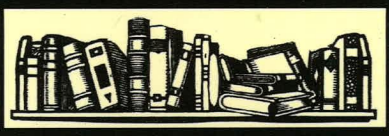

DIGESTA TURCICA

JOURNAL OF THE UNION OF TURKISH BAR ASSOCIATIONS

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from the editor...

In the previous issue of DIGESTA TURCICA we published the speech delivered by President Luzius Wildhaber on the occasion of the Opening of the Judicial Year of the European Court of Human Rights. In this issue you will find the text of the lecture given by Mr. Wildhaber's successor, President Jean-Paul Costa, on 25 April 2007 in Ankara at the International Symposium organised by the Turkish Constitutional Court. The occasion was the 45th Anniversary of the Constitutional Court and the topic of President Costa's lecture was *"The European Court of Human Rights and its case law: a factor in peace and tolerance?"*

Also in this issue we publish articles by Judge Françoise Tulkens and Judge Mark Villiger of the European Court of Human Rights. As that Court's judgments have considerable impact on Turkish legal and political life, to read personal views of some of its judges on general issues is of particular importance for Turkey.

* * *

In the second half of 2007 political events in Turkey have developed at a rather frantic speed. To illustrate just how rapid the pace has been, it suffices to list just the main headline developments over the period April-October 2007:

(i) **24 April 2007.** The Prime Minister and the leader of the party in power (AKP[1]) declared at a meeting of the party's parliamentary group that Mr. Abdullah Gül was the AKP's candidate for the post of President of the Republic.

(ii) **27 April 2007.** In the first ballot Mr. Gül received 357 votes out of a total of 361 votes cast by participating Members of Parliament. The main opposition party (CHP[2]) brought the matter before the Constitutional Court, arguing that the ballot was invalid because the Constitution requires that at least 367 parliamentarians take part in the election of President.

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1 Justice and Development Party *(Adalet ve Kalkınma Partisi).*

2 Republican People's Party *(Cumhuriyet Halk Partisi).*

(iii) **1 May 2007.** The Constitutional Court found that the first ballot for the election of President was indeed invalid on this ground. The Prime Minister announced that the AKP parliamentary group had decided to call early general elections, either in June or July. He also declared that that his party was determined to have the President elected by popular vote, by introducing a constitutional amendment to this effect.

(iv) **6 May 2007.** The second ballot for the election of President also failed because the quorum was not reached.

(v) **7 May 2007.** Mr. Gül withdrew his candidature.

(vi) **16 June 2007.** The constitutional amendments introducing universal suffrage for the presidential election and some other changes were approved by Parliament and published in the Official Gazette (Law no. 5678). President Sezer decided to submit the constitutional amendments to referendum. He also brought the issue before the Constitutional Court on grounds of unconstitutionality.

(vii) **22 July 2007.** In the general elections, AKP increased both its share of the popular vote (46%) and its number of seats in Parliament (340).

(viii) **20 August 2007.** As the constitutional amendments (see *vi* above) to introduce universal suffrage for the presidential election had not yet been submitted to referendum, the electoral procedure recommenced in Parliament. On the first ballot, Mr. Gül received 241 votes; the election was therefore incomplete.

(ix) **24 August 2007.** The second ballot for the presidential election was also incomplete, with Mr. Gül receiving 337 votes.

(x) **28 August 2007.** Mr. Gül was eventually elected President of the Republic with 339 votes. This score was sufficient, since, under Article 102 of the Constitution, on the third ballot, the candidate who receives an absolute majority of the votes of the total number of Members of Parliament is elected.

(xi) **17 October 2007.** The law modifying the constitutional amendments contained in Law no. 5678 was published in the Official Gazette (Law no. 5697).

(xii) **21 October 2007.** The referendum on the law introducing constitutional amendments was held. These were approved by 69per cent.

* * *

In the previous issue of DIGESTA TURCICA we published the full text of the judgment of the European Court of Human Rights in the case of *Leyla Şahin v. Turkey* (Application no. 44774/98).

The applicant Leyla Şahin, a student at Istanbul University Medical School, argued that the university regulations under which female students wearing the Islamic headscarf (the so-called *türban*) are not admitted to classes constituted a breach of the European Convention on Human Rights CHR (Articles 9, 10 and 14).

In its judgment the Court indicated, *inter alia,* that "the obvious purpose of the restriction was to preserve the secular character of educational institutions" (at paragraph 158).

The Turkish Constitutional Court and Supreme Administrative Court (*Danıştay*) had already found that the restrictions imposed on students wearing the Islamic headscarf (*türban*) did not violate constitutional rights but were necessary to preserve the secular character of the Turkish Republic in general and of educational institutions in particular.

Many in this country believed that after the judgment of the European Court the headscarf issue was closed. However, it continued to be an important item on the agenda of AKP. In late January 2008, this party declared that it was determined to "solve" this problem once and for all, even if it requires a constitutional amendment. While the main opposition party (CHP) was firmly opposed to this approach, the second-largest opposition party (MHP[3]) supported the idea and even pre-empted AKP by introducing a bill intended to lift the restriction on students wearing the Islamic headscarf.

By the middle of January, at the time of going to press, the representatives of AKP and MHP were working on the draft of the constitutional amendment to be introduced in the Grand National Assembly (Parliament) aiming at the lifting the ban on the Islamic headscarf at educational institutions in general or at universities in particular.

Prior to this development, AKP declared in July 2007 its intention

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3 Nationalistic Action Party *(Milliyetçi Hareket Partisi).*

of introducing an entirely new text to replace the existing 1982 Constitution. The leaders of AKP invited all interested organizations to contribute to this effort.

* * *

As briefly explained in my article[4] in this issue, the Union of Turkish Bar Associations (UTBA), in response to the call of the Prime Minister, formed a commission consisting of academics to work on a draft for a new Constitution. The text prepared by this commission was approved by the UTBA Board of Directors and published in October 2007 in book-form, running to over 400 pages with draft articles and detailed background information and explanations. These proposals attracted considerable interest from lawyers and from the general public; UTBA had to publish several editions of the book in the first month.

However, the AKP leadership declared that the UTBA proposals did not deserve to be taken into account at all. As they did not elaborate on any specific article or topic dealt with in the proposals, we are not in a position to know why our proposals were regarded as useless and discarded altogether.

* * *

Before I close, I would like to announce the launch of a new publication in English, the *Ankara Bar Review* (ABR). I congratulate the Ankara Bar Association for their decision to start publishing this review and wish every success to its editor, Att. Habibe İyimaya Kayaaslan.

Rona AYBAY

4 " Some Observations on the Position of International Treaties in Turkish Law"

Some observations on Turkey's Relations with the EU

Att. Özdemir ÖZOK*

The Republic of Turkey is determined to pursue the path to become a modern state based on scientific thinking, and attributes great importance to relations with the EU, regardless of certain negative social, political, cultural and historical factors. Generally speaking, most of these factors derive from Turkey's geographical location. Our organization, the UTBA, is aware of these difficulties but believes that relations with the EU should still be pursued for the sake of our national interests.

The UTBA, whose aim is to protect and promote democracy, human rights and the rule of law in its fullest sense, has been conducting various activities to this end. One may observe that there are times when the political and economic quality of Turkey's relations with the EU and with European countries are questioned in some circles, both in Turkey and abroad. We are of the opinion that such negative interpretations serve only shortsighted political aims.

It should not be forgotten that relations between Turkey and Europe stretch back a long way in history. Within this context, the Ottoman Empire was regarded as a European State by many western historians. The influence of the Ottoman Empire in the formation of some States in Europe must not be overlooked. Moreover, the large Muslim population of some States on the European Continent is another indication of the Ottoman past. The Republic of Turkey, being the successor to the Ottoman Empire in many respects, is also a European State. Mustafa Kemal Atatürk, the founder of the Turkish Republic, aimed at the attainment of "contemporary civilization", which at that time meant European civilization.

In keeping with the historical facts referred to above, Turkey became a member of the Council of Europe soon after its formation in 1949.

* President, Union of Turkish Bar Associations.

In accordance with the importance attributed to concepts such as the rule of law, fair trial and free access to justice, Turkey made the declaration allowing for individual applications to the European Commission of Human Rights in 1987, and accepted the exclusive jurisdiction of European Court of Human Rights in 1990. When these two bodies were merged in 1998 to form the European Court of Human Rights, Turkey acknowledged the exclusive jurisdiction of the new Court.

In addition to these commitments, in 1989 Turkey signed and ratified the European Social Charter, which was drawn up within the Council of Europe. Turkey has signed and became a party to the majority of the Council's approximately 200 conventions. These conventions have become part of Turkish Law by virtue of Article 90 of the Constitution of the Republic of Turkey.

Apart from the conventions pertaining to human rights and the rule of law, Turkey has also been a party to many significant treaties and agreements concerning economical and financial relations. As is well known, the EU was founded by the Treaty of Rome on 1 January 1958 as the European Economic Community and was based on four fundamental freedoms: free movement of goods, of services, of capital and of workers.

Turkey was the second state, after Greece, to apply to become an "associate member" of the European Economic Community in 1959. As a result of this application, Turkey signed the Ankara Agreement with the EEC on 12 September 1963. The Ankara Agreement aimed to integrate Turkey into a customs union with the EEC. The "Customs Union Agreement" was signed with the EU in 1996.

It is obvious that successive Governments and their representatives have always been enthusiastic about signing many documents and agreements to develop EU-Turkey relations. However, sufficient sensitivity and care has not been given by the EU side to these relations.

As a result, some have started to think that relations between Turkey and the EU are in fact mainly for the benefit of the EU rather than Turkey. Is this because in international relations there is no room for friendship and emotions?

45ème anniversaire de la Cour Constitutionnelle de Turquie et Symposium International
Ankara, Turquie 25-26 avril 2007

Discours de Jean-Paul Costa, Président de la Cour européenne des Droits de l'homme

« La Cour européenne des droits de l'homme et sa jurisprudence : un facteur de paix et de tolérance ? »

Madame la Présidente,
Mesdames et Messieurs,

Je voudrais adresser mes remerciements les plus chaleureux à la Cour constitutionnelle de Turquie et à vous-même, Madame la Présidente, qui avez souhaité que la Cour européenne des droits de l'homme soit présente à vos côtés pour célébrer le 45ème anniversaire de la création de votre institution. Celle-ci est un signe très important de la démocratisation et de la prééminence du Droit dans votre pays.

J'effectue mon premier déplacement auprès d'une Cour constitutionnelle depuis que j'ai pris mes fonctions, le 19 janvier. J'ai toujours cru à la nécessité du dialogue entre les juges internationaux et nationaux et je compte le favoriser pendant mon mandat. Je suis d'autant plus heureux de la présente rencontre que les liens entre la Cour constitutionnelle de Turquie et la Cour européenne des droits de l'homme sont anciens et étroits. Une preuve de cette grande proximité a d'ailleurs été votre présence à la Cour de Strasbourg et le discours que vous y avez prononcé à l'occasion de l'ouverture de l'année judiciaire en 2006.

En outre, je suis heureux de fêter avec vous le 45ème anniversaire de votre Cour. Elle est légèrement plus jeune que la nôtre, mais toutes deux participent au même combat.

Vous m'avez invité à traiter d'un thème relatif à la Cour européenne des droits de l'homme. J'ai choisi de me pencher sur sa jurisprudence. Est-elle facteur de paix et de tolérance ?

C'est une question essentielle qui touche aux fondements même de la Convention européenne des droits de l'homme et de notre Cour.

****

Le XXème siècle aura été, sans doute, le plus meurtrier dans l'histoire de l'Europe : la haine et le refus de l'autre, élevés au rang d'idéologies, auront mené tout notre continent à la ruine, par la barbarie.

C'est précisément sur les ruines de la Seconde guerre mondiale qu'est né le Conseil de l'Europe, dont l'objet était de rebâtir l'Europe sur le fondement de la paix. Nous avons tous en mémoire les noms de ces pionniers de l'idée européenne qui voulurent que, plus jamais, le mot guerre ne puisse être associé au continent européen, même si hélas ! leur espoir n'a pas toujours été réalisé complètement.

Dès 1948, les 58 États Membres de ce qui constituait alors l'Assemblée générale des Nations Unies adoptaient, à Paris, la Déclaration universelle des droits de l'homme [laquelle, dans son Préambule, rappelle que « la reconnaissance de la dignité inhérente à tous les membres de la famille humaine et de leurs droits égaux et inaliénables » constitue « le fondement de la liberté, de la justice et de la paix dans le monde » et qu'il est «essentiel d'encourager le développement de relations amicales entre nations ».]

La Convention européenne des droits de l'homme, qui fait référence dans son préambule à la Déclaration universelle, rappelle que « le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres », ce qui implique la paix et la tolérance entre les nations et les peuples. La Convention réaffirme également l'attachement des États signataires « à ces libertés fondamentales qui constituent les assises mêmes de la justice et de la paix dans le monde et dont le maintien repose essentiellement sur un régime politique véritablement

démocratique, d'une part, et, d'autre part, sur une conception commune et un commun respect des droits de l'homme dont ils se réclament ».

Ainsi, tant le Statut du Conseil de l'Europe que la Convention elle-même placent dans leurs préambules respectifs la notion de droits de l'homme et de libertés fondamentales en vue de la justice et de la paix. Le respect des droits de l'homme est donc un élément essentiel des politiques visant à assurer la justice et la paix aux plans national et international.

La Convention se veut, avant tout, un instrument de concorde entre les États européens autour d'un «patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de prééminence du droit». Certes, elle ne fait pas référence à la notion de tolérance, mais à plusieurs reprises elle parle de « société démocratique ». Or, la tolérance, comme le pluralisme, est un des éléments caractéristiques d'une société démocratique.

C'est dans cet esprit et afin de sauvegarder ces valeurs que notre Cour a, depuis près de cinquante ans, élaboré une jurisprudence qui me semble, en effet, facteur de paix et de tolérance.

Je souhaiterais vous e n donner quelques exemples. Ils touchent à la lutte contre le terrorisme, à la recherche de la paix sociale, à la liberté d'expression, au refus du discours de haine et du négationnisme, au pluralisme, à la laïcité.

Tous ces objectifs ont été atteints au travers de décisions rendues pour des pays très différents, dans des circonstances parfois proches, parfois totalement distinctes.

Notre Cour, à travers plusieurs affaires, a traité la question du *terrorisme,* ce fléau qui met en danger la paix civile et internationale. Si la lutte contre le terrorisme est légitime, si elle s'insère dans les obligations positives qu'ont les États de protéger les populations, cependant préserver les droits essentiels garantis par la Convention au profit de toute personne, dans le cadre de cette lutte, est également une façon de vaincre le terrorisme, comme doivent le faire les démocraties. Les mesures prises par les États doivent respecter les droits de l'homme et la prééminence du droit, en excluant tout arbitraire ainsi que tout traitement discriminatoire ou raciste. Elles doivent faire l'objet d'un contrôle approprié. Ce serait au contraire faire le jeu des terroristes que

d'user des mêmes armes qu'eux, en rabaissant les sociétés démocratiques au niveau des fanatiques et en recourant à la force disproportionnée contre la violence illégitime.

La Cour a rendu, en 1978, dans une affaire interétatique, un arrêt à l'origine duquel se trouve la crise que traversait alors l'Irlande du Nord. Dans un contexte qui avait vu des centaines de morts et des milliers de blessés du fait de la violence organisée par un mouvement clandestin, l'Armée républicaine irlandaise (IRA), le gouvernement d'Irlande du Nord avait eu recours à des pouvoirs spéciaux comprenant l'arrestation, la détention et l'internement sans jugement de nombreuses personnes. Le gouvernement irlandais alléguait que le Royaume-Uni avait enfreint différents articles de la Convention, que beaucoup de personnes privées de leur liberté avaient subi de mauvais traitements, que les pouvoirs spéciaux n'étaient pas compatibles avec la Convention, enfin que la manière dont ils avaient été appliqués constituait une discrimination fondée sur des opinions politiques.

La Cour a sanctionné le Royaume-Uni pour avoir, dans le cadre de ces mesures exceptionnelles de maintien de l'ordre, pratiqué des traitements inhumains ou dégradants en violation de l'interdiction absolue de l'article 3. Mais, surtout, au-delà des cas individuels, elle a rappelé qu'il incombe à chaque Etat contractant, responsable de la vie de la nation, de déterminer si un danger public la menace et si oui, jusqu'où il faut aller pour le dissiper. En effet, la Cour estime que les autorités nationales sont en principe mieux placées que le juge international pour se prononcer sur l'existence d'un pareil danger comme sur la nature et l'étendue des dérogations nécessaires pour le conjurer. La Cour a jugé, en tenant compte de la marge d'appréciation laissée aux Etats par l'article 15 que les dérogations à l'article 5 de la Convention n'avaient pas dépassé la stricte mesure, compte tenu du danger public menaçant la vie de la nation.

Je souhaite souligner un point essentiel : dans cette affaire, un État a décidé de confier à la Cour européenne des droits de l'homme le soin de dire si un autre État avait ou non violé un texte international. Je vous laisse imaginer comment de tels conflits auraient été résolus au cours des siècles passés. En choisissant la voie judiciaire, plutôt que celle des armes, les États démontrent que la Cour européenne est bien à leurs yeux un instrument de paix.

Autre affaire, qui a permis la Cour de prendre position sur l'article 2 de la Convention, et qui avait également pour toile de fond la lutte contre l'IRA, même si les faits se sont produits à Gibraltar, l'affaire Mc Cann contre Royaume-Uni (1996): elle concernait des membres de l'IRA soupçonnés de préparer un attentat à la bombe et qui furent tués par des agents de la sûreté britannique lors de leur arrestation. La Cour a rappelé que l'article 2 de la Convention, qui garantit le droit à la vie, se place parmi les articles primordiaux de la Convention et consacre l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe. Ces dispositions doivent donc être interprétées de façon stricte. Ainsi, dans le cas d'espèce, la Cour ne se déclara pas convaincue que la mort des trois terroristes ait résulté d'un recours à la force rendu absolument nécessaire pour assurer la défense d'autrui contre la violence illégale et elle conclut à la violation de l'article 2.

Cet arrêt a fait l'objet de controverses ; il n'en est pas moins fondamental.

Dernier exemple en matière de lutte contre le terrorisme, l'affaire Aksoy contre Turquie où notre Cour a estimé en 1996 que le fait de soumettre un individu à la « pendaison palestinienne » était d'une nature tellement grave et cruelle que l'on se trouvait bien en présence d'un cas de torture au sens de l'article 3. Sur un autre terrain, celui de l'article 5§3, et dans la même affaire, la Cour a considéré que l'ampleur et les effets de l'activité terroriste du PKK dans le Sud-Est de la Turquie, créaient un danger public menaçant la vie de la nation, et elle a tenu compte du problème grave que posait le terrorisme dans cette région et des difficultés rencontrées par l'Etat pour le combattre. Toutefois, elle a conclu à la violation de la Convention en raison de la période d'au moins 14 jours au cours de laquelle le requérant n'avait pas joui de garanties procédurales suffisantes.

Dans ces trois affaires, la Cour a donc rappelé l'équilibre essentiel entre le devoir des États d'user contre le terrorisme de la violence mais, comme le disait Max Weber, de la violence légitime, tout en maintenant les garanties matérielles et procédurales offertes par la Convention.

La Cour peut également jouer un rôle très utile pour favoriser *la paix sociale* et le dialogue entre ceux qui s'affrontent. Je pense ici à l'arrêt Eglise métropolitaine de Bessarabie contre Moldova (2001) : l'église

requérante se heurtait au refus de reconnaissance qui lui était opposé par les autorités moldaves. La Cour a estimé que le Gouvernement, en faisant dépendre sa reconnaissance de la volonté d'une autorité ecclésiastique elle-même reconnue, l'Eglise métropolitaine de Moldova, avait manqué à son devoir de neutralité et d'impartialité à l'égard des cultes. En constatant la violation de l'article 9, c'est la coexistence entre différents cultes que la Cour s'efforce de préserver. Là encore, le rôle de la Cour de Strasbourg est déterminant car, par ses décisions, elle encourage les hommes et les institutions à vivre et à coexister en harmonie.

En matière de *liberté d'expression*, la Cour a depuis longtemps considéré que le fait pour chacun de pouvoir s'exprimer est une composante essentielle de la société démocratique. L'esprit de tolérance exige que, sur tous les sujets, le débat soit ouvert. L'arrêt Erdost contre Turquie (2005) en est un exemple.

Le requérant était l'auteur d'un ouvrage qui retraçait les évènements sanglants survenus dans la ville de Sivas où des persécutions extrajudiciaires avaient eu lieu. Estimant que ce livre contenait de la propagande séparatiste contre l'intégrité de l'État, le procureur de la République avait saisi la justice. L'ouvrage fut saisi, M. Erdost fut condamné à un an d'emprisonnement et au paiement d'une amende.

Notre Cour a estimé que la teneur de l'ouvrage n'était pas de nature à justifier la condamnation pénale de l'intéressé. Cette condamnation ainsi que la confiscation ne répondaient pas à un besoin social impérieux et étaient, dès lors, non « nécessaires dans une société démocratique ». La Cour est toujours particulièrement exigeante dès qu'il s'agit de restreindre la liberté d'expression, surtout si l'on recourt à des peines privatives de liberté. La liberté de la presse contribue à la paix sociale et à la tolérance.

Toutefois, si le pluralisme doit permettre à toutes les opinions de s'exprimer, certaines portent atteinte aux fondements de nos démocraties. La tolérance, c'est notamment le refus du racisme et de la xénophobie. Pourtant, la Cour choisit parfois de privilégier la liberté d'expression des journalistes par rapport au droit d'autrui à être protégé contre la discrimination raciale comme dans l'affaire Jersild c. Danemark. Dans une société ouverte et tolérante, toutes les idées doivent pouvoir être débattues, quelque sorte un rempart contre le sectarisme qui interdit le

débat. Toutefois, cela ne signifie pas pour autant qu'il faille accepter le discours de haine.

Dans certains cas, la Cour admet d'ailleurs des ingérences dans la liberté de la presse et d'expression. Dans Sûrek contre la Turquie, (1999) la Cour rappelle que l'article 10 § 2 de la Convention ne laisse guère de place pour des restrictions à la liberté d'expression dans le domaine du discours politique ou s'agissant de questions d'intérêt général. Mais, là où les propos litigieux incitent à l'usage de la violence à l'égard d'un individu, d'un représentant de l'État ou d'une partie de la population, les autorités nationales jouissent d'une marge d'appréciation plus large dans leur examen de la nécessité de l'ingérence. Ce qui est alors sanctionné, c'est le discours de haine et l'apologie de la violence. La tolérance trouve ainsi ses limites. La Cour a donc conclu que la liberté d'expression n'avait pas été violée.Je voudrais encore citer une affaire qui a trait à mon pays, l'affaire Garaudy, qui s'est conclue par une décision d'irrecevabilité en 2003.

Le requérant, Roger Garaudy, philosophe, écrivain, fut déclaré coupable des délits de contestation de crime contre l'humanité, de diffamation publique envers un groupe de personnes, la communauté juive, et de provocation à la discrimination et à la haine raciales. La Cour s'est référée à un article de la Convention rarement appliqué, l'article 17 (interdiction de l'abus de droit), qui vise à empêcher les individus de tirer de la Convention un droit leur permettant de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits et libertés reconnus dans la Convention. Selon la Cour, il ne fait pas de doute que contester la réalité de faits historiques clairement établis, tels que l'Holocauste, ne relève pas d'un travail de recherche historique s'apparentant à une quête de la vérité. Une telle démarche a en fait pour objectif et pour effet de réhabiliter le régime nazi, et, par voie de conséquence, d'accuser de falsification de l'histoire les victimes elles-mêmes. La contestation de crimes contre l'humanité apparaît donc comme l'une des formes les plus aiguës de diffamation raciale envers le peuple juif et d'incitation à la haine à son égard. La négation ou la révision de faits historiques de ce type remettent en cause les valeurs qui fondent la lutte contre le racisme et l'antisémitisme et sont de nature à troubler gravement l'ordre public. De tels actes sont incompatibles avec la démocratie et les droits de l'homme, et rentrent dans le champ des objectifs prohibés par l'article 17. Il ne faut pas détourner l'article 10

de sa vocation en utilisant la liberté d'expression à des fins contraires à l'ensemble de la Convention.

Qu'en est-il maintenant de *la liberté politique* ? Pour qu'il puisse y avoir paix sociale, le *pluralisme* est indispensable et toutes les opinions doivent pouvoir s'exprimer. La Cour a souvent affirmé qu' « il n'est pas de démocratie sans pluralisme ».

Dans l'affaire Refah Partisi contre la Turquie de 2003, la Cour de Strasbourg s'est prononcée sur la dissolution d'un parti politique prononcée par votre Cour constitutionnelle. Elle a rappelé que seules des raisons convaincantes et impératives peuvent justifier des restrictions à la liberté d'association des partis politiques, les Etats ne disposant que d'une marge d'appréciation réduite. Le projet politique du parti dissous se démarquait nettement, selon elle, des valeurs de la Convention, notamment eu égard à ses règles de droit pénal et de procédure pénale, à la place réservée aux femmes et à l'intervention de ce parti dans tous les domaines de la vie privée et publique. En outre, le parti dissous n'excluait pas le recours à la force afin de réaliser son projet et de maintenir en place le système prévu. Ces projets étant en contradiction avec la conception de la société démocratique, la Cour a estimé que la sanction infligée par votre Cour répondait à un besoin social impérieux et que les ingérences en cause ne pouvaient passer pour disproportionnées aux buts visés. Certes, on peut soutenir qu'il y avait en quelque sorte un conflit de valeurs entre ce parti politique, d'une part, la Constitution turque et la Convention d'autre part. La Cour a fait prévaloir celles du Conseil de l'Europe et de sa jurisprudence, par exemple l'idée de la prohibition des châtiments corporels.

Dans un domaine proche, celui de la laïcité, je ne peux omettre l'affaire Leyla Şahin contre la Turquie de 2005, qui concernait l'interdiction de porter le foulard à l'université. La Cour, après avoir considéré que la circulaire litigieuse, qui soumettait le port du foulard à des restrictions de lieu et de forme dans les universités, constituait certes une ingérence dans l'exercice par l'intéressée du droit de manifester ses convictions, a estimé que cette ingérence avait une base légale en droit turc et que Melle Şahin pouvait prévoir, dès son entrée à l'Université, que le port du foulard était réglementé et, à partir de la circulaire de 1998, qu'elle risquait de se voir refuser l'accès aux cours et aux épreuves si elle persistait à le porter.

Selon notre Cour, cette ingérence était fondée notamment sur les principes de laïcité et d'égalité. D'après la jurisprudence constitutionnelle turque, la laïcité est au confluent de la liberté et de l'égalité. Ce principe interdit à l'État de témoigner une préférence pour une religion ou croyance précise, guidant ainsi l'État dans son rôle d'arbitre impartial, et implique nécessairement la liberté de religion et de conscience. Il vise également à prémunir l'individu non seulement contre des ingérences arbitraires de l'État, mais aussi contre des pressions extérieures émanant de mouvements extrémistes.

J'observe toutefois que tous les États ne sont pas laïques, et que la Cour admet qu'il faut laisser une marge d'appréciation à chaque État, pour ce qui est des délicats rapports entre les Eglises et l'État, comme elle l'a dit dans l'arrêt Cha'are Shalom c. France de 2000. Elle a dit de même que l'organisation par l'État de l'exercice d'un culte concourt à la paix religieuse et à la tolérance. A cet égard, il me semble qu'il y a plutôt une convergence entre notre approche et celle des différentes cours constitutionnelles européennes, et que notre Cour s'efforce de comprendre leur attitude autant qu'il est possible. C'est en effet aussi une forme de tolérance.

La conception de la laïcité contenue dans la Constitution de votre pays est en tout cas apparue comme respectueuse des valeurs sous-jacentes à la Convention, en ce qu'elle sépare la sphère publique et la sphère des choix privés.

Dans ces circonstances et compte tenu notamment de la marge d'appréciation laissée aux Etats contractants, la Cour a donc conclu que l'ingérence litigieuse était justifiée dans son principe et proportionnée aux buts poursuivis, et pouvait donc être considérée comme « nécessaire dans une société démocratique ».

Vous voyez que ces arrêts et décisions concernent des situations très différentes, mais ils ont contribué à créer une véritable jurisprudence, créative et évolutive.

Cette jurisprudence s'impose aux États en application de l'article 46 de la Convention et ils sont obligés de la mettre en œuvre sous le contrôle du Comité des Ministres qui fait peser sur eux le poids de l'opinion nationale et internationale, sans parler du contrôle qu'exerce les ONG internationales.

La jurisprudence de notre Cour a d'ailleurs fini, non sans résistances, par imprégner la pratique des États et elle a, à mon avis, œuvré en faveur de la paix civile. A l'inverse, les mesures d'exception sont devenues plus rares, que ce soit en Irlande du Nord, dans le Sud-est de la Turquie ou dans certains pays de l'Est.

Notre jurisprudence se veut un encouragement à la tolérance. A cet égard, tout ce qui touche à la liberté d'expression est particulièrement significatif. Notre Cour admet les « idées qui heurtent, choquent ou inquiètent », mais elle trouve des limites à cette liberté et j'en ai livré des exemples, notamment pour protéger les droits des plus faibles ou maintenir la paix sociale.

Madame la Présidente,
Mesdames et Messieurs,

La jurisprudence de la Cour européenne des droits de l'homme a encouru des reproches contradictoires. Certains regrettent qu'elle ait interprété la Convention de façon créative. D'autres trouvent qu'elle n'est pas suffisamment hardie. Assurément, notre Cour ne peut tout faire. L'Europe n'est jamais à l'abri d'un risque de guerre, ni d'un climat d'intolérance. L'existence de la Convention n'a pu éviter le conflit de l'ex-Yougoslavie, qui, certes, n'était pas encore liée par elle. Elle n'a pas davantage pu éviter la situation qu'on a connue en Irlande du Nord, au pays basque espagnol, dans le Sud-Est de votre pays ou en Tchetchénie.

Mais, de même que Michel Virally définissait dans les années 60 l'ONU comme un modérateur de puissance, la Cour de Strasbourg est un modérateur de violence (physique ou verbale).

C'est à mes yeux un de ses plus grands mérites. C'est en tout cas un de ses objectifs : mettre la protection des droits de l'homme, qui est déjà une fin en soi, au service de la tolérance et de la paix. Y réussit-elle ? Je le crois ; mais je reconnais que ce n'est pas à moi, au premier chef, d'en juger.

Merci de votre attention.

45th Anniversary of the Constitutional Court of Turkey and International Symposium Ankara, Turkey 25-26 April 2007

Speech of Jean-Paul Costa, President of the European Court of Human Rights*

"The European Court of Human Rights and its case law: a factor in peace and tolerance?"

Madame President,
Ladies and Gentlemen,

I would like to convey my warmest gratitude to the Constitutional Court of Turkey, and to you in particular, Madame President, for inviting the European Court of Human Rights to be with you to celebrate the 45th anniversary of the creation of your institution. This court is a very important sign of the democratisation and the pre-eminence of law in your country.

This is my first visit to a Constitutional Court since I took up office on 19 January. I have always believed in the need for dialogue between national and international judges, and I intend to further it during my mandate. I am all the more pleased to attend this meeting, given the close, long-standing ties between the Constitutional Court and the European Court of Human Rights. The closeness of these ties was affirmed by your presence at the Strasbourg Court and the speech you gave there at the opening of the judicial year in 2006.

I am, in addition, happy to celebrate with you the 45th anniversary of your Court. It is slightly younger than our Court, but they are both engaged in the same struggle.

* Unoficcal translation.

You invited me to speak on a theme relating to the European Court of Human Rights. I have chosen to discuss its case law - is it a factor in peace and tolerance?

This is an essential question, which goes to the very foundations of the European Court of Human Rights and of our Court.

* * *

The twentieth century was undoubtedly the deadliest in European history. Raised up to the level of ideology, hatred and the rejection of the other led our continent to savagery and ruin.

It was among the very ruins of the Second World War that the Council of Europe came into being, whose purpose was to rebuild Europe on peaceful foundations. We all remember the names of those pioneers of the European ideal, whose wish was that never again would the word war be associated with the continent of Europe, although regrettably their hope has still not been completely realised.

