that will be affected by the project. According to unconfirmed data this figure is around 105.

Again, according to the report, the number of displaced persons from the area of the project is 15,581. Of these, it is said that 8,600 have benefited from compulsory purchase or the right of resettlement. We wonder how these figures were reached and what they are based on. How was it possible to obtain such a figure regarding people who lived in villages which had already been evacuated and burnt? It is stated that the 1997 census was used as a basis. However, at the time of this census these villages had already been evacuated or burnt and the inhabitants had moved to provincial capitals, the Çukurova region or to the larger cities of Turkey. No census officers went to any of these villages. Even if they had gone, there would have been no one to count. There is consequently a need for an explanation. Whatever the figure is does not affect the fundamental problem, that of the violation of property rights.

2. The situation of property owners and those living in the units of settlement evacuated/burnt within the area of the project

Firstly, in most of the areas within the scope of the project, with the exception of Bismil district, no cadastral [survey] work has been carried out. Consequently, it is not known how much agricultural land and orchards will be affected by the project. The figures given in the report are far from accurate. Cadastral work is continuing and has not begun in many areas. The implementation of the project without determining the property rights of those who have been displaced will lead to irreparable losses and violations of human rights. Even if we accept the figures given in the report an answer is needed to the question of what will happen to the property rights in the 88 units of settlement evacuated and burnt. In order to find an answer to this question it is necessary to examine the Cadastral Law of 21.06.1987, Law no. 3402. Let us look at the law article by article. Article 2 contains the provision: "places within the provincial and district boundaries shall constitute the cadastral areas of that province". Article 3 contains the provision: "A cadastral team shall consist of at least two technicians, the neighbourhood or village mayor and three experts...... In villages at least 6 persons shall be selected by the village association within 15 days.... In the event of this not being done or the selected persons not being competent the local authority shall appoint the same number of persons." In this situation it will therefore not be possible to establish a cadastral team in the evacuated and burnt units of settlement or to determine property rights there. When it is considered that most of these areas will soon be submerged it is obvious that thousands of people will suffer a violation of rights. The provision whereby the local authority can appoint experts would lead to even more severe violations. Due to there being no inhabitants left only village guards will be able to be experts. Bearing in mind the tribal/feudal character of the region and political family/tribal animosity of village guards this will lead to thousands of losses of rights and subsequent legal disputes. This will lead to serious consequences, disputes and blood feuds.

Article 4 of Cadastral Law makes provision for the study area, declaration and objections: "Every village in the cadastral area shall constitute the cadastral study area. The cadastral director shall

announce at least 15 days before the study begins with the usual means in the district centre, study area and neighbouring village and municipality.... Boundaries determined by cadastral technicians may be challenged within 7 days. The cadastral director shall examine this objection and make a decision in 7 days. An objection may be made to this decision at the cadastral court within 7 days, and the final decision shall be made within 15 days."

It is obvious that work carried out on this basis would lead to more rights violations. It is unclear how the inhabitants of evacuated villages would be informed within 7 days. Without resolving these problems work would only create more problems.

Article 7 of the same law makes provision for the restriction of real estate and the determining of land ownership etc. In this article documents and the statements of other persons shall be utilised in the determining of property owners. It is therefore debatable what will happen to the rights of thousands of citizens who are no longer in their villages.

Article 11 makes provision for the proclamation of the results of the cadastral survey: "The cadastral director shall arrange and hang the lists of the surveys in the mayor's office and the directorate. Appeals shall be made within 30 days. Complainants may open a case in the cadastral court within 30 days." How will people who have moved to other parts of Turkey see, hear or be able to lodge objections? When these provisions are considered along with those of articles 13 and 14 it will become clear how serious the outcome will be. While article 13 covers the rules for determining the owners of real estate article 14 deals with establishing the ownership of land where there are no title deeds. When it is considered that most of the fields, orchards and vineyards in the area do not have title deeds the gravity of the situation will be understood. Article 14 states: "Ownership of land between 10 and 25 acres without title deed shall be ascertained with documents proving active use of the land for 20 years, or through expert or witness statements and the land registered in that person's name."

When the situation of land in the villages – the figure given is 88 – is compared to article 14 the following points emerge: most of the land is unregistered. It would be impossible to find the witnesses, experts and local mayor in the evacuated villages during the survey work. In this situation experts to be appointed by the authorities would almost certainly be village guards, as there is no one else left in the area. Won't they make declarations on their own behalf or in the name of relatives? Experience demonstrates that one of the most characteristic aspects of survey work is for experts to make false declarations in order to benefit the family or tribe. In this situation how will recourse be created for the displaced inhabitants of these places? They will not even be able to go to the survey work, for security or other reasons, or they will be prevented from doing so by the village guards.

If this project is implemented under these conditions it will be tantamount to handing the opportunity of land ownership on a plate to the gangs of village guards that have exploited the region for years. If the project is definitely to go ahead then the state of emergency legislation and the village guard system based on it should be abrogated. The return, if only temporary, of the inhabitants and their safety should be secured for the survey work. Otherwise, any work conducted will only mean the loss of rights for thousands of people, blood feuds and, most importantly, the enrichment of village guards.

Conclusion: The implementation of the project at this stage would, apart from the various disadvantages of the project, lead to adverse situations as regards the burnt/evacuated units of settlement. It is apparent that this would result in citizens losing rights and village guards making unjust property gains. Therefore:

a) The Region under State of Emergency and the village guard system based on it should be abolished immediately
b) The safe return of inhabitants to the evacuated sites should be guaranteed
c) After an accurate, detailed cadastral survey is undertaken and the real property owners ascertained the feasibility of the project should be reviewed.

I write this in the hope that no one with human feelings will say yes to the project at this stage.

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Louise Christian
Christian Fisher Solicitors
Solicitor acting for the families of three of the British citizens detained in Guantanamo Bay

The War on Terror and Human Rights – Guantanamo Bay

> "We have no right to roam the world arresting foreigners we think might be dangerous and keeping them in our jails when we cannot show them to have committed any crime"
>
> Professor Ronald Dworkin, *New York Review of Books*, 25 April 2002

The war on terrorism which George Bush declared in response to the atrocities of 11 September 2001 was said to be a war which would be fought in the name of democracy and human rights. Fifty three years after the adoption of the Universal Declaration of Human Rights on 10th December 1948 Bush issued a proclamation: "The terrible tragedies of September 11th served as a grievous reminder that the enemies of freedom do not respect or value individual human rights." He called on, "the people of the United States to honour the legacy of human rights passed down to us from previous generations and to resolve that such liberties will prevail in our nation and throughout the world as we move into the 21st century." In his State of the Union address on 29th January 2002 Bush said, "America will lead by defending liberty and justice because they are right and true and unchanging for people everywhere... America will always stand firm for the non-negotiable demands of human dignity... We choose freedom and the dignity of every life."

But these fine-sounding sentiments were already being undermined even as Bush expressed them. The transfer of hundreds of prisoners captured in Afghanistan to a US military base in Guantanamo Bay Cuba raised questions first about their treatment and conditions and then more fundamentally about the legal basis for their detention without trial or recourse to any court or access to a lawyer. In the US also there were reports of hundreds of arbitrary arrests while in Britain government rushed through a new terrorism law, the Anti Terrorism Crime and Security Act empowering itself to detain non UK nationals indefinitely without trial. Prisoners have also continued to be detained in Afghanistan in the Bagram air base and others have been transferred to Diego Garcia, an island in the Indian Ocean leased from Britain. There have been credible reports of torture methods used on prisoners.

Guantanamo in the furthest South East corner of Cuba may be best known for its vibrant musical tradition; the song Guantanamera, familiar to tourists everywhere actually comes from there. Now

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however Guantanamo bay is assured a place in the history of international relations and human rights. Since the beginning of 2001 over six hundred prisoners from thirty different countries have been held in the US naval base there who the US government claim are suspected Taliban and al Quaida fighters. Among them are seven British citizens who have at least been identified. It is not known who many of the other prisoners are or whether their families have been notified.

In 1903 the then Cuban government signed a lease "for as long as they are needed" to the US government of two territorial areas at Guantanamo and Bahia Honda for the purpose of "coaling and naval stations. This agreement followed the ending of the Cuban war of independence from Spain in 1898, US intervention and the notorious Platt amendment of 1901, an amendment introduced by Senator Platt to a resolution in the US senate about Cuban independence which provided, "That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence....". Subsequently the agreement was amended to extend substantially the area on lease at Guantanamo Bay in exchange for giving back Bahia Honda to the Cuban government. Today Guantanamo Bay is a vast US naval base inaccessible from the mainland with supplies to US quarters, supermarkets, cinemas, health facilities all being flown in from the US military base in Norfolk, Virginia. The base has been used before to incarcerate prisoners of the US military; in 1994 thousands of Haitians trying to leave in boats for the US were held there followed shortly afterwards by large numbers of Cubans who also tried to reach US shores.

The conditions at Camp X Ray caused huge consternation when they first came to light. Prisoners were shown in pictures broadcast around the world arriving at the camp in orange jump suits shackled, mittened and hooded and clearly subject to sensory deprivation. One prisoner was shown motionless on a trolley with his legs shackled. These pictures released by the US government to play to a domestic audience demanding tough action backfired and resulted in international condemnation. It was disclosed that the prisoners were being held in wire cages of eight foot by eight foot open to the elements and lit by flood lights all night. A hunger strike started in the camp and two prisoners had to be force fed after the protest at the forcible removal of a turban from a prisoner during prayer. A British prisoner wrote to his family complaining he had lost three stone in weight but otherwise letters received from prisoners by their families were short on information. Lawyers were refused any access to the prisoners but the British government sent MI5 officials to interrogate them in the presence of the CIA as well as Foreign Office officials. On the third such visit in May 2002 Feroz Abbassi complained that letters from his family explaining they had got him a lawyer had been withheld from him and said he would not speak without a lawyer. Notwithstanding this no lawyer was allowed him.

Following international condemnation cells were built to house the prisoners at Camp Delta to which they have all now been transferred. Yet these still breach international standards on

minimum conditions for humane imprisonment. The cells are tiny only 8 foot by 6 foot 8inches and the prisoners are allowed out of them only twice a week for fifteen minutes each time. International standards demand an hour's exercise a day. It is also said that the cells are lit by bright lights all night as well as in daytime. British officials have admitted that the British citizens have complained at the lack of exercise. The guards at the camp have been reported as saying that the reduction in contact between the prisoners who are less able to talk to one another than when they were in wire cages makes their job easier than in Camp X Ray where there were hunger strikes and protests. However the protests have been replaced by suicide attempts of which there have been reportedly over thirty with some inmates developing serious mental illness. Grotesquely the military doctor in charge of the detainees' health was quoted in the press as saying that the suicide attempts were a sign that the detainees were, "finally showing some signs of remorse".

Despite the US Secretary of State, Donald Rumsfeld publishing an order giving him the power to set up military tribunals with the power to impose the death penalty to try suspected members of al Quaida or persons suspected of terrorism none of the prisoners at Guantanamo Bay have been brought before such a tribunal or charged with anything. They are being imprisoned indefinitely incommunicado without access to a lawyer or to any court or tribunal. This has now been the situation for over a year. International law experts including the UN High Commissioner on Human Rights Mary Robinson have been more or less unanimous that this is a gross violation of international law.

The Geneva Conventions govern the treatment of prisoners taken during a war. They provide that if there is any uncertainty the status of a prisoner should be decided by a competent tribunal but this has not happened. If the detainees are prisoners of war then they must be released once the hostilities are at an end (which presumably those in Afghanistan now are) and cannot be prosecuted simply for fighting. They can only be prosecuted for war crimes such as crimes against humanity, genocide and ethnic cleansing. The US government says that the Guantanamo detainees are not prisoners of war because they were not part of the official Taliban army but instead they are "unlawful combatants". It is claimed this gives them no rights but this ignores the provisions of Article 75 of Additional Protocol 1 to the Geneva Conventions which provides for "an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence". The US has not ratified Additional Protocol 1 but the 1997 Operational Law Handbook of the US army states that it regards it as part of customary international law which will bind it.

On 16th December 2002 the UN Working Group on arbitrary detention concluded that so long as a competent tribunal is not convened to decide whether the Guantanamo Bay detainees are prisoners of war, then they provisionally enjoy the guarantees provided by the Geneva Conventions to persons taken on the battlefield who are not prisoners of war i.e. the right to have the detention reviewed and a fair trial and access to a lawyer. They recalled the decision of the Inter-American Court of Human Rights of 12th March 2002 urgently to request the US government to have the legal status of the Guantanamo Bay detainees determined by a competent tribunal.

In July 2002 an application for *habeas corpus* by some of the detainees to the United States District Court for the District of Columbia was thrown out on the grounds that the Court found that US courts have no jurisdiction over Guantanamo Bay and that "aliens" (non US citizens) detained outside the sovereign territory of the US do not have any recourse to a US court to complain of breach of rights. This case has been appealed to the Washington Court of Appeals but the detainees are also expected to lose there. From there it may be further appealed to the Supreme Court.
In the meantime the family of Feroz Abbasi, one of the British citizens detained in Guantanamo, made an application to the Court in Britain asking for an order that the British Government make diplomatic protests to the US government. The British government had refused to take any position whatsoever on the legality of the detention despite being the closest ally of the US in the war and therefore, it might be assumed, having more influence to protect the rights of its citizens. The application eventually went to the Court of Appeal who delivered judgment in November 2002. Although the Court of Appeal refused to make the order sought it did make some unusually trenchant comments about the legality of the detention describing it as "objectionable" and an "arbitrary detention in a legal black hole". The judgment refers to the common legal tradition in both the US and the UK of the concept of *habeas corpus* – the principle being that any imprisonment of a person is deemed unlawful unless declared otherwise by a court. This concept goes back to the seventeenth century and the acknowledged need for the constitution to protect against arbitrary imprisonment ordered by the King. The Court quoted Lord Atkin as saying it applies in war as in time of peace. The references in the judgment to the proceedings in the USA make it clear that the Court of Appeal expect their judgment to carry weight with the US courts in persuading them to overturn the previous finding that they have no jurisdiction.

However it was not long before the US courts were delivering a judgment in another case which suggests that they may not be prepared to intervene at all. Initially the USA appeared to be discriminating against non US citizens in that there are no US citizens in Guantanamo and John Lindh Walker a US citizen detained in Afghanistan was given a trial and access to a lawyer. (After making allegations of ill-treatment he entered into a plea bargain and was sentenced to fourteen years). The appearance of discrimination was one of the arguments that it was felt

would mean that the US courts would have to decide they had jurisdiction over the prisoners in Guantanamo Bay. However in January 2003 the Richmond Virginia Appeals court decided that the indefinite detention in the USA of Yaser Esam Hamdi without trial or access to a lawyer as an "enemy combatant" could not be reviewed by the US courts saying that, "to delve further into Hamdi's status and capture would require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law". Hamdi is one of two US citizens now deemed unlawful combatants and arbitrarily detained in the USA. He was initially taken to Guantanamo after being held in Afghanistan. When discovered to be a US citizen he was transferred to a navy brig in Norfolk Virginia where he is now set to remain indefinitely arbitrarily detained. The other US citizen deemed an enemy combatant, Jose Padilla, was allegedly planning to construct a radioactive bomb when arrested in Chicago in 2002. A trial court judge ruled in December 2002 that he could have access to a lawyer but his indefinite detention without charge in a South Carolina brig "is not per se unlawful".

This rolling over of the US Courts in refusing to protect fundamental constitutional rights has been mirrored in Britain. The British government has also detained people indefinitely without trial under its new Anti Terrorism Crime and Security Act. Eleven non British citizens are currently in this position. Although the Court initially ruled that the derogation from Article 5 of the Human Rights Act enabling the British government to detain " aliens" (non British citizens) indefinitely without trial was discriminatory because it did not apply to British citizens, this has now been overruled by the Court of Appeal which did not accept this argument. Both judgments also accepted in its entirety the government's case that there is a state of emergency in this country allowing the derogation to take place to permit arbitrary and indefinite detention. It is not possible to derogate from Articles 2 and 3 protecting the right to life and to be free from inhuman and degrading treatment and therefore people could not be sent back to countries which persecute them – instead a derogation from Article 5 (the right to access to a court) is relied on to allow arbitrary detention.

The breach of fundamental international law by the USA and its allies in the name of democracy sends a message to other countries. In the last year the numbers of Palestinians arbitrarily detained by the Israeli forces without trial has risen to well over 1000 while the phrase "targeted killings" – used to justify the killing of alleged Palestinian militants – was given legitimacy when the US openly trumpeted in late 2002 that it had carried out a "targeted killing" of three people said to be members of Al-Qaida in the Yemen. Arbitrary detention and ill-treatment also causes a huge feeling of injustice in the populations of countries whose nationals are disproportionately subject to it. The pressure on the Pakistan and Afghan governments has been sufficient to ensure they unlike Britain have made diplomatic protests about the incarceration of their citizens in Guantanamo and about twenty five of them were released from there in response.

Meanwhile it is said that the US has arranged for the interrogation of its prisoners held in Afghanistan and elsewhere in countries including Egypt, Morocco, Jordan and the Philippines where full-blown torture methods are used. In addition prisoners at Guantanamo have been subjected to sleep deprivation and shining harsh lights at them labelled "torture lite" by a former US navy intelligence officer Wayne Madsen. Solitary confinement and sensory deprivation are also alleged to have been used against the 800 or more mainly Muslims detained in the USA on immigration and other charges since September 11th.

Just over a year after George W Bush made the statements quoted at the beginning of this article it is abundantly clear that the agenda of the "war on terror" is to abrogate fundamental human rights and to perpetrate the very abuses it is claimed we are fighting against. Disturbingly there is little understanding or outrage about what is happening and this may well be linked to the extent to which the targets are non citizens or people who are disturbingly not really seen as citizens. In the USA anti-Muslim prejudice alone has been enough to achieve this; in Britain hysteria has been whipped up about asylum seekers. In both countries the Courts have failed to stand up for liberties and politicians have whipped up fears about terrorist attacks to justify human rights abuses.

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Section 2: Case Summaries and Commentaries

A. Case News – Admissibility decisions and communicated cases

Extra-Judicial Killings

Isayeva v Russia

(57950/00)

European Court of Human Rights: Admissibility decision of 19 December 2002

Chechnyan Rebels – Village aerial bombardment – civilian casualties – Articles 2 and 13 of the Convention.

Facts

The applicant, Sara Adamovna Isayeva, is a Russian national who was a resident of Katyr-Yurt, Chechnya at the relevant time. In autumn 1999, the Russian military forces started hostilities in Chechnya. After the takeover of Grozny by Russian forces, a large group of Chechen fighters left the city and a group of them entered the village of Katyr-Yury on 4 February 2000. According to the applicant, the arrival of the fighters was totally unexpected and the villagers were not warned in advance of the ensuing fighting or about safe exit routes out of the village.

The applicant submitted that bombardment of the village started on 4 February 2000. When the shelling stopped at about 3 p.m. the applicant and her family went outside and saw that other residents were leaving the village. The applicant and her family and neighbours got into their mini-van and headed out of the village. At 3.30 p.m., just after they had left the house, the planes reappeared and bombed the cars on the road.

The applicant's son, Isayev Zelimkhan, was hit by shells and died within a few minutes. Three other persons in their car were also wounded. During the same attack, three nieces of the applicant were also killed, aged fifteen, thirteen and six. The applicant also stated that her nephew was wounded on that day and became disabled as a result. She submitted that over 300 people were killed in the village during the bombing. The applicant and the wounded were later taken by her relative to the town of Achkhoy-Martan. She claimed that her house and car were looted and destroyed. She stated that safe exit routes were not provided for the residents before or after the bombing had started. Those who did manage to get out were detained at the Russian military roadblock for some time. In support of her allegations, the applicant submitted a transcript of interviews with three residents of Katry-Yurt, made by Memorial (a

Russian Human Rights NGO based in Moscow), which confirmed the massive bombardment of the village and that there were many victims among civilians.

The events of the beginning of February 2000 were reported in the Russian and international media and in NGO reports. Some of the reports spoke of serious civilian casualties in Katyr-Kurt and other villages during military operations.

According to the Government, a large group of Chechen fighters, between 850 and 1000 persons, did leave Grozny and take hold of Katyr-Kurt. Federal troops gave the fighters a chance to surrender, which was rejected. It also submitted that a safe passage was offered to the civilian residents, but that fighters prevented people from leaving the village. In a military operation that lasted from 3 to 5 February 2000, 53 federal servicemen were killed and 200 wounded, and over 180 Chechen fighters were killed and over 240 injured. According to the Government "the combat action weapons were used only against earlier designated targets".

The Government conceded the fact that on 4 February 2000, the applicant, members of her family and neighbours left the village in a minivan; that the vehicle was hit by a missile from a plane and that the applicant's son and niece and another were killed, and that two others wounded.

The Government submitted that before the communication of the complaint in June 2000, they had not been aware of the events described by the applicant. Subsequent to the communication, the Achkhoy Martan Prosecutor carried out a preliminary investigation and, on 14 September 2000, commenced criminal proceedings. They also stated that on 16 September 2000, a local prosecutor in Katyr-Yurt, acting upon complaints from individuals, opened a criminal case which concerned the attack on the minivan on 4 February 2000. This file was forwarded to the Military Prosecutor in December 2000.

According to the Government, a number of investigative steps had been taken, including an examination of the site of the attack, the interviewing of witnesses and the collection of relevant documents. They stated that forensic examinations were hampered due to the relatives' objections over exhuming the bodies. They also submitted that the investigations were also focusing on the actions of the Chechen fighters and the possibility they may have been involved in the killings. On 17 June 2002, the investigation was closed for lack of *corpus delicti* (evidence). They stated that "the investigation came to a conclusion that harm and injuries to civilians were done as a consequences (*sic*) of absolute necessity".