In 1948, the then 58 Member States that composed the United Nations General Assembly adopted the Universal Declaration of Human Rights in Paris, the Preamble of which states that "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" constitutes "the foundation of freedom, justice and peace in the world" and that it is "essential to promote the development of friendly relations between nations".

The European Convention on Human Rights, which refers in its Preamble to the Universal Declaration, states that "the aim of the Council of Europe is the achievement of greater unity between its members", which implies peace and tolerance between nations and peoples. The Convention also reaffirms the commitment of the signatory States to "those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend".

Thus, both the Statute of the Council of Europe as well as the

Convention itself include in their respective Preambles the notion of human rights and fundamental freedoms with a view to justice and peace. Respect for human rights is thus an essential element of policies aiming to ensure justice and peace at national and international level.

The Convention is supposed to be, first and foremost, an instrument of agreement among European States over "a common heritage of political traditions, ideals, freedom and the rule of law". Although it does not refer to the notion of tolerance, it speaks at several points of "democratic society". And tolerance, like pluralism, is one of the characteristics of a democratic society.

It is in this spirit, and in order to safeguard these values that our Court has, for almost fifty years, developed a jurisprudence that seems to me to be a factor for peace and tolerance.

I would like to give some examples of this. They concern the fight against terrorism, the pursuit of peaceful co-existence, freedom of expression, the rejection of hate speech and Holocaust denial, pluralism and secularism.

All of these objectives have been attained through decisions relating to different countries and to circumstances that were at times similar, at times totally different.

In several cases, our Court has dealt with the question of terrorism, that scourge which threatens peace within States and internationally. While the fight against terrorism is legitimate, being part of the positive obligations on States to protect their populations, another means to defeat terrorism is to uphold, as democracies must do, the essential rights guaranteed by the Convention to every persons. The measures taken by States must respect human rights and the rule of law, avoid all arbitrariness and any discriminatory or racist treatment. They must be subject to appropriate review. Dragging democratic societies down to the level of the fanatics and using disproportionate force against illegitimate violence would actually serve the terrorists' cause.

In 1978, the Court gave judgment in an inter-State case which arose out of the crisis in Northern Ireland at that time. In a situation in which hundreds of deaths and thousands of injuries had been caused by the violence perpetrated by a clandestine organisation, the Irish

Republican Army (IRA), the Government of Northern Ireland had introduced special powers including the arrest, detention and internment without trial or many persons. The Irish Government alleged that the United Kingdom had infringed different Articles of the Convention, that many people deprived of their liberty had been ill-treated, that the special powers were not compatible with the Convention, and that the manner in which they had been used constituted discrimination on the basis of political opinion.

The Court condemned the United Kingdom for having inflicted, in the course of these exceptional public order measures, inhuman or degrading treatment contrary to the absolute prohibition set forth in Article 3. But above all, on a wider level than the individual cases, it stated that it is the duty of every Contracting State, which is responsible for the life of the nation, to determine whether there is a threat to the public, and if so, how far the authorities must go to eliminate it. The Court considers that the national authorities are better-placed in principle than an international court to decide that such a danger exists as well as the nature and extent of the derogations required to avert it. The Court held that, taking account of margin of appreciation left to States by Article 15, that the derogations to Article 5 of the Convention had not exceeded what was strictly necessary, having regard to the threat to the life of the nation.

I wish to emphasise an essential point: in this case, one State decided to seek the opinion of the European Court of Human Rights on whether another State had violated an international treaty. I need hardly explain how such conflicts would have been resolved in previous centuries. By choosing the judicial path, rather than the path of conflict, States have shown that the European Court of Rights is indeed, in their eyes, an instrument of peace.

Another case that allowed the Court to rule on Article 2 of the Convention, and which also arose in the context of the struggle against the IRA, although the facts occurred in Gibraltar, is McCann v. United Kingdom (1996). It involved IRA members suspected of preparing a bomb attack and who were killed by members of British special forces during arrest. The Court recalled that Article 2 of the Convention, which guarantees the right to life, is among the most fundamental

provisions of the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe. This provision must therefore be interpreted strictly. The Court declared that it was not convinced that the death of the three terrorists was the result of the use of force that was absolutely necessary to protect others against illegal violence, and concluded that there had been a violation of Article 2.

This judgment gave rise to controversy, but it is nevertheless fundamental.

A final example concerning the fight against terrorism, the case of Aksoy v. Turkey in which our Court held in 1996 that to submit an individual to "Palestinian hanging" was so serious and cruel that it constituted torture within the meaning of Article 3. Addressing a different issue in the same case, Article 5(3), the Court considered that the extent and effects of PKK terrorist activity in South-east Turkey gave rise to a public emergency threatening the life of the nation, and took account of the serious problem of terrorism in that region and of the difficulties faced by the authorities in combating it. However, it found that there was a violation of the Convention on account of the period of at least 14 days during which the applicant had not enjoyed adequate procedural guarantees.

In these three cases, the Court referred to the essential balance between States' duty to use violence against terrorism - but, as Max Weber put it, legitimate violence - while at the same time ensuring the substantive and procedural guarantees afforded by the Convention.

The Court can also play a useful role in fostering peaceful co-existence and dialogue between adversaries. I have in mind the case Metropolitan Church of Bessarabia v. Moldova (2001). The applicant church was confronted with the refusal of the Moldovan authorities to recognise it. The Court found that by making recognition dependent on the opinion of another religious authority, which was itself recognised - the Metropolitan Church of Moldova - the Government had failed in its duty of neutrality and impartiality towards religions. Through its finding of a violation of Article 9, the Court seeks to secure the co-existence of different religions. Here too the role of the Strasbourg

Court is decisive since; through its decisions, it encourages individuals and institutions to live and co-exist in harmony.

In the area of freedom of expression, the Court has long held that the possibility for every person to speak their mind is an essential element of a democratic society. The spirit of tolerance requires that no subject be closed to discussion. The judgment Erdost v. Turkey is an example.

The applicant was the author of a publication that recounted the bloody events that occurred in the town of Sivas where illegal assaults had been perpetrated. The public prosecutor instituted proceedings against the applicant, alleging that the book contained separatist propaganda against the integrity of the State. The book was seized and Mr Erdost was sentenced to a year's imprisonment and fined.

Our Court considered that the tone of the publication was not such as to justify the applicant's conviction, which, along with the confiscation of the book, did not correspond to a pressing social need and therefore was not "necessary in a democratic society". The Court is always particularly stringent when faced with restrictions on freedom of expression, especially where custodial sentences are applied. Press freedom contributes to peaceful co-existence and tolerance.

However, if pluralism demands that all opinions may be uttered, some of these undermine the foundations of our democracies. Tolerance implies the rejection of racism and xenophobia. Yet the Court chooses on occasion to accord more weight to journalists' freedom of expression than to the rights of others to be protected against racial discrimination, as in the case Jersild v. Denmark. In an open and tolerant society, all ideas must be open to debate. This serves as a buttress against sectarianism, which seeks to forbid debate. This does not mean accepting hate speech, though.

In certain cases, the Court allows interference in freedom of the press and of expression. In Surek v. Turkey, (1999), the Court stated that Article 10 (2) of the Convention leaves little scope for restrictions on political speech or on debate on matters of public interest. But where the impugned remarks incite to violence against an individual, a public official or a sector of the population, the national

authorities enjoy a wider margin of appreciation where examining the need for an interference. It is hate speech and apologies for violence that are penalised. The limits of tolerance are to be found here. The Court therefore concluded that freedom of expression had not been infringed.

I would like to refer to one more case, concerning my country - the Garaudy case, which led to a decision of inadmissibility in 2003.

The applicant, Roger Garaudy, a philosopher and writer, was found guilty of denying crimes against humanity, of the defamation o a social group - the Jewish community - and of incitement to racial discrimination and hatred. The Court referred to a provision of the Convention that has been applied only rarely, Article 17 (**abuse of rights**), which aims to prevent individuals invoking the Convention in support of a right to engage in activity or perform an act intended to destroy the rights and freedoms recognised by the Convention. In the Court's view, there is no doubt that denying the reality of clearly established historical facts, such as the Holocaust, does not constitute historical research akin to a quest for the truth.

The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights and fall into the category of aims prohibited by Article 17. Article 10 must not be deflected from its real purpose by using freedom of expression for ends that are contrary to the whole Convention.

And what of political liberty? For there to be peaceful co-existence, there must be pluralism and freedom to express all opinions. The Court has often affirmed that "there is no democracy without pluralism".

In the case Refah Partisi v. Turkey in 2003, the Strasbourg Court ruled on the dissolution by your Constitutional Court of a political

party. It stated that only convincing and compelling reasons can justify restrictions on the freedom of association of political parties; the margin of appreciation of States is narrow. The programme of the dissolved party was clearly at variance with the values of the Convention, in particular as regards its rules on criminal law and criminal procedure, the place of women in society, and the intervention of this party in all areas of public and private life. Furthermore, the dissolved party did not rule out violence as a means to realising its programme and keeping such a system in force. Since this programme was contrary to the notion of a democratic society, the Court found that the sanction applied by your Court corresponded to a pressing social need and that the interferences complained of could not be seen as disproportionate to the aims pursued. One could of course argue that there was a conflict over values between this political party, on the one hand, and the Turkish Constitution and the Convention on the other. The Court vindicated the values of the Council of Europe and of its case law, for example the prohibition of corporal punishment.

In a closely-related area, that of secularism, I cannot fail to mention the case of Leyla Şahin v. Turkey of 2005, which concerned the ban on the wearing of the Islamic headscarf at university. After having considered that the impugned circular, which imposed restrictions on the manner and circumstances in which the headscarf could be worn at university, clearly constituted an interference with the applicant's right to manifest her beliefs, the Court held that this interference had had a basis in Turkish law and that Ms. Şahin could have foreseen, from the time she entered university, that the wearing of the headscarf was subject to regulation, and that, in the light of the 1998 circular, she ran the risk of being refused access to lectures and examinations if she persisted in wearing it.

Our Court found that this interference was based on the principles of secularism and equality. According to Turkish constitutional case law, secularism is the meeting point of liberty and equality. This principle forbids the State to display a preference for one religion or specific belief, and thus guides the State in its role of impartial arbiter and necessarily entails freedom of religion and conscience. It also serves to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements.

I note however that not all States are secular, and that the Court accepts that there must be a margin of appreciation for each State when it comes to the delicate relationship between religions and the State, as it said in the judgment Cha'are Shalom v. France in 2000. It observed that the organisation by the State of the exercise of worship is conducive to religious harmony and tolerance. In this respect, there appears to me to be convergence between our approach and that of the different constitutional courts of Europe, and that our Court endeavours to understand their attitude as far as possible, which is also a form of tolerance.

The conception of secularism in the Constitution of your country proved to be consistent with the values underpinning the Convention, in that it separates the public sphere from that of private choices.

In these circumstances and taking account of the margin of appreciation that is left to the Contracting States, the Court concluded that the impugned interference was justified in principle and proportionate to the aims pursued and could therefore be considered "necessary in a democratic society".

You can see that these judgments and decisions concern very different situations, but they have contributed to the creation of a creative, evolving case law.

This case law is binding on States through the application of Article 46 of the Convention and they are obliged to apply it under the supervision of the Committee of Ministers, which brings to bear the weight of national and international public opinion. The scrutiny of the international NGOs should not be forgotten either.

The case law of our Court has succeeded, although not without resistance, in permeating State practice and, in my opinion, has contributed to peace in these States. Conversely, emergency measures have become rarer, whether in Northern Ireland, South-east Turkey or in certain eastern European countries.

Our case law seeks to encourage tolerance. In this respect, anything that concerns freedom of expression is of particular significance. Our Court accepts ideas that "offend, shock or disturb", but it sets limits

to this freedom, and I have given examples, particularly the protection of the rights of the most vulnerable or the preservation of peaceful co-existence.

Madame President,
Ladies and Gentlemen,

The case law of the European Court of Human Rights has met with contradictory criticism. Some regret that that it has interpreted the Convention creatively. Others find that it has not been sufficiently daring. We cannot do both, of course. Europe is never free of the risk of war, or of a climate of intolerance. The existence of the Convention did not avert the conflict in the former Yugoslavia, which, of course, was not party to it. Nor did it avert the situation witnessed in Northern Ireland, in the Basque region of Spain, in the South-east of your country or in Chechnya.

But just as Michel Virally defined the UN in the 1960s as a restraint on power, the Strasbourg Court is a restraint on violence (physical or verbal).

This, to my mind, is one of its greatest virtues. In any case, it is one of its objects: to put the protection of human rights, which is an end in itself, in the service of tolerance and peace. Does it succeed? I believe it does, although I acknowledge that it is not for me to judge.

Thank you for your attention.

Recent trends in the European Court of Human Rights' jurisprudence*

Françoise TULKENS**

Introduction

As René Cassin noted in 1950, the Convention rights are the seeds of peace. They are also the *"essential bridges to building the future"* as defined by the President at the inauguration of the new Court of Human Rights on the 3rd of November 1998. Today, perhaps, the real issue here is how rights — especially human rights — are to be taken *"seriously"* to borrow Dworkin's expression.[1] Human rights are neither an ideology, nor a system of thought. If they are to have any meaningful bearing on the life of individuals and communities, they must be translated into action. Human rights are not just *logos*, they are also *praxis*. That constraint means that the recognition of human rights is inseparable from the machinery used to ensure their respect and protection.

Against this background, the text of the Convention operates at two levels: the rights guaranteed and the guarantee of the rights. In addition to laying down a catalogue of civil and political rights and freedoms, the Convention sets up a mechanism for the enforcement of the obligations entered into by Contracting States. These two levels will, in turn, form

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* All judgments and decisions of the European Court of Human Rights mentioned in the text are available from the *Hudoc* database accessible via the Court's website: http://cmiskp.echr.coe.int/tkp197/default.htm

** Judge of the European Court of Human Rights President of the Second Section. I express here my own views and not those of the Court.

1 R. DWORKIN, *Taking rights seriously*, Cambridge, Harvard University Press, 1977.

the two parts of my lecture. Through the question of effectiveness, I will refer in the first part to the substantial *rights* contained in the European Convention on Human Rights and Fundamental Freedoms and to the main issues at stake today. In the second part, I will highlight several procedural issues which are significant in the enforcement of these rights by the ECHR.

I. The rights guaranteed

As legal theorists have observed, the law must be stable yet it cannot stand still[2]. Adaptation and modification have been constant features of the Convention since 1950 and continue to be today. Further, the Court's reaffirmation of the dynamic principle of interpretation has ensured that issues are considered in the context of our contemporary society and this has lead to many pioneering judgments. **The Convention as a living instrument.**

A. As far as **general principles** *("principes directeurs")* are concerned, I identify three major trends in the recent case-law of the Court, namely the development of positive obligations (1), the application of the Convention in the private sphere (2) and the emphasis on the procedural requirements of human rights (3).

1. Positive obligations

Increasingly, a requirement that States take action is now being added to the traditional requirement that they be passive. This requirement takes the form of **positive obligations** for the State to adopt practical or legal (legislative, administrative or judicial) measures which are aimed at guaranteeing the effective respect of the rights and freedoms recognized.

As regards the *typology*, positive obligations can be *substantive* or *procedural*. The first obligations require States to take **substantive measures**, such as for example providing medical care in prison, legally

[2] Attributed to Roscoe POUND in his book *Interpretations of Legal History*, New York, MacMillan, 1923.

recognizing the status of transsexuals,[3] or establishing the biological paternity of a stillborn child.[4] It is probably the right to private and family life which most benefited from this growth of positive obligations.[5]

The second obligations require States to establish internal procedures, in order to provide for protection and / or redress by the Convention. The European Court, in its recent case-law, increasingly emphasises the **procedural requirements of human rights.**

In some cases, the procedural obligation is concerned with the necessity, at domestic level, to *involve the parties in the proceedings*, and in particular in the legal proceedings, where fundamental rights are at stake. So, for example, as regards children's placement, the Court, before turning to the State's margin of appreciation, will make sure that the judicial authorities have taken care to accompany their decision with all the possible guarantees, particularly by enabling the parties to play an effective part in the decisional process (communication of the reports, attendance of the hearing, assistance by a lawyer, a.s.o.).[6] What are the *major benefits* of the procedural approach taken by the Court? To my mind, the benefits lie in the objectivity and credibilty accorded to the control of the Court. Today more than ever, the Court is involved in very sensitive cases and its distance from them and the facts renders it less able to resolve them. The opportunity to place a child outside his family or the arbitration between economics and the environment in the night flights problem are questions that, to be resolved, assume a proximity with the facts and the social reality. In this regard, the proceduralization movement is able to give meaning to the margin of appreciation in adding a condition: before accepting the assessment of the State, the Court will check that the State has taken every opportunity to reach the right decision. In a certain way, the development of the procedural requirement could appear as the natural and fruitful corollary of the margin of appreciation doctrine.

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3 ECrtHR, *Christine Goodwin v. the United Kingdom*, judgment of 11 July 2002 (GC).

4 ECrtHR, *Znamenskaya c. Russie*, judgment of 2 June 2005.

5 F. Sudre, *Droit européen et international des droits de l'homme*, Paris, PUF, 8th ed., 2006, p. 241, no. 166.

6 ECrtHR, *Moser v. Austria*, judgment of 21 September 2006, § 72.

In this respect, positive obligations obviously widely extend the scope of control by the European judge, particularly towards economic, social and cultural rights. In the field of environment, in the *Fadeyeva v. Russia* judgment of 9 June 2005, the Court was required to scrutinize the extent of the positive obligations on the authorities to prevent environmental damage. The Court defined the test to be applied in this way: "(...) it is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly in the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community".[7]

In other cases, the procedural positive obligation consists in the obligation, in particular in the absence of evidence (such as, for instance, in the applications against Russia concerning extra-judicial killings in Chechnya[8]), to *open an investigation and to institute proceedings* that can lead to the identification and, possibly, punishment of those responsible.[9] In particular as regards Article 2 protecting the right to life, the leading case is the *McCann and Others v. the United Kingdom* judgment of 27 September 1995 and now in many other cases the Court imposes a duty to investigate suspicious deaths. As regards Article 3, in the *Labita v. Italy* judgment of 6 April 2000, where the applicant complained *inter alia* of ill-treatments which were of psychological nature and thus not leaving marks on the body, the Court found that there had been a violation of this provision in that no effective official investigation into the allegations had been held. The *Paul & Audrey Edwards v. the United Kingdom* judgment of 14 March 2002 — where the applicant alleged that the authorities had failed to protect the life of their son who had

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7 ECrtHR, *Fadeyeva v. Russia*, judgment of 9 June 2005, § 128. See also, ECrtHR, *Giacomelli v. Italy*, judgment of 2 November 2006, §§ 81, 82, 83, 84.

8 ECrtHR, *Khachiev and Akaïeva v. Russia*, judgment of 24 February 2005 (extra-judicial executions); ECrtHR, *Issaïeva, Youssoupova and Bazaïeva v. Russia*, judgment of 24 February 2005 (aerial attacks); ECrtHR, *Issaïeva v. Russia* (application no. 57950/00), judgment of 24 February 2005 (missile in the humanitarian corridor).

9 ECrtHR, *Matkov v. Slovenia*, judgment of 2 November 2006.

been killed by another detainee while held in prison on remand — is of particular interest since the Court found both a substantial violation of Article 2 concerning the positive obligation to protect life and a procedural violation of Article 2 concerning the obligation to carry out effective investigation and explained what an effective investigation should be (independent, prompt, complete, involvement of all the parties, a.s.o.).

In some recent cases, such as the *Okkali v. Turkey* judgment of 17 October 2006 concerning the ill-treatment of a twelve-year-old boy while in police custody and the *Zeynep Özcan v. Turkey* judgment of 20 February 2007 concerning the ill-treatment of a young woman at the police station, the Court considered that the criminal-law system, as applied in the applicant's case, had proved to be *far from rigorous* and had had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. The Court accordingly found that the impugned criminal proceedings, in view of their outcome, had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3.[10]

Finally, in certain circumstances, positive obligations do include obligations to take *preventive action* up to and including inter-individual relations. The *Osman v. the United Kingdom* judgment of 28 October 1998 is the seminal decision which first sought to define the extent of the positive duty on the authorities to protect potential victims of crime: *"it must be established (...) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".*[11] Nevertheless, the Court has always emphasised that such a principle should not be interpreted in a way which creates an impossible or disproportionate burden on the authorities. In this respect, the major interest of the judgment *Z and Others v. the United Kingdom* pronounced by the Grand Chamber on 10 May 2001 is to confirm

[10] ECrtHR, *Okkali v. Turkey*, judgment of 17 October 2006; ECrtHR, *Zeynep Özcan v. Turkey*, judgment of 20 February 2007.

[11] ECrtHR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116.

once again that Article 3 imposes on the State a positive obligation to protect the people within their jurisdiction – through the appropriate action of the social services – against inhuman treatment administered by private individuals (in casu by the father in law on his children). This leads us to the vertical application of the Convention.

2. Vertical application of the Convention

Today, with the redefinition of the role of the State, human rights are being increasingly relied on in disputes between **private individuals** or **groups** — non-state actors — with the result that their **horizontal application** — individual against individual — is developing alongside their vertical application — individual against State.[12] We have numerous examples of this development as, for instance, the case of *Hatton and Others v. the United Kingdom* of 8 July 2003 concerning night noise disturbances emanating from the activities of private operators suffered by residents living near Heathrow airport: *"the State's responsibility in environmental cases may also arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 of the Convention"*.[13]

It is the same thing in the inadmissibility decision in the case of *T.I. v. the United Kingdom* of 7 March 2000 where the applicant *"submits in particular that there are substantial grounds for believing that, if returned to Sri Lanka, there is a real risk of facing treatment contrary to Article 3 of the Convention at the hands of [among others] Tamil militant organisations"*.[14] Here, the Court "indicates that the existence of [an] obligation [not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3] is not dependent

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[12] A. CLAPHAM, *Human rights in the private sphere*, Oxford, Clarendon Press, 1993; Ph. ALSTON (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, 2005; A. CLAPHAM, *Human rights. Obligations of Non-State Actors*, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, 2006, pp. 349 et seq.

[13] ECrtHR (GC), *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 119.

[14] ECrtHR, *T.I. v. the United Kingdom*, decision (inadmissible) of 7 March 2000, p. 11.

on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials [...]. In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny".[15]

The most extreme example of vertical application of the Convention could be seen in the *Pla and Puncernau v. Andorra* judgment of 13 July 2004 where the Court was faced, under Article 14 of the Convention, with the interpretation of an eminently private instrument such as a clause in a person's will which prohibits the applicant, an adopted child, to inherit from his grandmother's estate because he was not a child *"of a lawful and canonical marriage"*. Admittedly, the Court was not in theory required to settle disputes of a purely private nature. That being said, in exercising its European supervisory role, the Court could not remain passive where a national court's interpretation of a legal act appeared unreasonable, arbitrary or, as in the applicants' case, blatantly inconsistent with the prohibition of discrimination established by Article 14 of the Convention and more broadly with principles underlying the Convention. The Court did not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, an adopted child was in the same legal position as a biological child of his or her parents in all respects. The Court had stated on many occasions that very weighty reasons needed to be put forward before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention. It reiterated that the Convention was a living instrument, to be interpreted in the light of present-day conditions and that great importance was currently attached in the member States of the Council of Europe to the question of equality between children born in and out of wedlock regarding their civil rights. The Court therefore found that there had been a violation of Article 14 read in conjunction with Article 8.

[15] *Ibid.*, p. 14.

The intervention of the State within individual relations raises, furthermore, very often, a **conflict between rights and freedoms:** one person's freedom vs. the protection of the right to life of others;[16] right to respect of family life of parents vs. protection of the physical integrity of their children;[17] right to respect of private life of the mother vs. right of the child to know his origins;[18] right of freedom of expression of journalists vs. right of private life of citizens.[19] But, the most fundamental rights are not arranged in order of priority. Therefore, such conflicts are among the most difficult since, on the two *"plateaux de la balance"*, are rights and freedoms which, *a priori*, deserve equal respect. On the contrary, they suppose an original way of solution — but the stages are still to be built — which could go along the line suggested by the German constitutional lawyer K. Hesse, of the *"practical compromise" ("concordance pratique")*.[20] When we are confronted with conflicting rights, it is not appropriate to turn immediately to the balance in order to determine which right is the *"most weighty"* and deserves to be sacrificed to the other rights. It seems better to see if some compromises, from both sides, could be reached in order to put, as far as possible, the time of the sacrifice. The originality of this approach is to encourage solutions which preserve, as far as possible, the two conflicting rights instead of finding a point of balance between them.

That is the meaning of the *Öllinger v. Austria* judgment of 29 June 2006. On 30 October 1998 the applicant notified Salzburg Federal Police Authority that, on All Saints' Day (1 November) 1998 from 9 a.m. until 1 p.m., he would be holding a meeting at the Salzburg municipal cemetery in front of the war memorial in commemoration

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16 ECrtHR, *Osman v. the United Kingdom*, judgment of 28 October 1998, § 116.

17 ECrtHR (GC), *Z. and others v. the United Kingdom*, judgment of 10 May 2001, § 74.

18 ECrtHR (GC), *Odièvre v. France*, judgment of 13 February 2003 (secret delivery).

19 ECrtHR, *Von Hannover v. Germany*, judgment of 24 June 2004.

20 K. HESSE, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg, C.F. Müller, 1984, 14th ed., nos. 71 et seq. On this "practical concordance", see also, F. MÜLLER, *Discours de la méthode juridique*, transl. from German by O. JOUANJAN, Paris, PUF, 1996, pp. 285-287, and S. VAN DROOGHENBROECK, *La proportionnalité dans le droit de la Convention européenne des droits de l'Homme. Prendre l'idée simple au sérieux*, Brussels, Publications des Facultés Universitaires Saint-Louis/Bruylant, 2001, p. 212 and pp. 709-710.

of the Salzburg Jews killed by the SS during the Second World War. He noted that the meeting would coincide with the gathering of Comradeship IV (Kameradschaft IV), in memory of the SS soldiers killed in the Second World War. On 31 October 1998 Salzburg Federal Police Authority prohibited the meeting and, on 17 August 1999, Salzburg Public Security Authority dismissed an appeal against that decision by the applicant. The police authority and public security authority considered the prohibition of the applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation. *"In [the] circumstances [of the case], the Court is not convinced by the Government's argument that allowing both meetings while taking preventive measures, such as ensuring police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors".*[21]

B. As far as the **substantive provisions** of the Convention are concerned — the rights and freedoms themselves as they are enshrined in Part I of the Convention, Articles 2 to 18 — I will very briefly point out the most significant developments for each article.[22]

1. Liberty rights

Article 2. Right to life

Here, the main issues facing the Court are the **beginning** and the **end** of life. As far as the end of life is concerned, naturally we should refer to the *Pretty v. the United Kingdom* judgment of 29 April 2002 where the Court held that it *"is not persuaded that the right to life guaranteed by Article 2 can be interpreted as involving a negative aspect"* and that *"Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die".*[23] The Court accordingly *"finds that no right to die, whether at the hands of a*

[21] ECrtHR, *Öllinger v. Austria*, judgment of 29 June 2006, § 48.

[22] For a general overview, see K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet & Maxwell, 2nd ed., 2004.

[23] ECrtHR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 39.

third person or with the assistance of a public authority, can be derived from Article 2 of the Convention".[24]

As far as the beginning of life is concerned, in the *Evans v. the United Kingdom* judgment of 10 April 2007, the applicant complained that the provisions of English law requiring the embryos to be destroyed once her former partner withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention. Endorsing the reasons given by the Chamber in its judgment of 7 March 2006, *"the Grand Chamber finds that the embryos [...] do not have a right to life within the meaning of Article 2, and that there has not, therefore, been a violation of that provision".*[25]

Article 3. Prohibition of torture and inhuman or degrading treatment

First of all, the new Court, at its very beginning, sent out a strong message. In the *Selmouni v. France* judgment of 28 July 1999, in the context of a torture complaint involving the police, the Court emphasised that: *"certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".*[26]

We know the strength of this provision is that it can produce a knock-on effect (un effet par ricochet) to incorporate some other fields into the Convention. In my view, this provision plays an increasing role in all the **detention situations** where people are **deprived of liberty.**

In the situation of **custody by the police,** as an example of the "greater firmness" of the Court, is the *Sheydayev v. Russia* judgment of 7 December 2006, where the Court found that amounted to torture a situation where the applicant, during his stay in the police station, was continuously beaten by up to five police officers who were trying to

[24] *Ibid.*, § 40.
[25] ECrtHR (GC), *Evans v. the United Kingdom*, judgment of 10 April 2007, § 56.
[26] ECrtHR (GC), *Selmouni v. France*, judgment of 28 July 1999, § 101.

coerce him to confess of having committed an offence.[27]

However, since the Court decided for the first time, in the *V.* and *T. v. the United Kingdom* judgments of 16 December 1999, that *"the question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account [...] but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3"*,[28] it opens the door to addressing the treatments in prison which are *objectively* inhuman or degrading: overpopulation, size of cells, poor condition and facilities, sanitary and hygienic conditions, health, poverty, a.s.o. In my view, the leading case is the *Kudla v. Poland* judgment of 26 October 2000 where the Court held that: *"under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, [...] and that, given the practical demands of imprisonment, his health and well-being are adequately secured [...]"*.[29]

And so, under Article 3 of the Convention, there were a number of cases concerning ill-treatment[30] and conditions of detention.[31] In several judgments, the Court concluded that the treatment to which the applicants had been subjected amounted to torture.[32] The problem

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27 ECrtHR, *Sheydayev v. Russia*, judgment of 7 December 2006. See also ECrtHR, *Ölmez v. Turkey*, judgment of 20 February 2007.

28 ECrtHR (GC), *V. v. the United Kingdom*, judgment of 16 December 1999 § 71 *in fine*; ECrtHR (GC), *T. v. the United Kingdom*, judgment of 16 December 1999, § 69 *in fine*.

29 ECrtHR (GC), *Kudla v. Poland*, judgment of 26 October 2000, § 94.

30 With regard to ill-treatment of detainees, see, for example, ECrtHR, *Çolák and Filizer v. Turkey*, judgment of 8 January 2004, and ECrtHR, *Balogh v. Hungary*, judgment of 20 July 2004. See also ECrtHR, *Martinez Sala and Others v. Spain*, judgment of 2 November 2004, in which the Court held that there had been a procedural violation but not a substantive violation. Several cases concerned ill-treatment during arrest: ECrtHR, *R.L. and M.-J.D. v. France*, judgment of 19 May 2004; ECrtHR, *Toteva v. Bulgaria*, judgment of 19 May 2004; ECrtHR, *Krastanov v. Bulgaria*, judgment of 30 September 2004; ECrtHR, *Barbu Anghelescu v. Romania*, judgment of 5 October 2004.

31 See, for example, ECrtHR, *Iorgov v. Bulgaria* and ECrtHR, *B. v. Bulgaria*, judgments of 11 March 2004, concerning prisoners sentenced to death.

32 See ECrtHR, *Batı and Others v. Turkey*, judgment of 3 June 2004; ECrtHR (GC), *Ilaşcu and Others v. Moldova and Russia*, judgment of 8 July 2004; ECrtHR, *Bursuc v. Romania*, judgment of 12 October 2004; and ECrtHR, *Abdülsamet Yaman v. Turkey*, judgment of 2 November 2004.

of keeping in detention individuals who were in poor health, elderly or very frail, had been addressed in *Mouisel v. France*[33] and *Hénaf v. France*[34]. The *Farbtuhs v. Latvia* judgment of 2 December 2004 concerned an 83-year-old paraplegic convicted of crimes against humanity and genocide who had remained in prison for over a year after the prison authorities had acknowledged that they had neither the equipment nor the staff to provide appropriate care. Despite medical reports recommending release, the domestic courts had refused to order it. The European Court held that there had been a violation of Article 3. In the *Vincent v. France* judgment of 24 October 2006, the Court found a violation of Article 3 of the Convention concerning the conditions of detention of a **handicapped** prisoner.

The *Jalloh v. Germany* judgment of 11 July 2006 is of great interest as regards the problem of forcible medical interventions. The applicant (a drug-trafficker) claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics by police officers, the aim being not therapeutic but legal (to obtain evidence of a crime). The Court considers that *"any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence at issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health"*.[35] In the present case, *"the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental*

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[33] ECrtHR, *Mouisel v. France*, judgment of 14 November 2002. The case concerned a prisoner undergoing treatment for cancer. The Court found a violation of Article 3

[34] ECrtHR, *Hénaf v. France*, judgment of 27 November 2003. The case concerned the conditions in which an elderly detainee was hospitalised. The Court found a violation of Article 3.

[35] ECrtHR (GC), *Jalloh v. Germany*, judgment of 11 July 2006, § 71.

integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3".[36]

Another field is **asylum and expulsion procedures.** In the *Ramzy v. the Netherlands* case, which is pending before the Court, the applicant — who claims to be an Algerian national — was arrested in the Netherlands on suspicion of membership of an active Islamic extremist network in the Netherlands (having links with the Algerian GSPC and al-Qaida) which was believed to be involved in, *inter alia*, the recruitment and preparation of young men in the Netherlands for Islamic extremist terrorist acts abroad (Kashmir, Afghanistan, Iraq). These suspicions were based on the contents of intelligence reports of the Netherlands national security agency. In the criminal proceedings taken against him, the applicant was acquitted as the trial court concluded that these intelligence reports could not be used in evidence (given the absence of an effective opportunity for the defence to verify their contents and completeness). Consequently, he was released from pre-trial detention. Although the prosecution department initially filed an appeal against this judgment, it recently withdrew this appeal before the appeal proceedings had started. Nevertheless, the authorities decided to expel him from the country. The applicant complains before the Court that, if expelled to Algeria, he will be exposed to a real and personal risk of treatment in breach of Article 3 at the hand of the Algerian authorities as a person *suspected* of involvement in Islamic extremist terrorism.

The key issue here is the future of the *Chahal v. the United Kingdom* case-law, which is disputed by some governments. Leave to intervene

[36] *Ibid.*, § 82.

as a third party in the Court's proceedings has been granted, on the one hand, to the Governments of Lithuania, Portugal, Slovakia and the United Kingdom and, on the other hand, to the non-governmental organisations the AIRE Centre, Interights (also on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, The International Commission of Jurists, Open Society Justice Initiative and Redress), Justice and Liberty. While the governments do not challenge the absolute nature of the prohibition in Article 3 agaist a Contracting State itself subjecting an individual to Article 3 ill-treatment, they insist however that the context of removal involves assessments of risk of ill-treatment, and also needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism; in this respect, national security considerations cannot simply be dismissed as irrelevant in this context.

Article 4. Prohibition of slavery and forced labour

In the landmark *Siliadin v. France* judgment of 26 July 2005, the Court for the first time applied this provision in a situation of domestic servitude — a young Togolese woman employed by a French couple in a situation that, in the Court's eyes, amounted to servitude (she worked in their house for about fifteen hours each day, without a day off, for several years, without being paid, with no identity papers and immigration status). In this case, the Court confirms that States have positive obligations to adopt a criminal legislation that penalises the practices prohibited by Article 4 and to apply it in practice – this means effective prosecutions. As a matter it was decisive that neither slavery nor servitude were classified as offences, as such, under French criminal law.

Article 5. Right to liberty and security

In the case of *Gusinskiy v. Russia,*[37] the Court found not only a violation of Article 5 of the Convention but also a violation of Article

[37] ECrtHR, *Gusinskiy v. Russia*, judgment of 19 May 2004.

18 of the Convention, which provides that the restrictions permitted under the Convention *"shall not be applied for any purpose other than those for which they have been prescribed"*. An agreement which had been signed by an Acting Minister linked the dropping of certain charges against the applicant to the sale of his media company to a State-controlled company. The Court pointed out that "it is not the purpose of such public law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies" and found that the proposal for the agreement while the applicant was in detention strongly suggested that the prosecution was being used to intimidate him. Thus, although the detention was for the purpose of bringing the applicant before a competent court under Article 5 § 1 (c), it was also applied for other reasons.

Concerning the specific situation of **psychiatric detention** (Art. 5 § 1), the *Storck v. Germany* judgment of 16 June 2005 is a leading case. At her father's request, the applicant was confined in a locked ward at a private psychiatric institution, for more than twenty months. Noting that the applicant, who had attained the age of majority at the time of the acts, had not been placed under guardianship, had neither consented to her stay in the clinic nor to her medical treatment and had been brought back to the clinic by force by the police after she had attempted to escape, the Court concludes, given the circumstances of this case, that the applicant was deprived of her liberty within the meaning of Article 5 § 1.[38] The major contribution of this judgment is the extension of the scope of application of positive obligations to the right to liberty and security and meeting the necessity of providing an effective and complete protection of personal liberty in a democratic society. The national authorities thus bear the obligation to take positive measures in order to ensure the protection of vulnerable people and, in particular, to prevent deprivation of liberty of someone who would have had or should have had knowledge of. Moreover, by the interplay of the *"horizontal effect"*, such an obligation applies also when interferences with an individual's right to liberty are the result of acts by private persons, such as in the present case. The Court, furthermore, considers that, in the field of health as in that of education, the State Party cannot

[38] ECrtHR, *Storck v. Germany*, judgment of 16 June 2005, §§ 76-77.

absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals but remains under a duty to exercise supervision and control over the latter.

Article 6. Right to a fair trial

Here, today, the main question is maybe the **applicability** of Article 6 concerning the determination, on the one hand, of civil rights and obligations and, on the other hand, of any criminal charges. The case-law of the Court is experiencing an evolution in this respect.

As far as *criminal charges* are concerned, two recent different decisions are worth quoting. In the *Dogmoch v. Germany* decision of 8 September 2006, concerning the freezing of assets, the Court noted that the attachment order was a provisional measure taken in the context of criminal investigations and primarily aimed at safeguarding claims which might later on be brought out by aggrieved third parties. If such claims did not exist, the order could, furthermore, safeguard the later forfeiture of the assets. Such forfeiture would, however, have to be determined in separate proceedings following a criminal conviction. There was no indication that the attachment order as such had had any impact on the applicant's criminal record. In these circumstances, the impugned decisions as such could not be regarded as a *"determination of a criminal charge"* against the applicant. Therefore, Article 6 § 1 under its criminal head did not apply.[39]

By comparison, the admissiblity decision *Matyjek v. Poland* of 30 May 2006 is an original one since the Court decided that Article 6 was applicable to a lustration procedure. In the present case, this procedure aims only at punishing those who have failed to comply with the obligation to disclose to the public their past collaboration with the communist-era secret services. As regards the degree of severity of the penalty, the Court notes that a judgment finding a lie in the lustration procedure leads to the dismissal of the person subject to lustration from the public function exercised by him or her and prevents this person from applying for a large number of public posts for a period of ten years. *"It is true that neither imprisonment nor a fine*

[39] ECrtHR, *Dogmoch v. Germany*, decision of 8 September 2006, p. 7.

can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character".[40]

The *Ezeh and Connors v. the United Kingdom* judgment of 9 October 2003 paved the way, in many countries, for the guarantees of the due process in disciplinary proceedings in prison. L'arrêt *Ganci c. Italie* du 30 octobre 2003 a complété le mouvement en appliquant l'article 6 à des contestations qui portaient sur des restrictions imposées en milieu carcéral à un détenu, certaines d'entre elles portant de toute évidence sur des droits et obligations de caractère civil.[41]

As to *civil rights and obligations*, concerning the applicability of Article 6 to civil servants, the *Vilho Eskelinen and Others v. Finland* judgment of the Grand Chamber of 19 April 2007 is of high importance since the Court "finds that the functional criterion adopted in the case of *Pellegrin* must be further developed. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[42] In concrete terms, *"in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest".*[43] In other words, "there will, in effect, be a *presumption* that Article 6 applies. It will be for the respondent Government to demonstrate, first,

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40 ECrtHR, *Matyjek v. Poland*, decision of 30 May 2006, § 55.

41 ECrtHR, *Ganci v. Italy* judgment of 30 October 2003, § 25.

42 ECrtHR (GC), *Vilho Eskelinen and Others v. Finland*, judgment of 19 April 2007, § 56.

43 *Ibid.*, § 62.

that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified".[44]

Turning now to the **guarantees** of Article 6, particularly the principle of due hearing of the parties ("le principe du contradictoire"), videoconference is becoming a sensitive issue, notably in large countries, where considerable distances separate the courts and tribunals. The *Marcello Viola v. Italy* judgment of 5 October 2006 is the leading judgment today. If the accused's participation at the hearing by videoconference is not, in itself, in breach of the Convention, it is up to the Court to ensure that its use, in each individual case, pursues a legitimate aim, and that the arrangements for the conduct of the proceedings respect the rights of the defence as set out in Article 6 of the Convention.[45] Furthermore, the *Svarc and Kavnik v. Slovenia* judgment of 8 February 2007 is interesting since the Court held that there had been a violation of Article 6 § 1 of the Convention as regards the impartiality of the Constitutional Court finding that a judge's previous involvement in the first-instance proceedings, albeit in a quite different role as a professional expert, put in doubt the impartiality of the tribunal.

Article 7. No punishment without law

As regards Article 7 of the Convention, and particularly Article 7 § 2, the *Kolk and Kislyiy v. Estonia* decision of 17 January 2006 is worth quoting. The Court held that the punishment of two persons in 2003 in Estonia for the deportation of civilians to the Soviet Union in 1949 classified as a crime against humanity was not contrary to the principle of non retroactivity of criminal law. According to the Court, in 1949, crimes against humanity were already proscribed and criminalized; responsibility for such crimes could not be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.[46]

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[44] *Ibid.*, § 62 *in fine*.

[45] ECrtHR, *Marcello Viola v. Italy*, judgment of 5 October 2006, § 67.

[46] A. Cassese, « Balancing the prosecution of crimes against humanity and non-retroactivity of criminal law : the Kolk and Kislyiy v. Estonia Case before the

Article 8. Right to respect for private and family life

A. Several novel issues arose in judgments dealing with the right to respect for **private life**. With regard to the right to *personal integrity*, mention should be made of a judgment concerning the administration of a drug to a severely handicapped child by hospital staff against the wishes of his mother,[47] where the Court found a violation of Article 8.

With regard to *personal identity*, the *Pretty* judgment is remarkable in the sense that it has for the first time and very explicitly emphasised *personal autonomy*. "Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".[48] Since "[t]he applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life", the Court "is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 § 1 of the Convention".[49] It remains however to be established "whether this interference conforms with the requirements of the second paragraph of Article 8",[50] which was the case.

Furthermore, today the right to identity extends to the right to *access to information about one's personal origins* and to *know of one's filiation*, as an element of the right to *self-fulfilment and personal development*. In the *Odièvre v. France* judgment of 13 February 2003, which concerns the issue of "births by an unidentified person" (*accouchement sous X*), the Court considers that "birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision is therefore applicable in [this] case".[51]

This judgment will pave the way for others, where the Court will

ECHR », *Journal of International Criminal Justice*, 2006, vol. 4, n° 2, pp. 410 et s.

47 ECrtHR, *Glass v. the United Kingdom*, judgment of 9 March 2004.

48 ECrtHR, *Pretty v. the United Kingdom*, judgment of 29 April 2002, § 61 *in fine*.

49 *Ibid.*, § 67.

50 *Ibid.*, § 67 *in fine*.

51 ECrtHR (GC), *Odièvre v. France*, judgment of 13 February 2003, § 29.

take into account or, more exactly, give effect to the technological developments in this field and, in particular, to DNA tests. In the *Jäggi v. Switzerland* judgment of 13 July 2006, for instance, the applicant complained that he had been unable to have a DNA test carried out on a deceased person with the aim of establishing whether that person was his biological father. The Court recalls that the right to identity, of which the right to know one's ancestry is an important aspect, is an integral part of the notion of private life.[52] It further notes that an individual's interest in discovering his parentage does not disappear with age; on the contrary.[53] In this case, as regards the respect of private life of the deceased person, the Court refers to its case-law in *The Estate of Kresten Filtenborg Mortensen v. Denmark* decision of 15 May 2006, where it observed that the private life of a deceased person from whom it was proposed to take a DNA sample could not be impaired by such a request since it was made after his death.[54] Lastly, it noted that the protection of legal certainty alone could not suffice as grounds to deprive the applicant of the right to discover his parentage.[55] Conversely, the right to identity in the field of filiation extends also to the right to rebut the *presumption of paternity*. So, in the *Mizzi v. Malta* judgment of 12 January 2006, the Court considers that "the potential interest of Y in enjoying the 'social reality' ("possession d'état") of being the daughter of the applicant cannot outweigh the latter's legitimate right to have at least the opportunity to deny paternity of a child who, according to scientific evidence, was not his own".[56] The Court adopts the same position in the *Paulik v. Slovakia* judgment of 10 October 2006 as well as in the *Tavlic v. Turkey* judgment of 9 November 2006.

Lastly, as regards *personal privacy* (intimité), the Court applied the new concept of personal autonomy in the *K.A. & A.D. v. Belgium* judgment of 17 February 2005 concerning sadomasochistic practices. The right to engage in sexual relations derived from the right of autonomy over one's own body, an integral part of the notion of personal autonomy, which could be construed in the sense of the right

[52] ECrtHR, *Jäggi v. Switzerland*, judgment of 13 July 2006, § 37.
[53] *Ibid.*, § 40.
[54] *Ibid.*, § 42.
[55] *Ibid.*, § 43.
[56] ECrtHR, *Mizzi v. Malta*, judgment of 12 January 2006, § 112.

to make choices about one's own body. It followed that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be "particularly serious reasons" for an interference by the public authorities in matters of sexuality to be justified for the purposes of Article 8 § 2 of the Convention.[57] Nonetheless, in the present case, the Court considered that on account of the nature of the acts in question, the applicants' conviction did not appear to have constituted disproportionate interference with their right to respect for their private life. Although individuals could claim the right to engage in sexual practices as freely as possible, the need to respect the wishes of the "victims" of such practices — whose own right to free choice in expressing their sexuality likewise had to be safeguarded— placed a limit on that freedom. However, no such respect had been shown in the present case.[58]

B. As far as **family life** is concerned, the particular disputes continue to be the same: prisoners and their family life in prison; children's placement measures in case of divorce and separation or of intervention by social services; the entry, residence and expulsion of foreigners.

Article 9. Freedom of thought, conscience and religion

I prefer not to comment on the *Leyla Sahin v. Turkey* judgment of 10 November 2005[59] (where the applicant complained under Article 9 that she had been prohibited from wearing the Islamic headscarf at university), with due respect, since I wrote a dissenting opinion in this case.

Article 10. Freedom of expression

Issues under Article 10 have often arisen out of defamation cases and some recent judgments involved balancing freedom of expression with the right to protection of reputation. *Cumpănă and Mazăre v.*

[57] ECrtHR, *K.A. & A.D. v. Belgium*, judgment of 17 February 2005, § 84.
[58] *Ibid.*, § 85.
[59] ECrtHR (GC), *Leyla Sahin v. Turkey*, judgment of 10 November 2005

Romania[60] was particularly interesting in that respect. It involved the criminal conviction of a journalist and an editor for defaming two public figures by imputing wrong-doing to them, in words and in a cartoon. On the substance of the question of the justification for the interference with the right to freedom of expression, the Court found that the domestic courts had given relevant and sufficient reasons for the convictions, which corresponded to a "pressing social need", since the applicants had made serious allegations of activity amounting to a criminal offence, for which they had been unable to provide any sufficient factual basis in the court proceedings. However, it nevertheless found that there had been a violation of Article 10, on account of *the severity of the penalties* imposed, namely seven months' imprisonment, temporary prohibition on the exercise of certain civic rights and a prohibition on working as journalists for one year, in addition to payment of damages to the plaintiffs. Although the applicants had not served their sentences, having been pardoned by the President, and had continued to work as journalists, the Court made it clear that both these penalties were quite inappropriate in pursuing the legitimate aim of protecting the reputation of others, given the inhibiting effect which they would have on the role of the press.

In the *Nordisk Film & TV A/S v. Denmark* inadmissibility decision of 8 December 2005, the applicant company complained that the Supreme Court's decision of 29 August 2002, which compelled it to hand over to the public prosecution service unpublished programme material — relating to alleged paedophiles' activities in Denmark and India —, breached its rights under Article 10 of the Convention. "In the Court's opinion, however, there is a difference between the case before it and previous case-law. In [this] case, [...] the journalist JB worked undercover [and] the people talking to him were unaware that he was a journalist. Also, owing to the use of a hidden camera, the participants were unaware that they were being recorded. [...]. Consequently, those participants cannot be regarded as sources of journalistic information in the traditional sense [...]. Seen in this light, the applicant company was not ordered to disclose its journalistic source of information. Rather, it

[60] ECrtHR (GC), *Cumpănă and Mazăre v. Romania*, judgment of 17 December 2004.

was ordered to hand over part of its own research material. The Court does not dispute that Article 10 of the Convention may be applicable in such a situation and that a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression [...]. However, [...] [t]he Court is not convinced that the *degree of protection* under Article 10 of the Convention to be applied in a situation like the present one can reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential, notably because the latter protection is two fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest [...]".[61]

Article 11. Freedom of assembly and association

In the case of *Baczkowski & Others v. Poland*, which was declared admissible on 5 December 2006, the applicants, a group of individuals, requested the Warsaw Town Hall for permission to organise a march in the framework of Equality Days. The request was refused due to lack of technical details submitted when making the request. They claim the refusal was unjustified and that they were treated in a discriminatory manner due to their homosexuality. In its judgment of 3 May 2007, the Court concluded that it could be reasonably surmised that the Mayors opinions affected the decision-making process and, as a result, infringed the applicant's right to freedom of assembly in a discriminatory manner. Accordingly, the Court was of view that there had been a violation of Article 14 in conjunction with Article 11.[62]

In the *Sørensen and Rasmussen v. Denmark* judgment of 11 January 2006, the applicants had been obliged to join a union and they claimed that this obligation was striking at the very substance of their negative right not to be forced to join an association. The Court expressly refers to Article 12 of the Charter of Fundamental Rights of the European Union.[63]

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61 ECrtHR, *Nordisk Film & TV A/S v. Denmark*, decision (inadmissible) of 8 December 2005, p. 11.

62 ECrtHR, *Baczkowski & Others v. Poland*, judgment of 3 May 2007, § 100.

63 ECrtHR (GC), *Sørensen et Rasmussen v. Denmark*, judgment of 11 January 2006,

Article 12. Right to marry

Here I have to quote the *Grant v. the United Kingdom* judgment of 23 May 2006, which is a follow-up to the *Christine Goodwin* and *I. v. the United Kingdom* judgments of 11 July 2002.[64] The applicant, a male-to-female transsexual complains of the ongoing failure of the United Kingdom government to enact legislation guaranteeing legal recognition of a transsexual's acquired gender. Her complaint centered on not being eligible for pension at age 60.

Article 13. Right to an effective remedy

Giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13 is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. This provision was revived y the *Kudla v. Poland* judgment of 26 October 2000.[65]

Article 14. Prohibition of discrimination

The *Nachova and others v. Bulgaria* judgment of 6 July 2005 is the first in which the Court joined Article 2, under its procedural limb, with Article 14, in a case concerning a so-called hate crime. "The Grand Chamber considers [...] that any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a

§ 74.

64 ECrtHR, *Grant v. the United Kingdom*, judgment of 23 May 2006; ECrtHR (GC), *Christine Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, judgments of 11 July 2002.

65 ECrtHR (GC), *Kudla v. Poland*, judgment of 26 October 2000.

thorough examination of all the facts should be undertaken in order to uncover any possible racist motives".[66] Here, the Court finds "that the authorities failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events".[67] Furthermore, as far as racism is concerned, the Court set out the nature of its requirements in a formula of principle: "Racial violence is a particular affront to human dignity and [...] requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment".[68]

Furthermore, geared towards securing a better recognition of equality, the 12th Protocol to the European Convention on Human Rights, opened to the signature of the States, in Rome, in November 2000, at the occasion of the anniversary of the Convention, is in itself a symbol. This new protocol contains a general equality and non-discrimination clause. It came into force on 1st April 2005 and now applies for the 13 countries which have ratified it.

Article 17. Prohibition of abuse of rights

The Court has given its opinion on the dangers that threaten democracy. Here I am thinking about decisions and judgments in which the protection of the Convention has been refused, in matters such as racist, negationist or revisionist speeches, or appeals to uprising or violence. In a couple of cases the Court applied Article 17 of the Convention, finding that the applicants could not rely on, respectively, Articles 10 and 11. One case involved the conviction of a member of a right-wing political party for displaying an anti-Islamic poster following the terrorist attack in New York,[69] while the other concerned

[66] ECrtHR (GC), *Nachova and others v. Bulgaria*, judgment of 6 July 2005, § 164.
[67] *Ibid.*, § 168.
[68] ECHR (GC), *Nachova and others v. Bulgaria*, judgment of 6 July 2005, § 145.
[69] ECrtHR, *Norwood v. the United Kingdom*, decision (inadmissible) of 16 November 2004.

a prohibition on the formation of associations with anti-Semitic objectives.[70]

Article 2 of Protocol no. 1. Right to education

In the *Leyla Sahin v. Turkey* judgment of 10 November 2005, the Court confirms that this provision is applicable to higher and university education. The judgment rightly points out that *"there is no watertight division separating higher education from other forms of education"* and joins the Council of Europe in reiterating *"the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy"*.[71] Moreover, since the right to education means a right for everyone to benefit from educational facilities, the Grand Chamber notes that a State which has set up higher-education institutions "will be under an obligation to afford an effective right of access to [such facilities]", without discrimination.[72]

Article 3 of Protocol no. 1. Right to free elections

The *Hirst (no. 2) v. the United Kingdom* judgment of 6 October 2005, where the Court addressed the question of the right of convicted prisoners to vote, is in my view of particular importance since the Court very clearly recalls that: "[i]t is well established that prisoners do not forfeit their Convention rights following conviction and sentence and continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty [...]".[73]

2. *Equality rights*

Rights and freedoms are not exercised in a vacuum. They necessarily relate to a particular person in a particular situation within a community, a player (un acteur) in the social relations through

[70] ECrtHR, *W.P. and Others v. Poland*, decision (inadmissible) of 2 September 2004.
[71] ECrtHR (GC), *Leyla Sahin v. Turkey*, judgment of 10 November 2005, § 136.
[72] *Ibid.*, § 137.
[73] ECrtHR (GC), *Hirst (no. 2) v. the United Kingdom*, judgment of 6 October 2005, § 69.

which he establishes or destroys his identity, through which he lives or merely subsists. Education, health, employment protection, housing, work, and culture all become right entitlements that require action or intervention if the necessary conditions for their fulfilment are to be created. As A. Touraine has said: "the recognition of fundamental rights would be devoid of substance unless it helped to provide security for everyone and continually enlarged the domain of legal guarantees and State intervention that protect the weakest"[74]. That is precisely why at times talk about human rights becomes intolerable, if not insulting, for some.

As the European Court of Human Rights has often stated, it is important to give the rights their full scope since the Convention is a living instrument whose interpretation forms one body with the text and whose aim is to "guarantee rights that are not theoretical or illusory, but practical and effective". In other words, the rights enshrined in the Convention cannot remain purely theoretical or virtual because "the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective". In the famous *Airey v. Ireland* judgment of 9 October 1979 (which concerned a woman's inability, through lack of funds, to seek a divorce), the Court acknowledged that there was no water-tight division separating the sphere of economic and social rights from the field of rights covered by the Convention and that "hindrance in fact can contravene the Convention just like a legal impediment".

Thus, some judgments of the European Court of Human Rights can be analyzed as going into the field of social rights. As regards the **right to have a home** (**"droit au logement"**), the *Hutten-Czapska v. Poland* judgment of 19 June 2006 occurs in the framework of a rent freezing policy and it is worth quoting. "It is true that [...] the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. *It had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable*

[74] A. Touraine, *Qu'est-ce que la démocratie?*, Paris, Fayard,1994, p. 52.

individuals"[75]. Moreover, in the sight of Article 46 of the Convention, the Court adopts the pilot-judgment procedure which "is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level"[76] and consequently it paves the – dangerous? – way for general measures to be applied by the Polish State in order to put an end to the systemic violation of the right of property identified in the present case. "[H]aving regard to its social and economic dimension, including the State's duties in relation to the social rights of other persons (...), the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a *fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off* – in accordance with the principles of the protection of property rights under the Convention".[77]

In the same vein but on a different topic – as regards the **right to work** –, we should also mention the *Sidabras and Džiautas v. Lithuania* judgment of 27 July 2004 where the Court concludes that the ban on the applicants seeking employment in various branches of the private sector, in application of section 2 of the KGB Act, because of their previous KGB activities, constituted a disproportionate measure, affecting to a significant degree the applicants ability to pursue various professional activities and having consequential effects on the enjoyment of their right to respect for their private life within the meaning of Article 8, even having regard to the legitimacy of the aims pursued by that ban.[78] Hence the revealing title of an article in France: "Le droit de gagner sa vie par le travail devant la Cour européenne des droits de l'homme".[79]

Finally, questions of **health** are a good indicator of the progressive

[75] ECrtHR (GC), *Hutten-Czapska v. Poland*, judgment of 19 June 2006, § 225.
[76] *Ibid.*, § 234.
[77] *Ibid.*, § 239.
[78] ECrtHR, *Sidabras and Džiautas v. Lithuania*, judgment of 27 July 2004, §§ 61 and 50.
[79] J.-P. Marguénaud and J. Mouly, "Le droit de gagner sa vie par le travail devant la Cour européenne des droits de l'homme", *Recueil Dalloz*, 2006, p. 477.

development of the Court's case-law geering towards the responsibility of States in this field. So, for instance, in the *Nitecki v. Poland* inadmissibility decision of 21 March 2002, the Court addressed to a more general obligation of the State. It recalled that "it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2" and "an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".

3. Solidarity rights

Lastly, the subject of the interdependence and indivisibility of fundamental human rights is now more than ever on the agenda. Viewed from one angle, it suggests a deepening, a widening of the rights: the third-generation rights — solidarity rights concerning the right to peace, the right to development, the right to a sound environment and the right to respect for mankind's common heritage— are already on the horizon. Admittedly, there has yet to be devised a means of protecting them through the technique of human rights, but our grasp of them is now far beyond the purely imaginary.

Here, I would like to quote two recent and relevant cases where **environmental issues** were at stake. In *Taşkın and Others* v. Turkey,[80] the authorities had failed to comply with a court decision annulling a permit to operate a gold mine using a particular technique, on the ground of the adverse effect on the environment, and had subsequently granted a new permit.

In *Moreno Gómez v. Spain*,[81] the authorities had repeatedly failed to respect regulations relating to the control of noise, granting permits for discotheques and bars despite being aware that the area was zoned as "noise saturated". In view of the volume of the noise, at night and

[80] ECrtHR, *Taşkın and Others v. Turkey*, judgment of 10 November 2004.
[81] ECrtHR, *Moreno Gómez v. Spain*, judgment of 16 November 2004.

beyond permitted levels, and the fact that it had continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8. The Court found that the applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances and held that the respondent State had failed to discharge its obligation to guarantee her right to respect for her home and her private life, in breach of Article 8 of the Convention.

II. Guaranteeing rights

Here we are at the heart of the question of effectiveness.

A. The national level

At the outset, it should be recalled that: "notwithstanding the vital role played by international mechanisms, the effective protection of human rights begins and ends at the national level".[82] Here it is important to take action at several levels.

Concerning the legislative power, first of all. As far as the texts are concerned, it is essential that national parliaments examine carefully their acts or legislations during their preparation before adopting them and, afterwards, abolish those which are incompatible with the Convention. The *Recommendation Rec(2004)5* of the Committee of Ministers to the Member States of 12 May 2004 is precisely on that: the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.

On the judicial level, after. The question here is the incorporation or the integration of the Convention in the national legal order of States and the way these States apply it.[83] The national courts are

[82] COUNCIL OF EUROPE, *In our hands. The effectiveness of human rights protection 50 years after the Universal Declaration*, Strasbourg, Council of Europe Publishing, 1999.

[83] See, in this respect, the research project by H. KELLER, *The reception of the ECHR in the Member States*, http://www.rwi.unizh.ch/keller/Reception/home.htm (University of Zurich, 2006).

therefore entrusted with the initial chief role of giving meaning and effect to the norms of the Convention in concrete cases through the right solution by correction and redress and by bringing domestic law in harmony with such norms. When we are saying that the system operates under the principle of subsidiarity, which explains and gives meaning to the rule of exhaustion of domestic remedies, it means that the primary responsibility for securing the rights and freedoms set out in the European Convention on Human Rights lies with the domestic authorities and particularly the judicial authorities.

Between the national and the international judge, in the field of human rights, there is clearly a **common responsibilty**: the national authorities assume the *first responsibility* of the respect of human rights, by all the organs of State; the European Court, which exercises the control of the third, assumes the *last responsibility*. Il est, en effet, acquis aujourd'hui que pour être crédible la protection des droits de l'homme doit accepter de s'exposer à un regard extérieur, un regard international qui fait office de tiers objectif.

Human rights invite us to reverse the perspective and, particularly, to abandon the Kelsenian model of the hierarchy of norms. In fact, the advent of European human rights law today presents a major and fundamental challenge to traditional legal thinking, since it actually makes this *"pyramidal"* way of thinking more fragile, less fair, less appropriate. Couldn't we, perhaps shouldn't we forget it? *From the pyramid to the network? Towards a new way of establishing the law*, M. van de Kerchove and Fr Ost rightly ask themselves.[84]

B. The international level

The European Convention on Human Rights and Fundamental Freedoms is not only the first instrument. It is also the most fundamental since, in terms of effectiveness, the Convention offers the fullest

[84] Fr. Ost et M. van de Kerchove, « De la pyramide au réseau ? Vers un nouveau mode de production du droit », *Revue interdisciplinaire d'études juridiques*, 2000, pp. 1-82 ; Fr. Ost et M. van de Kerchove, *De la pyramide au réseau. Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002.

protection, the rights it guarantees being actionable ("justiciable"), that is to say they may form the subject-matter of recourse before a wholly judicial body, the new European Court of Human Rights established on 1 November 1998. In more general terms, the ability to assert human rights before a court is the primary prerequisite for their effectiveness. It must be possible for them to be the subject-matter of a *remedy* before an international court acting as an independent third party. And that is the role and purpose of the European Court of Human Rights.

As far as the mechanism of the European Court is concerned, I will highlight five recent trends.

1. The scope of jurisdiction

The European Court has more and more cases directly involving European Community and European Union Law and acts of European insitutions.

The case of *"Bosphorus Airways" v. Ireland* concerns an aircraft leased by the applicant company from Yugoslav Airlines and seized by the Irish authorities under an EC Council Regulation which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The applicant's challenge to the retention of the aircraft was initially successful in the High Court, which held in June 1994 that the relevant Council Regulation was not applicable to the aircraft. However, on appeal, the Supreme Court referred a preliminary question under Article 177 of the EEC Treaty to the European Court of Justice on whether the applicant's aircraft was covered by the relevant Council Regulation. The answer was in the affirmative and by a judgment dated November 1996 the Supreme Court applied the decision of the European Court of Justice and allowed the State's appeal. The applicant complains under Article 1 of Protocol no. 1 (protection of property) to the European Convention on Human Rights that it has had to bear an excessive burden resulting from the manner in which the Irish State applied the sanctions regime and that it has suffered significant financial loss.

In the judgment of 30 June 2005, the Court seeks to ensure in particular that the Convention will not constitute an obstacle to further

European integration by the creation among the Member States of the Union of a supranational organisation — a development which, as the representatives of the European Commission argued in their submissions to the Court, would be seriously impeded if the Member States were to verify the compatibility with the European Convention on Human Rights of the acts of Union law before agreeing to apply them, even in situations where they have no margin of appreciation to exercise. But the Court stops short of stating that, as the Member States have transferred certain powers to a supranational organisation, the European Community, the situations resulting directly from the application of the European Community acts would escape their "jurisdiction" in the meaning of Article 1 of the Convention. Instead, while the Convention remains applicable to such situations (*ratione loci*, *materiae* and *personae*), and while the States parties remain fully-answerable to the supervisory bodies it sets up, it is only the *level of scrutiny* exercised by the European Court of Human Rights which is influenced by the circumstance that the alleged violation has its source in the application of an act adopted within the European Community: the Court considers that, insofar as the legal order of the European Union ensures an adequate level of protection of fundamental rights, and unless it is confronted with a "dysfunction of the mechanisms of control of the observance of Convention rights" or with a "manifest deficiency",[85] it may *presume* that, by complying with the legal obligations under this legal order, the EU Member States are not violating their obligations under the European Convention on Human Rights.