The applicant alleged that adequate steps were not taken by the authorities to conduct an efficient and meaningful investigation. She had not been provided with official information regarding the investigation and had not been granted the status of crime victim. The decision

to close the criminal investigation was being challenged before the Military Court. She also stated that no state of emergency or martial law had been declared in Chechnya; that no federal law had been enacted to restrict the rights of the population of the relevant area; and that no derogation under Article 15 of the Convention had been declared.

Complaints

The applicant complained under Article 2 of the Convention that her right to life and that of her relatives had been violated by the actions of the Russian army. She also complained that she had no effective remedies for those violations, contrary to Article 13 of the Convention.

The Government argued that the application was inadmissible. They contended that the power of attorney issued by the applicant to her representatives was invalid. They also argued that the applicant had failed to exhaust available domestic remedies.

Decision

The Court decided that the applicant was validly represented before the Court and unanimously declared all the applicant's complaints admissible. It joined to the merits the objection concerning non-exhaustion of domestic remedies.

Commentary

In its disputation that the applicant's power of attorney was not valid, the Government submitted that, in accordance with domestic law, it should have been verified by a notary and a separate power of attorney should have been issued by memorial to their lawyer. They also submitted that, under the 1961 The Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents, the power of attorney should bear an apostille. Thirdly, they argued the invalidity of the applicant's observations because the text had not been signed.

The Court cited Rule 45(3) of the Rules of Court, which states that, where an applicant is represented, "a power of attorney *or* written authority shall be supplied (italics added)". Therefore a written authority is valid for proceedings before the Court and there are no requirements in any case for powers of attorney to be drawn up in accordance with the national legislation. As for the Government's argument that the applicant's observations were not signed, the Court noted that the postal airway bill to send the document was signed by the applicant's representative and that, in any case, the document was sent to the Government for information only.

The second dispute over admissibility was not so simple to deal with. The Government argued that, though the courts in Chechnya had ceased to function in 1996, legal remedies were still available. The applicant argued that the formal remedies available were not effective. An effective remedy is one which is "available in theory and in practice at the relevant time, that

is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaint and offered reasonable prospects of success" (*Akdivar and Others v Turkey*, No. 21893/93,16.09.96, para.68). Therefore the Court must take into account not only the formal remedies available, but also the general legal and political context in which they operate, as well as the personal circumstances of the applicant. The applicant argued that an atmosphere of impunity reigned over the military and police units involved in the operations in Chechnya and cited extensive evidence from the press and NGO reports to uphold this view. Not surprisingly, the Court decided that it needed more information before it could decide whether domestic remedies were effective for crimes committed in the Chechnyan area and joined it to the merits of the case.

Unlike many of the cases concerning violations of Article 2 and 3 of the Convention by Turkey, the Russian Government does not dispute that the attack on the village occurred, or that the applicant's relatives were killed as a result of that attack. The merits of this case hinge on a crucial question. Was the damage and deaths an "absolute necessity" due to the activities of the Chechen rebel fighters, as the Government contends; or was such loss avoidable, as the applicant argues?

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Disappearance

Yurtseven and Others v Turkey

(31730/96)

European Court of Human Rights: Admissibility decision of 14 November 2002

Disappearance – Contradictory Facts – Articles 2, 3, 5, 6 and 7 of the Convention.

Facts

The applicants, Ali Yurtseven, Hasim Yurtseven, Abdullah Özeken and Sabri Saritas are Turkish nationals, living in Agaçli village in the Yüksekova district in southeast Turkey. The applicants allege that on 27 October 1995, soldiers came to their village to conduct a military operation. A search was conducted but nothing illegal was found. The applicants allege that Semsettin Yurtseven, the father of the first and second applicants, and Mikdat Özeken and Münür Saritas, the son and brother of the third and fourth applicants respectively, were taken away by the soldiers. Semsettin Yurtseven was 73 years old, Mikdat Özeken was 18 years old, and Münür Saritas was 13 years old.

The applicants asked the Yüksekova Commando Battalion for information regarding their relatives. It stated that Commander Yurdakul had notified Hakkari command centre of the arrests. Commander Yurdakul later denied arresting the applicants' relatives.

On 6 November 1995 the applicants applied to the Ministry of Human Rights and to their local Member of Parliament (MP). They also petitioned to the Turkish Parliament, the Ministry of Interior, the Yüksekova Public Prosecutor, the Diyarbakır Gendarmerie Headquartes and to the Governor of Diyarbakir. On 27 December 1995 the Yüksevova Public Prosecutor decided that he lacked jurisdiction to examine the alleged crimes committed by the soldiers and sent the file to the Military Prosecutor. The applicants have so far received no information about their relatives' whereabouts.

The Government submitted directly contradictory facts. It stated that, according to information obtained from the gendarmerie, no security operation was carried out on 27 October 1995. It stated that a letter from Commander Yürdaku dated 16 November 1995 maintained that the applicants' relatives had not been taken into custody. Furthermore, the Hakkari Commander stated in a letter of 4 March 1996 that the applicants' relatives had been spotted on 27 October 1995, carrying equipment to be delivered to the illegal PKK organisation.

Numerous documents were submitted to the Court. Included among these was a decision by the Military Prosecutor on 28 May 1996 that he too lacked jurisdiction, the file being then sent to the Diyarbakir State Security Court. On 14 April 1997, the State Security Court concluded that the ordinary criminal courts had jurisdiction and passed the file on to the Hakkari Public Prosecutor. According to evidence in the State Security Court's possession, an operation was carried out in Agaçli village between 25-28 October 1995 by a battalion under Commander Yurdakul. This evidence stated that the applicants' relative were taken into custody and that Semsettin Yurtseven later died as a result of blows received to his body. The two remaining relatives were shot and killed by Nihat Yigiter, an army captain and Kahraman Bilgiç a "confessor", a term used to describe a defected member of an illegal organisation who provides the authorities with information.

On 13 June 1997, the Hakkari Public Prosecutor filed an indictment with the Hakkari Assize Court, stating that the evidence in the file justified the prosecution of Commander Yurdakul, Bilgiç and Yigiter for the murders of the applicants' relatives. On 12 November 1999, the Hakkari Assize Court acquitted Commander Yurdakul and Bilgiç for lack of sufficient evidence. The court acknowledged that there was corroborating evidence that the applicants' relatives were taken away by the suspects. But it stated that the only evidence that the two army officers had taken part in their murder was a statement of Bilgiç, which they found to be unreliable. It also doubted the fact that the applicants' relatives had died, stating that their bodies had not been recovered. An appeal against this decision was rejected by the Court of Cassation on 2 April 2001.

Complaints

The applicants complained under Article 2 of the Convention that there was a substantial risk that their relatives had died while in unacknowledged detention, and there was a lack of any effective State system to ensure the protection of the right to life. The applicants submitted that the anxiety and pain caused, due to their inability to discover their relatives' whereabouts, amounted to a violation of Article 3 of the Convention. They complained of a breach of Article 5 of the Convention due to the unlawful detention of their relatives, the failure of the authorities to inform their relatives of the reasons for their detention and to bring them before a judicial authority within a reasonable time. They also complained of the inability to bring proceedings in order to determine the lawfulness of their relatives' detention. Under Article 6 of the Convention, the applicants complained that their relatives were not informed promptly or in detail of the nature and cause of the accusation against them. Invoking Article 7 of the Convention, the applicants submitted that the reasons for their relatives' detention were not provided for by law.

The Government argued that the application should be declared inadmissible as the investigation into the allegations was still pending before the office of the Hakkari Public Prosecutor.

Held

The Court noted that the investigation mentioned by the Court had actually been concluded on 2 April 2001, when the Court of Cassation rejected an appeal against the Assize Court's judgment. It therefore declared the application admissible.

Commentary

On the face of the information published in the admissibility decision, the Government's version of events seems to be inconsistent with those deduced from the documents collected in the course of the European Court proceedings. The Government submitted that no operation took place at the relevant time in the relevant area and that the applicants' relatives were not taken into custody; yet evidence from the Diyarbakır Security Court stated otherwise. In the admissibility decision of *Ipek v Turkey* (No. 25760/94, 14.05.02), which also concerned a disappearance[154], the documentary evidence collected corroborated rather than contradicted the Government's position that the alleged security operation did not take place. In order to find out whose version of events was correct, a fact-finding hearing was recently carried out in that case (see above). It remains to be seen (if the case proceeds to a judgment on the merits) whether the Court will consider that the documentary evidence in this case undermines the Government's position to such an extent that it can be established "beyond reasonable doubt" without the need for a fact-finding hearing, that the events alleged by the applicants did take place, without the need of a fact-finding hearing.

Ipek v Turkey
(25760/94)
European Court of Human Rights: Fact-Finding Hearing, 18-20 November 2002

Disappearance – Destruction of home and property

A delegation of three Judges of the Court (Second Section), composed of Section President Jean-Paul Costa (French), Gaukur Jörundsson (Icelandic) and Volodymyr Butkevych (Ukrainian), have been taking evidence from witnesses in Ankara in this KHRP assisted case. The case concerns the disappearance of the applicant's two sons, Ikram and Servet Ipek, who were allegedly last seen by three people taken into police detention with them. The applicant also alleges that his home and property were destroyed by security forces in the course of a security operation on 18 May 1994. The case was declared admissible on 14 May 2002[155].

Commentary
This is one of the few cases since 2001 where a fact-finding hearing has been conducted by the Court. The main issue that needs to be resolved is whether a security operation was actually carried out in the relevant area on 18 May 1994, as the Government submits that its own domestic investigations revealed that in fact no operation had been conducted.

However, it is open to the Government to make a friendly settlement offer at any stage of the proceedings and therefore the case may not proceed to a judgment on the merits. Two other recent cases that concerned disappearances (cf. *Acar v Turkey*, No. 26307/95, 09.04.02, *Togcu v Turkey*, No.27601/95, 09.04.02) were struck out by the Court following a settlement offer that was not accepted by the applicants. In both cases Judge Loucaides (Cyprus) dissented, stating that "the Government do not accept any responsibility for the violation complained of and do not undertake to carry out any investigation in respect of the disappearance of the applicant's son" (*Togcu v Turkey*, No.27601/95, 09.04.02). Judge Costa stated that he came "close to sharing the views expressed by [his] colleague, Judge Loucaides, in his dissenting opinion. In my view, striking out applications 'for any other reason' is similar to what is sometimes called discontinuation for the sake of expediency or convenience. It must not therefore be abused" (*Togcu v Turkey*, No.27601/95, 09.04.02).

Acar v Turkey
(26307/95)[156]
European Court of Human Rights: Grand Chamber Hearing of 29 January 2003

Disappearance – Torture

Facts

The case concerns the disappearance of the applicant's brother, Mehmet Salim Acar, a farmer from southeast Turkey in August 1994.

Complaints

The applicant complained of the unlawfulness and excessive length of Mehmet Salim's detention, of his ill treatment and torture and of the failure to provide him with the necessary medical care.[157]

Held

A Chamber of the Court struck the case (*T.A. v Turkey*, No. 26307/95, 09.04.02) out on 9 April 2002 (by six votes to one). On request of the applicant's representatives the case was referred to the Grand Chamber on 4 September 2002. In November 2002 Amnesty International intervened as a third party and lodged supporting submissions ("amicus"), but was not allowed to address the Court at the oral hearing.

During the hearing in Strasbourg the applicant's representative Keir Starmer QC concentrated on two main questions. Firstly, what is the proper interpretation of Article 37 (1) (c)? and secondly he questioned whether it is legitimate to strike out a case, such as this, where a continuing and unresolved breach of the Convention is alleged and the Respondent State is not undertaking to provide the applicant with an effective domestic remedy. The judgment of the Grand Chamber is now awaited with great interest since this might change the Court's recent approach to strike many cases out of the list under Article 37 (1) (c) of the Convention.[158]

Torture and Inhuman or Degrading Treatment

Absandze v Georgia

(57861/00)

European Court of Human Rights: Admissibility decision of 15 October 2002

Inhuman treatment Article 3 of the Convention – Unlawful detention Article 5 (1) (c), 5 (3) and 5 (4) of the Convention – Presumption of innocence Article 6 (2) of the Convention

Facts

The applicant was a Minister in the Georgian government, which collapsed with the 1992 civil war. In 1998 he was arrested in Russia, where he has been living in exile since 1992, on a request from the Georgian authorities to bring criminal proceedings against him for treason and the murder of five Russian soldiers in Georgia. Having been extradited to Georgia, the applicant was also charged with having managed and funded an assassination attempt on the Georgian

President Mr E. Shevardnadze, and having appropriated public funds. The applicant complained that during the period of his detention in Georgia, after being extradited and before being tried, he was repeatedly described as a terrorist and bandit by the Georgian authorities, including the prosecuting authorities. The applicant remained in custody until 2000, despite suffering from physical ailments, including the after effects of bullet wounds. On 15 September 2000, the applicant's lawyer intervened on the grounds that the applicant's detention was inhuman and degrading. The applicant escaped from the prison hospital to which he had been transferred after experiencing heart problems. He was sent back to prison after being captured two weeks later. The applicant was tried for misappropriation of funds and for having organised an assassination attempt. He was found guilty and sentenced to 17 years imprisonment. The applicant appealed and his case was referred to the High Chamber of the Supreme Court. The chamber acquitted the applicant in respect of his six-year prison sentence imposed for the misappropriation of public funds. Shortly after, the applicant was released on a pardon issued by the President of Georgia.

Complaint
The applicant complained under Article 3, 5 (1) (c), 5 (3), 5 (4), 6 (1) and 6 (2) of the Convention.

Held
The Court decided that the application was admissible under Article 3 of the Convention because the applicant had not been able to apply to the Prison authorities to improve the conditions of his detention until 1 January 2000, at which point he had already been in prison almost two years. The application was also declared admissible under Article 5 (1) (c), 5 (3), 5 (4). The application was deemed admissible under Article 6 (2) of the Convention since there was a strong case that the applicant had not been presumed innocent until proven guilty. However the application was not declared admissible under Article 6 (1) of the Convention, since despite the judges having been elected by the parliament on a proposal from the head of state, it could not be inferred that the executive authorities had had any influence upon the judicial proceedings.

Shamayev and 12 Others v Georgia and Russia
(36378/02)
European Court of Human Rights: Preliminary Application/Interim Measures, 4 October – 26 November 2002

On 4 October 2002 eleven Russian citizens of Chechen origin, detained in Tbilisi, Georgia, lodged a preliminary application to the Court. They claimed that an extradition request from Russia to Georgia concerning them was about to be granted, and they alleged that this would

result in breaches of their rights under Articles 2 and 3 of the Convention. They asked the Court to indicate interim measures, pursuant to Rule 39 of the Rules of Court, requesting the Georgian authorities to suspend the extradition decision.

Applying Rule 39, the Court requested the Georgian Government not to extradite the applicants to Russia until the Court had had an opportunity to examine the case in the light of further information, which they invited the Government to supply. The Court also gave urgent notification of the application to the Russian Government, under Rule 40.

The Court was informed on 9 October 2002 that five of the applicants had already been extradited to Russia, although the extradition of the other applicants had been suspended. On 5 November 2002, the Court communicated the applicants' main complaints to Georgia and Russia for their observations. It was also decided that the interim measure should remain in force until 26 November 2002, the relevant parties being asked to provide additional information so that the Court could decide by then whether the continued application of Rule 39 was still justified. Also, the Court gave priority to the case pursuant to Rule 41.

On 26 November 2002 the Court decided not to extend the application of the interim measure in the light of the undertakings given by the States concerned. The Russian authorities guaranteed unhindered access for the applicants to appropriate medical treatment, legal advice and to the Court itself. They also undertook that the applicants would not face capital punishment and that their health and safety would be protected. The Georgian authorities were also satisfied that the Russian Government had provided all the necessary guarantees regarding the future treatment of the applicants if extradited.

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Commentary

This interim application provides useful information about the timescale that the Court is willing to act within in cases where there is imminent danger of serious Convention violations. Through the application of Rule 39 of the Rules of Court, the Court was not only able to delay the extradition of applicants to a country where they may have faced violent treatment, but also obtain guarantees that they would be treated fairly and not be subject to the death penalty; all within a matter of weeks. It also provides guidance on the guarantees that a State needs to provide to satisfy the Court that the extradition of an applicant would not cause further violations of Convention rights.

According to Marie-Benedicte Dembour, there are currently thousands of applications pending before the Court concerning Russia, many of which have arisen out of the conflict in Chechnya[159]. Only recently have any of these cases passed the admissibility stage and been published (see *Khashiyev and Akayeva v Russia*, Nos. 57942/00, 57945/00, 19.12.02; *Isayeva and*

Others v Russia No. 57950/00, 19.12.02). It is encouraging that the main proceedings and issues for this case have been given priority by the Court under Rule 41 of the Rules of Court.

Expulsion

Müslim v Turkey

(53566/99)

European Court of Human Rights: Admissibility decision of 1 October 2002

Expulsion – Articles 2, 3 and 13 of the Convention.

Facts

The applicant is an Iraqi citizen. His brother died during the Gulf War and is thought to have been executed for desertion. The applicant was being sought by the Iraqi secret service following the issue of an arrest warrant against him. He therefore decided to leave Iraq. He entered Turkey legally and was granted a temporary residence permit. He also applied to the Turkish authorities for political asylum. As soon as his application to the UNHCR was dismissed, he launched an appeal. When this appeal was dismissed the applicant requested that his case be reviewed in the light of new evidence that had arisen since the applicant had fled to Turkey, with regard to his mother being subject to harassment by the Iraqi authorities to reveal the whereabouts of the applicant and the execution and murder of his cousin and brother. Nevertheless his case was finally dismissed and the Turkish authorities refused to grant him political asylum and issued a deportation order. The applicant appealed against this decision and his residence permit was provisionally renewed. The Turkish Government told the Court that the applicant held a valid passport and was therefore free to travel to other countries and did not have to return to Iraq even if his appeal against his deportation order was dismissed. The applicant made a number of unsuccessful visa applications. In January 2002 the applicant reiterated his request for permission to reside in Turkey. No final decision had been taken to deport him.

Complaints

The applicant complained that his eventual expulsion to Iraq would constitute a breach of the Convention. In effect, the applicant complained pre-emptively that were he to return to Iraq he would be executed or ill-treated and thus his right to life and humane treatment would be violated.

Held

The application was declared admissible under Articles 2, 3, and 13 of the Convention. The Court held that the applicant had done everything in his power to have the case settled at a domestic level.

Commentary
With regard to the applicant's complaints, the Turkish Government drew attention to the lack of reference to a specific Article of the Convention. The Court, however, emphasised the importance of the factual substance of the complaints rather than the necessity of referring to specific laws (cf. *Powell and Rayner v U.K.*, No. 172, 21.2.90, p.13, para. 29). The Court decided with regard to the applicant's complaints, that Articles 2 and 3 of the Convention were relevant in this context. The Court also decided that Article 13 of the Convention was pertinent in dealing with the applicant's complaints regarding the ineffectual proceedings of the national authorities.

Freedom of Expression

Halis v Turkey

(30007/96)
European Court of Human Rights: Admissibility decision of 23 May 2002

Imprisonment for authorship of newspaper article – Article 10 (freedom of expression) – Articles 5, 6, 9 and 14

Facts
On 2 January 1994, the Turkish daily newspaper *Özgür Gündem* published a book review written by the applicant that included a review of a book written by Abdullah Öcalan, the former leader of the PKK.

On 1 July 1994, the Public Prosecutor at the Istanbul State Security Court indicted the applicant under Article 7 (2) of the Prevention of Terrorism Act for disseminating propaganda about an illegal terrorist organisation. The indictment was based on the applicant's description of the PKK's "never ceasing firm struggle against liquidation", its "discipline and determination" and its timely diagnosis of "the liquidation tendencies which would lead the revolution to defeat". On 20 March 1995 the State Security Court found the applicant guilty and sentenced him to one year's imprisonment and a fine of 400 million Turkish liras (TRL).

Complaints
The applicant complains that under Article 5 (1) (b) of the Convention he was unlawfully deprived of his liberty by the State Security Court, which erred in its judgment by considering his opinions expressed in an article as a terrorist offence.

The applicant complains that he has been denied a fair hearing in breach of Article 6 (1) of the Convention as a result of the presence of a military judge on the bench of the State Security Court which tried and convicted him.

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The applicant alleges that the authorities have unjustifiably interfered with his freedom of thought and expression guaranteed by Articles 9 and 10 of the Convention, insofar as he was convicted for a newspaper review.

The applicant further alleges that the application of special rules under the Prevention of Terrorism Act and his trial constituted discriminatory treatment contrary to Article 14 of the Convention.

Held

The Court held that the applicant's complaints concerning his right to a fair trial hearing by an independent and impartial tribunal under Article 6 (1) of the Convention and his right to freedom of expression under Article 10 of the Convention were admissible.

The Court held that the remainder of the application was inadmissible.

Commentary

The Court stated that the essence of the applicant's complaint concerned the alleged interference with freedom of expression under Article 10 of the Convention and therefore decided to examine the central issue in the complaint from the standpoint of Article 10 of the Convention alone.

The Court considered that, in light of the parties' submissions that the presence of a military judge on the bench of the Istanbul State Court raises complex issues of law and fact under the Convention, the applicant's complaint under Article 6 (1) of the Convention was also admissible.

The Court opined that this case raises 'important questions' of fact and law and must therefore be examined on the merits.