2. Interim measures

The *Mamatkulov and Askarov v. Turkey* judgment of 4 February 2005 is, clearly, a reversal of case-law (revirement de jurisprudence). The applicants' representatives maintained that, by extraditing their clients despite the interim measure indicated by the Court under Rule 39 of the Court, Turkey failed to comply with its obligation under Article 34 — not to hinder in any way the effective exercise of the right

[85] ECrtHR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, § 166.

of individual application. In casu, the Court indicated to the Turkish Government that the extradition should not take place until it has had an opportunity to examine the validity of the applicants' fears. After having recalled that the right of *individual application* is "one of the fundamental guarantees of the effectiveness of the Convention system" and the philosophy that lies behind this provision,[86] the Court underlines that it is of the utmost importance that the applicants or potential applicants should be able to communicate freely with the Court: "for the present purposes, it [the Court] concludes that the obligation set out in article 34 *in fine* requires the Contracting States to refrain not only from exerting pressure on applicants, but also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure".[87]

As far as interim measures are concerned, these are granted by the Court "*in order* to facilitate the "effective exercise" of the right of individual petition in the sense of preserving the subject-matter of the application when that is judged to be at risk of *irreparable* damage through the acts or omissions of the respondent State".[88] To say it in a positive way: "interim measures [...] play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and [...] securing to the applicant the practical and effective benefit of the Convention rights asserted".[89] In the *Mamatkulov and Askarov* case, because of the extradition of the applicants, it was clear that the level of the protection which the Court should have been able to afford was irreversibly reduced. Having regard to the general principles of international law and the views expressed on this subject by other international bodies, the Court has decided – for the first time – that "a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal

[86] ECrtHR (GC), *Mamatkulov and Askarov v. Turkey*, judgment of 4 February 2005, § 100.

[87] *Ibid.*, § 102 *in fine*.

[88] *Ibid.*, § 108.

[89] *Ibid.*, § 125.

undertaking in Article 1 to protect the rights and freedoms set forth in the Convention".[90]

In the *Aoulmi v. France* judgment of 17 January 2006, the Court concluded that by not complying with the interim measures indicated under Rule 39 of its Rules and deporting the applicant to Algeria, France had prevented the Court from affording him the necessary protection from any potential violations of the Convention. As a result, France had failed to honour its obligations under Article 34 of the Convention.[91]

Lastly, the *Evans v. the United Kingdom* case, about artificial insemination, is worth mentioning since the Court applied Rule 39 in a very specific situation. When the case was brought in 2005, the Court indicated to the Government that "is was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos, the destruction of which formed the subject-matter of the applicant's complaints, were preserved until the Court had completed its examination of the case. On the same day, the President decided that the application should be given priority treatment, under Rule 41".[92] In the judgment of 7 March 2006, the Court considers "that the indication made to the Government under Rule 39 of the Rules of Court [...] must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention".[93] So, in the operative part, the Court "[d]ecides to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos are preserved until such time as the present judgment becomes final or further order".

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[90] *Ibidem.*

[91] ECrtHR, *Aoulmi c. France*, judgment of 17 January 2006, § 110.

[92] ECrtHR, *Evans v. the United Kingdom*, judgment of 7 March 2006, § 3. The case was referred to the Grand Chamber, which delivered judgment in the case on 10 April 2007 (see *supra*).

[93] *Ibid.*, § 77.

3. Remedies and execution of judgments

Remedies under Article 41 and the execution of judgments under Article 46 have recently prompted some extraordinary developments in the case-law of the Court. The Court thus significantly extended its role in indicating appropriate measures from *individual measures* to *general measures* required to remedy a systemic problem.

Individual measures

In the *Assanidze v. Georgia* judgment of 8 April 2004, the applicant complained that he was still being held by the authorities of the Ajarian Autonomous Republic despite having received a presidential pardon in 1999 for an offence and having been acquitted of another by the Supreme Court of Georgia in 2001. Having concluded that there had been violations of Articles 5 and 6 of the Convention on account of the failure ot the authorities of the Ajarian Autonomous Republic to release the applicant despite his acquittal by the Georgian Supreme Court, the Court held in the operative part of the judgment that "the respondent State must secure the applicant's release at the earliest possible date".[94] While reiterating that it is primarily for the State to choose the means of discharging its obligation to execute a judgment, the Court took the view that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it".[95]

Ilaşcu and Others v. Moldova and Russia concerned the responsibility of Moldova and Russia under Article 1 of the Convention and in particular in connection with the positive obligations of the State with regard to parts of its territory over which it has no control, i.e. the "Moldovan Republic of Transdniestria". The case was about ill-treatment of detainees and conditions of detention. In its judgment of 8 July 2004, the Grand Chamber of the Court held that the applicants came within the jurisdiction of Moldova within the meaning of Article 1 of the Convention (State jurisdiction) as regards its positive obligations; and that the applicants came within the jurisdiction of Russia within

[94] ECrtHR (GC), *Assanidze v. Georgia*, judgment of 8 April 2004, § 203.

[95] *Ibid.*, § 202 *in fine*.

the meaning of Article 1 of the Convention. Without going into details the Court found violations of both Articles 3 and 5 of the Convention and further held, unanimously, that Moldova and Russia were to take all the necessary steps to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release.

General measures

A further major development took place with the delivery of the Grand Chamber's judgment in *Broniowski v. Poland* on 22 June 2004 which is designated a **pilot judgment**. The case concerned successive undertakings by the Polish authorities to provide compensation, in the form of discounted entitlement to property, in respect of land "beyond the Bug river" which had ceased to be Polish territory after the Second World War. The European Court not only found that there had been a violation of Article 1 of Protocol No. 1 but also concluded that "the violation ha[d] originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants". The Court defined a systemic problem as a situation "where the facts of the case disclose the existence, within the [national] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]" and "where the deficiencies in national law and practice identified ... may give rise to numerous subsequent well-founded applications".

On that basis, the Court went on to say that, in executing the judgment, *"general measures should either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found to have been in breach of the Convention or provide equivalent redress in lieu"*. In the operative part of its judgment, the Court stated that *"the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1"*. As far as Article 46 is concerned, the *Broniowski* case ended up in a friendly settlement judgment of 28 September 2005.

The *Hutten-Czapska v. Poland* judgment of the Grand Chamber of 19 June 2006 raised the same issues as to whenever the case is to be considered a pilot case for the purposes of ruling whether successive rent-control schemes were compatible with Article 1 of Protocol No. 1.[96] This method of adopting a "pilot" judgment in which a systemic problem is identified has an important practical consequence for the work of the Court, which will in such circumstances adjourn consideration of other applications arising out of the same problem, pending adoption of the necessary remedial measures.

4. Working in synergy (Un travail de synergie)

The multiplication of the instruments now guaranteeing human rights has, both in terms of quantity and of quality, been considerable — some see this as frenzied proliferation, others as constructive progression towards a "general law of human rights". This situation, which may produce both positive and negative effects, is also reflected by the number of NGOs specialising in the defence of human rights, thus explaining the need for coordination and common platforms. One fundamental problem is the risk of a reciprocal lack of awareness, of compartmentalization, of divergences, of inconsistencies and even of instruments cancelling each other out. Instead, I advocate **synergy between all these instruments** at national and international level.

It is worth noting that in the course of these leading judgments the Court often refers to the case-law from other national and international jurisdictions. Recourse to a comparative perspective in human rights adjudication does not give rise to controversy before the European Court of Human Rights.[97] It is something that is taken for granted. The Court considers that there is every reason to study decisions in other

[96] The *Hutten-Czapska v. Poland* judgment of the Grand Chamber has been delivered on 19 June 2006.

[97] See, for example, the references to Canadian and United States judgments in ECrtHR (GC), *Hirst (no. 2) v. the United Kingdom*, judgment of 6 October 2005; ECrtHR, *Appleby v. the United Kingdom*, judgment of 6 May 2003; ECrtHR, *Allan v. the United Kingdom*, judgment of 5 November 2002. The issue has become a controversial one in the United States – see Justice Ruth Bader Ginsburg's remarks to the Constitutional Court of South Africa – "A decent respect to the Opinions of [human]kind" (7 February 2006).

jurisdictions dealing with similar issues. It recognises that while it is not in any sense bound by what national or other international courts say the Court's own understanding of the governing principles will inevitably be enriched by examining how other courts have approached the same question. With modern advances in technology it is no longer difficult to have immediate access to leading decisions from e.g. the United Kingdom's House of Lords, the Supreme Courts of Canada and the United States and the Constitutional Court of South Africa.

Moreover, we should not neglect the contribution to the development and application of these standards of other Council of Europe human rights bodies, in particular, the work of the Commission for the Prevention of Torture (CPT), the Commissioner for Human Rights, the European Committee of Social Rights, the European Commission against Racism and Intolerance (ECRI) and the Advisory Committee for the Protection of National Minorities under the Framework Convention. These bodies will often rely on the case-law of the Court in their work but it also works the other way around. For example, today, it is quite a common occurrence for the Court to rely heavily on the work of the CPT in judging whether prison conditions amount to inhuman and degrading treatment in particular cases.[98] Reference has also been made to ECRI reports[99] and to reports prepared under the European Social Charter.[100]

5. The reform

In response to this problem, the Committee of Ministers of the Council of Europe adopted Protocol no. 14 to the ECHR in May 2004, together with a number of recommendations and resolutions designed to increase its effectiveness. The aim of this reform is to allow the Court to devote more attention to meritorious applications, in particular those disclosing serious human rights violations, by increasing its filtering

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[98] Amongst numerous cases see ECrtHR, *Van der Ven v. the Netherlands*, judgment of 4 February 2003.

[99] See ECrtHR (GC), *Nachova and Others v. Bulgaria* judgment of 6 July 2005 (reference to ECRI's 2000 and 2004 reports on Bulgaria).

[100] See ECrtHR (GC), *Sorensen and Rasmussen* v. Denmark judgment of 11 January 2006 (reference to reports of the European Social Committee).

capacity and improving the implementation of the ECHR at national level. I will mention some of the most important changes of Protocol no. 14.

The Court will be competent to sit in a single judge formation to declare cases inadmissible or strike out of the Court's list of cases, where such a decision can be taken without further examination (art. 4 and 5). In principle the decisions on admissibility and the merits will be taken at the same time (art. 9).

The competence of the Committee of three judges is enlarged. It can declare admissible and render at the same time a judgment on the merits, if the underlining question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court (art. 8).

At the request of the plenary Court, the Committee of Ministers may, by unanimous decision, and for a fixed period, reduce to five the number of judges of the Chambers (art. 5).

A new admissibility criteria is added (art. 12), changing art. 35, § 3, in that a case is declared inadmissible if the applicant had not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

A new § 4 will be added to art. 46 of the Convention (art. 16) which allows the Committee of Ministers, if it considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, to refer to the Court the question whether that Party has failed to fullfill its obligation under para 1, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representarives entitled to sit on the Committee.

Furthermore some Recommendations to the Member states were adopted by the Committee of Ministers on 12 May 2004, such as Recommendation Rec(2004) 5, to ensure that

I. there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case law of the Court;

II. there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;

III. the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention.

The perennial problem with reform of the Convention is that it has always suffered from a time lag. This is mainly due to the complexity involved in the drafting of new Protocols that must be ratified by all the Contracting Parties when procedural or structural changes are involved. Protocol 11, for example, took more than three years to be ratified by all Contracting parties. The problem of time lag for a beleaguered international court is that by the time the much-needed reform enters into force the parameters and dimensions of the problem will have changed.

The Public Prosecutor and the Equality of Arms – Viewed from the Perspective of European Convention on Human Rights

Mark E. VILLIGER*

1. Introduction

This presentation highlights aspects of the Public Prosecutor's activities in criminal proceedings in the light of the principle of the equality of arms as prescribed by Article 6 of the European Convention on Human Rights (henceforth: the Convention). Traditionally, the Public Prosecutor and the accused are parties to proceedings which will be finally determined by the trial judge. These parties are placed on the same level; they have the same rights and obligations towards each other and *vis-à-vis* the judge.

It is proposed to examine the position of these two parties under Article 6 of the Convention in respect of the role and presence of the accused in the establishment of the facts; the access of both sides to documents essential to the trial; the role of the Public Prosecutor in cassation proceedings; the responsibility of the Public Prosecutor and the accused for the length of the criminal proceedings; and the relevance of the presumption of innocence for the Public Prosecutor.

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A further preliminary note: There are different systems of criminal procedure in Europe; they can roughly be broken down into two different types: the British and the Continental system. In the United Kingdom (and Ireland), the Public Prosecutor will establish the facts and aim to make a case directly at the trial as to the accused's guilt, whereas in the Continental system this occurs at an earlier stage with no judge present, and at the trial the Public Prosecutor will present the *results* of the investigation. The Convention does not *a priori* favour one or the other system; it is clear, however, that the European Court of Human Rights in Strasbourg (henceforth: the Court) has emphasised since its early judgments that also in Continental procedures a certain immediacy is required for instance in respect of the questioning of witnesses Conversely, the Court has also emphasised a certain judicial control also in respect of the pre-trial proceedings.

2. Relevance of the Guarantees of Article 6 Para. 1 of the Convention

At the outset the question arises as to the relevance of Article 6 of the Convention. This provision grants in criminal proceedings to everyone who is charged with a criminal offence various guarantees of a fair trial, e.g., the right to a public hearing, to proceedings within a reasonable time, to have legal assistance, to understand the language of the proceedings etc. Among these guarantees figures the important qualification that "*everybody is entitled to a fair ... hearing by a tribunal*". Article 6 ma kes it quite clear that the guarantees of a fair hearing concern the *court* – i.e., the judge, in particular the trial judge, and the trial court's manner of conducting the proceedings.

In other words, the obligations in Article 6 do not (or not immediately) appear to apply to other actors and phases in the criminal proceedings. The accused enjoys these *rights*, though such conduct may lead to their partial or even complete loss (the so-called *"waiver"*), for instance if there is a refusal to exercise these rights.

More importantly, the guarantees do not as such directly apply to the Public Prosecutor and the investigating bodies, for instance

the police, when questioning witnesses (though of course, Article 3 prohibiting inhuman treatment and torture comes to play here). In all European procedures the Public Prosecutor is not only called upon to compile elements which incriminate or inculpate, but also those which exonerate the accused. One can certainly make out a case that the Public Prosecutor exercises quasi-judicial functions. Nevertheless, Article 6 does not directly concern this part of the criminal proceedings.

This broader interpretation of Article 6 corresponds with the Strasbourg's Court's case-law that no complaint can be brought against a Public Prosecutor for having prosecuted a particular person. Whether or not a person is guilty – or even suspected of being guilty – is not a matter which the Court can decide (cases of arbitrariness left aside). This is part of the so-called "fourth-instance"-doctrine of the Strasbourg Court. Issues may arise under Article 5 of the Convention, and also in respect of the presumption of innocence under Article 6 § 2 (the presentation comes back to that later), but apart from that, the Public Prosecutor does not become directly responsible under Article 6.

However, Article 6 requires a broad and overall view of the criminal proceedings. While it is always the trial judge who is directly bound by the guarantees of a fair hearing, the Strasbourg Court has stated in numerous cases that the rights in Article 6 would remain ineffective if in preliminary stages of a criminal procedure the accused's rights could be grossly breached – perhaps even to such an extent that these breaches could no longer be repaired in the actual trial. The trial judge has the duty to ensure that the rights to a fair trial are as far as possible exercised also at the early stages of the criminal proceedings by all the actors of the proceedings. To this extent the trial judge will become responsible for the entire criminal proceedings.[1]

The following sections will explore how far the responsibility of the trial judge – and with it the guarantees of a fair hearing – extend in respect of the pre-trial proceedings and the Public Prosecutor.

[1] See for one of the leading judgments *Imbrioscia v. Switzerland* of 24 November 1993, Series A no. 275.

3. Role and Presence of Accused in the Establishment of the Facts

The first issue of the equality of arms between the Public Prosecutor and the accused concerns the latter's presence when establishing the facts, in particular the taking of evidence and the questioning of witnesses. In civil proceedings both parties have the same rights of submitting evidence, of commenting thereupon, and of having witnesses questioned in court – as long as the evidence is relevant for the trial court to reach its decision.. The court is called upon to treat both parties equally in all issues concerning the taking of evidence. But does this also apply in criminal proceedings in the relations between the Prosecutor and the accused?

One situation is clear: at the *trial* the accused has the right to be present, to be heard, and to participate in the taking of evidence. This follows from para. 1 of Article 6 of the Convention according to which every accused is "entitled to a ... hearing". Furthermore, subpara. 3(c) entitles the accused "to defend himself in person" and subpara. 3(d) "to examine or have examined witnesses against him". All these guarantees concern the *trial*. The Convention thereby complies with two cardinal principles of a fair hearing: the right to be heard and – more topical in the present context – the equality of arms. The Public Prosecutor must present all pertinent evidence in the presence of the accused, and all witnesses found to be relevant – whether exonerating or inculpating – will be questioned in such a manner that the accused has the possibility to be involved. These rights in the trial correspond with the British approach of immediacy in criminal proceedings.

Three points may be noted in passing. First, the right to be present at the hearing may even oblige the authorities to search for the accused's whereabouts if the latter does not appear at the trial (particularly if there insufficient information as to the date of the hearing)[2] – again a confirmation of the right to equality of arms. Second, the accused may waive these rights simply by refusing to appear at the hearing. Note, too, that the equality of arms may also apply in appeal proceedings, particularly if the appeal court is called upon again to examine all the

[2] *Colozza v. Italy* judgment of 12 February 1985, Series A no. 89.

facts of the case and determine their legal appreciation. Much will depend on whether the appeal court will assess issues relating to the person and culpability of the accused, and if it can raise the punishment. Third, the equality of arms at the trial applies to any other parties. For instance, if the trial court invites court experts to participate in the proceedings, they will have the same rights as the other parties – and *vice versa.*[3]

But what about the accused's rights in the *pre-trial stage.* Here, the situation is less clear. It has already been pointed out that in the continental criminal procedures much or most evidence is compiled in the pre-trial stages, in particular during the investigations.

In the pre-trial phase the accused's rights coincide with the Public Prosecutor's duty to conduct the investigations and the preparations for the accused's indictment efficiently and rapidly. In particular the Public Prosecutor will compile all exonerating and incriminating evidence and prepare it in order, to indict and later bring the accused before trial. Already, it would be cumbersome if the accused could at every stage comment on every item of evidence which may appear pertinent. Moreover, the authorities may not be able to assess and appreciate immediately the value of certain evidence. The accused, if made aware that certain incriminating evidence has been found, may abuse this information. There may be the wish to destroy further evidence which would incriminate the accused even more or to instruct others do so. Evidence obtained may also assist the accused in committing further offences. Finally, the Public Prosecutor may wish to protect witnesses, for instance in a vulnerable situation, such as victims, in particular juvenile victims.

In this situation, the Public Prosecutor has every interest in keeping the relevant evidence confidential for as long as possible in order to conduct the proceedings effectively and rapidly. This interest directly collides with the interest of the accused in being placed on an equal level with the Public Prosecutor and in particular being entitled to comment on the evidence and put questions to the witnesses.

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[3] See *Bönisch v. Austria* judgment of 6 May 1985, Series A no. 92; *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211.

The Convention in its interpretation by the Strasbourg Court aims at striking a balance of the interests of both sides – of the Public Prosecutor and of the accused. Thus, the proceedings must be seen in their entirety – and the accused's rights shall be exercised within reasonable limits (e.g., there is no right to have the same evidence examined more than once). Most importantly, the accused shall at least once in the proceedings have enjoyed these rights to be heard and of the equality of arms. At least once in the proceedings the accused should be present when evidence is examined or witnesses are questioned.[4]

The corollary to this principle is that if the accused cannot exercise these rights during the pre-trial stage, they should be exercised at the latest at the trial itself (with the exception of any serious breaches of the right to a fair hearing in the pre-trial stages).

The Court leaves it open *when* the accused's rights shall be exercised, i.e., the authorities may do so in the pre-trial stages or at the trial itself. If the accused was able to exercise these rights in the pre-trial stage, it is up to the Public Prosecutor – and before the Strasbourg Court to the respondent Government – to demonstrate how and when this occurred (e.g., by providing the verbatim records of the questioning). Again, in the appeal proceedings the accused has no further rights, except of course if the appeal court is confronted with new evidence or new witnesses.[5]

Some further differentiation is called for in respect of the right to be confronted with incriminating witnesses. As has been pointed out, at least once in the proceedings the accused must have the right to put questions to the witnesses. This right must be qualified to the extent that their testimony is not relevant for the trial court's final conclusions; or if the court could reach its same conclusion also on the basis of other evidence, or of statements of other witnesses.

There remains the problem of witnesses wishing to remain anonymous.[6] A Public Prosecutor may have a particular interest in not

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4 See the *Imbrioscia* judgment, loc. cit.

5 See the *Belziuk v. Poland* judgment of 25 March 1998, Reports of Judgments and Decisions 1998-II; *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168.

6 See on this topic the judgments in the cases of *Kostovski v. Netherlands* of

disclosing witnesses' identity to the accused for different reasons. For instance, the incriminating witness may fear retaliation by the accused and would not in the first place have offered to the Public Prosecutor to give evidence if the latter knew that its identity would be disclosed. Perhaps, the witness may be an anonymous informant, a so-called undercover agent, who has been "built up" by the Public Prosecutor. Such informants may require some time to prepare and implement their functions, and once their identity becomes known to the accused, they can no longer be employed for similar purposes. (Note also that the victim of an offence may have a particular interest in not being confronted with the accused, particularly a juvenile witness.)

The Strasbourg Court has dealt with various aspects of witnesses wishing to remain anonymous. It has not considered the use of such informants to be *a priori* contrary to the Convention.[7] On the other hand, it has been comparatively strict – and thereby attracted criticism by the Public Prosecutors in the Contracting States – as to the manner in which these incriminating witnesses should be questioned. In particular, it is clear from the case-law that such witnesses shall in principle *not* remain anonymous. The accused should have the possibility of arguing that the incrimination made by the witness is incorrect and the witness has simply made a mistake – or, which would be worse, that the witness is intentionally trying to harm the accused. Both cases are an essential aspect of the accused's right to defend oneself in person, and in both cases the accused needs to be confronted directly with the witness to argue these points.

It can be concluded that the Convention strikes a fair balance between the various interests. The accused must not necessarily be confronted with all evidence during the pre-trial stages; it suffices if this occurs at the latest at the trial. This duly considers the constraints of the investigating and prosecuting authorities, but also the rights of the

20 November 1989, Series A no. 166; *Windisch v. Austria* of 27 September 1990, Series A no. 186; *Kostovski v. Netherlands* of 20 November 1989, Series A no. 166; *Doorson v. Netherlands* of 26 March 1997, Reports of Judgments and Decisions 1996-II; and *van Mechelen v. Netherlands* of 23 April 1997, Reports of Judgments and Decisions 1997-III.

7 *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 19, para. 40.

accused: the latter must at least once have had this chance to examine the evidence.

4. Access to Documents

A similar situation arises in respect of the accused's right of access to documents. This matter is closely related to the examination of evidence. Indeed, the parties' right to participate in the examination of evidence will depend on them having obtained equal access to the documents.

Once again, conflicting rights are involved here. Article 6 § 1 of the Convention grants the accused to have access to, and comment on, all documents which may provide the basis for the trial court's conviction. (It goes without saying that there is no right to obtain access to documents which are irrelevant for the final judgment). On the other hand, the Public Prosecutor may have every interest in keeping certain documents confidential for as long as possible – for the purposes of conducting the investigations efficiently and speedily.

Again, the Convention strikes a balance between the different interests. It suffices if the accused has access to the documents at *one* stage during the procedures – and that this shall occur at the latest at the trial. However, a further precision is called for. The right to have access to the documents must be *effective*. The accused must be placed in the position, on the basis of these documents, duly to conduct the defence. Thus, it may well be too late if the documents can only be consulted at the trial. Here, the Public Prosecutor must be aware that as a rule the accused shall have access to the relevant documents pointing at innocence or guilt already early in the proceedings – and consecutively to more documents as the proceedings progress.

A final point in respect of the access to documents which does not only concern the Public Prosecutor relates to the *exchange* of documents. If in criminal proceedings the accused files a statement for the trial court, the Public Prosecutor may of course issue a reply thereupon. Subsequently, the principle of the equality of arms requires that the accused has access to the Public Prosecutor's reply – and, indeed, effective access, i.e., that the accused may reply thereto. The trial court may find well this further

round of exchange of documents cumbersome, but it may not refuse this right, for instance on the ground that what the Public Prosecutor said was irrelevant for the trial court's decision for which reason the accused's further comments thereupon are unnecessary (that one can only tell from the final judgment).[8] The principle remains that the accused has the right to have access to every document in the criminal proceedings and to communicate thereupon.

5. Cassation Proceedings

A further aspect of the equality of arms between the Public Prosecutor and the accused concerns the Public Prosecutor's functions in cassation proceedings. Cassation proceedings are normally high level judicial proceedings – occasionally even at the highest domestic level – and concern as a rule mainly legal issues, in particular the correct interpretation of domestic law.

In some Convention States, the Public Prosecutor has a privileged position in the proceedings before the Court of Cassation. This has been criticised as breaching the principle of the equality of arms in particular *vis-à-vis* the accused, and the Court has had occasion to deal with these issues in a number of issues concerning in particular Belgium[9] and Portugal.[10]

The issue in these cases is as follows. The accused will have been convicted and sentenced to a punishment as a rule by a second instance criminal court. The accused will then file a plea of nullity to the Court of Cassation, complaining of the incorrect interpretation of the law. In the Court of Cassation the accused will have further occasion to submit a memorial, the opposing Party –the Public Prosecutor – may or may not wish to reply thereto. Once the written proceedings are closed and – possibly – a hearing has taken place, the Court of Cassation will decide on the plea of nullity. In Belgium and in Portugal, the procedure then

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8 *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports of Judgments and Decisions 1997-I.

9 See the cases *Delcourt* and *Borgers* mentioned below.

10 *Lobo Machado v. Portugal* judgment of 20 February 1996, Reports of Judgments and Decisions 1996-I.

continued as follows: when deciding on the case, the Judge Rapporteur would speak first. Next, the Public Prosecutor would intervene and give an opinion on the plea of nullity – in particular whether it should be upheld or dismissed. As such, the Public Prosecutor would "advise" the Cassation court as to the preferable outcome of the case. The opposing party would not be present nor would the accused receive a copy of the Public Prosecutor's statement in advance, and there is no possibility to reply. The Cassation court would then decide.

Over the years, the Court has changed its view on this situation. At the outset, in the case *Delcourt v. Belgium*[11] of 1970, concerning a criminal case, the Court concluded that there was *no* breach of the principle of the equality of arms as in Article 6 § 1 of the Convention. It considered that the Public Prosecutor, exercising special – quasi-judicial – functions, was not actually an adversary of that accused. As such there was no room for unfairness in the proceedings. The Court noted that the Public Prosecutor could even take up matters *ex officio*, which had not been raised by the accused.

Much criticism was raised against this judgment. It took the Court 21 years to change its case-law in *Borgers v. Belgium* in 1991,[12] this time concerning a civil case, but raising the same issue (in Belgium, the Public Prosecutor becomes active before the Court of Cassation also in civil cases). The Court found that the opinion of the Public Prosecutor, who could in particular recommend to dismiss the plea of nullity, could not be regarded as neutral from the point of view of the parties to the cassation proceedings. In view thereof the accused had a clear interest in commenting on the Public Prosecutor's statement before the Cassation court decides which he could not do since he was not present. For the inequality was increased by the fact that the Public Prosecutor not only submitted a personal view, but actually did so in person during the deliberations of the Court of Cassation. The Court stated: "even if such assistance was ... limited in the present case, it could reasonably be thought that the deliberations afforded the (Public Prosecutor) an additional opportunity to promote, without fear of contraction by the accused, his submissions to the effect that the appeal

[11] Judgment of 17 January 1970, Series A no. 11.
[12] Judgment of 30 October 1991, Series A no. 214-B.

should be dismissed".[13] As a result, the Court found a violation of the principle of the equality of arms in Article 6 § 1 of the Convention.

To round off this subject, the Strasbourg Court has also been called upon to deal with the function of the *Commissaire du Gouvernment* in cases against France. While the French cases equally concern the equality of arms, the situation is different in that the *Commissaire du Gouvernement* exercises strictly advisory functions and has at no stage been the adversary of the accused. Also in these French cases the Court has found a breach of the equality of arms in Article 6 § 1 of the Convention.

6. Length of Criminal Proceedings

An interesting question concerning the equality of arms arises in the context of the length of criminal proceedings. Article 6 § 1 requires speedy criminal proceedings and prohibits their undue length. Here it can be asked whether the conduct of the prosecuting authorities and of the accused must be considered on a par when examining whether or not proceedings have been conducted overly long.

The Strasbourg Court's case-law is well-established: when examining the length of proceedings, it will consider both the conduct of the authorities and of the accused. (In addition, it will consider the complexity of the case and what was at stake for the accused).[14] At first glance, it appears that the prosecuting authorities and the accused are placed on the same level.

In fact, the conduct of the Public Prosecutor's Office is assessed differently than that of the accused. In respect of the authorities' conduct it is examined whether they pursued the investigations and the proceedings as a whole with the necessary diligence. It is examined whether there were any "gaps" in the investigations (for instance, if the responsible public prosecutor was ill and not replaced by a colleague) and if the actual conduct actually contributed towards conclusion of the proceedings or only had "alibi"-functions. Clearly, the authorities

[13] *Ibid.* p.. 32, para. 28.

[14] See for an early case *König v. Federal Republic of Germany* judgment of 28 June 1978, Series A no. 27.

must be given sufficient time to pursue their investigations. The more complex a case, the more time will be required. Criminal economic offences, for instance, extending over different countries, may require months and even years of investigations at home and abroad. Numerous witnesses may have to be heard and countless files examined.

The conduct of the accused is assessed in a different manner. Sufficient time must be given to examine the case-file, in particular all incriminating evidence, and generally to prepare the defence. As a rule, this requires less time that the investigations themselves; in fact, the accused may even be given copies of the documents *during* the investigations. The accused's conduct is relevant in this context if the latter contributes actively to delays in the proceedings. The accused is of course allowed to file complaints, appeals and other remedies in the course of the proceedings. But if such complaints are raised, the accused becomes objectively responsible for any delays in the proceedings. On the whole, the accused's conduct must appear "natural and understandable",[15] and the "necessary diligence" must be exercised.[16]

These are the main aspects of the relevance of the principle of the equality of arms for the Public Prosecutor.

7. Presumption of Innocence

A related topic may be mentioned, namely the relevance of the principle of the presumption of innocence according to Article 6 § 2 of the Convention. This provision provides that "everyone charged with a criminal offence shall be presumed innocent until provided guilty according to law". In practice, the guarantee concerns mainly the position of the accused in the course of criminal proceedings. A person, who has been arrested as the suspected perpetrator of a criminal offence, may be described as being a suspect, but not as having committed the offence.

This guarantee applies to all public authorities, regardless of whether or not they are involved in the criminal proceedings at issue. (In fact,

[15] *Martins Moreira v. Portugal* judgment of 26 October 1988, Series A no. 143.

[16] *H. v. France* judgment of 24 October 1989, Series A no. 162-A.

a case may even be made that the Convention requests member States to provide legislation in order to prevent non-State actors such as the media from prematurely convicting a person, i.e. legislation to prevent trial by the media).

Here, the Public Prosecutor is in a special situation – and indeed provides for the only exception to the presumption of innocence. For it is precisely the Public Prosecutor's role in the criminal proceedings as the prosecuting party to have a person indicted and brought before court precisely to have the person convicted of a criminal offence. It is not otherwise possible to do so without raising charges against the accused.

However, there are limits to this accusatory role which must be exercised objectively. At the outset, Article 6 para. 2 tells us that the burden of proof is on the Public Prosecutor (and not on the accused). Furthermore, the accusation will be raised for purposes of the judicial proceedings. All incriminating and exculpatory circumstances must have been adduced. It is only when the Public Prosecutor has objectively considered the case as a whole that the presumption of innocence would appear to have been complied with. On the whole, one can say in this light that the Public Prosecutor exercises a certain form of impartiality.

8. Other Aspects Going Beyond the Equality of Arms

The topic of this presentation – the Public Prosecutor and the Equality of Arms viewed from the perspective of the Convention – would be incomplete if not at least cursory reference were made to other aspects of the Convention concerning the Public Prosecutor.

Article 5, for instance, guaranteeing the right to liberty of person, concerns, *inter alia*, a person's detention awaiting trial. The accused has various rights vis-à-vis the Public Prosecutor, for instance to be informed of the grounds of detention and to be in a position effectively to exercise the defence rights to obtain release from detention. If the accused is being questioned, the authorities have the duty to comply with the requirements under Article 3 of the Convention prohibiting inhuman and degrading treatment and punishment and torture. If the

accused maintains a complaint about ill-treatment contrary to Article 3 – and can produce prima facie evidence herefor (for instance, there are bruises and wounds and even a medical certificate herefor), the Public Prosecutor is under an obligation to institute an independent examination to establish the situation.

Reference may also be made to Article 8 of the Convention, concerning, *inter alia*, the right to respect for private life, which limits the Public Prosecutor's powers, for instance, to monitor the telephone conversations or the correspondence of an accused, or to search the latter's residence.

9. Conclusion

In conclusion, it can be said that the Convention and its Article 6 are not entirely clear as to the applicability of these guarantees, though the Strasbourg Court in its case-law has provided unequivocal signposts as to the employment of these rights. Thus, it is established that the principle of the equality of arms and the fairness of the proceedings applies strictly before the trial court. In the pre-trial proceedings they apply insofar as accused should not suffer any damage which would prejudice the fairness of the entire trial. Moreover, at least once in the trial the accused shall benefit from these guarantees.

Stepping back and looking at the equality of arms as part of the general guarantee of a fair hearing as a whole, one can conclude that the equality of arms between the Public Prosecutor and the accused is a strong pillar of the saying "justice must not only be done, it must also be seen to be done".[17]

[17] See the *Delcourt* judgment, *ibid*, p. 17, ara. 31.

Some Observations on the Position of International Treaties in Turkish Law

Rona AYBAY*

I. Position of international treaties under the present Constitution

1) The Turkish Constitution of 1961 introduced for the first time in Turkish legal history the principle that international treaties duly given effect to possess the force of laws (statute; *kanun*) enacted by the Grand National Assembly (Parliament). Thus, treaties incorporated into the national (domestic) legal order have the same status as laws and therefore may be applied by the Turkish courts.

The 1961 Constitution did not permit recourse to the Constitutional Court to test the constitutionality of a treaty, although such recourse was possible in relation to laws.

Duly ratified treaties were thus accorded *"special"* status among laws[1]. Some authors argued that this status implied the superiority of treaties over ordinary laws.

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1 It should be noted that there were some other categories of laws (statutes) whose constitutionality could not be challenged before the courts, including the constitutional court. For example those "revolutionary laws" listed in Article 153 of the Constitution, which were introduced during the first years of Republic, could not be challenged before any court.

2) The 1961 Constitution abolished the outdated system of the 1924 Constitution, which required that all treaties should be ratified solely by the Grand National Assembly. It should be mentioned, however, that with the increase in the number of treaties to which Turkey became party, especially after the Second World War, this constitutional provision was already obsolete by the 1960s and was disregarded to some extent in practice.

The 1961 Constitution clearly indicated that the ratification of a treaty was an executive act and therefore should be performed by the *"Executive Branch"*. However, Article 65 paragraph 1 stated that in order to be able to ratify a treaty the Executive required parliamentary approval. In other words, the Executive could not ratify a treaty unless Parliament adopted a law authorising the Executive to do so.

It should be noted, however, that there were a number of categories of international treaty which were not subject to this basic rule, *i.e.* certain treaties could be ratified by the Executive without parliamentary authorization. These were listed in paragraphs 2-4 of Article 65 and included treaties regulating *"economic, commercial and technical relations"* and *"agreements concluded in connection with the implementation of an international treaty"*. However, where any such treaty necessitated amendments to Turkish legislation or affected individuals' legal status, etc., parliamentary authorization was required before ratification.

3) Although the final version of Article 65 of the 1961 Constitution did not include a provision allowing for constitutional challenge to a duly ratified treaty, the drafting history (*travaux préparatoires*) reflects a different approach. All of the drafts[2] on which the 1961 Constitution was based appear to have envisaged the possibility of the constitutionality of a treaty being examined by the Constitutional Court before ratification. On the other hand, none of the drafts included a provision giving the

[2] There were three main drafts on which the 1961 Constitution was based:
(i) the draft prepared by academics, under the chairmanship of the late Prof. Onar (*Ön- Tasarı*),
(ii) the text drafted by the Faculty of Political Sciences, Ankara University (*SBF Tasarısı*),
(iii) the draft of the Assembly of Representatives (*Temsilciler Meclisi Tasarısı*).

treaties equal status to enacted law.

4) The 1961 Constitution was replaced by a new text in 1982 following the military coup of 1980, but the language of the provision relating to international treaties remained unchanged[3]. One may therefore conclude that the system introduced in 1961 is still in effect. Under this system, it is obvious that the provisions of an international treaty to which Turkey is party have equal force to the provisions of laws passed by Parliament.

However, there have been disagreements regarding the question of conflict between treaty provisions and statutory provisions. In the opinion of some academics, where such conflict arises the provisions of the treaty should be applied. This opinion was based on the fact that while, under the Constitution, the constitutionality of laws could be examined by the Constitutional Court, judicial review of international treaties was not possible. For the advocates of this view, treaties were thus superior to laws. However, the opposing view denied that the non-availability of constitutional review implied superior status for treaties. For the proponents of this view, treaties and laws are equal sources of law - in case of conflict between the provisions of a law and of an international treaty, the general rules of conflict of laws would apply, i.e. *lex posterior derogat priori* and *lex specialis derogat legi generali.*

It may be noted in this connection that except for some very rare cases where judges based their reasoning even on non-binding international instruments[4], in general the courts have not been very enthusiastic about applying international treaties, preferring to decide according to the more familiar rules of domestic law.

5) Apparently with the hope of putting an end to these discussions and different understandings, Parliament passed a constitutional amendment providing that if the issue relates to fundamental rights and freedoms, in a case of conflict between the provisions of a law and an international treaty, the international treaty would, in principle,

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3 Only slight changes in style were made by the 1982 text.

4 See Aybay, R., *The International Human Rights Instruments and Turkish Law*, Turkish Yearbook of Human Rights, 1979. Also Aybay, R., *Implementation of the Helsinki Final Act by a Turkish Court*, Turkish Yearbook of International Relations 1978 (1982).

prevail. However, the new sentence added to the end of Article 90 was found ambiguous in certain respects and thus incapable of putting an end to the discussions.

First, international treaties relating to subjects *other than "fundamental rights and freedoms"* are not within the scope of the new sentence and therefore, as far as those treaties are concerned, the former vagueness would continue to exist.

Second, the sentence introduced in 2004 was regarded as ambiguous because the words employed in the text are not clear enough. The Turkish term *"esas alınır"* may be translated into English as *"in principle"* or *"as a rule"*, and therefore does not clearly state that international treaties are *"superior to"* or *"prevail over"* statute law.

Another point of ambiguity is created by the term "fundamental rights and freedoms" *(temel hak ve özgürlükler*[5]*)*, which restricts the scope of the provision. In the context of the Turkish Constitution, the term "fundamental rights and freedoms" includes not only the so-called "classic" rights and freedoms (Articles 17-40) but also "social and economic rights and duties" (Articles 41-65) and "political rights and duties" (Articles 66-74). This obviously is a much broader list of rights of freedoms than that provided for in the European Convention on Human Rights.

Moreover, almost any international treaty might include a provision directly or indirectly relating to the property rights of individuals (real persons or corporate bodies), and the "right to property" has to be included in any list of human rights. In view of this, one may ask if the envisaged distinction between treaties relating to the "fundamental rights and freedoms" and other treaties really matters.

[5] In no other Article of the Constitution is the Turkish word *"özgürlükler"* employed. Instead, its synonym of Arabic origin *"hürriyetler"* is used. This indicates that the drafters of the additional sentence overlooked the need for consistency in constitutional terminology.

II. The draft constitution proposed by the Union of Turkish Bar Associations

1) The leadership of the political party in power (AKP[6]) announced after its landslide victory in the general elections of 22 July 2007 that they were determined to introduce an entirely new constitution. The declared intention was to get rid of the constitutional *"residue"* of the military coup of 1980 and to draft a so-called "civil" constitution. The AKP leadership invited all NGO's and similar organizations and associations to contribute to this effort.

The Union of Turkish Bar Associations (UTBA) is the umbrella organization of all Bars in Turkey established by the Law relating to attorneys-at-law (advocates). One of the statutory duties of the UBTA is to introduce drafts and opinions on all important legal issues.

UTBA had already started on working on a draft new constitution and had published in 2001 a full text prepared by a group of experts. In 2007, in light of AKP's announcement, the UTBA Board of Directors decided to revise the 2001 text to take account of developments in the meantime.

To this end, a new commission of experts was established[7]. After four months' work, the commission submitted its text to the UTBA Board of Directors. Having been approved by the Board with minor changes, it was made public in October 2007 as the UTBA's Proposals for the Constitution of Turkish Republic (hereinafter UTBA Proposals).

Published in book form[8], and running to over 400 pages, the proposals include an introduction presenting the constitutional history of Turkey, followed by a general explanation of the fundamental principals on which the proposals are based along with detailed explanations and reasons for the 190 articles.

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6 Justice and Development Party *(Adalet ve Kalkınma Partisi)*.

7 The members of the commission were: Prof. Dr. Rona Aybay, Prof. Dr. Süheyl Batum, Prof. Dr. Fazıl Sağlam, Prof. Dr. Oktay Uygun, Assist. Prof. Dr. Faruk Bilir, Assist. Prof. Dr. Ece Göztepe and Attorney Teoman Ergül.

8 *Türkiye Cumhuriyeti Anayasa Önerisi, geliştirilmiş gerekçeli yeni metin*, Türkiye Barolar Birliği, Ekim 2007, Ankara

2) Article 103 of the UTBA Proposals provides, in its first paragraph, that, as a general rule, the ratification of all international treaties concluded on behalf of the Turkish Republic should be subject to the approval of the Grand National Assembly. However, the subsequent paragraphs of that Article provide that parliamentary approval may take different forms.

Under the proposal, the procedure for obtaining parliamentary approval starts with the submission of the text of the international treaty in question to the general assembly meeting of the Parliament. Within a period of thirty days, which starts on the day the text of the treaty reaches the general assembly of the Parliament, the President of the Republic may apply to the Constitutional Court on the grounds of incompatibility of the treaty provisions with the Constitution. Under the same Article, the parliamentary group of a political party[9] or a group of at least twenty parliamentarians has the same right to apply to the Constitutional Court.

If no application to the Constitutional Court is made during the thirty-day period, Parliament is presumed to have approved the ratification of that treaty. Where a case is brought before the Constitutional Court within the time limit and the contents of the treaty are found to be inconsistent with the Constitution, it cannot be ratified.

3) In addition to the right to apply to the Constitutional Court, the parliamentary group of a political party or a group of twenty parliamentarians has the right to request a parliamentary debate on the treaty in question. While the right to apply to the Constitutional Court will, naturally, be exercised on *legal* grounds, i.e. the alleged unconstitutionality of the treaty, the parliamentary debate will be *political* in nature, centring on the appropriateness of the ratification.

When the constitutionality of the treaty is not challenged before the Constitutional Court and no request for a parliamentary debate is made within the thirty-day period, it will be assumed that the ratification has Parliament's approval. In such a case, the Executive will

[9] In order to have a " parliamentary group", a political party should have at least twenty seats in Parliament (UTBA Proposals art.108/II).

be free to proceed to ratify the treaty.

4) Where the Constitutional Court finds that the treaty in question is not incompatible with the Constitution, parliamentary approval is still required for ratification. The same applies where the treaty has been the subject of debate in Parliament.

5) Under the UTBA Proposals, exceptions are made for certain treaties which could be ratified by the Executive without the approval or authorization of Parliament - these are listed in paragraphs 3-6 of Article 103. Among these are treaties regulating "economic, commercial and technical relations" and "agreements concluded in connection with the implementation of an international treaty". However, where any such treaty would involve amendments to Turkish law or would affect the legal status of individuals, etc., parliamentary authorization or approval should be secured before ratification.

6) The UTBA Proposals provide that duly ratified international treaties will have the force of law, i.e. will be applicable by the Turkish courts. The Proposals also adopt the principle that the constitutionality of a treaty cannot be challenged before the Constitutional Court after ratification.

7) In practice, a treaty may have another denomination, such as "convention", "agreement", "protocol", "charter", "pact", etc.. The term used does not affect its legal status, however[10]. In order to avoid any doubt on this point, the relevant article of the UTBA Proposals indicates that all instruments which comply with the elements and requirements of a treaty should be considered as such, regardless of what they are actually called.

8) On the question of conflict between a ratified treaty and a domestic statute, the UTBA Proposals distinguish between treaties concluded "exclusively" for the protection of human rights and all other treaties. In case of conflict between a human rights treaty and a domestic legal provision, the terms of the treaty will prevail. In all other cases of conflict, the general rules applicable to conflict of laws

[10] Article 2 of the Vienna Convention on the Law of Treaties provides that if an instrument contains the necessary elements of a valid treaty, "whatever its particular designation", it will be regarded as a treaty.

shall apply.

The drafters of the UTBA Proposals hope that with this provision the superiority of international human rights will be affirmed, while for other treaties any conflict of law will be solved by judicial interpretation.

Conclusions:

Although the constitutional principle of the equal status of international treaties to statute law was introduced almost half a century ago, the extent to which this principle has become a part of Turkish legal practice is questionable.

In any country, judges typically tends to refer to the domestic rules he/she is accustomed to rather than applying an international instrument, even if treaties enjoy the same status as enacted laws. In Turkey, in addition to this general phenomenon, there are certain ambiguous points in the relevant constitutional provisions. The sentence added to the relevant Article of the Constitution, which was intended to confer higher status on treaties relating to "fundamental rights and freedoms", appears not to have fully served its purpose.

On the other hand, while laws are subject to constitutional review, this recourse is not available in respect of treaties. While this is understandable in view of the possible international legal responsibility of the State, the exclusion of constitutional challenge to treaties is somewhat problematic.

As proposed during the drafting of the 1961 Constitution, and also by the UTBA, some kind of "preliminary" judicial review, i.e. before ratification, should be available. I am of the opinion that in view of the difficulties and discussions created by the exclusion of constitutional review, some form of constitutional review should exist for treaties. The proposal of the UTBA to introduce a system that would give standing to parliamentarians, in the conditions explained above, to challenge the constitutionality of a treaty before its ratification is a good solution.

Die Religionen in der türkischen Rechtsordnung: Fördernde und Hindernde Bestimmungen*

Ahmet MUMCU**

I. EINLEITUNG

Rechtsordnung, Religion und Humanität sind drei sehr wichtige Begriffe für uns Juristen. Unser Problem liegt darin, wie man diese drei Begriffe miteinander in Einklang bringen kann. Lassen wir einmal die Rechtsgeschichte beiseite und denken in modernen demokratischen Maßstäben: In einem wirklich demokratischen Staat muss die Rechtsordnung in jedem Falle human ausgerichtet sein. Grundrechte und Grundfreiheiten bilden das Fundament der z.Zt. bestehenden modernen Rechts- ordnung. Dass die Grundrechte und Grundfreiheiten das Ergebnis der hundert von Jahren andauernden, bitteren Kämpfe um die Humanität ist, ist ja eine historisch-soziologische Tatsache.

Das oben erwähnte Problem liegt nun darin, wo man die Religion innerhalb der humanen Rechtsordnung einsetzen kann. Es ist eine unleugbare Tatsache, dass die Religion sowohl in der inneren Welt des Individuums als auch im gesellschaftlichen sowie im nationalen Leben eine sehr große Rolle spielt. Wenn wir nun die oben nicht weiter

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ausgeführte Rechtsgeschichte kurz betrachten, so kann man feststellen, dass die Religion im Laufe der Geschichte das Recht dominierte. Das heißt, Religion und Recht waren, insbesondere in den islamischen Staaten, in vielen Systemen identisch. Auch christliche Länder bauten ihre Rechtsordnungen auf der Religion auf. Natürlich gab es hier und da einige Bestimmungen, die von der Religion nicht beeinflusst wurden, wie z.B. manche Prinzipien im germanischen Recht, so auch einige Bestimmungen aus der vorislamischen Zeit der Türken. Jedoch ist hier sofort der Einwand zu erheben, dass diese Arten von Bestimmungen mehr oder weniger aus den ehemaligen schon untergegangenen Religionen der Germanen oder Türken entstammten. Kurz gesagt, man konnte Religion und Recht nicht voneinander trennen. Diese „Untrennbarkeit" dauert immer noch an und wird beeinflusst, mal mehr, mal weniger, von den Aufklärungsbestrebungen der jeweiligen Gesellschaften und selbst in Staaten, die sich als „demokratisch" bezeichnen. Fördert die Religion die Humanität? Diese Frage kann ich nicht beantworten. Als Jurist muss ich aber sagen, je mehr die Religion die Rechtsordnung beeinflusst, desto mehr werden die humanen, auf den Mensch bezogenen Grundideen des Rechts vernachlässigt. Ich möchte keine Religionsphilosophie betreiben, aber mindestens ist zu sagen, dass in modernen Rechtsordnungen die Stellung der Religion ziemlich untergeordnet sein sollte. Damit ist aber nicht gemeint, dass die „Religions- und Gewissensfreiheit" auch untergeordnet sein sollte. Im Gegenteil! Die Freiheit des Glaubens ist einer der Grundsteine der Demokratie. Sie darf aber auf keinen Fall grenzenlos sein.

Als ein Bürger mit gesundem Menschenverstand finde ich Rechtsordnungen, die von religiösen Normen beeinflusst sind, wirklich absurd, wie z.B. das Kopftuchproblem oder etwa die Frage hinsichtlich des Kruzifixes. Der moderne Mensch sollte daran keine Gedanken verschwenden, denn die Auseinandersetzung mit solchen unsinnigen Fragen hat im Laufe der Geschichte Millionen von Menschen das Leben gekostet. Kann man das Humanität nennen? Gewiss, die Zeiten ändern sich und der menschliche Verstand entwickelt sich entsprechend. Aber wie kann man die Hexenverfolgungen erklären, welche sogar erst zu Beginn der Neuzeit eingesetzt haben und von einem der bedeutendsten Juristen des 16. Jahrhunderts, Jean Bodin (1529-1596), als „rechtmäßig" erklärt wurden?

Es gibt Tausende von Beispielen, die zeigen, dass während eines sehr langen Zeitraumes „Religion" und „Humanität" unvereinbar waren. Wenn man sagt, dass der Humanismus ein Produkt des Aufklärungszeitalters ist - in den Epochen davor war von Humanismus nicht die Rede - , so ist das zwar richtig, jedoch ist zu bemerken, dass der Humanismus kein Produkt der großen Religionen, sondern das Produkt der menschlichen Vernunft ist. Die Religionen allein konnten den Humanismus nicht hervorbringen. Nach dem Auftreten des Humanismus war sogar in vielen sogenannten „zivilisierten" Ländern die Religion fast immer ein Hindernis bei der Entwicklung der Humanität. Ein Beispiel aus der neueren Zeit ist die Haltung, die Papst Pius XII. während des größten Holocausts der Weltgeschichte einnahm, ganz zu schweigen von den Tragödien, die sich in dem ehemaligen Jugoslawien und im Irak abspielten bzw. noch abspielen.

Was Humanität bedeutet, möchte ich sodann nach den Aspekten eines säkularen Juristen kurz definieren: Humanität beruht auf Menschenrechten und Grundfreiheiten. Die absolute Gleichheit der Menschen ist hierbei die unabdingbare Notwendigkeit. Die Nächstenliebe ist zwar die Wurzel des Christentums, jedoch wurde diese Liebe zu wenig in die Praxis umgesetzt. Wenn wir heute den Einsatz christlicher Hilfsorganisationen zur Beseitigung des menschlichen Elends in Betracht ziehen, so sind diese humanen Bestrebungen natürlich sehr zu begrüßen. Hinter diesen Hilfeleistungen versteckten sich jedoch lange Zeit missionarische Tätigkeiten. Solche Bestrebungen sind im Islam weniger ausgeprägt. Natürlich liegt im Grund des Islams eine Art Menschenliebe: Gleichheit aller Muslime und Toleranz gegenüber anderen Anhängern der Offenbarungsreligionen, falls wichtige Bedingungen seitens der Nichtmuslime erfüllt sind. Wenn wir aber die Lage in nationalen Rechtsordnungen betrachten, ist festzustellen, dass sich die humane Rechtsentwicklung sehr langsam vollzieht. Das ist für beide Religionen zutreffend: Welches westliche Land hat rechtzeitig Maßnahmen gegen den wilden Kapitalismus getroffen, um Hunderttausende von Kindern, Frauen und Männern zu retten, die unter menschenunwürdigen Bedingungen lebten, arbeiteten und letztendlich verhungerten, obwohl dieser bereits in der Zeit der Entwicklung des Humanismus begann. Es sollte noch mehr als hundert Jahre dauern, bis der Sozialstaat auf Grund von

entsprechenden Rechtsordnungen zustande kam. Und denken Sie bitte an die Todesstrafe: Meiner Meinung nach ist diese Strafe der Gipfel der Inhumanität... In den humanen Rechtsordnungen konnte man diese Strafe erst in der zweiten Hälfte des vergangenen Jahrhunderts abschaffen. Nicht zu vergessen, dass beide Religionen diese Strafe als „gerecht" beurteilten.

Nach so vielen Überlegungen möchte ich endlich zu meinem eigentlichen Thema kommen: Wo steht die Religion in der heutigen türkischen Rechtsordnung ?

Die Türkei ist in diesem Sinne ein interessantes Land. Sie ist der einzige Staat unter den islamischen Ländern, der die „humane und moderne" Rechtsordnung des Westens ausnahmslos vollkommen rezipiert hat. Dies war nicht leicht und ist es immer noch nicht. Man wusste doch, dass nach dieser in der Weltgeschichte einzigartigen Rezeption viele Probleme auftauchen würden. In meinem Referat möchte ich mich aber nur auf die Lage der Religion in der türkischen Rechtsordnung beschränken.

II. ENTWICKLUNG DER HUMANEN RECHTSORDNUNG IN DER TÜRKISCHEN GESCHICHTE

Humane Rechtsordnungen im Sinne der wahren Humanität sind erst gegen Mitte des 19. Jahrhunderts entstanden. Vor dieser Zeit kann man von einer wahren „humanen" Rechtsordnung nicht sprechen, jedoch aber von „menschlichen" Rechtssystemen. Dieser „Menschlichkeit" setzt die Mentalität und die Kulturstufe der jeweiligen Gesellschaften Grenzen. Damit ein Rechtssystem „menschlich" ist, braucht man natürlich auch die religiösen Institutionen, vorausgesetzt, dass diese Institutionen nicht ein Instrument in den Händen der religiösen oder politischen Machthaber sind.

Das führt uns dazu, die Rolle der Religion in einem Rechtssystem, wie es die heutige Türkei aufweist, näher zu betrachten. Wie steht es nun mit der Religion im türkischen Recht ? Ist in dieser Ordnung Religion nur eine Mittel, um die Glaubensfreiheit zu bestärken, die nur in diesen Schranken funktioniert ? Oder spielt sie vielmehr eine - zur

Zeit versteckte – Rolle, um die Politik zu beeinflussen ?

Um die derzeitige Situation der Türkei besser zu verstehen, möchte ich vorerst eine kurze historische Anmerkung machen. Diese ist notwendig, da die Lage der Religion in der heutigen Türkei das Ergebnis eines interessanten historischen Prozesses ist. Hinzuzufügen wäre, dass man bis zur Gründung der Republik von keiner „humanen" Rechtsordnung sprechen kann, vielmehr aber, wie oben erwähnt, von ihrer „Toleranz" und „Menschlichkeit".

1. Vorislamische Zeit

Bis die Türken den Islam nach einem fast dreihundertjährigen, zum Teil sehr blutigen Prozess annahmen, spielte die Religion für sie keine große Rolle. Nach dem Schamanismus, der Urreligion der Turkstämme in Mittelasien, glaubten die Türken an eine Zweigötter-Religion. Infolge der unsteten und dynamischen Lebensweise als Nomaden gerieten sie dann in den Einfluss verschiedener Religionen, so dass unter ihnen eine Art „Glaubensfreiheit"(1) herrschte. Die religiöse Toleranz war fast unbegrenzt. Als Beispiel kann man die Chazar-Türken (7. – 10. Jhd.) nennen, in deren Staat sich alle Religionen sehr frei entfalten konnten. Da wir über die Rechtsordnungen der vorislamischen Türken sehr wenig Informationen haben - abgesehen von den Uiguren – ist anzunehmen, dass das tolerante Leben sich auch in den Rechtsordnungen wiederspiegelte.

2. Islamisch-osmanische Zeit

Ab etwa dem 10. bzw. 11. Jahrhundert bekannten sich die Türken zum Islam, eine monotheistische Religion, der sie bis heute angehören. Gegenwärtig sind alle Turk-völker islamisiert, bis auf einige tausend Pecenek-Türken in Osteuropa, die Christen sind. Grosse konfessionelle Unterschiede sind natürlich vorhanden.

Ich möchte hier nicht weiter ausschweifen, da diese Themen über den Rahmen meines Referates hinausgehen würden, jedoch möchte ich hinzufügen, dass die in Anatolien lebenden Türken anfänglich nicht fanatisch , sondern noch von der Duldsamkeit der vorislamischen Zeit

beeinflusst waren. In diesem Zusam-menhang sei die freie Auslegung des Islams durch den berühmten Vertreter des Sufismus, Ahmet Yesevi (gest. 1166 in Westtürkistan) zu erwähnen. Diese freie Auslegung wurde lange Zeit von den anatolischen Türken akzeptiert. Auch die Seldschuken lebten in einer sehr weitgehend religiösen Toleranz. Soweit wir wissen, haben die Türken körperliche Strafen des Islams (abgesehen von einigen Prügelstrafen) nicht praktiziert. Diese Praxis haben dann sogar die sehr orthodoxen Osmanen übernommen. Ebenfalls hatte der antolische Tasavvuf*, also der Sufismus, dessen berühmte Vertreter Haci Bektas Veli (1210-1271), Mevlana Celalettin Rumi (1207-1273), Yunus Emre (1238-1320) waren, in vieler Hinsicht sehr menschliche Züge: Sie lehrten, dass religiöses Leben Liebe und Duldsamkeit bedeute. Aber selbst die äußerst toleranten Seldschuken sahen in den Forderungen der Babais, Nach der Gründung des osmanischen Reiches herrschte für eine Zeit lang religiöse Toleranz. Als ein zutreffendes Beispiel hierfür könnte man den namhaften Scheich Bedrettin von Simavna (1358/65?-1420) nennen, welcher der größte Revolutionär seiner Zeit war, da seine Ideen von einer maßgebenden Humanität getragen wurden. Er war unter den Ulema** als ein sehr begabter und intellektueller Mann angesehen und bekleidete eines der höchsten Ämter innerhalb des osmanischen Reiches, und zwar das Amt des höchsten Richters (Kazasker). Trotz seiner sehr fundierten Kenntnisse des Islams, wurde er mit der Zeit zu einem echten Freidenker. Für ihn waren die 3 großen Religionen (Islam, Christentum, Judentum) gleichwertig und es gab keinen Unterschied zwischen den Menschen. Man könnte sagen, dass er einer der Vorläufer (Vordenker) des Sozialismus verkörperte. „Alles muss gerecht geteilt werden" war seine Devise. Es gelang ihm, eine beträchtlich große Gemeinde um sich zu scharen. Zusammen mit seinen Gefolgsmännern (Torlak Kemal und Börklüce Mustfa) inszenierte er Aufstände und trotz seiner sogenannten „ketzerischen Ideen" wurde er zweimal amnestiert und letztendlich zum Tode verurteilt. Bemerkenswert jedoch ist, dass sein Todesurteil nicht wegen Ketzerei, sondern wegen Aufstands gegen den Staat gefällt wurde. Da die Ideen von Bedrettin sehr gut in mein

* Tasavvuf, Sufismus: Islamische Mystik, Verinnerlichung der Religion die nach den freien Anschauungen ihrer mittelasiatischen Heimat lebten, eine Be-drohung des Staates, so dass deren Aufstand um 1240 unterdrückt werden musste.

** Ulema = die Gelehren, islamische Theologen

Thema passen, haben wir uns etwas detaillierter mit ihm beschäftigt. Hätten seine Ideen verwirklicht werden können – was letztendlich doch unmöglich wäre – so hätte dies zu der Schaffung einer ziemlich humanen Rechtsordnung im osmanischen Reich geführt (2).

Wir lassen die zwischen dem Ostiran und Sinkiang (China) ansässigen Turkvölker beiseite und wollen uns nun mit dem osmanischen Reich bzw. der heutigen Türkei befassen.

Nach Bedrettins Aufständen wurde das osmanische Reich Schritt für Schritt orthodoxer. Die nichtmuslimischen Untertanen, die aber an eine der Offenbarungsreligionen glaubten, genossen - wie allgemein bekannt - eine ziemlich große Religionsfreiheit. Ob aber das Dewschirme-System (Knabenlese)* gegen die Bestimmungen des wahren Islam verstößt, sollte dahingestellt sein. Meiner Meinung nach handelt es sich hier um eine meisterhafte Lösung zur Regelung der Staatsgeschäfte, sicher aber ist, dass die Rechte der Zimmis**, die im Koran verankert sind, auf eine sehr unmenschliche Art verletzt wurden. Dieses System ist als eine politisch-juristische Lösung zu sehen und richtete sich nicht gegen das Leben der Zimmis.

Bis zur Tanzimat-Zeit, besser gesagt , ein Jahr bevor Mahmut II. starb, wurde das orthodox-islamische Recht sehr streng gehandhabt. Während im Europa der Aufklärungszeit man sich große Gedanken hinsichtlich der Humanisierung der Rechtsordnung machte, war ein solches Gedankengut den Osmanen völlig fremd. Als einer der größten humanistischen Juristen aller Zeiten, Giovanni Batista Becceria (1738-1794), für eine Humanisierung des Strafrechts eintrat, bedeutete dies eine der grund-legendsten Veränderungen in der Rechts- und Menschheitsgeschichte. Während seine Ideen – abgesehen von der Abschaffung der Todesstrafe – in vielen europäischen Ländern mit Begeisterung aufgenommen wurden , waren die osmanischen Theologen – den Beruf Jurist gab es im osmanischen Reich noch nicht – völlig ahnungslos von der Humanisierung des Rechts, die einer Revolution gleich kam.