The Court considered that the applicant's complaint that under Article 5 (1) (b) of the Convention, his detention violated his right to liberty was inadmissible. Looking at this complaint from the standpoint of Article 5(1) (a), the Court recalled that the question of whether a detention complies with "a procedure prescribed by law" refers to national law. The Court further noted that its scope to review the conformity of a detention with the substantive and procedural rules thereof is limited and that "it is in the first place for national authorities to interpret and apply the domestic law" (see *Winterwerp v The Netherlands*, No. 6301/73, 24.10.79).

The Court found that there was nothing in the applicant's submissions that would render his detention "unlawful" within the meaning of Article 5(1) (a) of the Convention and therefore concluded that this part of the application was manifestly ill-founded under Article 35 of the Convention.

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As regards the applicant's complaint that he was discriminated against on account of his political opinions, the Court reiterated that Article 14 of the Convention is only concerned with differences of treatment that "have as their basis or reason a personal characteristic by which persons or a group of persons are distinguishable from each other" (see *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Nos. 5095/71, 5920/72, 5926/72, 07.12.76).

The Court considered that the distinction made by the Prevention of Terrorism Act is made not between different groups of people, but between different types of offences. It concluded that this is not a form of "discrimination" that is contrary to Article 14 of the Convention.

Varlı and Others v Turkey
(57299/00)

European Court of Human Rights: Admissibility decision of 17 October 2002

Freedom of expression – Articles 6, 9, 10 and 11 of the Convention

Facts

The applicants were all Turkish citizens at the material time and members or sympathisers of HADEP. In September 1996 the applicants wrote a declaration entitled "Open letter for Peace and Brotherhood" concerning the treatment of the Kurds in Turkey which they sent to the President and the Prime Minister of Turkey. The State Security Court of Ankara condemned the applicants to two years imprisonment and a fine of 1.72 million Turkish Lira (TRL), under Article 312 (2) of the Turkish Penal Code and Article 3 of the Turkish Constitution.

Complaints

The applicants complained under Article 6 (1) and 6 (3) (b) of the Convention that the judges at their trial were neither independent nor impartial and that they had left the courtroom when one of the applicants began his defence. Under Article 8 of the Convention the applicants complained that their sentence was a breach of their right to private life. Under Articles 9, 10 and 11 of the Convention the applicants complained of a breach of their rights to freedom of speech, expression and association. The applicants complained, with respect to the unfair nature of their trial, under Article 13 in conjunction with Articles 8, 9, 10, 11 of the Convention and Article 3 of Protocol No. 1 to the Convention. The applicants also complained of being victims of racial discrimination, invoking Article 14 of the Convention in conjunction with Articles 9, 10 and 11 of the Convention.

Held

The Court unanimously declared the application admissible under Articles 6 (1) and 6 (3) (b), 9, 10, 11 and 14 of the Convention, but not under Articles 8, 13 of the Convention or Article 3 of Protocol No. 1 to the Convention.

Taniyan v Turkey
(29910/96)
European Court of Human Rights: Decision of 5 December 2002

Closure of newspaper for publishing "separatist propaganda" – Articles 10, 6 (1), 13, 14 and 18

Facts

The applicant is the owner of *Yeni Politika* ("New Politics"), a daily newspaper published in Istanbul, with 11 liaison offices in different cities. For each issue, four copies of the sample printout were submitted to the Press Department of the Istanbul Security Directorate to be examined by the Public Prosecutor at the Istanbul State Security Court. The Public Prosecutor's decision usually entailed the confiscation of the newspaper. From the first day of its publication on 13 April 1995 until 16 August 1995, confiscation orders were issued for 117 out of 126 issues. On receiving the confiscation orders, new issues were prepared, taking out the offending articles. Even so, new confiscation orders were sometimes issued, entailing the preparation of third or fourth issues.
The applicant appealed the confiscation orders of the newspaper twenty-one times between 19 April and 22 May 1995, but was dismissed. On 16 August 1995, following an objection to a new confiscation order, the Istanbul State Security Court ruled, *inter alia*, that *Yeni Politika* had attempted to follow the line of *Özgür Gündem* and *Özgür Ülke*, two other newspapers formerly charged with making separatist propaganda and praising the activities of a terrorist organisation and which were no longer in circulation. *Yeni Politika* was subsequently closed down.

Complaints

The applicant complained that the actions of the Government of Turkey were an interference with his right to impart information, in breach of Article 10 of the Convention.

He also submitted that the Istanbul State Security Court, which approved the confiscation orders and dismissed his appeals against these orders, was not an independent and impartial court within the meaning of Article 6 (1), on account of the presence of a military judge on the bench. He further complained that the confiscation orders and the dismissal of his appeals were not reasoned under Article 6 (1). As the court dismissed his appeals without giving reasons, the applicant alleged under Article 13 of the Convention in conjunction with Article 6 of the Convention, that there were no effective remedies concerning such complaints as his. Invoking Article 14 of the Convention in conjunction with Article 10 of the Convention, the applicant alleged that his newspaper was discriminated against because he employed staff of Kurdish origin and published news about Kurdish people.

Lastly, the applicant submitted under Article 18 of the Convention that the restrictions imposed by the national authorities on his freedom of expression were inconsistent with the legitimate aims prescribed under Article 10 (2) of the Convention.

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The Government made preliminary objections regarding the six month time limit and the exhaustion of domestic remedies.

Held

The Court dismissed the Government's preliminary objections and unanimously declared admissible the applicant's complaints under Articles 10, 14 and 18 of the Convention. It declared the applicant's complaint under Article 6 (1) of the Convention admissible by a majority.

Commentary

The Turkish authorities have been extremely virulent in their attacks on the freedom of expression of newspapers. Regarding *Ozgür Gündem*, the newspaper to which the Turkish authorities compared *Yeni Politika*, there was a series of attacks and killings between 1993 and 1994 against journalists and others associated with the paper, which eventually led to its closure. In a number of cases at the Court regarding the attacks and closure of the paper, the Turkish authorities were found to be in breach of Articles 2, 3, 10 and 13 of the Convention (see, *inter alia, Ozgür Gündem v Turkey*, No.23144/93, 16.03.00; *Kilic v Turkey*, No.22492/93, 28.03.00).

The Government made two failed preliminary objections to the admissibility of the case. Regarding the six month rule, the Government made the mistake of believing that the time when the "clock stops running" is the date of registration of the application by the Secretariat of the Commission. In fact the clock stops running when the application is lodged with the Commission, which in this case was three months earlier than the registration date and brought the application within six months of the confiscation order complained of. The lodging of an application can be done by a letter to the Court and, as long as the full application is sent without a significant delay, is a simple method of "stopping the clock".[160]

The Government also tried to argue that the applicant had not exhausted domestic remedies. The applicant had appealed 17 out of a total of 121 such confiscation orders. The Government argued that the dismissal of those 17 appeals did not constitute a presumption that any appeal against the remainder of the confiscation orders would also have been dismissed. The Government maintained that each confiscation order was independent from the other; and that therefore domestic remedies had not been exhausted. The Court reiterated that the rule of exhaustion does not oblige an applicant to have recourse to remedies which are inadequate or ineffective (*Akdivar and Others v Turkey*, No. 21893/93, 16.09.96, para.42). The Court decided that the applicant had made use of appropriate legal remedies, until such time as he had decided that those remedies were not effective. Furthermore, the Court noted that the Government had not supplied any evidence which demonstrated that, if the applicant had continued to appeal further confiscations, the decisions of the national court would have changed. The Government's objection was thus dismissed.

Refah Partisi and Others v Turkey
(41340/98, 41342/98, 41343/98, 41344/98)
European Court of Human Rights: Grand Chamber Judgment of 13 February 2003

Case News
Following the decision by the Court on 31 July 2001 that there had been no violation of Article 11 of the Convention, the case was referred to the Grand Chamber, where it was heard on the 19 June 2002. The Grand Chamber decided that there had been no violation of Article 11 of the Convention, because "some of the party's objectives, such as the introduction of sharia and a theocratic regime, were incompatible with the requirements of a democratic society". Thus under paragraph 2 of Article 11 of the Convention the "interference had been prescribed by law and pursued a legitimate aim". The Court reasoned that any political party whose leaders propagated a programme that failed to respect one or more of the rules of democracy or aimed at flouting the rights or freedoms recognised in a democracy could not seek protection under the Convention. The Court decided that it was not necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention or Articles 1 or 3 of Protocol No.1 to the Convention.[161]

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Freedom of Religion

Tekin v Turkey
(41556/98)
and
Şahin v Turkey
(44774/98)
European Court of Human Rights: Chamber Hearing on the Merits of 19 November 2002

Ban on applicants wearing Islamic headscarves in Turkish higher-education establishments – Article 9 (freedom of thought, conscience and religion) – Articles 8, 10 and 14 of the Convention

Facts
At the material time Ms Tekin was a second-year student at the Nursing College (Hemsirelik Yüksek Okulu) of Ege University. A circular was issued by the Higher Education Council (Yüksek Ögretim Kurumu) on 22 December 1988 requiring student nurses to wear a regulation cap during practical training. In December 1993 the applicant was given a reprimand for wearing an Islamic headscarf instead of the regulation cap. The applicant persisted in wearing the headscarf and on 23 December 1993 was excluded from classes for 15 days in accordance with the newsletter.

The applicant challenged the disciplinary sanction in the Izmir Administrative Court relying on the principle of secularism laid down in Article 2 of the Constitution but was unsuccessful. The judgment was upheld by the Supreme Administrative Court on 16 October 1997.

Ms Şahin was, at the material time, a fifth-year medical student at Istanbul University. On 23 February 1998 a circular was issued by the Istanbul university authorities stating that students wearing a beard or an Islamic headscarf would not be admitted to the classes, training courses or tutorials. Furthermore, on 13 March 1998 the Higher Education Council published an information note on regular dress in higher education establishments, stating that it was a disciplinary and criminal offence for students to wear Islamic headscarves in such establishments.

On 12 March 1993 the applicant was refused the right to sit written tests in one of her subjects because she was wearing an Islamic headscarf. At a later date her application for enrolment was rejected, she was refused admission to a class and could not sit further written tests due to the same reason. Lastly the Department for failing to comply with the university dress code gave her a reprimand on 3 June 1998.

<u>Complaints</u>
The applicants complained of a breach of their right to freedom of religion under Article 9 of the Convention. The applicants also complained of the unjustified interference with their right to education set out in Article 2 of Protocol No.1 to the Convention.

Ms. Şahin further alleged a breach of Article 14 combined with Article 9 of the Convention, because she considered that the ban on wearing Islamic headscarves obliged students to choose between education and religion, and discriminated between believers and non-believers. Lastly she complained of breaches of her right to respect for private life and freedom of expression under Articles 8 and 10 of the Convention.

<u>Commentary</u>
The right to freedom of religion is often concerned in regulations on external signs of religious affiliation, and particularly the wearing of the so-called Islamic headscarf.

In the early 1990s in the cases of *Karaduman v Turkey* (No. 16278/90, 03.05.93) and *Bulut v Turkey* (No. 18783/91, 03.05.93) the former European Commission of Human Rights had held that the applicants could be ordered not to wear their headscarves since the students had enrolled at secular universities and had agreed to abide by the regulations of such a university. In *Bulut*, it was stated that, "La Commission considère que le statut d'étudiant dans une université laïque implique, par nature, la soumission à certaines règles de conduite établies afin d'assurer le respect des droits et libertés d'autrui." (page 7)

In the recent case of *Dahlab v Switzerland* (No. 42393/98, 15.2.01) the Court still held that the ban of wearing a headscarf does not necessarily constitute a violation of Article 9 of the Convention. However, this judgment was a result of weighing the right of the applicant to manifest her beliefs against the need to protect young children by preserving religious concord. The applicant was a teacher in a primary school and was forbidden to wear her headscarf whilst teaching. The Court held: "In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."

Furthermore, a reference to international law underpins the standpoint of the applicants: the General Comment of the Human Rights Committee on Article 18 (freedom of thought, conscience and religion) of the International Covenant on Civil and Political Rights (ICCPR) (No. 22, 30.07.93) expressly recognises the wearing of head coverings as being an aspect of the observance and practice of religion or belief. The General Comment provides, *inter alia*, as follows: "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts [...]. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as [...] the wearing of distinctive clothing or head coverings..." (para.4).

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Asylum

Abdullah Tekdemir v Netherlands

(46860/99, 49823/99)

European Court of Human Rights: Admissibility decision of 1 October 2002

Removal of Kurdish asylum seeker to Turkey – Articles 2, 3 and 5 of the Convention

Facts

Abdullah Tekdemir is a Turkish national of Kurdish origin, currently living in the Netherlands. The applicant left Turkey on the 10 July 1995 and arrived in the Netherlands six days later. He applied for asylum, or a residence permit on humanitarian grounds, on the 18 July 1995. In his initial interview by the Ministry of Justice he stated that he had been apprehended by the authorities in 1991 on suspicion of having transported PKK members in his van, but later released. Then between August 1994 and March 1995 he was apprehended by the authorities

on six occasions, and questioned and beaten in relation to his son's refusal to do military service. His reason for leaving his village on 10 March 1995 was that the authorities had been looking for him since PKK members had twice forced him to use his van to transport them in February and March 1995. In March 1995 they forced him to transport them to Gayreteppe where they carried out a bomb attack on the Anti-Terror branch office. After this incident he decided to leave the country for the Netherlands.

Subsequent to an objection *(bezwaarschrift)* that his request had not been determined speedily, the State Secretary for Justice *(Staatssecretaris van Justitie)* in the Netherlands accepted this objection on 23 February 1996. However they rejected the applicant's request for asylum on the grounds that belonging to the Kurdish minority in Turkey was insufficient grounds for granting asylum and that the applicant's fear of the authorities after transporting PKK members was unsubstantiated. The State Secretary further decided that the applicant was not allowed to remain in the Netherlands pending an appeal. The applicant appealed against this decision and a request for an injunction to suspend his expulsion. The court's examination of the request was deferred due to the uncertainties that had arisen over the position of the Kurdish population in Turkey. Following a second appeal for an injunction against his expulsion, the applicant was told by The Hague Regional Court in Zwolle on the 9 March 1998, that he "had not made out a plausible argument that he is in fact wanted by the Turkish authorities. There is no concrete information about his alleged persecution." The applicant's opposition *(verzet)* against the judgment was rejected.

The applicant was arrested and detained following the reporting of a public order disturbance by the police, when they discovered that he had left his place of residence. In his appeal against his second asylum rejection, the applicant mentioned that one of his cousins had been a vice-president of the political party HEP and murdered in 1994 by anti-guerrilla forces. His appeal was still rejected.

Amnesty International intervened in February and March 1999, requesting access to the applicant in order to conduct an examination of his physical condition. However the applicant's third and fourth appeals were rejected.

According to the findings of the Amnesty International Netherlands branch doctor, the applicant had been subjected to torture. Amnesty informed the Ministry that the applicant's case had not been sufficiently examined. Nevertheless the applicant's fifth and sixth appeals were rejected. In July and August 1999, the State Secretary requested that The Hague Regional Court suspend the examination of appeals of asylum seekers of Kurdish origin, and temporarily suspend expulsions due to doubts over the safeguarding of their human rights on their return. The applicant was released from alien's detention on 31 August 1999. However his

final appeal was rejected on the grounds that "the President finds that no credence can be attached to the alleged acts of torture [....] raised by the applicant for the first time in the context of his third asylum request [...the doctor's] conclusions that the scars 'could fit' the alleged acts of torture does not provide a decisive answer".

Complaints

The applicant complained under Article 3 of the Convention, as well as Article 2 of the Convention and Protocol No. 6. to the Convention, regarding his right to life. He submitted that both he and his son had been tortured and his cousin killed. He further submitted that in his second asylum request the information about his family was disregarded because he had not relied on this element earlier in the proceedings. He complained that his detention was contrary to his rights under Article 5 (1), (4) and (5) of the Convention. He further complained under Article 3 in conjunction with Article 13 of the Convention that the record of his interview on his first asylum request was not made available to him in a language that he understood and he was not provided with adequate legal assistance.

Held

The Court unanimously declared the application inadmissible. It considered that there had been no violation of Articles 3, 5 (5) or 13 of the Convention and that the application was manifestly ill founded pursuant to Article 35 (3) and (4) of the Convention. The Court declared the application also inadmissible under Articles 5 (4), 5 (1), Article 2 and Protocol No. 6 to the Convention

Commentary

In relation to the applicant's claim that by expelling him the Netherlands authorities would be in violation of Article 3 of the Convention, the issue identified by the Court was whether the applicant would face a "real risk" of being subjected to torture or to inhuman or degrading treatment or punishment upon return to Turkey (see *Chahal v United Kingdom*, No.22414/93, 15.11.96).

The Netherlands authorities focused on the inability of the applicant to support with evidence his argument that he had previously been subjected to any ill treatment in Turkey, citing the fact that the applicant repeatedly altered his motives for seeking asylum in the course of his three consecutive requests. The Court found that this could reasonably be regarded as undermining the credibility of his claim, despite the conclusion of an Amnesty International doctor that the applicant had been subjected to torture prior to first arriving in the Netherlands.

The Court rejected as unsubstantiated the applicant's contention that due to his personal relationships with a number of Kurdish dissidents, who were also seeking asylum in the Netherlands, he would be the target of violations of Article 3 of the Convention as well as Article 2 of the Convention and Protocol No.6 to the Convention if he returned to Turkey. It

was emphasised by the Netherlands authorities that the applicant had not invoked such relationships as a reason for his initial request for asylum. Therefore, the Court rejected the allegations that the expulsion of the applicant would be in violation of Article 3 or Article 2 of the Convention, or of Protocol No.6 to the Convention, as being manifestly ill-founded pursuant to Article 35(3) and (4) of the Convention.

The Court noted that the applicant was detained 'with a view to deportation' under the wording of Article 5(1) (f) of the Convention. It stated that under Article 5(1) (f) it is "immaterial" whether a decision to expel can be justified under national or Convention law, as long as the detention is only operative whilst deportation proceedings are "in progress" and such proceedings are pursued with due diligence. The Court considered that it was in the interests of the applicant that the two sets of proceedings, both appealing for asylum and appealing against his detention, were thoroughly examined by the domestic authorities. Therefore, the total period in detention from 4 October 1998 to 17 August 1999 could not be regarded as excessive for the purposes of Article 5(1) (f) of the Convention.

As to whether the applicant's detention pending proceedings was lawful for the purposes of Article 5(1) (f) of the Convention the Court concluded that the rejection of the applicant's argument that his placement in aliens' detention was unlawful by the Hague Regional Court in six separate judicial hearings could not be considered arbitrary (for the principle against arbitrary detention see *Chahal v United Kingdom*, No.22414/93, 15.11.96).

The Court also observed that there was no indication in the case-file that any of the seven domestic decisions as to the lawfulness of the applicant's detention could be considered to be insufficiently 'speedy' under Article 5(4) of the Convention. As a corollary, the possibility under the Aliens Act 1994 of challenging the lawfulness of a detention before the Regional Court, relied on by the applicant on seven occasions, ensured proper respect for the requirements of Article 5(4) of the Convention.

As such, the applicant's claim for compensation under Article 5(5) of the Convention was also manifestly ill-founded pursuant to Article 35(3) and (4) of the Convention, as the applicant had not been a victim of arrest or detention contrary to Article 5.

The applicant complained that a number of failures to make adequate provision of proper legal assistance for someone unfamiliar with the Dutch language were in violation of Article 3 in conjunction with Article 13 of the Convention. However, the Court noted that neither the national procedures for administering his claim or the decision to expel him gave rise to an arguable issue under Article 3 of the Convention. Article 13 therefore did not apply, since a claim of discrimination under that provision "applies only in respect of grievances under the Convention which are arguable," (see *Anne-Marie Andersson v. Sweden*, No.20022/92, 27.08.97).

B. Substantive – Judgments

Death Penalty

Öcalan v Turkey
(46221/99)
European Court of Human Rights: Judgment of 12 March 2003

Article 2 of the Convention (right to life) – Article 3 of the Convention (prohibition of ill-treatment) – Articles 5, 6 and 14 of the Convention

Facts
On 9 October 1998 the applicant was expelled from Syria, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities requested that he leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998 the applicant travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in Russia was accepted by the Duma, but the Russian Prime Minister did not implement that decision.

On 12 November 1998 the applicant went to Rome where he made an application for political asylum. The Italian authorities initially detained him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status and the applicant had to bow to pressure for him to leave Italy. After spending either one or two days in Russia he returned to Greece, probably on 1 February 1999. The following day the applicant was taken to Kenya. He was met at Nairobi Airport by officials from the Greek Embassy and put up at the Greek Ambassador's residence. He lodged an application with the Greek Ambassador for political asylum in Greece, but never received a reply.

On 15 February 1999 Kenyan officials went to the Greek Embassy to take the applicant to the airport. The applicant got into a car driven by a Kenyan official. On the way to the airport the car in which the applicant was travelling left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m.

The applicant was kept blindfolded throughout the flight except when the Turkish officials wore masks. According to the Government, the blindfold was removed as soon as the aircraft entered Turkish airspace.

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The applicant was taken into custody at Imralı Prison on 16 February 1999. While being transferred from the airport in Turkey to Imralı Prison he wore a hood. On photographs that were taken on the island of Imralı in Turkey, the applicant appears without hood or blindfold. He later said that he had been given tranquillisers, probably at the Greek Embassy in Nairobi.

From 16 February 1999 onwards the applicant was interrogated by members of the security forces. On 20 February 1999 a judge ruled on the basis of information in the case file that he should remain in police custody for a further three days as the interrogation had not been completed.