Ja, ahnungslos im Hinblick auf den immer mehr an Bedeutung

* Dewschirme = Zwangsrekrutierung und Zwangsislamisierung christlicher Knaben
** Zimmis = nichtmusilmanische Untertanen im osmanischen Reich

gewinnenden Humanismus versuchten die Osmanen, die sich durchaus bewusst waren, dass Reformen notwenig waren, in den primären Bereichen des Rechts neue Wege zu gehen. Die Tanzimat-Bewegung war der größte Reformversuch im islamischen Recht überhaupt. In dieser Periode, die von 1839 bis zum Endes des osmanischen Reiches (1918) dauerte, wurden nicht nur im Erziehungswesen, sondern auch in der Rechtsprechung sehr wichtige juristische Reformen durchgeführt. Durch den berühmten Tanzimat-Erlass (3. November 1839) wurden zum ersten Mal in der islamischen Welt die zwei Grundsteine des Strafrechts feierlich proklamiert: „Nullum crimen sine lege" und „Nulla poena sine lege". Der Herrscher hat freiwillig eine sehr wichtige Kompetenz seiner Rechte aufgegeben, und zwar die Bestrafung. Die grundlegendste Reform dieses Erlasses war die völlige Gleichsetzung aller Bürger ohne Rücksicht auf ihre religiösen Anschauungen. Der Zimmi-Status war demnach abgeschafft. Einige wichtige Gesetze wurden von der französischen Gesetzgebung übernommen. Strafrecht-, Handelsrecht und das Zivilprozessrecht sind in dieser Periode die Rechte, in denen sich eine gewisse Humanität hätte entwickeln können, wenn das islamische Recht nicht gleichzeitig angewandt worden wäre. Ja, insbesondere das Zivilrecht (Handelsrecht und Zivilprozessordnung ausgenommen) blieb sunnitisch-islamisch, obwohl man versucht hatte, verschiedene Bestimmungen des Obligations- und Sachenrechts in einem systematischen Gesetzbuch zu sammeln, welche zum größten Teil den Ictihats* der hanefidischen Schule entnommen waren. Dieses Gesetzbuch, „Mecelle" genannt, ist ein großes juristisches Werk, in dem das islamische Recht zum ersten und meines Wissens auch zum letzten Mal kodifiziert wurde, welches aber das Konzept des alten islamischen Zivilrechts in keiner Weise veränderte.

Für die Rechtshistoriker ist die Tanzimat-Periode eine sehr interessante Epoche. In diesem Semi-Modernisierungsprozess entstand eine Kultur, in der sich traditionelle islamisch-osmanische und westliche Werte teils vermischten, teils widersprachen. Dieser Dualismus beherrschte die ganze islamisch-osmanische Gesellschaft: Im Staatsrecht hingegen blieb der theokratische Grundcharakter weiterhin unangetastet. Alles sollte islamisch geprägt sein. Man hat sogar den

* Ictihats = Rechtslehre

Seyhülislam* ins Kabinett aufgenommen und mit einem Ministeramt betraut, obwohl er bis zu dieser Änderung seines Status im Jahre 1870 nie direkt zu Staatsgeschäften hinzugezogen wurde (3). Er war nicht einmal Mitglied des Kaiserlichen Großrates *(Divan-i- Hümayun),* von dem alle wichtigen Staatsgeschäfte erledigt wurden.

Während der Tanzimat-Zeit wurde das Verwaltungsrecht und der Verwaltungsapparat nach französischem Vorbild neu organisiert. Man hat neue Gerichte nach westlichem Muster gegründet und die Kadi-Gerichte wurden – soweit es möglich war – verbessert.

Im Jahre 1876 wurde das osmanische Reich eine konstitutionelle Monarchie. Die Verfassung von 1876, die mit vielen Änderungen bis 1922 gültig war, war eine oktroyierte Verfassung im wahrsten Sinne des Wortes. Sie war nicht das Resultat einer Volksbewegung, sondern die Forderung der neuen Intellektuellen der Tanzimat-Zeit, der sogenannten Neuosmanen. Der Herrscher, also der Sultan, hatte trotz der Verfassung die uneingeschränkte Macht. Die Staatsgewalt und Souveränität ging vom Sultan aus. Es herrschte eine vollkommene Machtkonzentration. Die Verfassung brachte aber zum ersten Mal - wenn auch sehr einfach und eingeschränkt – den Bürgern politische Rechte. Was als human bezeichnet werden könnte, war das absolute Verbot der Folter (Art. 26).

Die Freiheit des Glaubens wurde durch die Verfassung garantiert (Art.11). Dies galt aber nicht für die Muslime; sie genossen nie eine Religionsfreiheit.

Zusammenfassend kann man sagen, dass im osmanischen Reich die humane Rechtsordnung – im Sinne der Aufklärung – nie im gewünschten Maße erreicht wurde, aber die mit Beginn der Tanzimat-Zeit einsetzenden Bestrebungen haben veranlasst, dass die nachfolgende Generation die Rechtsordnung noch besser gestalten konnte.

* Şeyhülislam = Oberster Würdenträger jenes Teils der osmanischen Verwaltung, der das Religions-, Rechts- und Erziehungswesen umfasst.

III. DIE STELLUNG bzw. DIE ROLLE DER RELIGION IN DER HEUTIGEN TÜRKISCHEN RECHTSORDNUNG

a. Einleitung

Der neue türkische Staat, also die heutige türkischen Republik, wurde nach dem Niedergang des osmanischen Reiches gegründet. Die Gründungszeit umfasst fünf Jahre:

1919 , Besetzung des Vaterlandes durch die Alliierten und erste nationale Bewegungen;1920 , Konzentration aller nationalen Kräfte unter der Führung von Mustafa Kemal (später Atatürk genannt) und Einberufung der ersten türkischen Nationalversammlung, das seine Macht nicht vom Herrscher, sondern vom Volk herleitete; bis 1922, Krieg gegen die Besatzungsmächte und Kampf mit dem osmanischen Sultanat um die Vorherrschaft; nach dem errungenen Sieg, Abschaffung der Monarchie; 1923, Friedensvertrag von Lausanne und Gründung der Republik.

Der so gegründete neue Staat hatte in gewisser Weise revolutionären Charakter. Die Gründer der Republik wussten sehr genau, dass eine erneute Niederlage unumgänglich sein würde, wenn man die alten, traditionellen Gesellschaftsnormen weiterleben ließe.

Man musste also alles unternehmen, um diese Gesellschaft aus der Rückständigkeit zu führen. Das Mittel dafür waren sehr radikale Reformen, die im osmanischen Reich bisher nicht in Angriff genommen worden waren. Das am geeignetste Instrument dafür war ohne Zweifel eine umwälzende Rechtsreform, um die Gesellschaft zu modernen Lebensformen zu führen.

Die Richtung dieser Reform hat Kemal Atatürk bei der Eröffnung der juristischen Fakultät in Ankara (5.11.1925), der ersten Hochschulinstitution der Republik, in der nur westliches Recht erforscht und gelehrt wurde, klar angezeigt. Eine Passage dieser Rede ist für unser Thema sehr wichtig:

„Was ist die türkische Revolution? Dieses Wort Revolution hat nicht nur den Sinn der Revolte, wie es beim ersten Ansehen sich aufdrängt, sondern es drückt Umschwung in einem viel weiteren Sinne aus. Das zwischen den Einzelnen angenommene gemeinsame Band, das der

Nation die Dauer ihrer Existenz sichert, hat Form und Charakter, wie sie seit Jahrhunderten überliefert sind, gewechselt, d.h., die Nation fasst ihre einzelnen Mitglieder nicht mehr mit dem Band der Religion und des Bekenntnisses, sondern statt dessen mit dem Bande des türkischen Nationalismus zu einer Einheit zusammen. Die Nation hat es als eine feststehende Wahrheit zu ihrem Grundsatz erhoben, dass die Wissenschaft und sonstige Mittel, die auf dem Gebiet des allgemeinen Wettstreits der Nation die Quelle von Kraft und Leben sind, nur in der modernen Kultur gefunden werden können... Kurz, die Nation sieht als natürliches und notwendiges Erfordernis der aufgezählten Umwälzungen und der Revolution sowie als Lebensbedingung eine weltliche politische Gesinnung vor, die sich in der allgemeinen Verwaltung und in allen Gesetzen nur nach weltlichen Bedürfnissen richtet und deren Grundsatz es ist, dass mit der Änderung und mit der Entwicklung der Bedürfnisse sich auch die Gesetze zu ändern und zu entwickeln haben .. (4)".

Aufgrund des oben Gesagten war zu erkennen, in welche Richtung die vorzunehmenden Reformen gehen würden: Religion sollte nicht mehr als ein Mittel zur Förderung der Gesellschaft angesehen werden. Einflüsse von weltlicher und westlicher Kultur sollten bei der Entwicklung eine führende Rolle spielen.

So war es auch. Ein Jahr bevor Kemal Atatürk diese so wichtige Rede hielt, wurde das Kalifat – ich nenne es das osmanische Kalifat – und die damit verbundenen sehr wichtigen Institutionen abgeschafft (3.3.1924). Im Jahre 1926 wurden große Schritte unternommen, um insbesondere das Zivilrecht gänzlich zu ändern. Die völlige Rezeption des schweizerischen Zivilgesetzbuches, wie bekannt, war zwar ein großes Wagnis, wurde aber letztendlich ein bedeutender Erfolg. Mit diesem Gesetz waren sehr humane Fortschritte verwirklicht worden: Völlige Gleichheit der Geschlechter - mit einigen kleinen Ausnahmen im Familienrecht, die doch in allen Zivilgesetzbüchern der damaligen Zeit, so auch im schweizerischen, als ganz normal anzunehmen waren -; die Bestimmungen des islamischen Ehe - und Familienrechts wurden außer Kraft gesetzt; die religiöse Erziehung des Kindes obliegt den Eltern und Volljährige waren (und sind es noch heute) in der Wahl ihres Glaubens völlig frei.

Das waren wahrscheinlich die bedeutendsten Meilensteine zur Erreichung einer humanen Gesellschaft. Im selben Jahr wurden die hauptsächlichsten Gesetze geändert. Bis zum Jahre 1928 war in der Verfassung die Staatsreligion angeführt: Der Islam. Da die Reformen seit der Abschaffung des Kalifats diese Bestimmung überflüssig machten, hat man im genannten Jahre diese Bestimmung sowie auch die damit verbundenen anderen Bestimmungen – wie z.B. Eidesformeln – aufgehoben. Seitdem ist der Laizismus Grundstein der Republik.

Der türkische Laizismus ist etwas anderes als die Säkularität. Säkularität ist die Trennung der Staatsgeschäfte von der Religion. Doch die Religion spielt eine Rolle, indem sie vom Staat in einem gewissen Grade geschützt wird. Im Grunde des Staates liegt - vielleicht ganz minimal - eine religiöse Färbung. Viele säkulare Staaten sind wahre Demokratien aber ein „Hauch von Religion" ist doch zu bemerken. Nehmen wir die Bundesrepublik Deutschland als Beispiel: In diesem Staat ist die Demokratisierung vollkommen verwirklich. Die Freiheit des Glaubens ist bestens garantiert. Aber der Staat ist „im Bewusstsein seiner Verantwortung vor Gott..." gegründet (Präambel des GGs). Das ist nicht zu kritisieren. Aber wie kann der abstrakte Begriff „Gott" Grundstein eines säkularen Staates sein? Ich betreibe nun reine Spekulation: Von diesem Betriff „Gott" ausgehend wäre die Humanität ein Gottesbefehl, was natürlich dann in einem demokratischen Staat völlig absurd wäre. Auch Grossbritaniens Säkularität ist eigenartig. Da ist der König bzw. die Königin, theoretisch uneingeschränkter Souverän und Haupt der anglikanischen Kirche. Von Griechenland ganz zu schweigen: Dieser wahre demokratische Staat, ein Mitglied der EU, hat das orthodoxe Christentum zu einer Art Staatsreligion erklärt ... Es könnten noch viele andere Beispiele genannt werden.

Aber ein laizistisches System dürfte in keiner Weise religiös gefärbt sein. Mindestens theoretisch gesehen, muss der Staat ganz und gar neutral gegenüber allen Glaubensrichtungen sein. In dieser Hinsicht ist der Laizismus in Frankreich am besten entwickelt und nur die Türkei kann als ein weiteres Beispiel hierfür genannt werden.

b. Fördernde Bestimmungen

Es handelt sich hier um Bestimmungen, die nach dem Prinzip des Laizismus und mit dem Ziel, ihn zu fördern und zu schützen erlassen wurden. Eine humane Rechtsordnung kann nur durch die völlige Trennung von Religion und Staat verwirklich werden. Die Verwirklichung einer humanen Rechtsordnung, wo das Individuum nach seinem Gewissen handelt und sich von den Einflüssen der Religion befreien kann, ist ebenso nur dann möglich, wenn der Laizismus geschützt und gefördert wird.

Aus dem oben Gesagten kann man sich vielleicht ein Bild von der Lage der Religion in der türkischen Rechtsordnung machen. Also rein theoretisch hat die Religion in der türkischen Rechtsordnung keine bedeutende Stellung. Das heißt, die Religion ist in keiner Weise maßgebend, weder für die Verfassung und Verwaltung, noch im zivilrechtlichen Bereich. Meiner Meinung nach wird durch die Bestimmungen, die die Entfaltung der Religion, also des Islams, ziemlich begrenzen, eine humane Rechtsordnung gefördert. Falls wir die anfangs vorgenommene Definition der Humanität aus juristischer Sicht betrachten, so wird deutlich, dass die uneingeschränkte Entfaltung der Religion bei der Etablierung der Menschenrechte und somit der Förderung der Humanität ziemlich problematisch sein könnte. Falls die türkische Rechtsordnung erlauben würde, vom Eherecht bis zum Strafrecht die religiösen Bestimmungen gelten zu lassen, so wäre es unmöglich gewesen, von einer Humanisierung des Rechts zu sprechen. Dasselbe könnte man von anderen Religionen sagen, die es in der Türkei gibt. Die türkische Rechtsordnung erlaubt keinen Religionsbezug. Die durch die Religion bestimmte Pluralität der Rechtsordnung im osmanischen Reich, welche zerstörende Folgen für die rechtliche und staatliche Einheit mit sich brachte, wollte man nicht wieder erleben.

Fördernd sind die anderen Bestimmungen in der Verfassung und der Rechtsordnung. Dass das Prinzip Laizismus mit der Gewissens- und Religionsfreiheit verbunden ist, ist ja logisch. Durch besondere Betonung des Prinzips Laizismus in der Präambel und in Artikel 2 wird die „Religions- und Gewissensfreiheit" in Artikel 24 der Verfassung geregelt. Wir möchten hier auf die Unterscheidung zwischen der Religion und dem Gewissen nicht eingehen (5). Falls man diese

Bestimmung analysiert, kann man positive und negative Urteile fällen .Die negative Auslegung dieses Artikels sehen wir unter c) Hindernde Bestimmungen.

Artikel 24 der Verfassung regelt die Gewissens- und Religionsfreiheit, was inhaltlich dem Artikel der Europäischen Menschenrechtskonvention (EMRK)von 1950 (Art. 9) entspricht. Die Religionsfreiheit ist in vollem Umfang anerkannt und gesichert.

Obwohl Art. 9 der EMRK „die Wechselfreiheit der Religion" ausdrücklich erwähnt, hat man einen solchen Satz in die türkische Verfassung nicht aufgenommen. Sie ist jedoch im Wesensgehalt dieses Artikels enthalten.

Es darf nur in Fällen einer ernsthaften Gefährdung des Staates und der Gesellschafts-ordnung und im Falle des Versuches, aus der Religion und den religiösen Gefühlen politische und sonstige Vorteile zu ziehen, die Praktizierung dieser Freiheit beschränkt und sogar auch verboten werden. Aber die reine Religionsfreiheit als „forum internum" ist unantastbar.

Wenn man von der Verfassung ausgeht, findet man verschiedene Bestimmungen, die für eine humane Rechtsordnung zwingend sind. So Art. 10 der Verfassung, in dem die völlige Gleichberechtigung der Geschlechter geregelt wird - fast so, wie es das Deutsche GG vorsieht. Auf die Bestimmungen der Verfassung, die diese Gleichheit sichern, wie z.B. die vollen politischen Rechte der Frauen, möchte ich nicht eingehen.

Am Anfang des Jahres 2001, also am Anfang des 21. Jahrhunderts, trat das neue türkische Zivilgesetzbuch in Kraft, welches das Produkt von fast 20jährigen Bemühungen war. In diesem neuen Gesetz wurden die Grundprinzipien des schweizerischen Zivilgesetzbuches beibehalten, jedoch wurden viele Bestimmungen des im Jahre 1926 verabschiedeten alten Gesetzes in verschiedener Hinsicht sehr zeitgenössisch geändert. Für unser Thema ist es von besonderer Wichtigkeit, dass die völlige Gleichheit der

Ehepartner klar festgelegt ist. Der Mann ist nicht mehr Oberhaupt der Familie. Die

Gleichberechtigung innerhalb der Familie wurde hergestellt.

Nicht nur was das Strafrecht angeht, sondern im Hinblick auf die Humanisierung dergesamten Rechtsordnung müssten wir vielleicht die völlige Abschaffung der Todes-strafe nach einem raschen Änderungsprozess der Verfassung zwischen 2001 und 2004 besonders hervorheben. Die Türkei ist in dieser Hinsicht viel entwickelter als viele entwickelte Staaten wie z.B. die USA.

Auf der strafrechtlichen Ebene ist weiter zu bemerken: Obwohl Folter und ähnliche unmenschliche Methoden der Verfassung nach verboten sind, waren die Beschwerden über Folter in der Türkei bis zum Anfang des 20. Jahrhunderts sehr häufig Thema der internationalen Öffentlichkeit. Nach den Regelungen im neuen Strafrecht ist der Kampf gegen Folter fast gewonnen. Entsprechende Prozesse vor dem Europäischen Gerichtshof für Menschenrechte (EGMR) werden von Jahr zu Jahr weniger.

Die Erniedrigung der Frau in sehr traditionellen Familien - häufig wird die Frau auf Beschluss des sogenannten Familienrates ermordet – wird im neuen Strafgesetzbuch als ein besonders schwerwiegendes Delikt definiert. Das Ergebnis dieser neuen Praxis wird mit Spannung erwartet.

Ehebruch war nach dem alten Strafgesetzbuch eine ziemlich schwerwiegende Straftat, doch als Antragsdelikt anerkannt. Die Bestrafung der Ehebrecherin und des Ehebrechers war ungleich. Schon in der Geltungszeit des alten Strafgesetzbuches wurde diese Bestimmung vom Verfassungsgerichtshof als verfassungswidrig und für nichtig erklärt. Seitdem ist der Ehebruch nur ein Scheidungsgrund.

Die Abschaffung der Todesstrafe und die Aufhebung der Strafe für Ehebruch wider-sprechen der Denkweise des Islam. Die Todesstrafe ist dem Islam nach legitim und Ehebruch eines der schwersten Straftaten. Dies ist ein weiteres Beispiel dafür, dass die Religion in der humanen Rechtsordnung keine Rolle spielen darf.

c. Hindernde Bestimmungen

In einer laizistischen Ordnung hat der Staat kein Recht die Bürger und Bürgerinnen nach ihrer Religion zu befragen. In den türkischen „Bürgeridentitätskarten", das maßgebend-ste offizielle Dokument

für alle Bürger, gibt es die Spalte „Religionszugehörigkeit". Bis vor 30 Jahren musste in dieser Spalte sogar die Konfession des jeweiligen Glaubens ein-getragen werden: Also „Muslim – sunnitisch" oder „Christ – protestantisch". Nach vielen juristischen Kämpfen verzichtete man auf Angaben zur Konfession. Die Spalte für „Religion" blieb aber. Da das die Religionsfreiheit verletzt, hat man eine Lösung gefun-den: Wenn man will, kann man diese Spalte leer lassen. Das ist natürlich sehr gefährlich und zwingt die Bürger und Bürgerinnen – abgesehen von den Christen und Juden, die ihre Religion nicht zu verstecken brauchen – in diese Spalte „Islam" schreiben zu lassen. Es würde sonst die Gefahr bestehen, dass man glaubt, er bzw. sie sei Atheist und kein Muslim. Das würde bedeuten, dass dann viele Türen für sie verschlossen wären. Es ist ein Muss des laizistischen Staates, diese Spalte zu beseitigen.

Als das Kalifat und das Ministerium für islamische Angelegenheiten (Şeriye Vekaleti),also eines der wichtigsten Ministerien seinerzeit, abgeschafft wurden, fehlte es an einer religiösen Institution. Daraufhin hat man mit guten Absichten ein „Generaldirektorium für religiöse Angelegenheiten" gegründet (Diyanet İşleri Başkanlığı). Im Laufe der Zeit hat diese Einrichtung immer mehr an Macht gewonnen. Wegen der Besorgnis, bei Parla-mentswahlen Stimen zu verlieren, wurde dieses Generaldirektorium ein Amt, das sich nur um die Belange der Sunniten kümmerte. Das bedeutete, dass Gottesdienste und Beisetzungszeremonien der Bürger und Bürgerinnen, welche aufgrund des oben ge-nannten Identitätszwanges sich als „Muslime" ausgegeben hatten, nach sunnitischen Vorschriften vollzogen wurden. Die Aleviten, eine sehr liberale Volksgruppe in der Türkei, deren Religion zwar vom Islam beeinflusst, aber im Wesentlichen auf die frei-heitliche, vorislamische Zeit zurückzuführen ist, und deren Zahl auf nicht weniger als 15 Millionen geschätzt wird, müssen sich als Sunniten ausgeben, wenn sie von den religiösen Diensten des sogenannten „laizistischen Staates" profitieren wollen. Das ist ein großes Problem, aber die Diskussion darüber geht weit über unser Thema hinaus. Kurz gesagt: In einem laizistischen Staat hat der Staat kein Recht, das religiöse Leben der Bürger und Bürgerinnen zu ordnen. Wenn es zum Schutze der demokratischen Ordnung vor Fanatikern für nötig angesehen wäre – eine solche Begründung wäre in den ersten Gründungsjahren der laizistischen Republik zu vertreten gewesen – so

sollten in diesem Generaldirektorium alle Religionen, Konfessionen und Glaubensrichtungen vertreten sein, und alle diese Gruppen sollten in den Genuss solcher „staatlichen Dienst-leistungen" kommen.

In Art. 24 der Verfassung werden Religions- und Gewissensfreiheit voll anerkannt und garantiert. In Art 24 Abs. 4 Satz 2 heißt es wörtlich: „Religiöse Kultur und Sittenlehre ge-hören in den Primär- und Sekundärschulen zu den Pflichtfächern". Nach der Einführung dieser Vorschrift in der Verfassung von 1982 wurde in der Praxis nach sunnitischer Lehre Religionsunterricht erteilt. Erst haben die nichtmuslimischen Eltern gegen diese Praxis protestiert, dann hat das Erziehungsministerium die nichtmuslimischen Kinder (gem. den Angaben ihrer Identitätskarten) von diesem Unterricht befreit. Das alles beweist, dass in diesem Unterricht nicht objektive, religiöse Kultur, sondern echte sunnitische Lehre unterrichtet wird. In diesem Sinne verstößt aber Art. 24 Abs.4 Satz 2 gegen die allgemeinen Regeln des Laizismus und steht insbesondere mit den Absätzen 1-3 und 4sowie Absatz 3 und 5 in völligem Gegensatz. Ein alevitischer Bürger hat sich bei dem EGMR beschwert. Wir hoffen, dass das Gericht ein gerechtes Urteil fällt.

Im Bereich des Verwaltungsrechts könnte man das Kopftuchtrageverbot als ein Hindernis in der freien Entfaltung des religiösen Lebens sehen, jedoch ist zu bemerken, dass das Kopftuchverbot nur in Schulen und in Hochschulinstitutionen sowie für Frauen, die im öffentlichen Dienst tätig sind, gültig ist. Sonst gibt es weder ein Kopftuch- noch Ver-schleierungsverbot. Der Grund dieses Verbots ist, dass ein religiöses Symbol in Dienst-stellen eines laizistischen Staates keinen Platz haben darf. Dieses Verbot wurde durch Regierungsverordnungen geregelt. Nur für Hochschulen gibt es eine gesetzliche Be-stimmung. Man hat sich sogar, um diese Bestimmung im Hochschulgesetz aufheben zu lassen, beim EGMR beschwert. Das hohe internationale Gericht hat entschieden, dass dieses Verbot kein Verstoß gegen die EMRK ist (6). Seit dieser Entscheidung sind die europäischen Institutionen, in denen auch die türkische Republik vertreten ist, für die türkischen Fundamentalisten keine akzeptablen Einrichtungen mehr.

SCHLUSS

Wir haben uns bemüht, die Probleme bzgl. der Religion bei der Erreichung einer humanen Rechtsordnung in der Türkei kurz darzustellen. Die Entwicklung des Humanismus in der türkischen Gesellschaft hat Suat Sinanoğlu in seiner meisterhaftenStudie aufgezeigt und analysiert (7). Unsere Schlussworte hinsichtlich der türkischen Rechtsordnung wollen wir aber kurz wie folgt zusammenfassen:

Geserze allein reichen nicht aus, die Rechtsordnung einer Gesellschaft zu ändern. Obwohl in der Türkei schon ab Mitte des 19. Jahrhunderts viele Versuche zur Schaffung einer humanen Rechtsordnung unternommen wurden, reichten diese nicht aus, jedoch bildeten sie die Ausgangsbasis für eine spätere positive Ent-wicklung.

Zur Zeit der Republik wurden im Hinblick auf eine Humanisierung der Rechtsordnung sehr große, revolutionäre Fortschritte erzielt. Der erreichte Erfolg ist beachtenswert, wenn auch viele Probleme ungelöst blieben. Da sich die Religion seit Jahrhunderten als maßgebendste Gewalt zur Gestaltung des Rechts sehr gründlich etabliert hatte, war und ist es nicht leicht, viele Gewohnheiten, die die Humanisierung des Rechts behindern, zu beseitigen.

Heute ist der humane Laizismus offiziell als Grundstein der Republik definiert,aber Überreste des streng orthodoxen Islams treten immer mehr in Erscheinung. Es ist sozusagen eine Gegenrevolution im Gange. Sunnitisches Gedankengut gewinnt an Macht und Kraft, so dass die nicht sunnitischen Gruppen dieser Entwicklung mit Unbehagen gegenüberstehen.

Hinzu kommt, dass das Generaldirektorium für religiöse Angelegenheiten (GRA)sich derzeit nur mit rein theoretischen und wenig nützlichen Problemen des Islam beschäftigt, wie dies z.B. das folgende bemerkenswerte Beispiel beweist: Das Gene-raldirektorium für religiöse Angelegenheiten hat Frauen für „sündig" erklärt, wenn sie sich auf Passbildern ohne Kopfbedeckung fotografieren lassen (8) . Solche Fotos werden für alle bürokratischen Formalitäten verwendet, und gemäß dem Gesetz ist vorgeschrieben, dass nur Passbilder, auf denen Frauen ohne Kopfbedeckung abgebil-det sind, gültig sind. GRA ist ein Amt, das unmittelbar dem türkischen Minister-präsidenten

untersteht. Man sieht, in welcher Kontroverse die Türkei sich befindet. Trotz aller Bestrebungen zu Gleichstellung, ist die Identität „Türk – Islam" von Vorzug. Obwohl ein großer Teil der türkischen Frauen, die die seit Ausrufung der Republik ge-währleisteten Vorzüge voll nutzen (fast 1/3 des Universitätspersonals sind Frauen – besonders in den intellektuellen Berufen ist die Frau maßgebend vertreten), lebt ein anderer größerer Teil noch gemäß den Gepflogenheiten, die vor der Gründung der Republik herrschten. Das alles behindert natürlich die vielfachen Bemühungen zur Erreichung eines wahren Humanismus.

Der Wunsch, der EU beizutreten, führte dazu, dass die politische Macht eine große Anzahl von Reformgesetzen erließ, was natürlich sehr zu begrüßen ist. Aber innenpolitisch gesehen, spielt insgeheim die sunnitisch-islamische Mentalität weiterhin eine große Rolle. Die Türken befinden sich wieder in einer widersprüchlichen Situation, wie dies zur Tanzimat-Zeit der Fall war. Eine sehr große Gruppe von Intellektuellen verteidigt den wahren Humanismus, indem sie den Geist der Gründungsjahre der Republik herauf beschwören, während eine noch größere Gruppe bzw. Gruppen sich für eine Reislamisierung einsetzt. Aber die jetzige Lage der Türkei ist nicht mit der Tanzimat-Zeit zu vergleichen. Der heutige türkische Staat ist laizistisch. Westliches und weltliches Recht wird uneingeschränkt praktiziert, so dass man sagen kann, dass die erste Gruppe, also die nach Humanismus strebenden Intellektuellen, noch stärker ist, als man denkt. Die Mehrheit des Volkes ist aufgrund der bisher geführten unbeständigen Erziehungspolitik nicht tiefgründig im Sinne des Humanismus erzogen worden. Humanismus ist - ganz spontan - im Gewissen und in der historischen Toleranz der Türken verankert. Auf die Frage, ob sich die heutige Staatsmacht, die versteckt fanatisch ist, sich aber als Anhänger der europäischen Werte ausgibt - wiederum ein Gegensatz - letztendlich aber ihr eigenes Ziel erreicht und damit die humanistische Gruppe neutralisieren wird, weiß ich keine Antwort.

ANMERKUNGEN

(für allgemein bekannte Informationen ist eine Anmerkung nicht gegeben)

1) Siehe u.a.: Abdülkadir INAN, Eski Türk Dini Tarihi, Ankara 1976

2)Für den Bedrettin-Fall und die Literatur, Ahmet MUMCU, Osmanlı Devletinde Siyaseten Kati, (3. Aufl.) Ankara 2007 , S. 110-111

3)Für diese Entwicklung: Esra YAKUT, Şeyhülislamlık. Yenileşme Döneminde Devlet ve Din, Istanbul 2005

4) Geschichte der rütkischen Republik (offizieller Druck), Istanbul 1934(?), S. 264

5) Über Gewissensfreiheit - eine meisterhafte Arbeit: Erhard MOCK, Gewissen und Gewissensfreiheit (Duncker-Humblot, Berlin), Schriften zur Rechtstheorie 104

6) Die „Leyla-Şahin-Entscheidung". 44774/98 vom 10.11.2005

7) Suat SINANOĞLU, Türk Humanizmi, Ankara 1980

8) Die Tageszeitung „Milliyet" vom 26.5.2006.

Die Probleme der Verfassungsgerichtsbarkeit aus türkischer und deutscher Perspektive*

Fazıl SAĞLAM**

I. Einführung in die Problematik

Am 25. April wird der 44. Gründungstag des türkischen Verfassungsgerichts gefeiert. Dieses Alter zeigt schon dass das türkische Verfassungsgericht eines der aeltesten Verfassungsgerichte in Europa ist. Es ist durch die Verfassung von 1961 in die türkische Rechtsordnung eingeführt. Wie das deutsche Bundesverfassungsgericht ist das türkische Verfassungsgericht ein unabhaengiges Verfassungsorgan. Organisch gesehen, ist es sogar noch unabhaengiger, weil seine Mitglieder nicht vom Parlament gewaehlt werden, sondern vom Praesidenten der Republik, und zwar überwiegend aus den Reihen von je drei Kandidaten, die von den obersten Gerichten aufgestellt werden.[1]

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[1] Der betreffende Artikel 146 TVerf lautet: "Das Verfassungsgericht besteht aus elf ordentlichen und vier Ersatzmitgliedern. Der Präsident der Republik wählt aus der Reihe von je drei Kandidaten, welche die Plenen der betreffenden Gerichtshöfe mit der absoluten Mehrheit der Gesamtzahl ihrer Mitglieder aus der Reihe ihrer Präsidenten und Mitglieder für jede freie Stelle aufstellen, zwei ordentliche und zwei Ersatzmitglieder aus dem Kassationshof, zwei ordentliche Mitglieder und ein Ersatzmitglied aus dem Staatsrat, je ein ordentliches Mitglied aus dem Militärkassationshof, dem Hohen Militärverwaltungsgerichtshof, dem Rechnungshof; ein Mitglied aus der Reihe von drei Kandidaten, welche

Es hat grundsaetzlich dieselbe Funktionen, wie das Bundesverfassungsgericht: Schutz des Verfassungsrangs. Das heisst: Beschraenkung, Rationalisierung und Kontrolle staatlicher und gesellschaftlicher Macht, Schutz der Menschenrechte und damit zugleich Schutz der pluralistischen demokratischen Ordnung[2] sowie Wahrung der Grundprinzipien der Republik[3].

Zwar hat die Verfassung von 1982 den Zugang zum Verfassungsgericht teilweise verkürzt, die Zustaendigkeiten des Gerichts blieben jedoch grundsaetzlich unberührt. Abstrakte und konkrete Normenkontrolle der Gesetze, der Rechtsverordnungen mit Gesetzeskraft sowie die Kontrolle der Geschaeftsordnung des Parlaments. Hinzu kommt die Zustaendigkeit für die Anklagen gegen die politischen Parteien.