On 21 February 1999 judges and prosecutors from Ankara State Security Court arrived on the island of Imralı. According to the applicant, upon the instructions of his family, sixteen lawyers sought leave from the State Security Court on 22 February to be allowed to see him. They were informed orally that only one lawyer would be allowed access.

Complaints

The applicant complained under Article 5(4) and 5(1) of the Convention that he had not had an opportunity to question the lawfulness of his detention. The applicant alleged that, in breach of Article 5(3) of the Convention, he had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

The applicant complained under Article 6(1) of the Convention that he had not been tried by an independent and impartial tribunal, since a military judge had sat on the bench of the State Security Court which had convicted him.

The applicant complained that the provisions of Article 6(1), 6(2) and 6(3) of the Convention had been infringed owing to the restrictions and difficulties he had encountered in: securing assistance from his lawyers; gaining access for him and his lawyers to the case file; calling defence witnesses; and securing access for his lawyers to the full prosecution file. He also alleged that the judges had been influenced against him by a hostile media.

The applicant maintained that the imposition and/or execution of the death penalty constituted a violation of Article 2 of the Convention – which should be interpreted as no longer permitting capital punishment – as well as an inhuman and degrading punishment in violation of Article 3 of the Convention. In conjunction with this, he also claimed that his execution would be discriminatory in breach of Article 14 of the Convention.

The applicant further complained that the conditions in which he had been transferred from Kenya to Turkey and detained on the island of Imralı infringed Article 3 of the Convention, which protects against torture and inhuman or degrading treatment.

The applicant further complained under Article 3 of the Convention that the conditions of his detention, as the sole prisoner on the island, denied contact with family and lawyers alike and disallowed physical exercise and media access, were inhuman. The applicant complained under Article 34 of the Convention, of the hindrance of his right to individual application when his legal representatives in Amsterdam were not permitted to contact him after his arrest, compounded by the Government's failure to reply to the Court's request that it supply information.

The applicant also alleged violations of Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken alone or together with the aforementioned provisions of the Convention.

Held

The Court held that there had been violations of Articles 5(4), 5(3), 6(1), 6(3) (b) and 6(3) (c) of the Convention, all of which relate to the lawfulness of the applicant's detention, trial, legal and defence proceedings. The Court held that there had been a violation of Article 3 of the Convention concerning the imposition of the death penalty following an unfair trial. The Court stated that even if the death penalty were still permissible under Article 2 of the Convention, an arbitrary deprivation of life pursuant to capital punishment would be prohibited. This flowed from the requirement that "Everyone's right to life shall be protected by law". To impose the death penalty after an unfair trial, in the Court's view, was to subject the person wrongfully to the fear of execution, which amounted to inhuman treatment in violation of Article 3 of the Convention. An arbitrary act could not be lawful under the Convention. The Court decided that the applicant had not been unlawfully deprived of his liberty under Article 5(1) of the Convention. The Court ruled that there had been no violations of Article 3 of the Convention with regard to the applicant's treatment and conditions, nor had there been any violation of Article 2 of the Convention regarding the imposition of the death penalty. The Court did not consider that discrimination had occurred under Article 14 of the Convention, nor that the right of individual application had been violated under Article 34 of the Convention.

Commentary

See Article by Tim Otty (Barrister), above.

Extra-Judicial Killing

Adali and Şaziment Yalçin and Soğukpinar and Filiyet Şen v Turkey

(31137/96; 31152/96; 31153/96; 31154/96)

European Court of Human Rights: Judgment of 12 December 2002

Deaths by police officers' shooting – Article 2 of the Convention – Friendly Settlement

Facts

The applicants are Turkish nationals living in Istanbul. The applications were submitted on their own behalf and that of the sons of Mrs Adalı, Mrs Yalçın and Mr Soğukpınar and Mrs Şen's husband, all four of whom were killed in an attempt by Turkish police to arrest them on 7 October 1988. Under Articles 448, 281 and 463 of the Criminal Code, the Public Prosecutor issued proceedings against 16 police officers who had taken part in the operation, accusing them of causing the death of the four men. The applicants, who joined the proceedings as "intervening parties" on 17 January 1989, alleged that the officers had exceeded their powers in using lethal force. They alleged that the officers had opened fire on the suspects from short range and without issuing a warning. On 6 February 1990 the Assize Court acquitted the officers on the ground that legitimate force had been used when attempting to arrest the men. The decision was based on statements of officers present at the scene, the police record of the investigation, an autopsy report and reports by expert witnesses. An appeal by the Public Prosecutor and three of the applicants was dismissed.

Complaints

The applicants complained under Article 2 of the Convention that the men had been intentionally killed by the use of unnecessary and illegal force.

The Turkish Government submitted a statement to the Court, regretting the occurrence of individual cases of death resulting from the unjustified use of force and accepted that the instant case constituted a violation of Article 2 of the Convention. It offered Mrs Adalı, Mrs Yalçın and Mr Soğukpınar GBP 55,000 and Mrs Şen GBP 70,000 for the damage sustained and for costs. The applicants accepted the settlement offers.

Held

The cases were struck out of the list, following the friendly settlements, pursuant to Articles 38, 39 of the Convention and Rule 62 of the Rules of Court.

Commentary

In the case of *Gül v Turkey* (No. 22676/93, 14.12.02), Mehmet Gül was fired upon and killed by security forces conducting a search. In that case, though the officers were acquitted by the domestic court, the Court, after having conducting a fact-finding hearing, found that the evidence adduced for the officers acquittal was unreliable and that the officers' reactions had been grossly disproportionate to the perceived danger.

The case shows that carrying out fact-finding hearings into cases of gross violations of human rights, such as death and torture, can highlight the techniques and deficiencies of a State's investigative machinery. The Turkish Government, in its friendly settlement statement undertook to "adopt all necessary measures to ensure that the right to life – including the

obligation to carry out effective investigations – is respected in the future". However unless the Court undertakes fact-finding hearings at least in cases of the grossest violations, a key method of ascertaining whether Turkey is in fact complying with its Convention obligations will be lost. It remains to be seen whether the supervision by the Committee of Ministers of the Council of Europe will be an appropriate mechanism for ensuring such compliance.

Death by Negligence

Öneryildiz v Turkey

(48939/99)

European Court of Human Rights: Judgment of 18 July 2002

Death caused by methane explosion – Destruction of property – Liability of authorities – Effectiveness of domestic remedies – Articles 2, 6(1), 8, 13 and Article 1 of Protocol 1 to the Convention

Facts

The applicant, Maşallah Öneryildiz, is a Turkish national who was living with twelve members of his family in the shanty town of Hekimbaşi Ümraniye (Istanbul). This shantytown was built on land surrounding a rubbish tip, used by four district councils and under the authority of the main City Council of Istanbul. An expert report drawn up on 7 May 1991 drew the authorities' attention to the fact that decomposing refuse at the rubbish tip would create methane gas, and that no measures had been taken to prevent a possible explosion. The report gave rise to a series of disputes between the two mayors concerned. Before any conclusions, a methane-gas explosion occurred on 28 April 1993 at the rubbish tip, burying eleven houses situated below it with refuse, including the applicant's. Nine members of his family were killed.

Criminal and administrative investigations into the incident were carried out. The mayors of Umaniye and Istanbul were convicted on 4 April 1996 of "negligence in the exercise of their duties", the former for failing in his duty to have the illegal huts surrounding the tip destroyed, the latter for failing in his duty to make the tip safe or order its closure. They were sentenced to a fine of 160,000 Turkish Liras (TRL), the approximate equivalent to e9.70. The minimum three-month prison sentence provided for in Article 230 of the Criminal Code was commuted to a fine for both the mayors; moreover a stay of execution of those fines was ordered by the court.

The applicant subsequently lodged, on his own and on behalf of his three remaining children, an action for damages in the Istanbul Administrative Court against the authorities for their liability in the death of his relatives and the destruction of his home. On 30 November 1995, the court ordered the authorities to pay the applicant and his children TRL 100 million in non-pecuniary damages and TRL 10 million in pecuniary damages, the latter being limited to the

destruction of household goods rather than the property. This was approximately the equivalent to e2,077 and e208 respectively.

Complaints

The applicant complained under Article 2 of the Convention that nine members of his family had died in circumstances that were the result of the authorities' negligence, and that the subsequent criminal and administrative proceedings were deficient. He also complained that the excessive length of the proceedings was a breach of Article 6(1) of the Convention, and that the lack of fairness of the domestic proceedings was a breach of Article 13. He submitted that there had been a breach of Article 8 due to the distressing situation caused by the authorities' negligence and subsequent actions. Lastly, he complained that the loss of his house and possessions was a breach of Article 1 of Protocol No 1 to the Convention.

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Held

There had been a violation of Article 2 of the Convention (by 5 votes to 2).

The Court noted that there did exist protective regulations regarding rubbish tips, and that the expert report of 7 May 1991 revealed that the local authorities had failed to take the measures required by the legislation. Although some decontamination work had started in 1989, this had been stopped by a court order, i.e. by a State organ. The Court also noted that though the authorities had not encouraged the applicant to set up home near the rubbish tip, they had not acted to dissuade him either. It held that an ordinary citizen could not be expected to know of the risks linked to the process of methanogenesis and landslides; that it was the duty of the authorities to inform the inhabitants of the area of those risks. The authorities had thus failed in that duty. The Court accordingly held that the authorities had known or should have known that the inhabitants of that area had been faced with a real threat and that by failing to remedy the situation and doing all that could be reasonably expected to avoid the risks, there was a causal link between the authorities' negligence and the accident. Thus there would be a breach of Article 2 of the Convention *unless* the applicant's complaints could be deemed to have been effectively remedied in the domestic proceedings.

Regarding the criminal convictions of the two mayors, the Court noted that the original complaint by the applicant, based on the notion of homicide through negligence, was limited merely to "negligence" in the trial. In the Court's opinion this weakened the substance of the investigation. Also, the negligible amount of the fines (which were furthermore stayed from execution) showed that the tribunals had been unaware of the seriousness of the events. As such judgments gave virtual impunity to the mayors, the Court concluded that the criminal proceedings could not be considered to have been an adequate and effective remedy. As to the administrative proceedings, the Court noted that the applicant's right to compensation had

not been acknowledged until four years, eleven months and ten days after his first claims for compensation had been dismissed. This excessive length of time, and the fact that the compensation awarded (itself of a questionable amount) had not been paid, led the Court to conclude that the remedy was not adequate or effective.

There had been a violation of Article 1 of Protocol No. 1 to the Convention (by 4 votes to 3).

Although the dwelling had been built in breach of town-planning regulation and there had been no valid transfer of title of the land from the Treasury to the applicant, the Court held that Mr Öneryildiz had been the *de facto* owner of the main structure and any personal property within. In the Court's opinion, the fact that the applicant had lived in the dwelling with his family and was tolerated by the authorities, amounted to a possession for the purposes of Article 1(1) of Protocol No. 1 to the Convention.

The Court held that the effective exercise of the above right could require positive measures of protection. The authorities' failure to take any such measures was a clear infringement of the applicant's right to peaceful enjoyment of his possessions, which could be construed as an "interference". As to whether the applicant had received an effective remedy domestically, the Court found that the applicant's claim had not been carefully and expeditiously examined with a view to awarding proportionate compensation. The administrative court had been prejudiced by finding that the dwelling had not been supplied with electricity without checking the actual situation, and there had been no recognition by the tribunals of the administrative authorities' liability for the applicant's loss of possessions. Also, the Court noted that the applicant's right to compensation had not been acknowledged within a reasonable time and that he had not yet been paid. The Court therefore concluded that the national authorities could not be deemed to have effectively acknowledged and compensated the alleged violation.

It was not necessary to consider the violations of Articles 6(1), 8 and 13 of the Convention (unanimously).

Commentary

This case is significant in that it demonstrates, in an environmental context, the level of negligence required for the Court to find the authorities in breach of the right to life. As in the case of *Osman v the United Kingdom* (No.23452/94, 28.10.98) the Court did not believe that the failure to take preventive measures must be "tantamount to *gross negligence or wilful disregard* of the duty to protect life"; rather that the authorities "did not do all that could be *reasonably expected* of them to avoid a *real and immediate risk to life* of which *they have or ought to have knowledge*" (para.116, publisher's italics). Thus the level of knowledge required by the respondent party is not just a subjective one but also an objective one of what they should have known in the circumstances.

The case also establishes an important principle regarding what the Court is willing to define as "property" for the purposes of Article 1 of Protocol No. 1 to the Convention. The mere "toleration" by the authorities of property inhabited illegally, in this case in breach of domestic regulations, may be enough to give rise to property rights that fall within the ambit of the Convention. It was the issue of the illegality of the occupation which gave rise to the three dissenting judgments regarding the breach of Article 1 of Protocol No. 1 to the Convention. The case has been referred to the Grand Chamber according to Article 43 of the Convention.

Death in Custody

N.Ö. v Turkey

(33234/96)
European Court of Human Rights: Judgment of 17 October 2002

Torture leading to death – Article 2 and 3 of the Convention – Friendly Settlement

Facts

This case concerns the torture and subsequent death of M.S.Ö. the applicant's husband. The applicant alleged that on 21 June 1993, gendarmes searched her home in the hamlet of Dikmetaş and took her husband away. She claimed that he was taken to a wooded area outside her village, stripped naked and strung up by his arms, inflicting a form of torture known as "Palestinian hanging". His genitals were pulled using a rope and electric shocks were administered to his body. He was then taken to Çinar Gendarmerie.

Due to the deterioration in M.S.Ö.'s condition, he was taken to Diyarbakır State Hospital on 22 June 1993. A medical report of that date referred to bruising on his body. Although M.S.Ö. was released from hospital for further questioning under medical control at Diyarbakır Gendarmerie Headquarters, his health deteriorated further and he was transferred back to the hospital. A report drawn up on the 5 July 1993 stated that M.S.Ö. could not speak and that he had traces of blood around the mouth. M.S.Ö. died that day.

On 4 July 1993 an autopsy, carried out in the presence of the Diyarbakır State Security Court Public Prosecutor, revealed bruising on the deceased's body and fractures in the ribs. An examination of the skull and brain revealed internal bleeding. The doctors carrying out the autopsy requested that the Istanbul Forensic Medicine Institute carry out further examinations of the deceased's organs, including his brain.

At the conclusion of a preliminary investigation, the Diyarbakır Public Prosecutor charged the two gendarmes who had brought M.S.Ö into custody with having caused the death of a third

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person through professional negligence, basing his finding on the report of the Forensic Medical Institute which concluded that "death had resulted from cranial trauma provoking cerebral bleeding". However, the Diyarbakır Gendarme regiment had already informed the Public Prosecutor on 28 March 1994 that the two gendarmes in question had been killed in a confrontation with terrorists. As a result, relying on Article 96 of the Penal code which provides that "the death of a suspect brings an investigation to an end", the Public Prosecutor issued a decision on 6 April 1994 not to bring charges. The applicant's appeal against the Public Prosecutor's decision was dismissed on 6 March 1996.

Complaints
Invoking Articles 2 and 3 of the Convention, the applicant complained that her husband had died after being tortured by members of the security forces.

On 13 August 2002 the Turkish Government submitted a declaration to the Court, regretting the occurrence of death resulting from the use of force and accepted that the use of force in the present case constituted a violation of Article 2 of the Convention. It undertook to issue appropriate instructions and adopt all necessary measures to ensure that the right to life was respected, noting that new legal and administrative measures adopted had reduced the occurrence of deaths in similar situations, as well as creating more effective investigations. It offered to pay the applicant e100,000 as final settlement of the case. The applicant accepted the offer as a friendly settlement under Article 38 of the Convention.

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Held
Under Article 39 of the Convention, the Court noted the friendly settlement achieved and accordingly decided to strike out the case.

Commentary
This case differs from the controversial principle established in *Akman v Turkey* (No. 37453/97, 26.06.01) as the applicant accepted the Government's settlement offer rather than submitting to the Court that the offer was inadequate. If both parties agree to settle, the Court's only duty under the Rule 62(3) of the Rules of Court is to ensure that the settlement is "based on respect for human rights as defined in the Convention". Taking into consideration the present backlog of cases and the Court's current stance of striking out cases even where the applicant has objected to the settlement offer, it is difficult to envisage a situation where the Court would continue to investigate due to a belief that the mere acceptance of a standardised statement of regret and offer of financial compensation is *not* a settlement based on human rights. However, the friendly settlement procedure does offer the possibility for the applicant to negotiate terms by means of counter proposals that are more focused than those offered in the present case – such as an agreement to amend particular legislation – thereby achieving measures beyond what the Court could order in a merits judgment.

It is interesting to note that in this case there seemed to be an adequate paper trail to allow an apparently effective investigation into the death of M.S.Ö. There was an arrest report, doctors' reports which recorded bruising and bleeding, a prompt autopsy report and a further report by the Forensic Medical Institute which revealed the cause of death. In *Tanlı v Turkey* (No. 26129/95, 10.04.01) there was a delay in carrying out a thorough autopsy, and the subsequent deterioration of the body did not allow the Forensic Institute to establish the cause of death; consequently the officers charged in the domestic proceedings were acquitted[162]. Also, in *Taş v Turkey* (No. 24396/94, 14.11.00) a preliminary domestic investigation into the disappearance of the applicant's son was stalled due to the failure to keep adequate records[163]. There has to be a note of caution though as to whether this case demonstrates any willingness on the Government's part to effectively investigate allegations of state torture and killing in future situations. The Public Prosecutor was informed of the deaths of the two officers responsible for arresting the applicant on 28 March 1994, prior to the conclusion of his investigation. It is a matter of speculation whether the knowledge of their deaths affected the amount of documentary evidence revealed for both the domestic and European Court proceedings. Also, the mere fact of prosecution, or even the finding of guilt, does not mean that punishment adequate to the crime will be meted[164].

As in the case of *N.Ö. v Turkey*, the applicant accepted the Government's offer of friendly settlement, thereby demonstrating satisfaction with the terms therein.
It is notable that the Turkish Chief of Police initiated an investigation into the allegations of torture to be conducted by a police Superintendent, but that due to the inadequacy of its conclusions the public prosecutor ultimately decided to indict the relevant police officers.

The Government's declaration to the Court on 19 August 2002 includes an undertaking to "adopt all necessary measures to ensure that the prohibition of such actions – including the obligation to carry out effective investigations as required by Articles 3 and 13 – is respected." In this regard, the declaration alludes to recent administrative improvements 'resulting in more effective investigations', but does not indicate what new improvements are intended.

Yakar v. Turkey
(36189/97)
European Court of Human Rights: Judgment 26 November 2002

Death in custody – Failure to properly investigate circumstances – Article 2 of the Convention – Friendly Settlement

Facts

The applicant's son was arrested by the Turkish security forces on 17 November 1996 and then taken to accompany them on a search for the body of a deceased PKK member. Whilst walking in front of the security forces on this search, the applicant's son stepped on a mine placed by the PKK and died.

In a letter to the public prosecutor of 22 November 1996, the local Gendarmerie Command wrote that the applicant's son had stated during interrogation that he knew where the deceased PKK member's body was hidden and had then died whilst accompanying the security forces on their search to find it. This was supported by the statements made by the gendarmes who had witnessed the death of the applicant's son during a preliminary investigation by the public prosecutor.

In the course of the investigation into the death of the applicant's son the local Provincial Administrative Council issued a decision, on 23 August 2000, stating that no prosecution should be brought against the members of the security forces. In its view, they had acted with due diligence and had been unable to collect the body of the applicant's son owing to weather conditions and the possible existence of other mines in the area.

On 16 October 2000 the applicant filed an objection with the District Administrative Court (*Bolge Idare Mahkemesi*) against the decision of the Provincial Administrative Council. The case is still pending.

Complaints

The applicant complained, *inter alia*, that his son was killed whilst in the custody of the security forces in violation of Article 2 of the Convention. He further complained of the lack of any effective system for ensuring the protection of the right to life in Turkey's domestic law.

The applicant also complained of violations under Articles 6 (the criminal proceedings in respect of his son), 14, 15 and 18 of the Convention.

Held

The Court found that the complaints relating to Articles 6, 14, 15 and 18 were inadmissible. The applicant and the Turkish Government reached a friendly settlement with regard to Article 2 of the Convention on 13 August 2002.

Commentary

The applicant actively accepted the Government's offer of friendly settlement, which included an undertaking to "adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in future." As in the case of

Süleyman Kaplan v Turkey (No. 38578/97, 10.10.02; see below) this undertaking was not supported with specific proposals for further improvement.

Süleyman Kaplan v Turkey
(38578/97)

The European Court of Human Rights: Judgment of 10 October 2002

Torture, inhuman and degrading treatment – Article 3 of the Convention – Friendly Settlement

Facts

The applicant Süleyman Kaplan, a Turkish national, was arrested on 3 May 1995 by the Anti-terror branch of the Ankara Police Headquarters. He was accused of being a member of the TDKP/GKB (Türk Devreimci Komünist Partisi/Genç Komünistler Birligi – The Turkish Revolutionary Communist Party/Young Communists' Union). During his interrogation he was beaten, hung by his arms, given electric shocks and threatened with death. An examination of the applicant on 15 May 1995 confirmed that he was bruised on several parts of his body, and unfit for work for five days. When questioned by the public prosecutor the applicant denied the charges against him and stated that he had signed his statement only under duress. On the same day the Ankara State Security Court ordered the applicant's detention on remand. On 17 October 1995 the applicant lodged a complaint with the Ankara public prosecutor stating that he had been subjected to torture while in custody and requesting that the relevant police officers be brought to justice.

On 24 June 1996 the applicant was sentenced to twelve years' and six months' imprisonment for involvement in an armed gang. Four days later an investigation was launched against the police officers who allegedly tortured the applicant. On 18 September 1996 the Superintendent appointed to investigate the torture charges issued a report stating that there was no evidence to substantiate that the police officers committed the alleged crime. Despite this the Ankara Provincial Administrative Council decided to put the accused officers on trial. The case was transferred to the Ankara Assize court where the proceedings are still pending.

Complaints

The applicant complained under Article 3 of the Convention that he was tortured whilst being held in police custody.

Held

The applicant and the Turkish government reached a friendly settlement on 5 June 2002.

Commentary

As in the case of *N.Ö v. Turkey*, the applicant and the Government secured a friendly settlement through an all inclusive *ex gratia* payment of e28,000 and a declaration of regret by the Government for the occurrence of individual cases of ill-treatment of persons detained in custody. It is notable that the Turkish Chief of Police initiated an investigation into the allegations of torture to be conducted by a police Superintendent, but that due to the inadequacy of its conclusions the public prosecutor ultimately decided to indict the relevant police officers.

The Government's declaration, which was sent to the Court on 19 August 2002, includes an undertaking to "adopt all necessary measures to ensure that the prohibition of such actions – including the obligation to carry out effective investigations as required by Articles 3 and 13 – is respected." In this regard, the declaration alludes to recent administrative improvements 'resulting in more effective investigations', but does not indicate what new improvements are intended.

Algür v Turkey

(32574/96)

European Court of Human Rights: Judgment of 22 October 2002

Police custody leading to inhuman treatment – incompatibility of medical reports – Article 3, 6(1) and 6(3) of the Convention

Facts

On 21 March 1995, an operation was being carried out by security police against the PKK. Meryeme Algür, a student, was arrested while in the possession of false identity papers. She was taken into police custody but was not give any assistance from a lawyer. On 29 March 1995 the applicant signed a statement, drawn up by the police that detailed her alleged activities in the PKK. The applicant alleged that, while she had been in police custody, she had been subjected to both physical and psychological ill treatment. She stated that she had been punched and kicked, threatened with rape and death, been subjected to "Palestinian hanging" and had been given electric shocks.

In an examination by a forensic medical expert on 3 April 1995, a report was drawn up that did not mention any sign of injury to the applicant's body. In contrast, a report by the prison doctor on the same day mentioned that the applicant was suffering from trembling and pain in her arms, legs and neck, and had scratches on her breasts. The prison doctor's report stated that a final report could be drawn up after the applicant had been examined by a forensic medical expert, but there was no evidence of such an examination.

In her trial before the National Security Court, the applicant partly retracted her initial statement, admitting that she had known the organisation through relatives but denying any involvement with it. She also stated that she had been forced to sign the statement by police officers.

In response to a criminal complaint lodged by the applicant on 25 May 1995, alleging ill treatment while in police custody, the Public Prosecutor held that there was no case to answer due to insufficient evidence. An appeal to the Assize Court was dismissed.

On 15 October 1996 the National Security Court, whose bench included a military judge, convicted the applicant for being a member of an illegal organisation and sentenced her to 15 years imprisonment. The Court of Cassation upheld the sentence in a judgment of 16 June 1997. Meryeme Algür is currently in Bayrampşa Prison.

Complaints

The applicant complained that the treatment to which she had been submitted while in police custody was a violation of Article 3 of the Convention. She also submitted that she had not been tried by an independent and fair tribunal, in violation of Article 6(1) of the Convention and that not having access to a lawyer while in detention was a violation of Article 6(3) of the Convention.

Held

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

The Court noted that two medical reports had been drawn up on the same day in total contradiction with each other. In the absence of an explanation from the Government for the discrepancies, the Court concluded that the first examination, as it did not reveal any signs of injury, had been carried out incorrectly. The Court pointed out that it was the duty of the State to protect persons in custody as they were in a highly vulnerable position and that fundamental safeguards to prevent ill treatment were not applied in this case. Having regard to these circumstances, and to the fact that the additional medical examination requested by the prison doctor had not been carried out and that the Government had not provided an explanation for the applicant's injuries, the Court concluded that the Government bore responsibility for the after-effects suffered by the applicant from her treatment.

There had been a violation of Article 6(1) of the Convention (unanimously).

The Court reiterated that it had already found the independence of military judges questionable, being servicemen who belonged to the army, who in turn were under the orders of the executive. It considered that a civilian standing trial before a court that included a military judge would have a legitimate reason for not believing the court to be independent or

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impartial (see *Sadak and Others v Turkey,* Nos. 29900/96, 29901/96, 29902/96, 29903/96, 29900-03/96, 17.07.01[165])

Having regard to the finding of a violation of Article 6(1) of the Convention, the Court held it was not necessary to examine the applicant's complaint under Article 6(3) of the Convention (unanimously).

The Court awarded the applicant e25,000 in respect of all heads of damages, and costs of e3,000.

Commentary

The Court stated that one of the fundamental safeguards needed to prevent the ill-treatment of detainees was the right to request an examination by a doctor of the applicant's choosing *in addition* to examinations carried out by the authorities. This has not been a procedure adopted as yet by detention centres in Turkey, nor is it an issue which has been substantially raised by the European Committee for the Prevention of Torture (CPT) in its reports on Turkey [166]. In its most recent visit, CPT recommended that medical examinations of detainees should in all but exceptional circumstances be conducted out of the presence of law enforcement officials, and that complaints of ill-treatment should be promptly and diligently investigated, with a suitable penalty if appropriate[167].

Due to the inadequacy of the medical certificate, the Court could not establish the severity of the injuries suffered by the applicant. However, the age of Meryeme Algür (22) was a factor that the Court took into consideration in finding that the treatment fell within the minimum requirements for a finding of inhuman and degrading treatment.

Destruction of Homes/Property

Kinay & Kinay v Turkey

(31890/96)

European Court of Human Rights: Judgment of 26 November 2002

Village destruction – Lack of effective investigation – Articles 3, 5, 6, 13 and 14 of the Convention – Friendly Settlement

Facts

On an unspecified date, while the applicant Ramazan Kinay was serving a prison sentence in Diyarbakır prison, the mayor of Dirimpinar village told villagers, including the second applicant Makbule Kinay, that their houses would be burned by security forces. On 18 September 1995,

security forces composed of 50-60 village guards arrived in the applicants' village. They conducted a search of Mabule Kinay's house, manhandling and insulting her as well as her three children. They seized valuables belonging to the applicant and then set fire to the house.

Makbule Kinay moved to a relative's house following the incident, later moving to Istanbul due to intimidation by security forces. She later learnt that 75 tons of barley had been collected from her fields by the village guards.

On 15 March 1995 Ramzan Kinay was conditionally released. He submitted a petition to the Public Prosecutor on 30 November 1995, complaining about the burning of his and his relatives' houses by village guards and requesting permission to return to his village and compensation for the losses sustained. He alleged that no investigation was carried out by the authorities.

The Government claimed that an investigation was carried out into the applicants' allegations. They maintained that on 5 December 1997 the Gendarme Commander took statements from the mayor of Dirimpinar village, who stated that Makbule Kinay moved out of the village of her own free will. The Government also claimed that there were no village guards or operations being carried out in the Dirimpinar region at the relevant time.

<u>Complaints</u>
The applicants submitted that the suffering caused by their eviction from their village and the destruction of their home and possessions amounted to a violation of Article 3 of the Convention. They also relied on Articles 5, 6, 8, 13 and 14 of the Convention.

<u>Held</u>
On 29 August 2002 the Government submitted a declaration to the Court, regretting the destruction of home and property resulting from the acts of agents of the State, and the subsequent failure to carry out effective investigations. It accepted that such acts constituted violations of Articles 3, 8 and 13 of the Convention and Article 1 of Protocol No.1 to the Convention. It offered to pay *ex gratia* €59,000 to the applicants to secure a friendly settlement of the complaints. The applicants notified the Court of their acceptance of the offer on 6 June 2002.

Taking note of the agreement reached between the parties, the Court was satisfied that the settlement was based on respect for human rights and struck the case out of the list according to Article 39 of the Convention.

<u>Commentary</u>
Following the case of a village destruction in *Matyar v Turkey* (No. 23423/94, 25.09.95)[168], where no fact-finding hearing was undertaken by the Court due to budgetary constraints, a friendly settlement can be regarded as an option for an applicant. Since, inevitably, without

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establishing the facts, the applicant is in difficulties to proof any violation of the Convention "beyond reasonable doubt".

Unlawful Detention

Gündogan v Turkey

(31877/96)
European Court of Human Rights: Judgment 10 October 2002

Rights of detainees – Article 5(3), 5(4) and 5(5) of the Convention

Facts
The applicant Halil Gündogan was born in 1960. He is currently being held in Erzurum prison. On 17 October 1995 he was arrested and placed in police custody for being a member of an illegal organisation, the TKP/ML-TIKKO (the Turkish Communist Party/Marxist Leninist – Liberation of the Turkish workers and peasants branch). On the order of the State Security Court of Erzurum the applicant's detention in police custody was extended, and he was then placed in provisional detention. On 12 November 1999 the applicant was sentenced to life imprisonment under Article 146(1) of the Turkish Penal Code.

Complaints
The applicant complained that there had been a violation of Article 5(3), 5(4) and 5(5) of the Convention. He had been detained at length and no swift action had been taken to ensure that he be brought before an independent judge within a reasonable time. The Turkish legislation does not provide the right to compensation if detained, in breach of Article 5(5) of the Convention.

Held
The Court decided that there had been violations of Articles 5(3), 5(4) and 5(5) of the Convention.

Commentary
See commentary for *Murat Satik and Others v Turkey* (Nos. 24737/94, 24740/94 and 24741/94, 22.10.02) below.

Murat Satik and Others v Turkey

(24737/94, 24740/94 and 24741/94)

European Court of Human Rights: Judgment of 22 October 2002

Rights of detainees – Article 5(3) and 5(4) of the Convention

Facts

The application was brought by Murat Satik, Nuran Çamli (Marasli), Fahriye Satik and Recep Marasli, Turkish nationals, now living abroad as political refugees. On 8 July 1994 the applicants were arrested at their homes by policemen working for the anti-terrorism branch of the Istanbul Security Division, under the auspices of an inquiry into the 'terrorist' activities of the PRK (Party of the Liberation of Kurdistan). False papers, an identity card and several documents concerning PRK activities and structure, were seized by the police. On these grounds the applicants were held for questioning, with six other suspects. The State Prosecutor authorised the extension of this custody under the written demands of the anti-terrorism section, until 21 July 1994. On 21 July, following their medical examinations the applicants were heard by the prosecutor, in front of whom they admitted to being in possession of false papers but contested the accusations of their involvement with the PRK. That same day the State Security Court ordered that Recep Marasli be placed in provisional detention and that the other three be separated during the procedure. On 1 September 1994 the State Security Court sentenced Recep Marasli of managing the organisation of the illegal PRK and the others of assisting an illegal organisation under Articles 7, 1 and 2 of the Terrorism Law No. 3713 of the Turkish Penal Code.

Complaints

The applicants complained under Article 5(3) and 5(4) of the Convention, that they were not brought 'promptly' before a judge and that there was no justification for them to be held for such a long period in police custody. The applicants complained under Article 5(4) of the Convention that they were given no recourse to protest against this unlawful detention, and they maintain that at the material time no possibility of appeal was foreseen.

Held

The Court decided that holding the applicants in police custody for 13 days constituted a violation of Article 5(3) of the Convention. With regard to Article 5(4) of the Convention, the Court decided that the Article required that the authority called to take proceedings needed to be judicial in its nature, rather than being linked, as in this case, to executive power. The Court concluded unanimously that there had been a violation of Article 5(4) of the Convention.

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Commentary

In light of the current global situation, national authorities within the Council of Europe are likely to be increasingly vigorous in their implementation of anti-terrorism legislation. This will inevitably lead to a number of applications to the Court alleging that the creation or implementation of such domestic measures has led to a violation of Convention rights.

Two recent applications against Turkey concerned the lengthy detention of persons pursuant to bringing terrorist charges against them and are indicative of the approach of the Court to these types of applications under Article 5 of the Convention. In *Gündogan v Turkey* (No.31877/96, 10.10.02) the Court found that the extended detention of the applicant in police custody for a number of years under the order of the State Security Court violated Articles 5(3), 5(4) and 5(5) of the Convention, as the authorities had not taken any action to ensure that the applicant was brought 'promptly' before a independent judge and entitled to trial within a 'reasonable time' (as required by Article 5(3) of the Convention). Further, the applicant had not been entitled to an examination of the lawfulness of his detention under domestic law (as required by Article 5(4) of the Convention) and as a corollary had no 'enforceable right to compensation' (as required by Article 5(5) of the Convention). Similarly, in *Murat Satik and Others v Turkey* (No.24737/94, 22.10.02) the Court held that there had been violations of Articles 5(3) and 5(4) of the Convention. In this case, the applicants had been arrested in their homes by anti-terrorism police and held for questioning on the basis of the alleged discovery of false papers and documents relating to the activities of the PRK. At the authorisation of the State Prosecutor, the detention of the applicants was extended to a total of 13 days in police custody. As in *Gündogan v Turkey*, the applicants were not entitled to seek a judicial ruling on the lawfulness of their detentions, instead having recourse only to the Public Prosecutor, who has direct links with the executive arm of the state.

Whilst neither judgment represents a departure from the Court's previous jurisprudence, it is notable that in *Murat Satik and Others v Turkey* the Court alluded to the ill-founded presumption among national authorities that when conducting 'terrorist enquiries' there is a form of 'carte blanche', under which Article 5 rights can be easily abrogated. In citing this misconception, the Court may have been demonstrating its awareness that world events may be leading inexorably to governmental disregard for the liberty of its nationals and non-nationals. However, as the United Kingdom's derogation from Article 5 of the Convention in response to the Court's ruling in *Brogan and Others v United Kingdom* (No. 11209/84, 29.11.88) demonstrates, when the threat from terrorism is perceived to be at its height, the Convention's core rights may be rendered powerless against the excesses of national authorities[169].

Further tests of the application of Article 5 of the Convention during times of global unrest are imminent, with the lawfulness of the arrest of Armenians during presidential elections in

February and March 2003. However, as with the fairly straightforward findings in *Gündogan v Turkey* and *Murat Satik and Others v Turkey*, this is unlikely to represent a truly contemporary challenge to both the resolve of the Court and the willingness of national authorities to adhere to its interpretation of the proper application of our human rights at times when the protection of such principles is perhaps most important.

Zeynep Avcı v Turkey

(37021/97)

European Court of Human Rights: Judgment of 6 February 2003

Sexual torture – Article 3 of the Convention – Unlawful detention – Article 5 of the Convention

Facts

Zeynep Avcı is a Turkish National, born in 1975. At the time of lodging her application she was being detained in Kocaeli Prison. She was arrested by the police in the province of Izmir, in connection with a police investigation into the activities of the PKK. She claimed to have been taken into custody on 25 November 1996, however the record of interview which she signed states that she was arrested on 27 November 1996. Before being taken to Istanbul for questioning the applicant was twice examined by a medical doctor, on 28 November 1996 and 3 December 1996. Neither doctor found any evidence of rape.

The applicant was prosecuted under Article 125 of the Turkish Criminal Code for attempting to undermine the indivisibility of the national territory. The first instance proceedings are still pending.

On 26 May 1997 the applicant lodged a complaint alleging that she had been raped and tortured by the police during her period in custody. On 5 August 1997 it was ruled that there was not sufficient evidence to prove this and on 17 September 1997 the President of the Assize Court dismissed an appeal against this ruling. The applicant was then examined by three psychiatrists between March and October 1999 who issued a report stating that the applicant was suffering from post-traumatic stress disorder as a result of rape in 1988.

Complaints

The applicant complained under Article 5(1), 5(3), 5(4) of the Convention, that her detention in police custody had been unlawful and excessively long. She complained that she had been tortured and raped by the police whilst being held in custody, under Article 3 of the Convention, and that she had not had an effective remedy as regards her complaint of rape, under Article 13 of the Convention.

Held

The Court reasoned that the applicant should not have been held in custody for a period of over 15 days. Therefore her detention of 21 days (according to the Police, or 23 days according to the applicant) was indeed unlawful and in breach of Article 5 of the Convention.

The Court decided that the applicant had not produced any evidence in support of her complaint of rape under Article 3 of the Convention. The medical reports dating from her detention had found no evidence of sexual violence and the applicant had neither questioned this at the time nor later, when she had launched her complaint alleging rape. There was therefore no way of proving beyond reasonable doubt that rape had taken place. The Court claimed that the discrepancy in the three psychiatric reports, which alleged that the applicant was suffering from post-traumatic stress disorder as a result of being raped in 1988 and not in 1996, had not been explained by the applicant, although she had been given a chance and indeed encouraged to do so.

The Court declared a violation of Article 5(1), 5(3), 5(4) of the Convention, but no violation of Article 3 or of Article 13 of the Convention. The Court awarded e10000 non-pecuniary damages and e3000 for costs and expenses.

Commentary

This case demonstrates that the main problem in cases regarding rape in custody is to prove these allegations during the trial. The Turkish Code of Criminal Procedure states that individuals must be examined by a member of the Forensic Medicine Facility, which is under the auspices of the Ministry of Justice. But according to the latest report of Amnesty International 'Turkey: End Sexual Violence against Women in Custody!'[170], "...security forces take individuals to primary health care centres or busy hospital services where it may be easier to intimidate younger or less experienced doctors."[171] Apart from the attempts to intimidate doctors in order to receive falsified medical reports, many medical examinations are taking place in situations that respect neither the safety nor the privacy of the woman.

In another rape in custody case *Aydın v Turkey* (No. 23178/94, 25.9.97)[172] the Court found a violation of Articles 3 and 13 of the Convention. The Court reiterated its continuous jurisdiction that, "...where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, [...] a thorough and effective investigation capable of leading to the identification and punishment of those responsible..." (*Aydın v Turkey*, No. 23178/94, 25.9.97, para. 103; see also *Aksoy v Turkey*, No. 21987/93, 18.12.96, para. 98)[173]. In paragraph 107 of the *Aydın* judgment the Court further noted, "... that the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not

circumscribed by instructions given by the prosecuting authority as to the scope of the examination." This also should include a psychological examination by independent medical authorities, which is also recommended by the Istanbul Protocol, an international manual comprising guidelines on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, published in August 1999.

As a consequence of the *Aydın* judgment psychological reports have been requested by Turkish prosecutors and have been admitted as evidence by Turkish courts in some cases, as in the case of Zeynep Avci. Nevertheless, they need to be undertaken in timely forensic examination procedures by specialist female staff and in a safe and professional way. Failures in gathering this important evidence, "...contribute to the probability that perpetrators of sexual violence remain unpunished for their crimes, and that victims of sexual violence will be denied their right to redress and reparation."[174]

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Freedom of Expression

Ayse Öztürk v Turkey

(24914/94)

European Court of Human Rights: Judgment of 15 October 2002

Article 10 (right to freedom of expression) – 'Necessary in a democratic society'

Facts

The application was brought by Ayse Öztürk, a journalist and editor from Istanbul. At the material time she was the owner and Editor-in-Chief of a bi-monthly journal entitled Kizil Bayrak (Red Flag), which was published in Istanbul and distributed in Istanbul, Ankara, Izmir and Adana.

An article entitled "Colonialist oppression forcibly displaces the Kurds" was published in the 1-15 June 1994 issue of Red Flag. On the 4 June 1994, the public prosecutor of the State Security Court in Istanbul requested the confiscation of this journal on the grounds that the article incited racial hatred, in breach of Article 312 (2) of the Turkish Penal Code. That same day, the State Security Court ordered the confiscation, but on the 7 June 1994, when the police went to the Red Flag office to seize the journals, all 1000 copies had already been distributed. The applicant's appeal dated 10 June 1994, that the order constituted a breach of her freedom to receive and communicate information under both the Turkish Constitution and Articles 9 and 10 of the Convention, was rejected by the Court on the 14 June 1994.

In the next issue of Red Flag, 15 June to 1 July 1994, articles entitled, "Full support for the Kurdish people", "Stop the dirty war" and "A revolutionary example of resistance against State terror: extending the boycott to the State Security Court" were published, giving rise to the same official reaction leading to the seizure of the publication on the grounds that the articles constituted 'separatist propaganda', according to Article 86 of the Turkish Penal Code.

Articles in the third consecutive issue (1 –15 July 1994) provoked similar reactions from the State. "The economics of the dirty war and what the working class should do" and "The Democratic Party (DEP) was dissolved", led to the court placing a confiscation order on the journal. Once again, when the police entered the office to carry this out, the journal had already been distributed.

On 24 July 1995 the State Security Court sentenced the applicant in relation to the first confiscation under article 312 (2) and (3) of the Turkish Penal Code and 2(1) of the Turkish Press Law to two years' imprisonment and a fine of 500 000 TRL. Publication of the journal was banned for one month. On 26 January 1998 the court granted a reprieve of three years for this sentence but stated that the sentence would be reintroduced if the applicant were to be found guilty of a similar offence before 14 August 2000.

A similar reprieve of three years was granted on the second seizure case, in which the applicant was found guilty of 'separatist propaganda'.

On the 24 August 1995 the court ruled, in relation to the third confiscation order, that the applicant was guilty of 'separatist propaganda' under Article 8 of the Anti-Terror Law No.3713. On 7 May 1996 the court re-examined the case and decided that the prison sentence be reduced to 5 months and converted to a fine of 750 000 TRL and the original fine be increased to 41 666 000 TRL. The three-year reprieve was again granted with the provision that the penalty would be invoked if any crime was committed before 14 August 2000.

Complaints

The applicant complained under Article 10 of the Convention.