Diese decken sich grundsaetzlich mit den Zustaendigkeiten des Bundesverfassungsgerichts. Im türkischen Recht fehlt aber die Verfassungsbeschwerde, was für den Schutz der Grundrechte in der Türkei ein wichtiges Defizit darstellt, worauf ich zurückkommen werde. Dagegen wird das türkische Verfassungsgericht gelegentlich auch als Staatsgerichtshof taetig,[4] was im deutschen Verfassungsrecht nur für die Anklagen gegen den Bundespraesidenten der Fall ist. Die Zustaendigkeit als Staatsgerichtshof kommt in der Regel bei den Anklagen gegen ehemalige Ministerpraesidenten und/oder gegen ehemalige Minister zum Tragen. Klagen haben in den letzten 2 Jahren

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der Hochschulrat aus Mitgliedern der Lehrkörper der Hochschulanstalten, die nicht Mitglieder des Hochschulrats sind, aufstellt; sowie drei Mitglieder und ein Ersatzmitglied aus den Reihen der leitenden Beamten und Rechtsanwälte."

2 Peter Haeberle, "Die Verfassungsbeschwerde im System der bundesdeutschen Verfassungsgerichtsbarkeit": JöR 45 (1997), s. 93-102.

3 Art.2 TVerf: "Die Republik Türkei ist ein im Geiste des Friedens der Gemeinschaft, der nationalen Solidarität und der Gerechtigkeit die Menschenrechte achtender, dem Nationalismus Atatürks verbundener und auf den in der Präambel verkündeten Grundprinzipien beruhender demokratischer, laizistischer und sozialer Rechtsstaat."

4 Art.148 Abs.3 TVerf: "Das Verfassungsgericht führt die Verfahren gegen den Präsidenten der Republik, die Mitglieder des Ministerrats, die Präsidenten und Mitglieder des Verfassungsgerichts, des Kassationshofs, des Staatsrats, des Militärkassationshofs und des Hohen Militärverwaltungsgrichtshofs, die Generalstaatsanwälte, den stellvertretenden Generalstaatsanwalt der Republik, die Präsidenten und Mitglieder des Hohen Richter- und Staatsanwälterats und des Rechnungshofs wegen im Zusammenhang mit ihren Ämtern begangener Straftaten als Staatsgerichtshof durch."

enorm zugenommen und eine zusaetzliche Überlastung mit sich gebracht. Aber diese kann man nicht als ein fortdauerndes Problem ansehen. Deswegen werde ich sie in diesem Vortrag nicht behandeln.

Die Anklagen gegen die politische Parteien bildeten früher ein ziemlich grosses Problemfeld. 24 Parteien wurden bis jetzt verboten. Das war zum Teil eine Folge der gesetzlichen Erweiterung verfassungsrechtlicher Parteiverbote. Aber die Verfassungsaenderung von 1995 hat es ermöglicht, die in der Verfassung aufgestellte Gründe der Parteischliessung als *numerus clausus* zu interpretieren und demgemaess eine gesetzliche Erweiterung dieser Gründe als verfassungswidrig zu bewerten. Diese These hatte ich schon 1997 bei dem internationalen parteirechtlichen Symposion in Hagen vorgetragen.[5] Sie wurde spaeter auch vom Verfassungsgericht anerkannt.[6]

Diese Entwicklung wurde durch die Verfassungsaenderung von 2001 ergaenzt, wonach für die Entscheidung über eine Parteischliessung eine Stimmmenmehrheit von drei Fünfteln erforderlich ist. Ausserdem wurden der Mass und die Intensitaet der verfassungswidrigen Aktivitaeten definiert, jedoch zum Teil lückenhaft und widersprüchlich. Hinzukommt die Ermaechtigung des Verfassungsgericht, anstelle der Parteischliessung je nach der Schwere der Verstösse nur die teilweise oder vollstaendige Versagung staatlicher Unterstützung anzuordnen. Dabei haben die Entscheidungen des Europaeischen Gerichsthofes für Menschenrechte für eine freiheitlichere Linie im Parteienrecht eine unterstützende Rolle gespielt. Infolge dieser Entwicklung wurde das Problemfeld der Parteiverbote ziemlich verkleinert, sodass ich die Einzelheiten dieses Bereiches im Rahmen dieses Vortrages vernachlaessigen kann.

Mein Vortrag wird sich daher auf die Probleme der Normenkontrolle und Verfassungsbeschwerde beschraenken. Als Hauptproblem kann ich dabei von der Überlastung der Verfassungsgerichte ausgehen. So kann ich schon am Anfang sagen, dass die Überlastung des Bundesverfassungsgerichts eine Folge der Verfassungsbeschwerde

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[5] Siehe dazu Fazil SAGLAM, "Parteiinstitution in der Türkei" : Dimitris Th. Tsatsos (Hrsg.), 30 Jahre Parteiengesetz, Die Parteiinstitution im internationalen Vergleich, Nomos Verlagsgesellschaft Baden- Baden 2002, S. 238 – 244.

[6] AYM 22.05.1997. E.1996/ 3, K. 1997/3 (Mehrheit des Verfassungsgerichts)

ist, waehrend die Überlastung des türkischen Verfassungsgerichts eine Folge der Normenkontrolle ist. Da aber ein Grundrechtsschutz ohne Verfassungsbeschwerde lückenhaft ist, kann das Fehlen der Verfassungsbeschwerde für uns auch als ein Problemkreis gelten. Im folgenden werde ich zunaechst auf die Probleme der Normenkontrolle und dann auf die der Verfassungsbeschwerde eingehen und auf die möglichen Lösungswege für diese Probleme hinweisen.

II. Probleme der Normenkontrolle

Eine Normenkontrolle kann unabhaengig von der Anwendung der Norm durchgeführt werden. Das nennen wir *"abstrakte Normenkontrolle"*. Diese Art der Normenkontrolle ist oft mit einer kurzen Klagefrist verbunden[7] und kann nur durch bestimmte in der Verfassung festgelegte Personen oder Gremien eingeleitet werden.[8] Sie ist inhaltlich ohne Begrenzung.

Wenn aber die Normenkontrolle in Verbindung mit der für den konkreten Fall anzuwendenden Norm durchgeführt wird, heisst sie *"konkrete Normenkontrolle"*. Diese wird durch die Gerichte eingeleitet. Sie ist mit keiner Klagefrist verbunden, ist aber inhaltlich mit der anzuwendenden Norm begrenz.

Weder die abstrakte, noch die konkrete Normenkontrolle ist in Deutschland problematisch. Insbesondere die abstrakte Normenkontrolle (zum Teil aber auch die konkrete Normenkontrolle) bilden in Deutschland im Vergleich zur Verfassungsbeschwerde eine Seltenheit.

Das kann man mit einigen Zahlen veranschaulichen. Beim

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[7] Nach Art 151 TVerf ist diese Frist 60 Tage nach der Verkündung des anzufechtenden Gesetzes, der anzufechtenden Rechtsverordnung mit Gesetzeskraft oder Geschäftsordnung im Amtsblatt.

[8] Nach Art. 150 TVerf könnet folgende Personen und Graemien diese Klage erheben: "Der Präsident der Republik, die Fraktionen der Regierungspartei und der größten Oppositionspartei sowie eine Anzahl von mindestens einem Fünftel der Gesamtzahl der Mitglieder der Großen Nationalversammlung der Türkei"

Nach Art.93 Abs.1 Zif.2 GG sind folgende zur Erhebung erhebung dieser Klage zustaendig: "Bundesregierung, Landesregierung und ein drittel der Mitglieder des Bundestages"

Bundesverfassungsgericht waren seit 7. September 1951 bis 31. Dezember 2005 insgesamt 157.233 Verfahren anhaengig. Davon waren 151.425, also ca. 96 % Verfassungsbeschwerden. Abstrakte und konkrete Normenkontroll-Verfahren waren demgegenüber nur 3.437, also ca. 2 %.

Wie oben erwaehnt, kennt das türkische Recht keine Verfassungsbeschwerde. Deswegen kann ein Vergleich mit dem türkischen Recht nur für das abstrakte und konkrete Normenkontrollverfahren gemacht werden. Dafür nehmen wir einen Zeitraum (zwischen 1995-2005) zum Vergleich. In diesem Zeitraum wurden beim Bundesverfassungsgericht nur 35 Normenkontrollverfahren auf Antrag von Verfassungsorganen (also abstrakte Normenkontrolle) vorgelegt, waehrend die Zahl der Normenkontrollverfahren auf Vorlage der Gerichte (also konkrete Normenkontrolle) 325 betraegt. Mit anderen Worten war die Zahl der konkreten Normenkontrollverfahren fast zehnfach mehr als die der abstrakten.

In demselben Zeitraum wurden beim türkischen Verfassungsgericht 181 abstrakte und 1274 konkrete Normenkontroll-Verfahren eingeleitet. Das heisst mit anderen Worten: Das türkische Verfassungsgericht hatte innerhalb des genannten Zeitraumes rund fünfmal mehr abstrakte und fast viermal mehr konkrete Normenkontrolle zu erledigen.

Dass die Zahl der abstrakten Normenkontrollverfahren viel geringer ist als die der konkreten, soll uns nicht taeuschen. Denn eine Richtervorlage bezieht sich auf die vom Gericht anzuwendenden Vorschrift. Da ist nur ein bestimmtes verfassungsrechtliches Problem zu lösen. Demgegenüber kann das abstrakte Normenkontrollverfahren gegen zahlreiche Bestimmungen eingeleitet werden. Theoretisch kann man die Verfassungswidrigkeit des ganzen Gesetzes mit seinen zahlreichen Artikeln und Absaetzen behaupten, was in der Türkei nicht selten der Fall ist. Als Verfassungsrichter würde ich manchmal 10 Richtervorlagen einem abstrakten Normenkontrollverfahren gegenüber vorziehen. Das Verfassungsgericht in der Türkei wird nicht durch die Richtervorlagen überlastet, sondern vielmehr durch die Klagen der Opposionsparteien. Hinzukommt unübersichtliche, gemischte und komplexe Inhalt der neueren Gesetze. Es ist nicht selten, dass in einem Gesetz Bestimmungen enthalten sind, die zahlreiche andere Gesetze

betreffen, welche in keinerlei Zusammenhang stehen. Hierfür kann ich Ihnen Gesetz Nr. 5228 als Beispiel geben, in dem 32 andere Gesetze teilweise veraendert oder erneuert wurden. Solche Gesetze, die an sich einer einheitlichen Kontrolle nicht zugaenglich sind, werden dem Verfassungsgericht als **eine Klage** vorgelegt und zwar ohne dabei die verfassungsrechtlichen Probleme zu sortieren. Die demokratische Opposition wird aber somit vor das Verfassungsgericht getragen. Und das Gericht soll aus diesem Material die verfassungsrechtlich relevanten Punkte selbst sortieren und zugleich in seiner Entscheidung begründen, warum die anderen angeklagten Punkte verfassungsrechtlich irrelevant sind. Und das bringt wiederum eine unnötige und aufwaendie Mehrarbeit mit sich.

Auf die Lösungswege kann hier ich nur ansatzweise hinweisen. Aber zunaechst soll eine Besonderheit des Türkischen Verfassungsgerichts hervorgehoben werden. Wir kennen kein Senatsprinzip.[9] Unser Gericht muss jede Angelegenheit (Vorprüfung und Hauptprüfung der Akte, Fallberatung, Abstimmung und oft auch Leseberatung) bei seiner Versammlung mit elf Richter erledigen. Die steigende Belastung kann durch diesen Aufbau nicht bewaeltigt werden. Das Gericht braucht eine Reorganisation. Es muss in zwei gleichberechtigte Senate geteilt werden. In den beiden Senaten sollen ausreichende Kammern eingegliedert sein. Die Kammern könnten bei den Richtervorlagen die Vorprüfung leisten und sollten dabei ermaechtigt werden, diejenigen Vorlagen, die die Voraussetzungen einer konkreten Normenkontrolle nicht erfüllen, einstimmig abzulehnen. Die Nichtigkeit einer Bestimmung sollte aber nur durch eine Senatsentscheidung erwirkt werden. Die Kammern könnten auch mit der Formulierung sowie Leseberatung der Senatsentscheidungen beauftragt werden. Das sind Vorschlaege, die nur mit einer Verfassungsaenderung zu erreichen sind.

Bei der abstrakten Nomenkontrolle könnte eine Verlaengerung der Klagefrist für eine sachgerechte Vorbereitung des Antrages behilflich sein. Bei diesem Verfahren sollten nur diejenigen Bestimmungen

[9] Anders als das deutsche Recht ist die Zahl der Mitglieder und die Organisation sowie die Versammlung des türkische Verfassungsgerichts durch die Verfassung selbst festgelegt. Es besteht aus elf ordentlichen und vier Ersatzmitglieder (Art.146 Abs.1 TVerf) und tritt mit dem Praesidenten und zehn Mitgliedern zusammen (Art.149 Abs.1).

zugelassen werden, die als echte Bestandteile desselben Gesetzes betrachtet werden können. In diesem Sinne sollte das Verfassungsgericht ermaechtigt werden, die Bestimmungen, die verschiedene Gesetze betreffen und untereinander keinen sinnvollen Zusammenhang haben, zurückzuweisen. Das abtrakte Normenkontrollverfahren könnte auch durch Antragsformen rationalisiert werden. Abgesehen von der Klagefrist bedürfen solche Lösungen keiner Verfassungsaenderung.

II. Probleme der Verfassungsbeschwerde

1. Das Fehlen einer Verfassungsbeschwerde als Problem

a. Dass ein Grundrechtsschutz ohne Verfassungsbeschwerde lückenhaft ist, erklaert sich aus zwei Gründen.

aa. Bei einer Normenkontrolle wird die Norm in ihrer Allgemeinheit bewertet. In dieser Eigenschaft umfasst die Norm eine Vielzahl von Fällen. Eine Gesetzesnorm kann mit dieser allgemeinen Aussage für die meisten Faelle, die in ihren Geltungsbereich fallen, als verfassungsmäßig betrachtet werden. Aber es ist durchaus möglich, dass dieselbe Norm bei ihrer Konkretisierung auf einen Fall, eine Grundrechtsverletzung darstellt. Denn die Norm ist nicht immer identisch mit dem allgemein formulierten Normtext.[10] Das Grundrecht kann in diesem Falle durch Verfassungsbeschwerde geschützt werden.

In diesem Zusammenhang möchte ich Ihnen einen deutschen Jurist zitieren. Er sagt: ***"Was für die Naturwissenschaft das Experiment, das ist für die Rechtswissenschaft und Rechtspraxis der "Fall". Der Einzelfall ist die Herausforderung, an der sich dogmatische Konzeptionen und Grundrechtsinterpretationen (die Theorie) immer wieder auf das Neue zu bewaehren haben."***[11]

Bei einer Verfassungsgerichtsbarkeit, die sich lediglich mit Normenkontrolle begnügt, werden die Schutzmaßstäbe für die

[10] Friedrich MÜLLER, "*Arbeitsmethoden des Verfassungsrechts*": Sonderdruck aus Enzyklopaedie der geisteswissenschaftlichen Arbeitsmethoden, R. Oldenbourg Verlag, München und Wien, S.144 ff.

[11] Ulli F.H. RÜHL, "*Die Funktion der Verfassungsbeschwerde für die Verwirklichung der Grundrechte*", KritV 1988, S.161.

Grundrechte unvermeidlich einen begrenzten Anwendungsbereich haben. Dies zeigt, warum das türkische Verfassungsgericht bei seinen Entscheidungen im Gegensatz zum Europaeischen Gerichtshof für Menschenrechte und im Gegensatz zum Bundesverfassungsgericht die Schutzmaßstäbe für Grundrechte weniger und ohne konkreten Inhalt anwendet. Die Anwendung der Schutzmaßstäbe bleibt unvermeidlich eine abstrakte Aussage.

bb. Die Ausstrahlungswirkung der Grundrechte auf die Rechtsbeziehungen zwischen den Einzelnen wird als "Drittwirkung der Grundrechte" bezeichnet. Wie die Entwicklung des deutschen Verfassungsrechts deutlich gezeigt hat, kann eine solche Drittwirkung grundsaetzlich mit der Verfassungsbeschwerde erzielt und erweitert werden.[12] Das zeigt auch das türkische Verfassungsrecht. In Artiken 11 TVerf heisst es: (Ich zitiere:) "*Die Verfassungsvorschriften sind rechtliche Grundregeln, welche die Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung, die Verwaltungsbehörden und übrigen Organisationen und Personen binden.*"

Obwohl diese auch in der Verfassung von 1961 enthaltene Bestimmung, eine Formulierung der Drittwirkung ist, wurde sie bis jetzt kaum angewendet. Dies zeigt eindeutig, dass eine Drittwirkung sich ohne Verfassungsbeschwerde nicht durchsetzen kann.

b. Andererseits ist die Einführung der Verfassungsbeschwerde für die Türkei deswegen wichtig, um die hohe Zahl der gegen die Türkei erhobenen Klagen bei dem Europaeischen Gerichsthof für Menschenrechte zu reduzieren. Die Lösung der Menschenrechtskonflikte im Inland, bevor sie vor den Europaeischen Gerichtshof für Menschenrechte getragen werden, entspricht auch dem Subsidiaritaetsprinzip.

c. Es laesst sich dabei fragen, ob dieser fallbezogene Grundrechtsschutz durch die Fachgerichte gewaehrt werden kann. Theoretisch ist das möglich. Aber die Fachgerichte haben gemaess ihrer Hauptfunktion

[12] Eine Ausnahme hierfür bilden einige Entscheidungen des Bundesarbeitsgericht in denen es unter anderem zur Zulaessigkeit von Zölibatsklauseln in Arbeitsvertraegen oder zur Kündigung eines Arbeitnehmers wegen seines politischen Engagements Stellung nehmen musste, BAGE 1, 185 (191 ff), 4, 274 (276 ff): Annette GUCKELBERGER, "Die Drittwirkung der Grundrechte" : JuS 2003 Heft 12, S. 1553, Fn.12.

keine ausreichende verfassungsrechtliche Perspektive. Sie sind Fachgerichte der Gesetzesanwendung, waehrend das Verfassungsgericht sich hauptsaechlich mit den verfassungsrechtlichen Fragen beschaeftigt. Erst durch die *„fallübergreifende Wirkung"*[13] der Verfassungsbeschwerde erwerben die Fachgerichte mit der Zeit eine verfassungsrechtliche Perspektive, was man auch gelegentlich *"Edukationseffekt"*[14] nennt.

2. Die Diskussion über die Einführung der Verfassugsbeschwerde in der Türkei

Im Bewusstsein dieser Sachlage hat das türkische Verfassungsgericht vor zwei Jahren dem Parlament einen Entwurf über eine Verfassungsaenderung vorgelegt. In diesem Entwurf wurde unter anderem die Einführung der Verfassungsbeschwerde und eine Neuorganisation des Verfassungsgerichts nach dem Senatsprinzip vorgeschlagen. Der Enwurf wurde von der Regierung ziemlich positiv entgegengenommen und auch von der Lehre unterstützt. Überraschenderweise kam aber vom Kassationshof und vom Staatsrat eine heftige Reaktion. Diese Gerichte sehen darin die Beseitigung ihrer Gleichstellung, was ihrer Meinung nach eine Vorrangstellung des Verfassungsgerichts zur Folge hätte. Andererseits würden sie eine Superrevisionsinstanz über sich nicht dulden. Diese Reaktion der Obersten Gerichte ist einigermassen verstaendlich, weil die Verfassungsbeschwerden sich ganz überwiegend gegen die richterlichen Entscheidungen richten. Das ist eine Folge der Voraussetzung, dass vorher alle regulaeren Rechstwege erschöpft werden müssen.

In Bezug auf die Vorrangstellung ist aber diese Reaktion nicht berechtigt. Wenn man unbedingt von einer Vorrangstellung sprechen möchte, so kommt dieser Vorrang nicht von der Verfassungsbeschwerde als solcher, sondern vom Primat der Verfassung selbst. Denn ***auch nach der gültigen Verfassung ohne Verfassungsbeschwerde "... binden die Entscheidungen des Verfassungsgerichts ... die Organe ... der Rechtsprechung "*** (Art.153 Abs.6).

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[13] Schlaich / Korioth, Das Bundesverfassungsgericht, Verlag C.H.Beck, 6. Aufl., München 2004, S. 141 Rn.205 und Fussnöte 32: BVerfGE 85, 109 (113).

[14] Haeberle, aaO, S.113 und 131.

Aber die Behauptung bezüglich der Superrevisionsinstanz laesst sich nicht so leicht widerlegen. Diese bringt uns konkret zur Frage der Abgrenzung der Zustaendigkeitsbereiche zwischen Verfassungsgericht und Fachgericht. Das ist auch in der deutschen Fachliteratur eine Zentralfrage und sie ist nicht leicht zu lösen. Theoretisch geht sie derzeit dahin, ob überhaupt eine erkennbare Grenze für die Zustaendigkeitsbereiche zwischen Verfassungsgericht und Fachgerichte existiert.

3. Probleme der Abgrenzung der Zustaendigkeitsbereiche zwischen Verfassungsgericht und Fachgerichte

Es wird allgemein angenommen, dass die Verwischung der Grenze zwischen Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit eine Folge zweier Musterentscheidungen des Bundesverfassungsgerichts ist: Naemlich das *"Elfes-Urteil"* und das *"Lüth-Urteil"*

a. Elfes-Urteil

Im Elfes Urteil (1957) wird das Recht auf freie Entfaltung der Persönlichkeit (Art.2 Abs.1 GG) als ein *"Auffanggrundrecht"* oder "Muttergrundrecht" im Sinne einer allgemeinen Freiheit interpretiert. Diese Interpretation hat sich zu einer staendigen Rechtsprechung entwickelt und ist auch von der Rechtslehre anerkannt. Nach einer unter dem Stichwort "Reiten im Walde" bekannten, neueren Entscheidung schützt dieses Grundrecht ***"jede Form menschlichen Handelns ohne Rücksicht darauf, welches Gewicht der Betaetigung für die Persönlichkeitsentfaltung zukommt"***.[15] Diese Freiheit ist zwar nicht unbegrenzt; sie findet ihre Schranken u.a. in der verfassungsmaessigen Ordnung. Im Elfes-Urteil wird aber die verfassungsmaessige Ordnung im Sinne der allgemeine Rechtsordnung verstanden, ***"die die materiellen und formellen Normen der Verfassung zu beachten hat."***[16] Gemaess dieser Interpretation kann jede falsche Anwendung

[15] BVerfGE 80, 137, 152 f : Jutta LIMBACH, Aufgabe und Bedeutung der Verfassungsbeschwerde, Roderer Verlag, Regensburg 1997, S.16.

[16] BVerfGE 6, 37 f : Georg BRUNNER, *"Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europaeischen Raum"*: JöR 50 (2002), S. 213

des einfachen Rechts als Grundrechtsverstoss verstanden werden. Auf diese Weise wird der ***Kontrollumfang*** des Verfassungsgerichts erheblich erweitert.[17] Wegen dieser Erweiterung seines Kontrollumfangs wird dem Bundesverfassungsgericht oft vorgeworfen, dass es sich wie eine Superrevisionsinstanz verhaelt.[18] Das Bundesverfassungsgericht wehrt sich dabei beharrlich –aber ich würde sagen umsonst- gegen diesen Vorwurf.[19]

Dieses Problem der Verfassungsbeschwerde scheint ein deutsches Problem zu sein. Es ist in einem türkischen Modell vermeidbar. In den Entscheidungen des türkischen Verfassungsgerichts ist die Auffassung eines vergleichbaren Auffanggrundrechts nicht anzutreffen. Ausserdem sind nach dem Vorschlag des türkischen Verfassungsgerichts nur diejenigen Rechte und Freiheiten der türkischen Verfassung als Kontrollmassstab zulaessig, die den Rechten und Freiheiten in der Europaeschen Konvention für Menschenrechte entsprechen. Durch diese Begrenzung des Kontrollmassstabes kann eine Erweiterung des Kontrollumfangs vermieden werden, weil die Konvention kein Auffanggrundrecht kennt.

b. Lüth-Urteil

In Lüth-Urteil wird der Weg zur unmittelbaren Drittwirkung der Grundrechte eröffnet. Es handelt sich bei diesem Urteil um einen Boykottaufruf gegen einen Film, der von einem unter dem Nazi-Regime populaeren Filmregiseur gedreht wurde. Das Fachgericht betrachtete den Aufruf zum Boykott als eine sittenwidrige Schaedigung im Sinne des Zivilrechts (Art. 826 BGB). Im Lüth-Urteil wurde festgestellt, dass die Entscheidung des Fachgerichts den Beschwerdeführer in seinem Grundrecht auf Meinungsfreiheit verletze und zwar mit folgender Begründung: Die Verfassung habe mit ihrem

[17] LIMBACH, aaO, S. 17 und 18.

[18] Christian STARCK, "*Verfassungsgerichtsbarkeit und Fachgerichte*": Juristenzeitung (JZ) 51 (1996) 21, S. 1038; Stefan KORIOT, "*Bundesverfassungsgericht und Rechtsprechung*": Festschrift 50 Jahre Bundesverfassungsgericht (Hrg. Peter BADURA – Horst DREIER) 1. Band, Mohr-Siebeck Verlag 2001, S. 69, Markus KENTNER, "*Das Bundesverfassungsgericht als subsidiaerer Superrevisor*": NJW 2005 12, s.785 – 789.

[19] BVerGE 18, 85 (92), 68, 361 (372)

Grundrechtskatalog zugleich eine objektive Wertordnung aufgerichtet, die in alle Bereiche der Rechtsordnung ausstrahlt. Als Einbruchstellen der Grundrechte in das Bürgerliche Recht dienen die Generalklauseln und die unbestimmten Rechtsbegriffe, welche im Geiste der genannten Wertordnung ausgelegt werden müssen.[20]

Durch die Kontrolle der Ausstrahlungswirkung der Grundrechte wird der Kontrollumfang des Verfassungsgerichts auch ausgeweitet. Aber darin sehe ich grundsaetzlich kein Problem, weil diese Ausstrahlungswirkung zumindest als mittelbare Drittwirkung in der türkischen Verfassung verankert ist. Gemaess Art. 11 und 153/6 TVerf. binden die Verfassungsvorschriften und auch die Entscheidungen des Verfassungsgericht nicht nur staatliche Organe, sondern auch die *übrigen Organisationen und Personen.*

Gerade deswegen ist die Einführung der Verfassungsbeschwerde in der Türkei für die Durchsetzung dieser Vorschrifte unvermeidlich.

4. Die Abgrenzungsmöglichkeiten des Kontrollumfangs des Verfassungsgerichts

Die Ausweitung des Kontrollumfangs kann hier einerseits durch die Selbstbegrenzung des Verfassungsgerichts und andererseits durch die funktionsgerechte Abgrenzung der Zustaendigkeitsbereiche erzielt werden.

a. Für die **Selbstbegrenzung** kann die im deutschen Recht vom Christian STARCK vorgeschlagene Formel einen Beitrag leisten. STARCK geht vom Rahmencharakter der Verfassung aus und meint, dass die Verfassungsbeschwerde als eine quasi Normenkontrolle anzuwenden sei. Danach liege ein Verfassungsverstoss nur vor, wenn der Auslegungs- und Anwendungsfehler als Inhalt eines Gesetzes gedacht, ausserhalb des Rahmens der Verfassung laege. Daher könne im Verfahren der reinen Urteilsverfassungsbeschwerde nur geprüft werden, ob das Ergebnis der Gesetzesanwendung als Norm verallgemeinert verfassungswidrig waere.[21] Dieser Standpunkt kann für

[20] BVerGE 7, 205, 206: LIMBACH, aaO, S.12 ff

[21] STARCK, aaO. S.1034 ff

die Selbstbegrenzung des Gerichts als ein funktionsfaehiger Massstab dienen. Ob man aber diesen Standpunkt als eine Verfassungs- oder Gesetzesnorm formulieren kann, darüber bin ich mir noch nicht im klaren.

b. Zur **funktionsgerechten Abgrenzung** der Zustaendigkeitsbereiche laesst sich folgendes sagen.

In Deutschland werden über 40 % der Urteilsverfassungsbeschwerden auf die Verletzung der Verfahrensgrundrechte (Art.101/2, 103/1, 104, 19/4 GG) gestützt.[22] Das ist ein Bereich, wo sich die verfassungsrechtlichen Anforderungen und einfachgesetzliche Ausgestaltung weitgehend decken, sodass in den meisten Faellen eine Verletzung der Verfahrensordnung unmittelbar verfassungsrelevant ist.[23] Im Bereich des Verfahrensrecht kennen sich aber die Fachgerichte besser aus. Demgemaess waere es angebracht, die Verfahrensgrundrechte aus dem Verfassungsbeschwerdeverfahren auszuklammern oder wie Frau GRASSHOF, -ein Mitglied des Bundesverfassungsgerichts - vorgeschlagen hat, für sie ein separates Verfassungsbeschwerdeverfahren innerhalb der Fachgerichtsbarkeit zu errichtenç[24] Für die gesetzliche Einschraenkung verfassungsrechtlicher Verfahrensanforderungen würde dann eine Normenkontrolle ausreichen.

Schlussbewertung:

Ich habe versucht, Ihnen die überwiegenden Probleme der türkischen und deutschen Verfassungsgerichtsbarkeit darzustellen. Die Aufdeckung der Probleme bringt uns den Vorteil, über die möglichen Reforme diskutieren zu können. In Deutschland tritt die Verfassungsbeschwerde mit ihrem komplexen Problemfeld in den Vordergrund. Für die Türkei

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[22] Hans Jürgen PAPIER, "*Das Bundesverfassungsgericht als Hüter der Grundrechte*": Der Staat des Grundgesetzes Kontunuitaet und Wandel, Festschrift für Peter BADURA, Mohr Siebeck Verlag, Tübingen 2004, S.418, KORIOTH, aaO, S. 68 ff

[23] KORIOTH, aaO, S. 69

[24] Karin GRASSHOF, "*Entlastung des Bundesverfassungsgerichts durch Aufspaltung der Entscheidungszustaendigkeit über Verfassungsbeschwerden*": Urteilsverfassungsbeschwerde zum Bundesverfassungsgericht (Hrg. Harald Bogs), Nomos 1999, S. 115-122, 118 f.

ist schon das Fehlen der Verfassungsbeschwerde ein eigenes Problem. Diesbezüglich hat die Türkei aber den Vorteil, von den Erfahrungen der deutschen Verfassungsgerichtsbarkeit ausgehend ein neues Modell einzuführen, das die aufgedeckten Probleme vermeidet oder auf ein Mindestmass reduziert. Die Obersten Gerichte sollten sich dabei von einem Institutions-Chauvinismus befreien und bei der Einführung der Verfassungsbeschwerde mitwirken. Denn der Sinn und das Endziel aller Gerichtsbarkeit ist der Schutz der Menschenrechte. Und ohne Verfassungsbeschwerde können die Menschenrechte nicht effektiv und ausreichend geschützt werden.

Problems Concerning International Criminal Law in Cases Regarding Terrorism

Durmuş TEZCAN*

1. The terrorist acts committed in Israel as part of the Intifada movement by the so-called "human bombs" of Palestinian nationality, and Israel's strategy of state-sponsored terror in response; the American intervention against the Taliban in Afghanistan following the bloody attacks against the twin towers in New York using passenger aircrafts; the invasion of Iraq by the United States of America together with the United Kingdom and other coalition forces in the absence of a decision passed by the UN Security Council as a result of the United States' administration holding the regime of Saddam Hussein responsible for certain terrorist attacks and threats, and the fact that terror has since become a part of daily life in that country;[1] the terrorist acts perpetrated in Casablanca, Haifa, Istanbul, Madrid, Moscow, Riyadh following the invasion of Iraq and the terrorist bomb attacks on public transportation vehicles which took place on 9 July 2005 in London have yet again proved that these crimes, whatever their motive, require the close cooperation of states.

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[1] See IGNACIO Ramonet, *Antiterrorisme*, http://www.monde-diplomatique.fr/2004/03/RAMONET/10722.