Ayse Öztürk argued that the three seizure orders constituted a breach of her freedom to receive and communicate information or ideas without state interference, under Article 10(1) and 10(2) of the Convention. She argued that she appealed contemporaneously against all three confiscation judgments of the State Security Court and that she exhausted all possible domestic remedies. The applicant denied that this interference was allowed under Turkish law and that Article 86 of the Turkish Penal Code had been applied incorrectly. She argued that this interference was not 'necessary for a democratic society', as had been argued by the Government.

Held
In this case the Court considered that freedom of expression was one of the most essential components of a democratic society and the articles published in Red Flag constituted political discourses as opposed to incitements to the use of violence or armed resistance, terrorism or ethnic hatred. The Court concluded, by five votes to two, that there had been a violation of Article 10 of the Convention.

Commentary
Changes have been made in Turkish legislation relevant to the right to freedom of expression, under the Third Harmonisation package. These changes came into practice with regard to cases after August 2002. Criticism, as an offence in itself, was removed from Article 159 of the Turkish Penal Code on 3 August 2002. The following sentence has been added, "The expressing of opinions only intended to criticise in written, verbal or visual form regarding the institutions and authorities mentioned in the first paragraph, without any intent to insult or vilify, shall not require punishment". The offence has also been moved from the 'heavy offence' category, entailing the possibility of the suspension of the sentence, as in Ayse Öztürk's case. Nevertheless, these changes by no means guarantee freedom of expression, especially bearing in mind that the offence of insult is covered in other articles of the Turkish Penal Code. With regard to these, Article 312 of the Turkish Penal Code is the most frequently implemented, as above. The European Commission's 2002 Regular Report on Turkey's progress towards EU accession stated, "The change made to Article 159 of the Turkish Penal Code means that the expression of opinion without the intention of insulting public institutions will no longer face criminal sanction. Changes to Article 312 of the Penal Code and to the Anti-Terror Law, the Press Law, the Law on Political Parties and the Law on Associations eased certain restrictions on freedom of expression, association, the press and broadcasting."[175]

The Court noted that the Government's objection, that the material endangered democracy because of the residual situation with the PKK and terrorism in the 1980's, was untenable. The distribution of the publication to areas far from the conflict zone compounded this. This is particularly interesting to note in the current climate of heightened awareness of terrorist issues. The confiscation of these issues of the Red Flag was not 'necessary for a democratic society' and could not be justified under Article 10(2) of the Convention, however Judge Gölcüklü (Turkey), the ad hoc judge, voted that the seizure of one of the issues containing the article, "Full support for the Kurdish people", had not violated Article 10 of the Convention. He argued that the language of this article was far from 'neutral' with regard to its support for 'armed resistance' and 'national struggle'.

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Karakoç and Others v Turkey
(27692/95, 28138/95, 28498/95)
European Court of Human Rights: Judgment 15 October 2002

Freedom of expression – Article 10 of the Convention

Facts
The applicants Bahri Zülfü Karakoç, Mehmet Alpaslan and Hamdullah Akyol, born in 1959, 1952 and 1964 respectively, are all Turkish nationals who live in Diyabakır. The first applicant was a member of the trade union *Türk Har-Is*, the second applicant was the leader of the trade union *DISK-Genel-Is*, and the third was the representative of the newspaper *Medya Günesi*. On 27 May 1993 the applicants and 20 others, all of whom were representatives of various trade unions, organisations and newspapers, issued and signed a press release stating their opposition to the extra-judiciary killings that were being carried out by the Turkish authorities against the Kurdish population in the south-eastern region of Turkey.

On 16 September 1993 the Public Prosecutor of the State Security Court of Diyabakır demanded that the applicants be placed in provisional detention on charges of disseminating separatist propaganda. That same day the State Security Court judge dismissed the request, since there was not sufficient grounds to sentence the applicants under Article 8 of the Turkish Law relative to the fight against terrorism. The next day the Public Prosecutor appealed against this judgment. On 17 September 1993 the President of the State Security Court invalidated the decision the judge had made the day before and ordered that the applicants be placed in detention. On 13 April 1993 the applicants were sentenced to 20 months imprisonment and a fine of 208, 333 million TRL on the grounds of disseminating separatist propaganda. The applicants' appeal against the lack of impartiality of the Court that had sentenced them was heard, although the first applicant was imprisoned and detained until the 30 October 1995. On 3 July 1995 the first applicant was discharged from his job with neither explanation nor indemnity.

On 30 October 1995 a new law entered into use which alleviated the imprisonment sentence but heightened the fines. Thereby the State Security Court re-examined the case. On 16 November 1995 each applicant was sentenced to 10 months' imprisonment and a fine of 83,333 million TRL.

Complaints
The applicants complained under Article 10 of the Convention, that their condemnation under Article 8 of the Turkish Anti-terrorist Law No. 3713 was a breach of their right to freedom of expression. The applicants complained under Article 6(1) of the Convention that they had not been given an independent and impartial hearing.

Held

The Court decided that there had been a violation of Article 10 of the Convention. The detention of the applicants could in no way be justified as "necessary in a democratic society". The Court also held that there had been a violation of Article 6(1) of the Convention on two counts. Firstly because the State Security Court judges who ruled on the provisional detention of the applicants had already expressed their opinion on the justification of the prosecution; secondly due to the presence of a military judge in the State Security Court of Diyabakır.

Commentary

In finding that the inclusion of a military judge in the composition of a State Security Court violates the right to a fair trial under Article 6 of the Convention, the Court was reaffirming its judgment in *Incal v Turkey* (No. 22678/93, 09.06.98). In that case it was stated that due to the maintenance of direct links between military judges and their hierarchical superiors, who monitor their performance through military discipline and assessment reports, there is a sufficient objective justification for the accused to fear that a court so composed may be "unduly influenced by considerations which [have] nothing to do with the case", and that she or he therefore will not be granted "an independent and impartial" hearing under Article 6(1) of the Convention. This is likely to be particularly true in circumstances in which the individual is accused of terrorist offences of which the military is actively seized.

In the case of *Çiraklar v Turkey* (No.19601/92, 28.10.98) two tests were put forward to find out whether or not the condition of "impartiality" was within the meaning of that provision. The first consisted of seeking to determine the personal conviction of a particular judge in a given case and the second test involved ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

In this case due to the same reasons as was stated above in the case of *Incal v Turkey* (No. 22678/93, 09.06.98) Mr Çiraklar's fears as to that court's lack of independence and impartiality were regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel them. Therefore there had been a violation of Article 6(1) of the Convention.

For the Court's recent approach to restrictions on freedom of expression in Turkey under Article 10 of the Convention, see the commentary on *Ayse Öztürk v Turkey* (above).

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Özkan Kılıç v. Turkey
(27209/95, 27211/95)
European Court of Human Rights: Judgment of 26 November 2002

Publication of "Separatist Propaganda" – Article 10 and 6(1) of the Convention – Friendly Settlement

Facts
At the material time the applicant was the editor of the weekly *Yeni Ülke* ("New Country") and the editor and proprietor of the magazine *Alternatif.* He currently is residing in Switzerland. On 27 August 1991, charges were brought against the applicant under Article 16 of Law No. 5680 and Articles 6 (2), 8 (1) and (2) of Law No. 3713, relating to the fight against terrorism. The charges were based on four articles published in *Yeni Ülke* and accused the applicant of publishing separatist propaganda. A second charge was brought against the applicant on 12 March 1993 under Article 8 (1) of Law No. 3713, this time for allegedly publishing separatist propaganda in the magazine *Alternatif.*

On 28 October 1993 he was sentenced by the National Security Court to 12 months' imprisonment and a fine of TLR 100,000,000 for disseminating separatist propaganda in *Yeni* Ulke. Furthermore, on 14 April 1994 he was sentenced to 20 months' imprisonment and a fine of TLR 208,333,333 on account of the second charge against him. The applicant was tried as not only the proprietor and editor of the magazine, but also as the author as he had not disclosed the identity of the author.

After Law No. 4126 of 27 October 1995 came into force, which amended *inter alia* Article 8 of Law No. 3713, the National Security Court re-examined the case and reduced the applicant's first sentence to six months' imprisonment and a fine of TRL 50,000,000 and his second sentence to thirteen months and ten days' imprisonment and a fine of TRL 111,111 million.

Complaints
Relying on Article 10 of the Convention, the applicant complained that his convictions violated his right to freedom of expression. He also submitted that his case had not been heard by an independent and impartial tribunal, contrary to Article 6(1) of the Convention.

The Government submitted a declaration to the Court and offered the applicant a payment of €6,097 for damages and €1,524 for costs. In its declaration it admitted that the Court's past rulings in cases involving prosecutions under Article 312 of the Penal Code or under the Prevention of Terrorism Act "clearly show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10". It undertook to implement all the necessary reforms of domestic law as outlined in the National Programme of

Action of 24 March 2001[176]. It also referred to the Committee of Ministers' Interim Resolution of 23 July 2001 (ResDH (2001)106)[177] and stated it would apply the individual measures as set out.

Held

Taking note of the applicant's agreement to the Government's settlement offer, the Court struck the case out of the list, pursuant to Article 39 of the Convention and Rule 62 of the Rules of Court.

Commentary

A friendly settlement may offer not only pecuniary compensation, it could also, as here, include undertakings to change the law. In cases of violations of Article 2 and 3 of the Convention, the Government has so far only given a standardised set of undertakings to "issue appropriate instructions and adopt all necessary measures to ensure that the right to life – including the obligation to carry out effective investigations – is respected in the future".

In this case though, the Government made reference to the Committee of Ministers' Interim Resolution of 23 July 2001 (ResDH (2001) 106). This Resolution took into account the findings of violations of Article 10 of the Convention in 16 cases against Turkey[178] and noted that the convictions still remained in the applicants' criminal records and that restrictions on their civil and political rights remained in place. It urged the authorities to take *ad hoc* measures to erase these consequences of the applicants' convictions and hoped that the Turkish authorities would bring to a conclusion the planned reforms, bringing Turkish law into conformity with Article 10 of the Convention. The Committee decided to resume consideration of these cases until the adoption of the measures required.

That was in July 2001. As these cases show, not much has been done to stop people being convicted of similar offences, in violation of Article 10 of the Convention. At the very least though, the Interim Resolution lists concrete measures that the Government should take. It may also mean that the terms of any friendly settlements following violations of Article 10 will be more closely scrutinised for compliance by the Committee of Ministers.

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Küçük v Turkey
(28493/95)
European Court of Human Rights: Judgment of 5 December 2002

Publication of "separatist propaganda" – Article 10 of the Convention.

Facts
The applicant Yalçin Küçük, is a Turkish national who was living in Paris when the application was lodged. In December 1992 he was arrested while in possession of audio-visual cassettes of an interview he had had with Abdullah Öcalan, the PKK leader. He was prosecuted for publicly vindicating a terrorist organisation, but was acquitted on 26 April 1993 on the ground that the cassettes had not been shown to the public.

In April 1993 the applicant published a book called "Interview in the Kurdish Garden", which included the interview he had had with the PKK leader and made references, among other things, to the "programme for Kurdish cultural autonomy". The applicant was prosecuted for separatist propaganda under Article 8 (1) of Law No. 3713, and on 2 August 1994 was sentenced by the National Security Court to two years' imprisonment and a fine of TRL 250,000,000. Copies of the book were confiscated. After Law No. 4126 of 27 October 1995 came into force, which amended *inter alia* Article 8 of Law No. 3713, the National Security Court re-examined the case and reduced the applicant's sentence to one year's imprisonment and a fine of TRL 100 million. That sentence was upheld by the Court of Cassation.

Complaints
The applicant complained under Article 10 of the Convention that his conviction for publishing the book infringed his right to freedom of expression.

Held
There had been a violation of Article 10 of the Convention (unanimously)

The Court considered that the book, which was written in a literary and metaphorical style, had to be put into context. Although it contained passages concerning the Kurdish cause, it also contained comments and criticism of other political, historical and literary facts. It decided that passages which criticised individuals or the Turkish authorities were more a reflection on the intransigence of those parties than an incitement to violence. It therefore found that the content of the book, in particular from the perspective of public safety and public order, did not justify such a serious interference with the applicant's freedom of expression and could not be regarded as "necessary in a democratic society".

The Court awarded €4,000 for damages and €1,500 for costs and expenses.

Commentary

The Court referred to fundamental principles which had emerged from past case law regarding Article 10 of the Convention (see *Castells v Spain*, No.11798/85, 23.04.92, para. 46; *Oztürk v Turkey*, No.22479/93, 28.09.99, para. 64; *E.K. v Turkey*, No.28496/95, 07.05.02, para. 69-71). Freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10(2), "it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (*Okçuoglu v Turkey*, No.24246/94, 08.07.00, para. 43). Under Article 10(2), any interference must be "envisaged by the law", aim at one or more legitimate goals quoted in that paragraph, and must be "necessary in a democratic society".

In determining whether an interference with this right is "necessary in a democratic society", the Court is required to decide whether the interference complained of responds to a "pressing social need", whether it was "proportionate to the legitimate aim pursued" and whether the reasons given by the authorities to justify the measure are reasonable (see *Handyside v United Kingdom*, No. 5493/72, 07.12.76, para. 50).

The Court observed that the book, written in a literary and metaphorical style, was more a reflection on the state of affairs, rather than an incitement to violence. It thus did not consider the contents of the book of a character to justify the gravity of the attack to freedom of expression by the applicant's imprisonment. Although it noted the States' worries concerning words and acts which may worsen the situation in south-east Turkey, the Court observed that, along with the duty of the press to impart information on matters of public interest, the public also had a concomitant right to receive such information (para.38 of the judgement. See also *Observer and Guardian v The United Kingdom* (No. 51/1990/242/313, 24.10.91, para. 59). It felt that the State had not sufficiently taken into consideration this right of the public to receive information from alternative sources. In finding the measure taken by the national authorities to be disproportionate, the Court also took into consideration the severity of the penalty imposed (even after the case had been re-examined under an amendment to the law which lowered the terms of imprisonment and fines).

For a view that considers that the Court should take a more "contextual approach" in considering whether freedom of expression has been breached, see the concurring opinions of Judges Tulkens, Fischbach, Casadevall and Greve in the case of *Okçuolglu v Turkey* (No. 24246/96, 08.07.99). Also in that case, Judge Bonello in a concurring opinion takes an altogether stricter view of what constitutes a legitimate interference with freedom of expression. He considers that interference can only be justified if there was a "clear and present danger" to law and order.

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Freedom of Association

Dicle on Behalf of the DEP (Democratic Party) v Turkey

(25141/94)

European Court of Human Rights: Judgment of 10 December 2002

Dissolution of a political party – "Necessary in a democratic society" – Articles 9, 10, 11, 14 and 6(1) of the Convention

Facts

The applicant, Hatip Dicle, was president of the Democracy Party (*Demokrasi Partisi –DEP)*, a political party founded on 7 May 1993. On 2 November 1993, the Chief Public Prosecutor petitioned the Constitutional Court to dissolve DEP on the ground that a written declaration made by its central committee and speeches made by the applicant at two meetings in Germany and Bonn had infringed constitutional principles and the Law on Political Parties. On 16 June 1994 the Constitutional Court concluded that DEP's purpose was to demand that the Kurdish people's "identity should be recognised with all its effects, including the right to divide the country and found a separate state,"[179] and therefore was acting in contravention to the Constitution. It accordingly ordered the dissolution of DEP, stating in conclusion that DEP's activities were among those that could be restricted under paragraph 2 of Article 11 of the European Convention on Human Rights. As a consequential measure under Article 84 of the Constitution, all the current members of DEP were stripped of their parliamentary mandate.

Complaints

The applicant alleged that the dissolution of DEP and the associated penalties had infringed Article 9, 10 and 11 of the Convention. He also complained of a violation of Article 14 of the Convention on the ground of discrimination against DEP due to the political opinions it represented. Finally, invoking Article 6(1) to the Convention, the applicant complained of a lack of a public hearing.

Held

There was a violation of Article 11 of the Convention (unanimously). The Court noted that, though the written declarations and speeches that led towards the dissolution of DEP promoted Kurdish identity and were critical of governmental policy towards citizens of Kurdish origin, it reiterated that, if democracy was to work properly, it was essential that political bodies be allowed to make public proposals, even if they conflicted with governmental policy. The Court did not find that DEP's call for autonomy was tantamount to support of terrorist acts as it did not believe that it had been established to the requisite standard that DEP was seeking to undermine democracy through its political activities. With regard to the speech made in

Bonn, Germany and the written declaration by the central committee, the Court observed that there had not been any explicit support or approval of the use of violence for political ends. The Court was not persuaded that the aim of the party in making those declarations was other than to fulfil its duty in voicing the concerns of its voters. Therefore there was no "pressing social need" to dissolve DEP on account of that speech or the written declaration.

In contrast, the Court considered that the declaration made by the former president of DEP in Iraq conveyed two messages which amounted to the approval and call for the use of force as a political tool, those two messages being that the activities of the PKK were comparable to a war to create a Kurdish state in north Kurdistan; and that the Turkish Government was disreputable. Recourse to violence appeared to have been presented as a necessary and justified means of obtaining freedom, and therefore the dissolution of the party in respect of that declaration met a "pressing social need". However, it considered that a single speech by a former leader of DEP, that had been made overseas in a language other than Turkish, to an audience not directly concerned with the situation in Turkey, would have very limited impact on "national security", "public order" or the "territorial integrity" of Turkey. Accordingly the Court found that that speech, by itself, could not justify such a wide penalty as the dissolution of an entire political party, particularly as the maker of the speech had already been prosecuted under criminal law. Therefore it did not regard the dissolution of DEP as proportionate to the aims pursued.

The Court considered it unnecessary to examine separately the complaints under Article 9, 10 and 14 of the Convention.

Commentary

The right to the freedom of assembly under Article 11 of the Convention allows no derogation except in such cases as "prescribed by law" and are "necessary in a democratic society" in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others (Article 11(2) of the Convention). The test of "necessary in a democratic society" requires the Court to determine whether the interference complained of responds to a "pressing social need", whether the reasons given by the national authorities to justify the measure are reasonable, and whether the measure was proportionate to the legitimate aim pursued. The Court acknowledged that the dissolution of DEP met the first part of the test as the speech in Iraq advocated violence as a means to a political end. It was on the last limb of this test that the Government's argument fell. The Court felt that, taking into consideration the circumstances of the speech in Iraq, the measure taken – the dissolution of an entire political party – was disproportionate to the legitimate aim of public security.

In contrast, in *Refah Partisi and Others v Turkey* (Nos. 41340, 41342-4/98, 31.07.01; see also Grand Chamber judgment above) the Court held that the dissolution of the party *was* proportionate to

the aims pursued. In arriving at that conclusion the Court held that as only five members of the party were removed from office, leaving the remaining 152 members to sit in parliament, the measure was proportionate (in the current case, all the members of DEP were deprived of their parliamentary mandate). In three dissenting judgments, it was pointed out that this fact should not have been taken into consideration when assessing the proportionality of the measure, as it was the *party's right of association*, not the individual members, that was in question.

This case should be considered alongside that of *Sadak and Others v Turkey* (Nos. 25144/94; 26149-54/95; 27100-1/95, 11.06.02)[180] as that complaint was brought on the same facts – i.e. the dissolution of DEP – but from the point of view of the individual MPs and the loss of their parliamentary mandate. The Court found that such a loss was in violation of the electorate's right to free elections under Article 3 of Protocol No.1 to the Convention.

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Right to Free Elections

Podkolzina v Latvia

(42726/99)

European Court of Human Rights: Judgment of 9 April 2002

Parliamentary elections – Language requirements – Article 3 of Protocol No.1, Article 13 and 14 of the Convention

Facts

The applicant, Ingrida Podkolzina, is a Latvian national and is a member of the Russian-speaking minority of that country. She stood as a candidate for election to the Latvian parliament, on the list of the National Harmony Party, in the general election of 3 October 1998. The National Harmony Party supplied the Central Electoral Commission with all the documents required by law on parliamentary elections, including a copy of a certificate stating that the applicant knew Latvian, the State's official language. The certificate was issued by the Standing Committee for Language Certification, a branch of the State Language Centre.

An examiner from the State Language Centre came to the applicant's workplace to check her Latvian proficiency, conducting a conversation with the applicant in that language and asking her why she supported the National Harmony Party rather than any other. The examiner returned the next day, accompanied by witnesses and asked the applicant to write an essay in Latvian. As she had not expected such an examination, and because of the presence of the witnesses, the applicant stated that she became extremely nervous and tore up her work. The examiner consequently reported that the applicant did not have an adequate command of Latvian and the Central Electoral Commission struck the applicant's name off the list of candidates.

The National Harmony Party, acting on the applicant's behalf, asked the Riga Regional Court to set aside the Central Electoral Commission's decision. The application was refused, on the ground that possession of a certificate attesting to knowledge of the official language was a precondition for registration for those who had not completed their studies in Latvian. An application by the National Harmony Party to the President of the Civil Division of the Supreme Court and the Attorney-General was also refused.

Complaints

The applicant, relying on Article 3 of Protocol No. 1 to the Convention, complained that the removal of her name from the list of candidates for parliamentary elections, on the ground that she had an inadequate command of Latvian, infringed her right to stand as a candidate in elections.

Held

There had been a violation of Article 3 of Protocol No. 1 to the Convention (unanimously).

The Court found that the purpose of the national legislation on parliamentary elections, barring citizens without an advanced degree of proficiency in the national language from standing for election, was to ensure the proper functioning of the Latvian institutional system. It added that it was not for the Court to determine the choice of the working language of a national parliament: in principle that was for the State to decide. The issue before the Court therefore was whether the measure taken – removing the applicant's name from the list of parliamentary candidates – was proportionate to the aim pursued, i.e. ensuring the proper functioning of the State.

The Court noted that the applicant did in fact hold a valid language certificate in due form, issued by a standing committee following an examination. It found that the standing committee had followed objective marking criteria and a set of rules when voting. It noted that, though the Latvian authorities had not contested the validity of that document, the applicant had nonetheless been required to sit a further language examination. That assessment had been left to the sole discretion of a single official, whose discretionary powers the Court considered to be excessive. Consequently, the Court considered that, in the absence of any objective guarantees, the procedure followed in this case was incompatible with the procedural requirements for fairness and legal certainty for determining eligibility for election. In the Court's opinion, this view was supported by the fact that the Riga Regional Court, in its judicial review of the Central Electoral Commission's decision, only had regard to the result of the impugned examination and had accepted those results as incontrovertible.

The Court considered it unnecessary to consider the complaints under Article 13 and 14 of the Convention.

The applicant was awarded e7,500 for non-pecuniary damages and e1,500 for costs.

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Commentary

In this case the Court considered that language requirements for standing as a parliamentary candidate "pursued a legitimate aim", as it ensured that the State functioned properly.

Therefore the Court did not actually consider whether language requirements are discriminatory as regards the right to free elections, which it could have done if it had pursued the complaint under Article 14 of the Convention. Instead it considered only the issue of whether the decision to strike out the applicant from the parliamentary candidate list was *proportional* to the aim pursued. The main factors it took into consideration were that the applicant did in fact already hold a valid language certificate, which had not been disputed; and that the discretionary power invested in just one assessment officer was excessive. The Court also expressed "surprise" that the assessment officer had questioned the applicant about her political affinities, which suggests that the Court may have been influenced in their decision by the possibility that the officer had not been impartial in his judgement.

Asylum

Yildiz v Austria

(37295/97)

European Court of Human Rights: Judgment of 31 October 2002

Deportation – Violation of right to family life – Article 8 of the Convention.

Facts

The applicants Mehmet Yildiz, Güler Yildiz and Yesim Yildiz are all Turkish nationals, born in 1975, 1976 and 1995 respectively. They were all living in Austria at the time of introducing their application. The first applicant came to Austria in 1989 when he was 14, to live with his parents and siblings. The second applicant was born in Austria and lived there all her life. The first and second applicant co-habited from 1994 and were married under muslim law in April 1994 and Austrian civil law in March 1997. Their daughter, the third applicant, was born on 14 August 1995.

On 5 January 1993 the first applicant was sentenced to three days' imprisonment on probation for shoplifting by a Swiss court. On 19 May 1993 the Dornbirn District Court *(Bezirksgericht)* convicted him of theft without pronouncing a sentence. They established that he had stolen goods worth the equivalent of 1,817. The first applicant was also convicted of minor breaches of traffic rules in 1992 and 1993 and sentenced to pay fines. Between February and April 1994 he was convicted three times of driving a car without a driving licence and sentenced to pay fines. In September 1994 the Dornbirn District Authority imposed a five-year residence ban

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on the first applicant. His appeal was rejected on the grounds that the under Section 18 (1) and (2) of the 1992 Aliens Act in Austrian domestic law, a residence ban has to be issued against an alien if, *inter alia*, he has been convicted more than once for similar offences by a domestic and foreign court, or if a fine has been imposed on him more than once for a grave administrative offence.

On 11 May 1995 the first applicant was taken into detention with a view to his expulsion. He was released on 10 August 1995 when the Administrative Court granted the first applicant's complaint at this detention suspensive effect. This complaint was made on the grounds that neither the second nor third applicant could possibly have been expected to follow him to Turkey and that since Austria had become a part of the European Union on 1 January 1995 it was bound by the Association Agreement between the European Union and Turkey which stated that Turkish workers legally employed in the member state had the right to a residence permit.

On 4 December 1996 the Administrative Court dismissed the first applicant's complaint. It found that the contested ban served out the aims set out in Article 8(2) of the Convention, namely the prevention of crime and the protection of the rights of others. The first applicant complied with an order to leave Austrian territory issued on 16 June 1997. The first applicant is currently living in Turkey and although his residence ban has expired he states that the possibilities of returning to Austria are very limited and involve long waiting periods. This statement has not been contested by the Austrian Government.

The first and second applicants divorced in March 2001. The second applicant is now living in Austria and has full custody over the third applicant who, though residing at present with relatives in Turkey, will come back to Austria according to the wishes of the second applicant

Complaints

The applicants complained that the residence ban issued against the first applicant constituted a breach of Article 8 of the Convention, as it violated their right to respect for their family life and that the date of enforcement of the ban was 1 July 1997, at which point they had been married for 3 years under Muslim law and were also married under Austrian civil law and their daughter was two years old. Even when the first judgment confirming the residence ban was issued on 4 December 1996, the couple had been co-habiting for 2 years and had a one and a half year old child. The applicants submit that the residence ban disrupted the family to the extent of leading to the first and second applicants' divorce.

Held

The Court decided that the first applicant's offences had been of a minor nature, as confirmed by the modest penalties imposed, therefore not constituting "disorder and crime" or threatening

"the rights and freedoms of others" as laid out in Article 8 (2) of the Convention. The interference with the applicants' right to respect for family life was not proportionate to the legitimate aim pursued. The Court concluded a breach of Article 8 of the Convention.

Commentary

The Austrian Government relied heavily in argument on its interpretation that the residence ban became effective on 27 September 1994, the date when it was first issued. It stated therefore that having only been cohabiting for a matter of months, and with their daughter unborn at that time, the applicant's 'family ties' were not of sufficient intensity to invoke the protection of Article 8 of the Convention.

However, referring to its judgment in *Bouchelkia v. France* (No. 23078/93, 29.01.97) the Court reiterated that the question as to whether the applicants had established a violation of their right to a private and family life within the meaning of Article 8 of the Convention must be determined in the light of the position when the residence ban became final, which in this case was on 4 December 1996, when the Administrative Court confirmed its operational effectiveness. Therefore, the applicants could rely on the third applicant's birth in addition to the three year co-habitation of the first and second applicants in support of their assertion that their right under Article 8 of the Convention had been violated.

Thus, the residence ban constituted an interference with the applicants' right to respect for their private and family life.

The Court went on to consider whether the limitation of the applicants' right to respect for family life could be justified under the criteria in Article 8(2) of the Convention. The Court found that the ban was 'in accordance with law', its basis in domestic law being the Aliens Act 1992. The Court was satisfied with the Administrative Court's conclusion that the Association Agreement between the European Union and Turkey did not apply to the first applicant because he had failed to show that he fulfilled the conditions for the application of these provisions. It also noted that the ban served the 'legitimate aim' of the "prevention of disorder or crime" under Article 8(2) of the Convention.

In evaluating the requirement that such limitations be 'necessary in a democratic society', the Court emphasised the Austrian Government's failure to consider the second and third applicants effective inability to travel to Turkey in order to retain family ties with the first applicant. Balancing this against the minor nature of the first applicant's offences, an "essential element for assessing the *proportionality* of the interference with the applicants' family life", the Court held that the Austrian authorities had failed to strike a 'fair balance' and were therefore in violation of Article 8 of the Convention.

The Court recognised that the applicants' family situation had since changed, with the first and second applicants being divorced, but reiterated that it must make its assessment in light of the position when the residence ban became final.

It is interesting to note that the minor penalties imposed upon the first applicant under Austrian law were an essential consideration in the Court's conclusion that there was not a sufficient public interest to justify a major limitation to the right to respect for family life.

C. Procedural

Libel

Nogolica v Croatia
(77784/01)
European Court of Human Rights: Admissibility decision of 5 September 2002

Defamation – Exhaustion of domestic remedies – Articles 6(1) and 13 of the Convention

Facts
On 5 October 1995 the applicant, Mr Zvonko Nogolica, filed two civil actions for damages with the Zagreb Municipal Court, claiming that the newspapers "Arena" and "Globus International" had published libellous articles against him. The applicant's claim against "Arena" was rejected on 10 April 2000, and his claim against "Globus International" was rejected in June 2000. The applicant appealed against both judgments and the proceedings for both are currently pending in the Zagreb County Court as the appellate court.

Complaints
The applicant complained that his claims for damages were not concluded within a reasonable time, as required under Article 6(1) of the Convention. He also complained under Article 13 that he had no effective remedy in respect of his claim about the length of the proceedings.

Held
The Court unanimously declared the application inadmissible. It noted that the Croatian Parliament had passed the *Act on Changes of the Constitutional Court's Act*, entering into force on 15 March 2002. This provided, *inter alia*, that the Constitutional Court must examine a constitutional complaint even before all legal remedies have been exhausted in any case where

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a court has not decided, within a reasonable time, a claim concerning the applicant's rights and obligations, or a criminal charge against him. The Court found that this provision removed the obstacles that were decisive when the Court found in an earlier case that the Constitutional Court's Act did not provide an effective remedy in respect of the length of proceedings (see *Horvat v Croatia*, No. 51585/99, 26.07.01, paras. 41–45). The Court found the wording of the provision to be clear and therefore a remedy which must be exhausted in a complaint regarding the length of proceedings.

Commentary

At the time of *Horvat v Croatia* (No. 51585/99, 26.07.01) s. 59(4) of Croatia's *Constitutional Court's Act* required that an applicant's rights had to have been "grossly violated" by a decision not being issued within a reasonable time; and that there should have been a risk of "serious and irreparable consequences". The Court found such terms to be too uncertain to provide an effective remedy. Consequently the Croatian Parliament passed the *Act on Changes of the Constitutional Court's Act* to remedy the situation. Although the Court acknowledged that the Constitutional Court had not yet considered any cases under the new legislation, it held it to be clear enough to be an effective remedy.

The problem though was that the applicant had introduced his complaint to the Court on 17 September 2001, i.e. before the legislation providing for an effective remedy was published in the Official Gazette (22 March 2002). The question arose therefore of whether the applicant was still required to exhaust this remedy before the Court could examine his complaint. The Court reiterated that the purpose of the exhaustion rule was to allow Contracting States the opportunity of *preventing or putting right* the violations alleged against them *before* those allegations are submitted to it (cf. *Selmouni v France*, No. 25803/94, 28.06.99, para. 74). It recalled that, though the issue of whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court, the rule is subject to exceptions which might be justified by the special circumstances of each case (cf. *Baumann v France*, No. 33592/96, 22.05.01, para.47). The Court noted that the Government had admitted that excessive length of proceedings was a widespread problem in Croatia and that the new legislation was specifically designed to address that problem. Also, as the domestic case was still pending judgment at the appellate court, the Court held that the new remedy was still open to the applicant and would be effective as it not only provided compensation but also obliged the Constitutional Court to set a time limit for deciding the case. In the light of the above, the Court considered that the applicant first had to address himself to the Constitutional Court under the new remedy available.

Implicit within the wording of the decision is the Court's worry about increases in its backlog of cases and its desire to cut down on cases that do not reveal new points of law. The Court

stated that it had received "in a rather limited period of time [...] hundreds of applications against Croatia claiming violations of the reasonable time requirements". It maintained that such complaints should more appropriately be addressed within the national legal system, as not to do so would "affect the operation at both the national and international level of the system of human rights protection set up by the Convention". In the *Final Report of the Working Party on Working Methods of the European Court of Human Rights*, the report stated that "it should be a priority to increase the number of finally decided cases, not least because if the backlog increased substantially, difficulties would be created in the future"[181]. Increasing the number of decided cases at the expense of cutting down the right of individual petition is a worrying trend, especially when the Court uses the fact that the applicant's case is still pending before the national appellate court as justification for declaring that the new legislative remedy is still available for him to pursue, when it is the very essence of his complaint that he is still waiting for a final judgment.

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Ayşenur Zarakolu and Others v Turkey

(26971/95, 37933/97)

European Court of Human Rights: Admissibility Decision of 11 December 2002

Book confiscation – Denial of freedom of expression – Articles 6, 10 and 13 of the Convention

Facts

Ayşenur Zarakolu, the owner and director of the Belge Uluskararası Yayincılık (BUY) Publishing House published a book in 1994, entitled "Our Ferhat, Anatomy of a Murder". The book dealt with the killing of Ferhat Tepe. On 12 October 1994 the Istanbul State Security Court ordered the prohibition and confiscation of this book under Article 8 of the Anti-Terror Law No. 3713 and Article 36 of the Turkish Penal Code. On 29 December 1995 the State Security Court sentenced the applicant to 5 months' imprisonment and a fine of 42 million Turkish Lira. The applicant's appeal was dismissed by the Supreme Court.

Complaints

The applicant complained under Article 10 of the Convention, that she had been denied her right to freedom of expression. Under Articles 6 and 13 of the Convention, she stated that she had been denied her right to a fair and swift trial and an effective remedy. The applicant also complained under Articles 14, 18 and Article 1 of Protocol No.1 to the Convention.

Held

Since the applicant died in January 2002, the Court decided in this KHRP assisted case that the applicant's husband and two sons may 'claim in their turn to be 'victims [...]'and thus pursue

the application in this capacity. The Court declared the application admissible under Articles 6, 10 and 13 of the Convention, and also under Article 1 of Protocol No.1 to the Convention but not under Articles 14 and 18 of the Convention.

Commentary

The Court has held previously "that when an applicant dies during the course of proceedings, his heirs may in principle claim in their turn to be 'victims' [...] of the alleged violation, as rightful successors" (*Deweer v. Belgium*, No. 6903/75, 27.02.80). The heirs of a deceased applicant cannot claim a general right that the examination of an application should be continued by the Court (*Kofler v. Italy*, No. 8261/77, 9.10.82) but "[t]he essential point is whether, bearing in mind the nature of the particular application, the successor can be considered to have sufficient interest to justify the further examination of the application on his or her behalf." (*Mathes v. Austria*, No. 12972/87, 13.01.92). Similar to this case in *Ahmet Sadik v. Greece* (No. 18877/91, 15.11.96) the widow of the applicant and their children sought to continue the case regarding, *inter alia*, the allegation of a violation of Article 10 of the Convention. The Court held that the heirs of the applicant had a legitimate moral interest in obtaining a ruling that the applicant's conviction infringed Article 10 of the Convention, apart from having a pecuniary interest in the case.

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Footnotes

155 Cf. (2002) 2 KHRP LR, p. 75.

156 See (2002) 2 KHRP LR, p. 75.

157 Formerly known as *T.A. v Turkey*. Cf. (2002) 2 KHRP LR, p.101.

158 See KHRP Newsline, Winter 2002, p.8 (under T.A. v Turkey).

159 See article by P. Leach, 'Striking out – dissent revealed amongst European Court Judges', KHRP Newsline, Summer 2002, p. 5.

160 See "Finishing Off Cases: the Radical Solution to the Problem of the Expanding EctHR Caseload", Article by Marie Dembour above.

161 See P. Leach/K. Yildiz, *Taking Cases to the European Court of Human Rights*, A Manual, KHRP, 2002, p. 30.

162 See commentary on *Dicle on Behalf of the DEP (Democratic Party) v Turkey* (25141/94), below and (2002) 1 KHRP LR, p. 72.

163 See (2002) 1 KHRP LR, p. 38.

164 See (2002) 1 KHRP LR, p. 52.

165 See *Öneryildiz v Turkey* (No. 48939/99,18.06.02), above.

166 See (2002) 2 KHRP LR, p. 127.

167 See CPT/Inf(2002) 13, CPT/Inf (2001) 25.

168 See CPT/Inf(2002) 13, para.37 – 42.h.

169 See (2002) 2 KHRP LR, p. 112.

170 In the subsequent case of *Brannigan and McBride v. UK* (No.14553/89 and 14554/89, 26.05.1993) the Court found that detentions without trial of similar length to those in *Brogan v United Kingdom* (above) were also in breach of Article 5(3) of the Convention, but that due to the United Kingdom Government's derogation under Article 15 of the Convention the applicants could not validly claim that there had been a violation.

171 Turkey: End Sexual Violence against Women in Custody!, Amnesty International, February 2003, EUR 44/006/2003.

172 Turkey: End Sexual Violence against Women in Custody!, Amnesty International, February 2003, EUR 44/006/2003, p.37.

173 A case handled by KHRP. Case Report on the Practice of Torture in Turkey of December 1997.

174 In the case *Assenov v Bulgaria*, No. 24760/94, 28.10.98, the Court went even further in recognising an obligation for the State to investigate allegations of torture not only under Article 13 but also under Article 3 of the Convention.

175 Turkey: End Sexual Violence against Women in Custody!, Amnesty International, February 2003, EUR 44/006/2003, p.39.

176 Commission of the European Communities, 2002 Regular Report on Turkey's Progress Towards Accession, {COM(2002) 700 final}, Brussels, 9.10.2002, SEC(2002) 1412.

177 For a synopsis of these reforms, see (2002) 1 KHRP LR, p. 11.

178 See www.cm.coe.int/site2/ref/dynamic/resolutions/.

179 See ResDH(2001)106.

180 Judgment of the Constitutional Court, p. 108.

181 See (2002) 2 KHRP LR, p. 127.

182 Council of Europe, published January 2002, para 48.

183 The Evaluation Group on the European Court of Human Rights was established by the Council of Europe's Committee of Ministers on 7 February 2001. Its report, published on 27 September 2001, EG (Court) 2001, is available on the Council of Europe's web site at http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

184 As mentioned by Mr Luzius Wildhaber, President of the European Court of Human Rights in a speech to the Liaison Committee on 4 March 2003, and by the Registry in an impact assessment produced for the Committee of Ministers' Steering Committee for Human Right (Document reference CDDH-GDR(2003)017). The Registry estimated that this proposal would affect only 4.7 % of current Chamber cases.

185 See the report of the Evaluation Group on the European Court of Human Rights, paragraph 83, available at http://cm.coe.int/stat/E/Public/2001/rapporteur/clcedh/2001egcourt1.htm

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Section 3: Appendices

1. Status of Ratifications of the Principal United Nation's Human Rights Treaties

Country	CESCR	CCPR	CCPROP1	CCPROP2	CERD	CEDAW
Armenia	13 Sep 93	23 Jun 93	23 June 93		23 June 93	13 Sep 93
Azerbaijan	13 Aug 92	13 Aug 92	27 Nov 01	22 Jan 99	16 Aug 96	10 Jul 95
Iran	24 Jun 75	24 Jun 75			29 Aug 68	
Iraq	25 Jan 71	25 Jan 71			14 Jan 70	13 Aug 86
Syria	21 Apr 69	21 Apr 69			21 Apr 69	
Turkey	*s: 15 Aug 00*	*s: 15 Aug 00*			16 Sep 02	20 Dec 85

Country	CEDAW OP	CAT	CRC	CRCOPA C	CRCOPS C	MWC
Armenia		13 Sep 93	23 Jun 93			
Azerbaijan	01 Jun 01	16 Aug 96	13 Aug 92	03 Jul 92	03 Jul 02	11 Jan 99
Iran			13 Jul 94			
Iraq			15 Jun 94			
Syria			15 Jul 93			
Turkey	29 Oct 02	02 Aug 88	04 Apr 95	*s: 08 Sep 00*	19 Aug 02	*s: 13 Jan 99*

CESCR: International Covenant on Economic, Social and Cultural Rights, monitored by the Committee on Economic, Social and Cultural Rights;

CCPR: The International Covenant on Civil and Political Rights, monitored by the Human Rights Committee;

CCPR-OP1: Optional Protocol to the CCPR, administered by the Human Rights Committee;

CCPR-OP2: Second Optional Protocol to the CCPR, aimed at the abolition of the death penalty;

CERD: International Convention on the Elimination of All Forms of Racial Discrimination, monitored by the Committee on the Elimination of Racial Discrimination;

CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women, monitored by the Committee on the Elimination of Discrimination against Women;
CEDAW-OP:	Optional Protocol to CEDAW;
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, monitored by the Committee against Torture;
CRC:	Convention on the Rights of the Child, monitored by the Committee on the Rights of the Child;
CRC-OP-AC:	Optional Protocol to CRC, on the involvement of children in armed conflict;
CRC-OP-SC:	Optional Protocol to CRC, on the sale of children, child prostitution and child pornography;
MWC:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly in 1990 and which will enter into force when 20 States have accepted it.
s:	Signifies that the country is a signatory to the Convention but has not yet ratified/acceded to it.

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2. Status of Ratifications of European Conventions and Treaties

Convention	Armenia	Azerbaijan	Turkey
ECHR	26 Apr 02	15 Apr 02	18 May 54
ECPT	18 Jun 02	15 Apr 02	26 Feb 88
ECE	25 Jan 02 *r,d*	28 Jun 02 *r,d*	07 Jan 60, *r*
ECST	*s: 08 Nov 01*	*s: 7 Nov 01*	19 May 81
ESC Rev	*s: 18 Oct 01*	*s: 18 Oct 01*	
ECRML	25 Jan 02	*s:21 Dec 01*	
FCPNM	20 Jul 98	26 Jun 00	
ECHR P1	26.04.02	15.04.02	18.05.54
ECHR P2			25 Mar 68
ECHR P4	26 Apr 02	15 Apr 02	*s: 19 Oct 92*
ECHR P6	*s: 25 Jan01*	15 April 02	*s: 15 Jan 03*
ECHR P7	26 Apr 02	15 Apr 02	*s: 14 Mar 85*
ECHR P12			*s: 18.04.01*
ECHR P13			

ECHR: European Convention on Human Rights and Fundamental Freedoms

ECPT : European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECE: European Convention on Extradition

ECST: European Convention on the Suppression of Terrorism

ESC Rev: European Social Charter (revised)

ECRML: European Charter for Regional or Minority Languages

FCPNM: Framework Convention for the Protection of National Minorities

ECHR P1: Protocol No. 1 to the ECHR, securing further rights (right to peaceful enjoyment of possessions, right to free elections, right to education)

ECHR P2 : Protocol No. 2 to the ECHR, conferring upon the European Court of Human Rights Ccompetence to give Advisory Opinions

ECHR P4: Protocol No. 4 to the ECHR, securing further rights (inc. prohibition of expulsion of a national, and the prohibition of the collective expulsion of aliens)

ECHR P6:	Protocol No. 6 to the ECHR, concerning the abolition of the Death Penalty in Peace time
ECHR P7:	Protocol No. 7 to the ECHR, conferring additional rights
ECHR P12:	Protocol No. 12 to the ECHR, providing a general prohibition of discrimination
ECHR P13:	Protocol No. 13, concerning the abolition of the Death Penalty in all circumstances
r:	Reservation made
d:	Declaration made
s:	Signifies that the country is a signatory to the Convention but has not yet ratified/acceded to it.

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3. NGO Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights

To the Committee of Ministers:

We, the undersigned NGOs, submit the following response to proposals to ensure the future effectiveness of the European Court of Human Rights put forward by the Evaluation Group on the European Court of Human Rights[182] *and the Committee of Ministers' Steering Committee on Human Rights (CDDH).*

1. We recognise that the increasing number of individual applications which are being lodged with the European Court of Human Rights (the Court) has been detrimental to its effectiveness and that, accordingly, reforms are needed.

2. We consider that the measures taken to ensure the long-term effectiveness of the Court should aim to improve the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) in member states, and to strengthen the right of individual application by ensuring the speedier resolution of applications. We urge you to ensure that the right of individual application – which lies at the heart of the European Convention system – is not prejudiced, restricted or weakened.

3. We believe that better implementation of the European Convention in member states would reduce the number of people who need to seek redress before the Court, and hence its workload. For this reason, we believe the main objective of reform should be to improve the implementation of the European Convention in the member states of the Council of Europe. We therefore particularly welcome the proposals that aim at preventing violations at the national level and improving domestic remedies, including by asking states to ensure continuous screening of draft and existing legislation and practice in the light of the European Convention and the Court's case law; and by asking states to increase information, awareness-raising, training and education in the field of human rights.

4. We consider that new measures are required to screen quickly and effectively the high numbers of applications received by the Court, 90% or more of which are inadmissible or struck out under the current criteria. We also acknowledge the need for the Court to be able to handle in an efficient manner the 65% or more of admissible cases which raise repetitive issues about which its case law is clear.

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5. In this respect, we urge the Committee of Ministers to ensure that the Registry receives adequate human and financial resources, including sufficient paralegal, secretarial and clerical support for the Registry lawyers.

6. We welcome proposals to empower committees of three judges to rule on the admissibility and merits of cases which raise repetitive issues, about which there is well-established case law, by amending Article 28 of the European Convention. Given that such a large proportion of the cases now considered substantively by the Court are repetitive cases, we consider that this proposal would have a significant impact on reducing the work-load of the court and expediting the rendering of judgments, while maintaining the essence of the right of individual petition.

7. We oppose proposals to invest judicial status on members of the Registry who have not been elected as judges, as – in accordance with the principle reflected in the Court's own jurisprudence – applicants are entitled to expect their cases to be determined by a court, not by administrative officers. If such proposal is adopted, the system could be subject to criticism that it lacks the appropriate appearance of independence and transparency. We are of the view that no decision on the admissibility and/or merits of an application should be made by less than three judges. We would therefore oppose any proposal that such decisions be made by a single judge.

8. We share concern expressed by some judges of the Court, members of the Registry, representatives of the European National Human Rights Institutions and experts about proposals to change the current admissibility criteria in a manner which would restrict the right of an individual to have currently admissible cases determined on their merits. The right of individual petition is a vital element of the protection of human rights in the Council of Europe system. We consider that curtailing this right would be wrong in principle. Unlike other proposals, curtailing this right would have little impact on the main source of the Court's overburdening, which is disposing of the high number of cases that are inadmissible under the current criteria. Such a measure would be seen as an erosion of the protection of human rights by Council of Europe member states, an erosion which will have an adverse impact on efforts to promote the protection of the rights of people in countries where systems are significantly weaker. Particularly at a time when human rights – including the right to fair trial and the absolute prohibition of torture and inhuman or degrading treatment or punishment – are under great pressure around the world, we urge the Council of Europe to maintain the integrity of the system it has established.

9. Accordingly, we *vigorously* oppose the proposal which would empower the Court to decline to issue judgments on the merits of applications which are admissible under current criteria but which the Court deems raise "no substantial issue" under the European Convention.

10. We are concerned about the proposal to extend the inadmissibility criteria by amending Article 35 of the European Convention to allow the Court to declare inadmissible cases if the applicant has not suffered a significant disadvantage and if the case does not either raise a serious question affecting the interpretation or application of the Convention or the protocols thereto or any other issue of general importance. We are unconvinced of the necessity or effectiveness of this proposal, particularly as the President of the Court and the Registry have recently indicated their anticipation that this proposal will do little to reduce the Court's caseload.[183] Instead, we believe that by adding additional admissibility criteria, it will make the admissibility process significantly more time-consuming and complex.

11. With a view to improving the quality of applications and reducing the number of inadmissible applications to the Court, we urge the Committee of Ministers to recommend that member states provide resources to lawyers and non-governmental organizations in order for them to provide initial advice to individuals in respect of potential Convention applications. This should include the provision of legal aid by the national authorities. Our experience is that the provision of such advice has dissuaded people from making misconceived applications.

12. We are concerned that an expansion of the existing friendly settlement process must not be to the detriment of the individual right of application. We consider that the striking out of applications under Article 37 of the Convention should be regarded as a wholly exceptional procedure. The suggestion that an applicant's consent could be dispensed with in striking out an application should be rarely, if ever, invoked. This would require a clear admission of liability by the respondent Government in the particular circumstances of the applicant's case, and could only apply where the applicant's position is manifestly unreasonable. There would have to be a rigorous consideration by the Court of the respondent Government's settlement offer and a careful assessment as to whether the offer provides as full a remedy as is appropriate in the circumstances. It should never be invoked in cases of arguable violations of those Articles that are non-derogable under Article 15.2.

13. Although we acknowledge that the Court's fact-finding hearings may be time-consuming and expensive, we believe that in exceptional cases such procedures are essential to the Convention system and must be continued. Such hearings have been conducted in complex and serious cases where there has been no or inadequate

investigations by the national authorities. It is the very failure of the national authorities to provide an effective remedy in respect of violations of the Convention which creates the need for the Court to hold fact-findings hearings.

14. We do not support the creation of regional human rights tribunals throughout Europe – with the Court becoming a tribunal of last instance – or the use of preliminary rulings on Convention issues at the request of national courts. We agree with the Evaluation Group, which said about this solution that "it carries the risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform and coherent standards, collectively set and enforced, should obtain throughout the Contracting States".[184]

15. We support proposals to improve and accelerate the execution of judgments of the Court. In particular, we would welcome the Court identifying underlying systemic problems in its judgements, and the Committee of Minister further developing procedures to give priority to the rapid execution such judgments. We would welcome the Committee of Ministers being enabled to supervise the execution of decisions taken by the Court with respect to friendly settlements. We would encourage the Committee of Ministers to further explore the idea that it be enabled to petition the Court after a persistent failure of a state to execute a Court judgment, and the Court be empowered to impose a financial sanction on the state if it finds an continuous violation by the state of its obligation under Article 46 to abide by judgments against it. We would welcome optimum use being made of other existing institutions, mechanisms and activities, and the Court making more frequent use of the possibility to invite other states to intervene in cases of principle.

16 We consider that adequate financial and human resourcing of the Court is vital for its continued credibility and effectiveness. It is noted that the total budget of the Court of Human Rights is only a quarter of the budget of the Court of Justice. It is essential that Contracting States show greater commitment to the Court system, by providing the Court with sufficient resources to carry out its tasks.

17 Finally, we are concerned that the majority of member states have yet to inform or consult with the legal community and civil society within their jurisdictions about the proposals being considered for ensuring the long-term effectiveness of the Court. According to information available to us, fewer than 12 of the 44 member states have held such consultations. In view of the significant impact the proposed reforms may have on the protection of human rights, we urge the Committee of Ministers to immediately request all states to consult with legal and other appropriate associations and inform it of the outcome of such consultations, before decisions on proposals for reform are taken.

28 March 2003

4. Judges Elected to the International Criminal Court

On 7th February 2003, after four days and 33 rounds of secret balloting, the following 18 judges were elected to sit on the world's only permanent war crimes tribunal, the International Criminal Court (ICC). The judges will be sworn in when the ICC is inaugurated on 11 March 2003 in The Hague. The ICC is expected to be operational by the end of 2003 and will have jurisdiction over crimes committed after the 1st July 2002, the date when the Rome Statute entered into force. Only 88 countries have ratified the Statute to date.

Elected Judges (in alphabetical order)

List A:

	Name	Country	Sex	Term
1.	CLARK, Maureen Harding	Ireland	Female	9 years
2.	DIARRA, Fatoumata Dembele	Mali	Female	9 years
3.	FULFORD, Adrian	United Kingdom	Male	9 years
4.	HUDSON-PHILLIPS, Karl T.	Trinidad and Tobago	Male	9 years
5.	JORDA, Claude	France	Male	6 years
6.	ODIO BENITO, Elizabeth	Costa Rica	Female	9 years
7.	PIKIS, Gheorghios M.	Cyprus	Male	6 years
8.	SLADE, Tuiloma Neroni	Samoa	Male	3 years
9.	SONG, San-Hyung	Republic of Korea	Male	3 years
10.	STEINER, Sylvia H. de Figueiredo	Brazil	Female	9 years

List B:

	Name	Country	Sex	Term
1.	BLATTMANN, René	Bolivia	Male	6 years
2.	KAUL, Hans-Peter	Germany	Male	3 years
3.	KIRSCH, Philippe	Canada	Male	6 years
4.	KOURULA, Erkki	Finland	Male	3 years
5.	KUENYEHIA, Akua	Ghana	Female	3 years
6.	PILLAY, Navanethem	South Africa	Female	6 years
7.	POLITI, Mauro	Italy	Male	6 years
8.	USACKA, Anita	Latvia	Female	3 years

The nationalities of the judges nominated was as follows: Western European: 12 nominations, Latin American and Caribbean States: 8 nominations, Eastern European States: 7 nominations, Asian States: 6 nominations, African States: 10 nominations.

5. European Court of Human Rights – Composition of the Court – List of judges

(in order of precedence)

WILDHABER, Luzius	Switzerland	Male	President
ROZAKIS, Christos	Greece	Male	Vice-President
COSTA, Jean-Paul	France	Male	Vice-President
RESS, Georg	Germany	Male	Section President
BRATZA, Sir Nicolas	Britain	Male	Section President
ÖRUNDSSON,Gaukur	Iceland	Male	
BONELLO, Giovanni	Malta	Male	
PALM, Elisabeth	Sweden	Female	
CAFLISCH, Lucius	Switzerland	Male	
LOUCAIDES, Loukis	Cyprus	Male	
KURIS, Pranas	Lithuania	Male	
CABRAL BARRETO, Ireneu	Portugal	Male	
TÜRMEN, Riza	Turkey	Male	
TULKENS, Françoise	Belgium	Female	
STRÁŽNICKÁ, Viera	Slovakia	Female	
BÎRSAN, Corneliu	Romania	Male	
LORENZEN, Peer	Denmark	Male	
JUNGWIERT, Karel	Czech Republic	Male	
FISCHBACH, Marc	Luxemburg	Male	
BUTKEVYCH, Volodymyr	Ukraine	Male	
CASADEVALL, Josep	Andorra	Male	
ZUPANCIC, Bostjan	Slovenia	Male	
VAJIC, Nina Croatia Female			
HEDIGAN, John	Ireland	Male	
THOMASSEN, Wilhelmina	Netherlands	Female	
PELLONPÄÄ, Matti	Finland	Male	
TSATSA-NIKOLOVSKA, Margarita	"The Former Yugoslav Republic of Macedonia"	Female	

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GREVE, Hanne Sophie	Norway	Female	
BAKA, András	Hungary	Male	
MARUSTE, Rait	Estonia	Male	
LEVITS, Egils	Latvia	Male	
TRAJA, Kristaq	Albania	Male	
BOTOUCHAROVA, Snejana	Bulgaria	Female	
UGREKHELIDZE, Mindia	Georgia	Male	
KOVLER, Anatoly	Russia	Male	
ZAGREBELSKY, Vladimiro	Italy	Male	
MULARONI, Antonella	San Marino	Female	
STEINER, Elisabeth	Austria	Female	
PAVLOVSCHI, Stanislav	Moldova	Male	
GARLICKI Lech	Poland	Male	
BORREGO, Javier	Spain	Male	
MAHONEY, Paul	Britain	Male	Registrar
FRIBERGH, Erik	Sweden	Male	Deputy Registrar

Three new judges elected 2 April 2003

GYULUMYAN, Alvina	Armenia	Female
HAJIYEV, Khanlar	Azerbaijan	Male
FURA-SANDSTROM, Elisabet	Sweden	Female

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KHRP Publications 2001-2003

CODE	TITLE	PUBLISHER/DATE	PRICE/ISBN
REPORTS 2003			
03/A	**Trial Observation Report: the State and Sexual Violence – Turkish Court Silences Female Advocate**	KHRP/BHRC January 2003	£5.00 ISBN 1900175568
03/B	**"This is the Only Valley Where We Live": The Impact of the Munzur Dams The Report of the KHRP Fact-Finding Mission to Dersim/ Tunceli**	KHRP/ the Corner House	£5.00 ISBN 1900175576
REPORTS 2002			
02/S	**The Kurdish Human Rights Project Legal Review 2**	KHRP December 2002	£8.00 ISBN 1 900175 55X
02/R	**Ülke Içinde Göç Ettirilen Insanlar: Kürt Göcü** (A Turkish Translation of KHRP's June 2002 Report, "*Internally Displaced Persons: The Kurds in Turkey*")	KHRP/Goç-Der/ Senfoni/IHD	ISBN 9759286181 *Available only in Turkey.*
02/Q	**Dicle-Firat ve Su Sorunu: Türkiye'de Baraj Yapimi Suriye ve Irak'taki Etkileri** (A Turkish Translation of KHRP's August 2002 Report, "*Downstream Impacts of Turkish Dam Construction on Syria and Iraq*")	KHRP/Senfoni	ISBN 9759286159 *Available only in Turkey.*
02/P	**Türkiye'de Kürtce Hakki** (A Turkish Translation of KHRP's June 2002 Report, "*Denial of a Language: Kurdish Language Rights in Turkey*)	KHRP/Senfoni/IHD November 2002	ISBN 9759286165 *Available only in Turkey.*
02/O	**Azeri and Armenian translations of KHRP's September 2002 Publication, "*Taking Cases to the European Court of Human Rights: A Manual*"**	KHRP/HCA/IBA November 2002	*Available only in Armenia and Azerbaijan.*
02/N	**The Lifting of State of Emergency Rule: A Democratic Future for the Kurds?**	KHRP/BHRC/IHD November 2002	£5.00 ISBN 1 900175 541

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02/M	**Some Common Concerns: Imagining BP's Azerbaijan-Georgia-Turkey Pipelines System**	KHRP/Platform/ The Corner House/FOE/ CRBM/CEE Bankwatch Network October 2002	£5.00 ISBN 1 900175 495
02/L	**Damning Indictment: How the Yusufeli Dam Violates International Standards and People's Rights**	KHRP/IDC/ The Corner House/FOE/ Frances Libertes September 2002	£5.00 ISBN 185750 344 9
02/K	**'W' and Torture: Two Trial Observations**	KHRP/BHRC/IHD September 2002	£5.00 ISBN 1900175 533
02/J	**The Ilisu Dam: Displacement of Communities and the Destruction of Culture**	KHRP/IDC/ The Corner House/ University of Ireland, Galway	£5.00 ISBN 1900175 525
02/I	**Taking Cases to the European Court of Human Rights: A Manual**	KHRP/BHRC September 2002	£5.00 ISBN 1 900175 509
02/H	**The Kurdish Human Rights Project Legal Review I**	KHRP August 2002	£8.00 ISBN 1900175 517
02/G	**Downstream Impacts of Turkish Dam Construction in Syria and Iraq: Joint Report of Fact-Finding Mission to Syria and Iraq**	KHRP/The Corner House/ Ilisu Dam Campaign August 2002	£5.00 ISBN 1 900175 487
02/F	**Sadak & Others v. Turkey: The Right to Free Elections – A Case Report**	KHRP August 2002	£10.00 ISBN 1 900175 479
02/E	**The Trial of Students: "Tomorrow the Kurdish Language will be Prosecuted..." – Joint Trial Observation**	KHRP/ BHRC/ IHD July 2002	£5.00 ISBN 1 900175 460
02/D	**Internally Displaced Persons: The Kurds in Turkey**	KHRP June 2002	£5.00 ISBN 1 900175 444
02/C	**Denial of a Language: Turkish Language Rights in Turkey – KHRP Fact-Finding Mission Report**	KHRP June 2002	£5.00 ISBN 1 900175 436
02/B	**AB Yolunda Türkiye: Değişim Için Firsat mi? Yoksa Yol Ayrimi mi?**	KHRP/Bumerang Yayinlari April 2002	ISBN 975831769X *Available only in Turkey.*

02/A	The Viranşehir Children: The trial of 13 Kurdish children in Diyarbakir State Security Court, Southeast Turkey – KHRP Trial Observation Report	KHRP January 2002	£5.00 ISBN 1 900175 428

REPORTS 2001

01/J	State Violence Against Women in Turkey and Attacks on Human Rights Defenders of Victims of Sexual Violence in Custody – KHRP Trial Observation Report	KHRP December 2001	£5.00 ISBN 1900175 41X
01/I	Salman v Turkey and Ilhan v Turkey: Torture and Extra-Judicial Killing – A Case Report	KHRP December 2001	£10.00 ISBN 1900175 401
01/H	The F-Type Prison Crisis and the Repression of Human Rights Defenders in Turkey	KHRP, Euro-Mediterranean Human Rights Network & World Organisation Against Torture October 2001	£5.00 ISBN 1900175398
01/G	"Şu nehir bir dolmakalem olaydi..." – Ilisu Baraji, Uluslararasi Kampanyasi ve Barajlar ve Dünya Komisyonu Degerlendirmeleri Isiginda Hazirlanan Bir Rapor (a Turkish translation of KHRP's March 2001 report, *"If the river were a pen..." – The Ilisu Dam, the World Commission on Dams and Export Credit Reform*)	KHRP and Scala-Bumerang Yayinlari October 2001	ISBN 975830755X *Available only in Turkey.*
01/F	Akduvar davasi: Bir dönüm noktasi – Avrupa Insan Haklari Mahkemesi Kararlari Işiğinda Ifade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD – the Contemporary Journalists Association of Turkey) July 2001	ISBN 9757866229 *Available only in Turkey.*
01/E	Özgür Gündem Davasi (2) – Avrupa Insan Haklari Mahkemesi Kararlari Işiğinda Ifade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD – the Contemporary Journalists Association of Turkey) July 2001	ISBN 975866210 *Available only in Turkey.*

01/D	Özgür Gündem Davasi – Avrupa Insan Hakalri Mahkemesi Kararlari Işiğinda Ifade Özgürlüğü	KHRP and Çağdaş Gazeteciler Derneği (CGD – the Contemporary Journalists Association of Turkey) July 2001	ISBN 975866210 *Available only in Turkey.*
01/C	Kaya v Turkey, Kiliç v Turkey: Failure to Protect Victims at Risk – A Case Report	KHRP June 2001	£10.00 ISBN 190017538X
01/B	Ertak v Turkey, Timurtaş v Turkey: State Responsibility in 'Disappearances' – A Case Report	KHRP June 2001	£10.00 ISBN 1900175371
01/A	"If the River were a Pen..." – The Ilisu Dam, the World Commission on Dams and Export Credit Reform	KHRP and the Ilisu Dam Campaign March 2001	£5.00 ISBN 1900175363

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"Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey's political-legal configuration. The BHRC is proud of its close association with the KHRP."

Stephen Solly QC, *Bar Human Rights Committee President*

"KHRP can count many achievements since its foundation ten years ago, but among these its contribution to the fight against torture and organised violence has been one of the most important. Through its litigation strategies, notably at the European Court of Human Rights, its reports and public advocacy, KHRP has helped expose continuing abuse against both Kurds and others, particularly in Turkey, and to raise hopes that victims and survivors of torture and other state violence may obtain recognition of their ordeal, compensation and justice."

Malcolm Smart, *Director Medical Foundation for the Care of Victims of Torture*

"KHRP's work in bringing cases to the European Court of Human Rights, seeking justice for the victims of human rights violations including torture and extra-judicial killings, has been groundbreaking. In many of these cases the European Court of Human Rights has concluded that the Turkish authorities have violated individual's rights under the European Convention on Human Rights. Amnesty International salutes the work of this organisation over the last 10 years in defending human rights."

Kate Allen, *Director Amnesty International UK*

"For more than a decade after the military coup, governments in Turkey committed the gravest of human rights abuses while blandly denying that the violations were taking place. By pioneering the use of the personal petition to the European Court of Human Rights in Turkey KHRP helped to make those violations a matter of record in the form of court judgments. This has added valuable leverage in the continuing struggle to bring abuses such as 'disappearance', forced displacement, torture and repression of free speech to an end."

Jonathan Sugden, *Director Human Rights Watch UK*

"In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better."

Can Dundar, *Journalist in Turkey*

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