2. Terrorism and organised crime[2] have existed since the earliest times, and sometimes independent from each other, sometimes intertwined. There exist terrorist organisations which have turned to profit-oriented crime in order to achieve their aims, as there exist criminal organisations which operate only in the field of profit-oriented activities. For instance, the Italian *mafias*, Chinese *triads*, Japanese *Yakuzas* and American *cosa nostra*, which are all based on a culture of secrecy and the law of silence, are considered criminal organisations which operate to obtain profit.[3]

3. The probability of being randomly victimised by acts of violence[4] increases feelings of fear and anguish among the population since there is no direct personal antagonism between the perpetrators and the victims, who do not know each other. In fact, terror is often used as a means for achieving unlawful objectives. Especially in recent years, when the boundaries between states are easily eliminated thanks to the facilities provided by modern technology, terror has been a very ugly form of armed combat[5] since it is directed towards broad categoris of civilians who are not party to the particular struggle. On the other hand, the fact that Turkey is a country which has lost - and is still losing - so many victims to terror[6] increases Turkish people's sensitivity to the issue.

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2 For the differences between domestic and international terrorism, see ZAFER Hamide, *Ceza Hukukunda Terörizm* (Terrorism in Criminal Law), Istanbul 1998, pp. 70-73; TOPAL Ahmet Hamdi, *Uluslararası Terörizm ve Terörist Eylemlere Karşı Kuvvet Kullanımı* (International Terrorism and the Use of Force against Terrorist Acts), Istanbul 2005, pp. 51-53. For the problems encountered in defining terrorism, see BEŞE Ertan, *Terörizm, Avrupa Birliği ve İnsan Hakları* (Terrorism, European Union and Human Rights), Ankara 2002, pp. 23 *et seq.*.

3 See BORRICAND Jacques, Rapport introductif, in *La criminalité organisée*, Presse univ. d'Aix-Marseille, 1997, p. 9 *et seq.*.

4 For the difference between terrorism and other acts of violence see ZAFER, *op. cit.*, pp. 76 *et seq.*.

5 For the relationship between armed conflict and terrorism, see BEŞE, *op. cit.*, pp. 43 *et seq.*. For an extensive evaluation regarding the use of force based on the concept of self-defence in the fight against terrorism, see TOPAL, *op. cit.*, pp. 104 *et seq.*.

6 See *Rakamlarla Terör* (Terror in Numbers), http://www.teror.gen.tr/turkce/index.html. See also, for a chronological analysis, http://www.kronoloji.gen.tr/kronoloji.php3?sayfa=1&kategori=teror.

4. The international community's response to terrorist acts has been reflected in a variety of ways. One model has been the use of force. As a matter of fact, the use of force, once the favourite and definitive means, has gradually lost its validity and is no longer a legitimate method for the settlement of international disputes[7]. The right to wage war has been prohibited in clear language by Art. 2 (4) of the Charter of the United Nations.[8] War has thus come to be regarded by members of the international community as an unlawful measure and methods of peaceful settlement have been adopred instead.[9] However, the possibility of using force has not been completely eliminated. International law has been obliged to accept the legitimacy certain acts of force.[10] The use of force laid down in Chapter Seven of the Charter of the United Nations in response to threats to the peace, breaches of the peace, and acts of aggression made it possible to implement such measures. In practice, the scope of the measures has been defined by the Security Council, which chose to authorise certain military operations, including the successful operation to solve the Gulf Crisis.[11] But the purpose defined as the 'restoration of international peace' in Article 39 has been very widely applied. While certain practices have provided a positive contribution to the system, others have exceeded its scope. For example, the tacit consent given by the Security Council to NATO with a view to conducting a military operation during the 1999 Kosovo crisis was a very important step in this field.[12] In contrast, the unilateral

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7 See ÖNOK R. Murat, *Savaşın Yasaklanma ve Cezalandırılma Süreci* (The process of prohibiting and penalising war), HPD, Sayı 3, Nisan 2005, pp. 21 *et seq.*.

8 See Official Journal of 24.8.1945, no. 6092, p. 1383. For extensive information on the prohibiton of the use of force in the UN system, see ACER Yücel, *Uluslararası Hukukta Saldırı Suçu* (The Crime of Aggression in International Law), Ankara 2004, pp. 55 *et seq.*, see also TOPAL, *op cit.*, pp. 85 *et seq.*.

9 See CARREAU Dominique, *Droit International*, Ed. Pédone, Paris, 1988, 2.éd., pp. 502 *et seq.*.

10 For exceptions to the prohibition see ACER, *op. cit.*, pp. 67 *et seq.*. For methods based on the use of force to combat terrorism, see TOPAL, *op. cit.*, pp. 80 *et seq.*, and 102 *et seq.*.

11 See TEZCAN Durmuş, *Saldırgan Savaş ve Devletlerarası Ceza Hukuku* ('War of Aggression and International Criminal Law'), Prof. Dr. İlhan ÖZTRAK'A ARMAĞAN, AÜSBF Dergisi, c.XXXXIX, 1994/ No: 1-2, pp. 349-363.

12 According to one view, this humanitarian intervention can be described as a 'new international legal chaos' or the 'Infringed UN Charter', see presentation at the *Colloque de Tunis* by Professor Habib Slim.

American intervention to in Afganistan, which was conducted under the excuse of fighting a "war against terror" and operating in "self-defence" due to the alleged fact that this country was harbouring Al-Qaeda terrorists has very much stretched the limits and scope of Article 39. As for the ensuing attack on Iraq waged under the pretext of 'preventive war' and based on the allegation that the regime of Saddam Hussein possessed weapons of mass destruction, this invasion has assumed a character that is incompatible with the purpose of 'restoring the peace' as laid down in Art. 39.[13] In particular, the fact that no trace of the alleged weapons was found has made the wrongfulness of the intervention even clearer. This intervention has reinforced the terrorists' stance by providing them with grounds to serve as a pretext for bloody attacks.

5. If we take a look at comparative law, we see that some states enact special laws regarding the fight against terror, some enact special laws regarding organised crime, while other states try to deal with both problems within the sphere of other ordinary types of crime. The report prepared by Prof. Dr. Christopher L. Blakesley for the second part of the special provisions on Criminal Law in the framework of the XVIth International Congress on Criminal Law constitutes a rich resource about the situation in various countries.[14]

6. States had laid down heavy sentences for crimes of terrorism, drug-trafficking of and profit-oriented crime long before the suicide attacks carried out by the Al-Qaeda organisation on 11 September 2001. However, it has been continually proven that punishment is not an effective deterrent by itself. A recent example was provided by the vehicle explosions caused by suicide attacks perpetrated in Istanbul

[13] The chronical of Bernard Guetta : *Comment réparer l'erreur irakienne,* L'Express, edition dated 15/03/2004. Further see TOPAL, *op cit.*, pp. 230 *et seq.*.

[14] See BLAKESLEY Christopher L., *Les systèmes de justice criminelle face au défi du crime organisé*, Colloque préparatoire de l'AIDP, Alexandrie, 8-12 novembre 1997, RIDP, 1998/no 1-2, pp. 34-68. For an extensive list of Turkish resources see DÖNMEZER Sulhi, *Çetelerle Mücadele Amacıyla 4422 Sayılı Kanunla Kabul Edilen Koruma Tedbirleri* (Precautionary Measures Adopted by the Act no. 4422 enacted for the purpose of fighting gangs) , Yargı Reformu 2000 Sempozyumu, İzmir Barosu yay, İzmir, 2000, pp. 537-565.

within a few days of each other.[15]

7. Generally, new criminal law policies are advanced in the fight against terror. For example, in the new French Criminal Code the establishment of an organisation for the purposes of committing criminal acts has been included as a separate offence (*delit d'obstacle*). Furthermore, the organised commission of certain crimes constitutes an aggravating circumstance.[16] Italy has followed a similar path to France; Article 416 of the Italian Criminal Code prohibits the establishment of a criminal organisation, while Article 416*bis* concerns participation in mafia-style organisations, thus regulating a new typology of criminal act that prohibits taking advantage of membership of and the intimidating effect of such organisations. Up to eight other countries may be cited as examples of a similar approach.[17] As for the European Union, many measures have been adopted but an analysis of such measures would fall outside the scope of this article.[18]

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[15] See various newspaper reports published after the twin attacks on two synagogues situated in Istanbul: "Bomba Yüklü Araç Dehşetiyle Tanıştık : 20 ölü, 303 yaralı" (We familiarised with the terror of bomb-loaded vehicles: 20 killed, 303 wounded), Article in the *Milliyet* paper, edition of 16.11.2003, p.1; "Duaya Bomba : ... 20 vatandaşımız öldü, 303 yaralı var" (Bomb to the prayer: 20 of our citizens have been killed, there are 303 wounded), article in the *Hürriyet* paper, edition of 16.11.2003, p.1; 'İki Sinagogun yanında eşzamanlı olarak bomba yüklü araçlar patlatıldı : En az 20 ölü" (Bomb-loaded vehicles blown up simultaneously next to two synagogues: at least 20 killed), article in the *Cumhuriyet* paper, edition of 16.11.2003, p. 1.

[16] In fact, article 450-1 of the French Criminal Code includes in the definition of *association des malfaiteurs* all associations and organisations established with the purpose of committing one or several crimes which are punishable with a custodial imprisonment sentence exceeding 10 years, while article 132-71 of the same code prescribes aggravated sentences for certain crimes when committed within an organisation (*bande organisée*).

[17] Amongst other examples, the new Canadian approach, the Austrian model, the American conspiracy approach which requires continuality and the American RICO law are given, see BLAKESLEY, *op cit.*, pp. 49 *et seq.*.

[18] See http://ec.europa.eu/justice_home/doc_centre/criminal/terrorism/doc.criminal_terrorism_en.htm. For the fight against terrorism within the European Union see ERDEM Mustafa Ruhan, *Avrupa Birliği Hukuku'nun Üye Devletlerin Ceza ve Ceza Muhakemesi Hukukuna Etkileri* (The Influence of European Union Law to the Criminal Law and Criminal Procedure Law of Member States), Ankara 2004, pp. 220-221; ZAFER, *op cit.*, pp. 270 *et seq.*.

8. With regard to Turkey, the establishment of a criminal organisation has long been proscribed by Art. 313 of the Criminal Code (corresponding to Art. 220 of the new Criminal Code which entered into force on 1 June 2005). Furthermore, Act no. 4208 of 13 November 1996 on the Prevention of Money Laundering was, in a sense, complemented on 30 July 30 1999 by Act no. 4422 on the Fight against Profit-Oriented Criminal Organisations[19]. Subsequently, the New Criminal Code and Criminal Procedure Code both entered into force on 1 June 2005. The relevant provisions of the new Criminal Procedure Code have replaced those of Act no. 4422, which is no longer in force. While Act no. 4208 is still in force, the prohibition regarding the crime of money laundering has now been replaced by Art. 282 of the new Criminal Code.[20] In this way, a separate prohibition on the establishment of criminal organisations remains in force and allows

[19] The draft prepared by the Ministry of Justice, which was entitled 'Draft Act on the Fight against Certain Organised Crimes' and the draft prepared within the National Security Directorate of the Ministry of Internal Affairs, which was entitled 'Draft Act on the Fight against Organised Crime Groups' were merged into one final text, the 'Act on the Fight against Profit-Oriented Criminal Organisations' which was published in the Official Journal of 1.8.1999, no. 23773. The Regulation on the Application of the Act on the Fight against Profit-Oriented Criminal Organisations was subsequently published in the Official Journal of 26.1.2001, no. 24299. For information on the Turkish Anti-Terrorism Act see ZAFER, *op cit.*, pp. 118 *et seq.*.

[20] Article 282 is entitled 'Laundering of Assets Acquired from an Offence' and reads:

'(1) Where a person conducts any act in relation to an asset, which has been acquired as a result of an offence which carries a minimum penalty of one year imprisonment, in order to transfer such asset abroad or to give the impression that such asset has been legitimately acquired and conceal the illegitimate source of such, shall be subject to a penalty of imprisonment for a term of two to five years and a judicial fine of up to twenty thousand days.

(2) Where this offence is committed by a public officer or professional person in the course of his duty then the penalty to be imposed shall be increased one half.

(3) Where this offence is conducted in the course of the activities of an organisation established for the purpose of committing an offence, the penalty to be imposed shall be doubled.

(4) Where a legal entity is involved in the commission of this offence it shall be subject to security measures.

(5) In relation to the offences defined in this article, no penalty shall be imposed upon a person who directly enables the securing of financial assets, or who facilitates the securing of such assets, by informing the relevant authorities of the location of such before the commencement of a prosecution.', see BIÇAK Vahit / GRIEVES Edward, *Mukayeseli-Gerekçeli Türkçe-İngilizce Türk Ceza Kanunu*, 2. Bası, Ankara 2007, pp. 683-884.

such acts to be punished independently, even if the purported criminal acts have not yet been committed. On the one hand, the prohibition regarding the establishment of criminal organisations has been spelled out in detail through Art. 220 of the new Criminal Code (which replaces the definition provided by the previous Act no. 4422) in order to guarantee effective deterrence and accountability for these types of offence. On the other hand, new strategies which were not previously envisaged by the Criminal Procedure Code and that comply with the Article 8 of the European Convention on Human Rights were envisaged in various provisions of Act no. 4422 in order to allow effective action against such criminality. The measures embodied in Act no. 4422 consisted of the following: interception of communications (tapping of telephones) (Art. 2); covert surveillance (Art. 3); analysis of transcripts and data (Art. 4); assigning covert agents (Art.5). Furthermore, rules ensuring the security of the covert agent entrusted with investigating and evidence-gathering regarding the criminal organisations and the deriving profits were also provided for.[21] The new Code of Criminal

[21] See ÖZTÜRK Bahri, *Türk Hukukunda ve Mukayeseli Hukukta Organize Suç Kavramı* (The concept of Organised Crime in Turkish Law and Comparative Law), Em. Gen. Md.ğü yay, Ankara, 1998, pp. 2-6; DÖNMEZER Sulhi / YENİSEY Feridun, *Çıkar Amaçlı Suç Örgütleriyle Mücadele Kanunu* (Act on the Fight against Profit-Oriented Criminal Organisations), Adalet Bakanlığı yay, Ankara, 1999, 80 pp.. For general information see GASSIN R./SABATIER M., "Criminalité organisée, ordre social et coopération policière européenne", in *Criminalité organisée et ordre dans la société*, Presses univ. d'Aix-Marseille, 1997, pp. 241 *et seq* ; *Les systèmes pénaux à l'épreuve du crime organisé*, Colloque préparatoire de l'AIDP, RIDP, 1999. The first article of the Act on the Fight against Profit-Oriented Criminal Organisations defined in detail the basic aims of the fight against organised criminal groups as well as the characteristics of this type of criminality. For the rather long and detailed definition of profit-oriented criminal organisations, see article 1(1), of the Act. ('*Those who set up organisations to commit crimes or manage such organisations or wilfully and knowingly undertake services, in order to take control of the management and administration of an institution, establishment or enterprise directly or indirectly; take control of or gain control or influence over public services, press and publishing institutions; bids, privileges and licensing transactions; establish cartels and trusts concerning financial activities; inflict scarcity or reduction of items or articles; cause price fluctuations; get unfair benefits on behalf of oneself or others; or elicit votes of people in elections or prevent elections from being held, by means of exercising force or threat or making people to be subject to themselves or undertaking overt or covert clandestine co-operation among their members in whatsoever form, shall be sentenced to a term of imprisonment of three to six years solely for this reason, whilst an imprisonment term of two to four years shall be imposed on offenders who become members of such organisations*').

Procedure no. 5271, which entered into force on 1 June 2005 lays down the norms regarding the application of the above-mentioned measures, thus replacing the provisions of Act no. 4422. The interception of communications (tapping of telephones) is now regulated by Arts. 135 *et seq.*, surveillance through the use of technical equipment is regulated by Art. 140, analysis of transcripts and data is provided for in Art. 134, the assignment of covert agents is laid down in Art. 139.

9. With the developments in technology and the increase of air transport, attacks on civil aircraft have also multiplied. Similar attacks have targeted civilian shipping too. At the same time, assassination plots aiming at internationally protected persons such as diplomats have been carried out by terrorist organisations such as the Armenian ones. These developments have made necessary the implementation of a number of conventions on an international scale. Such terrorist attacks have affected certain countries much more than others. For instance, the problems caused by the IRA to Britain; the Red Army Faction to Germany; ETA, fighting for the independance of the Basque region, to Spain; various Palestinian Arab terror groups to Israel; Al-Qaeda, based in Afghanisatan and responsible for the attacks of 11 September 2001; and the damage caused by the PKK to Turkey, especially following the collapse of authority in Northern Iraq in the afermath of the Gulf War of 1991. All of these difficulties have pushed the relative countries to implement serious measures in order to protect their national security and to fight terrorism.

10. From the point of view of international criminal law,[22] Turkey encountered mainly three obstacles in its fight against terrorism: the qualification of certain crimes as political, capital punishment and the refugee problem. In relation to the second of these, the abolition of the death penalty for crimes committed in time of peace has solved an important problem.

[22] For extensive discussion on the possibilities for prosecuting terrorists before international organs see ÖNOK R. Murat, *Türkiye'ye Yönelik Dış Destekli Terör Eylemleri Nedeniyle Yabancı Devlet veya Organlarına Karşı Hukuki Girişimler* (Legal initiatives against foreign states or their organs due to foreign supported terrorist acts directed to Turkey), HPD, Sayı 4, Ağustos 2005, pp. 232 *et seq.*. For the role of international criminal law in combating terrorism, see ZAFER, *op cit.*, pp. 243 *et seq.*.

11. A major step forward on this issue is the International Convention for the Suppression of the Financing of Terrorism,[23] dated 9 December 1999, which stipulates that each State Party shall adopt such measures as may be necessary in order to prevent the financing of terrorism, to establish as a criminal offence the financing of terrorism, and to make these offences punishable by penalties appropriate to their gravity. The Convention also aims to establish international cooperation in this field by setting out an obligation on the States party to cooperate in preventing activities aimed at the financing of terrorism which may occur outside their own territory.

In the Preamble to the Convention, there is a long explanation regarding its purposes thereof. According to the Preamble, '*the States Parties to this Convention, Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States, Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations, recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995, Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States, Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal*

[23] Ratified by Turkey with Decree no. 2002/3801 (1.3.2002) of the Cabinet of Ministers in accordance with the Parliament Act no. 4378 and the relative declaration on the approval of the Convention; both published in the Official Gazette of 1 April 2002, no. 24713. See further Yargı Mevzuatı Bülteni, 3.4.2002, pp. 3 *et seq.*.

framework covering all aspects of the matter, Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such financing is direct or indirect through organisations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds, Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996, Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments, Considering that the financing of terrorism is a matter of grave concern to the international community as a whole, Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain, Noting also that existing multilateral legal instruments do not expressly address such financing, Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators, have agreed on the Convention.'

12. According to article 2 of the Convention '*Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out*' any of the acts enumerated in the Convention. Some of the acts which are within

the scope of the Convention are proscribed by certain international conventions drafted or accepted by the International Civil Aviation Organisation, the International Maritime Organisation and the United Nations. These are: a) the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; b) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; c) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; d) the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; e) the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; f) the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; g) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; h) the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; i) the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

According to article 2 of the Convention, any act which constitutes an offence within the scope of and as defined in one of these treaties (article 2, paragraph 1(a)); as well as '*any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act*' shall fall within the ambit of the Convention. Pursuant to article 2, attempting to commit (article 2, paragraph 4) or participating (article 2, paragraph 5) in the commission of any of these crimes shall also be punished.

13. As for political crimes, the prohibition regarding extradition for such offences has been restricted with regard to terrorism and organised crime cases.[24]

The first exception to the prohibition of extradition for political crimes is the so-called 'Belgian Clause', which takes its name from a Belgian Act of 22 March 1856, enacted following the attempted assassination of Napoleon III in 1854, and which stated that attacks directed at Heads of States and their family members shall not be qualified as political and that perpetrators of these acts shall be extradited. This rule has since been incorporated in all bilateral and

[24] For an evaluation of acts of terrorism as political crimes see ZAFER, *op. cit.*, pp. 106 *et seq.*. While in Turkish law a tendency to widen the established definition of political crime accepted by international criminal law was evident in article 9 of the previous Turkish Criminal Code, on the contrary, article 14 of the International Convention for the Suppression of the Financing of Terrorism narrows the definition. In reality, the concept of political crime is rather complex and no complete definition can be formulated. Since States do not want to intervene within the internal affairs of other States, they tend not to accept requests for extradition in relation to crimes regarding the political order and activities, governemental status and political rights of foreign countries. According to scholarly opinion, political crimes are divided into two categories: real political crimes and politically-connected crimes. To explain the meaning of real political crimes, objective, subjective and mixed theories have been advanced. The objective theory takes into account the quality of the right violated - if such right belongs to the State, it considers the act to be political. The subjective theory gives importance to the purpose of the perpetrator, trying to determine who it is they seek to harm. The mixed theory tries to combine both theories. However, it reaches a conclusion according to the specific circumstances of each concrete case. Politically-connected crimes are, in reality, ordinary crimes inspired by political motives. For example, the Belgian judicial authorities have determined that during the Bolshevik Revolution, stealing tyres from the Army was a politically-connected crime. As explained in the text, in the case of an airplane hijacked from Bulgaria in 1948, the six perpetrators were considered to have committed a politically-inspired act and they were granted refugee status. As a result, by its decision of 31 October 1949, no. 1/108-93, the Grand Chamber of the Turkish Court of Cassation had held that a prosecution based on the principle of universality could not be carried out. For further information see BAYRAKTAR Köksal, *Siyasal Suç* (Political Crime), Istanbul, 1982, pp. 70 *et seq.*; DÖNMEZER Sulhi / ERMAN Sahir, *Nazari ve Tatbiki Ceza Hukuku* (Theoretical and Practical Criminal Law), 12. b, İstanbul, 1997, c. III, n° 2356 *et seq.*; BEŞE, *op. cit.*, pp. 58 *et seq.*. Article 18 of the newly enacted Criminal Code does not explicitly refer to 'politically-connected crimes' but only to 'political crimes' as an obstacle to extradition. For the situation within the EU, see ERDEM, *op. cit.*, pp. 309-310; BEŞE, *op. cit.*, pp. 69 *et seq.*.

multilateral conventions, including the European Convention on Extradition.[25]

Later, international conventions ratified by Turkey in accordance with Article 90 of the Constitution, such as the 1970 Hague Convention, the 1971 Montreal Convention and the 1973 UN Convention on Crimes against Internationally Protected Persons (all mentioned above) and the 1977 European Convention on the Suppression of Terrorism have all restricted the definition of political crime. Consequently, Turkey may extradite the perpetrators of these acts. If not, then, in accordance prescribed by Article 7 of the Montreal and The Hague Conventions in the case of hijacking, the perpetrators must be tried and punished by Turkey as if the act had been committed on her own territory.

The jurisprudence of Turkish courts sets out the issue in a very concrete way. In fact, shortly after the Second World War (on 30 June 1948), long before the aforementioned Conventions were drafted within the framework of the ICAO and ratified by Turkey, a Bulgarian plane flying from Varna to Sofia was hijacked and diverted to Turkey by six Bulgarians. The perpetrators had been indicted in Bulgaria on multiple counts, including two murders, multiple attempts to murder, deprivation of personal liberty, armed assault with threat and violation of the Passport Act. After the decision of the Turkish first instance court holding that the suspects could not be extradited because of the prohibition laid down in Article 9 of the Criminal Code regarding extradition for political or politically-connected crimes, the Grand Chamber of the Court of Cassation held in its decision of 31 October 1949 (no. 1/108-93)[26] that Turkey could not prosecute and punish

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[25] On this issue see TEZCAN Durmuş, *Terörizm ve Uluslararası Yardımlaşma* (Terrorism and Judicial Assistance), in Prof. Dr. Yaşar KARAYALÇIN'A 65 YAŞ ARMAĞANI, Ankara, 1988, pp. 693-704.

[26] For the text of the judgment see GÖZÜBÜYÜK A.P., *Türk Ceza Kanunu Açıklaması* (Explanation of the Turkish Criminal Code), Ankara, 2.b., c.1, md.6, pp. 41 *et seq.*. For acts against aircrafts and the relevant applications on the matter see KÖNİ Hasan S., *Uçaklara Karşı Girişilen Eylemlerin Uluslararası Hukukta Doğurduğu Sorunlar* (Problems Raised in International Law by Acts Committed Against Aircrafts), Ankara, AİTA yay, 1977, 262 pp.

the suspects for acts which had been committed in the Bulgarian airspace.[27]

After the ratification and entry into force of the Hague and Montreal Conventions however, this case law was overturned. For instance, after the hijacking of a plane using threats of violence and its forced diversion to Turkey for the purpose of applying for refugee status, the acquittal decision delivered by the Sinop Court of First Instance (Aggravated Felony's Court), with reference to the above-mentioned judgement of 31 October 1949, was reversed by the 8th Chamber of the Court of Cassation on 18 January 1984 (no. 1993/2528-1984/54). The perpetrators, two citizens of the German Democratic Republic, pleaded that their actions had been compelled by the need to flee the totalitarian regime in their country. The Court of Cassation ruled that this was insufficient to categorise the act as political and that according to article 7 of the Hague Convention, where the perpetrators were not extradited, the State was required to prosecute and, if necessary, to punish the suspects.[28]

The International Convention for the Suppression of the Financing of Terrorism includes a similar provision in article 14 which reads '*None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground*

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[27] According to article 6 of the previous Turkish Criminal Code, unlike the situation in other countries such as The Netherlands, the principle of universal jurisdiction concerning crimes committed abroad by a foreigner against another foreigner was recognized just in the framework of the principle of justice, therefore only applied in cases where there was no extradition agreement between the two States or when the State where the crime had been committed or the State of which the suspect was a national refused Turkey's extradition request. See TEZCAN Durmuş, *Yurt Dışında İşlenen Suçlarda Türk Hukuku Bakımından Yabancı Ceza Kanununun Değeri Sorunu* (The Value of the Foreign Criminal Code in Turkish Law for Crimes Committed Abroad), A.Ü.SBF Dergisi, c.39, S.1-2 (separate edition), pp. 14 *et seq.*. Note, however, that the new Turkish Criminal Code does not provide for such restriction.

[28] On this topic see TEZCAN Durmuş, *Uluslararası Terör Suçlarında Uluslararası Yardımlaşma* (International Assistance in International Terrorist Crimes), Uluslararası Terörizm ve Gençlik Sempozyumu, Sivas, 1985, pp. 105 *et seq.*.

that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives'.

A similar provision restricting the scope of political crimes is incorporated into the European Convention on the Suppression of Terrorism of 27 January 1977, subsequently amended by the Protocol of 2003. According to Article 1, for the purposes of extradition between Contracting States, the offences indicated under that provision shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Amongst the offences enumerated are those involving the use of automatic firearms. However, in connection with the killing of three Turkish citizens on 9 January 1996 in Istanbul by a member of the DHKP-C organization, which is listed as a terrorist organisation by both the US and the European Union, Belgian courts are refusing the extradition of Fehriye Erdal to Turkey on the account that the weapon used in the commission of the crimes was a 'semi-automatic firearm'. This interpretation is allows the offender to go unpunished while constituting at the same time a means of propaganda for terrorist organisations. Turkey's ratification of Protocol No. 13 to the European Convention on Human Rights concerning the Abolition of the Death Penalty in all circumstances, on 6 October 2005, means that there is nothing to prevent a repeated request to Belgium for her extradition. Even so, despite the efforts of the Turkish Ministry of Foreign Affairs,[29] Erdal has not been extradited to Turkey. Although she is now facing the prospect of being prosecuted in Belgium, she is currently at large.

14. The International Convention for the Suppression of the Financing of Terrorism, while bringing a solution for existing

[29] See http://www.ntvmsnbc.com/news/348241.asp

extradition treaties between States,[30] also clarifies the extent of international assistance by providing that States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy. The Convention includes many advanced provisions on the subject. According to article 12: '*1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.*

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

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[30] 'Article 11: *1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.*

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.'

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity

with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.'

Futhermore, in order to ensure a fair trial, the provisional transfer of detainees and convicts is also provided for in article 16.[31] With respect to the right to a fair trial, article 17 of the Convention reads '*Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that*

[31] 'Article 16: *A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:*

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with thepresent article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred'. For extensive discussion on the relationship between terrorism and the right to a fair-trial see BEŞE, *op. cit.*, pp. 178-182.

person is present and applicable provisions of international law, including international human rights law', while according to article 18 '*States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories*'. Therefore, the extent and scope of the obligation to assist is spelled out in detail in an effort to ensure full protection of human rights during prosecution.

15. On the other hand, in article 13 it is explicitly provided that for the purposes of this Convention, fiscal offences shall not constitute an obstacle to legal assistance or extradition.[32]

16. However, according to article 15, '*Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that persons race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that persons position for any of these reasons.*'

17. Finally, the UN Convention for the Suppression of the Financing of Terrorism is based on the understanding that not all member States of the United Nations will be party to bilateral or multilateral conventions regulating mutual legal assistance. It therefore, like similar UN Conventions, attempts to deal with all aspects of the prevention of financing terrorism.

In the fight against a terrorism which is increasing its violence by taking full advantage of new technologies, in addition to close cooperation between States, restricting the financial resources of terrorism is of major importance. It is vital that all member States of the Council of Europe ratify the European Convention on the Suppression

[32] 'Article 13 : *None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence*'.

of Terrorism and the amending Protocol. The fact that Belgium, which had accepted universal jurisdiction for certain crimes violating international humanitarian law,[33] is not a party to most conventions enacted under the Council of Europe constitutes an important defect in the fight against terrorism, as demonstrated by the Fehriye Erdal case. Since the close cooperation envisaged on a regional scale in the framework of the Council of Europe and the European Union[34] does not suffice by itself, it is vital that many countries enable the International Convention for the Suppression of the Financing of Terrorism to take effect within a short time. In the light of my current knowledge, this result does not seem impossible to achieve.

[33] See TEZCAN Durmuş, *Ulusal Mahkemelerin Evrensel Yargı Yetkisi ve Belçika Kuralı* (Universal Jurisdiction of National Courts and the 'Belgian Rule'), Hukuk Kurultayı 2004, Ankara Barosu yayını, Ankara, 2004, c. II, pp. 128-145.

[34] For extensive discussion of judicial cooperation mechanisms within the European Union, see ERDEM, *op. cit.*, pp. 292 *et seq.*.

The Future of the European Protection of Human Rights

Mark E. VILLIGER*

Everything flows, nothing stands still
HERACLITUS OF EPHESUS

Change alone is unchanging
DIOGENES LAERTIUS OF CILICIA

1. Introduction

Those who after the Second World War were involved in the creation of the 1950 European Convention on Human Rights (henceforth: the Convention) and its procedures, would no doubt view with incredulity today's business of the European Court of Human Rights (henceforth: the Court) in Strasbourg.[1] Again, whoever is looking at the Court's situation today, and in particular at its current problems, will immediately conclude that further substantial changes are inevitable.

This article takes up the topic of *"change"* for the Court and will attempt to look at possible future developments in the European protection of human rights in the years to come. However, in order

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[1] See among the "founding fathers" of the Convention in 1949 (regrettably, there were no "mothers"), *inter alia*, MM. AZARA, AKAN, ANTONOPOULOS, BASTID, EDBERG, HEDLUND, LANNUNG, ROLIN, TEITGEN, WOLLER and Sir DAVID MAXWELL-FYFE, i.e., all members of the Committee on Legal and Administrative Questions which prepared the first drafts of the Convention. See on the subject: Council of Europe (ed.), Collected Edition of the "*travaux préparatoires*" of the European Convention on Human Rights, 8 volumes (1974).

to fathom the future, a solid basis is required as the starting point, which must be the Court as it operates *today* (N. 4-17). Equally clearly, today's situation cannot be fully apprehended without looking at the past and attempting to understand why it was in the first place that the Court changed and developed as it did (N. 18-30). With the benefit of this hindsight the circle closes and it is possible to assess better the developments that the future may bring (N. 31- 55).[2]

2. The Court's current situation

The starting point is a *"photograph"*, albeit incomplete, of the Court's current situation, in particular its quantitative and qualitative relevance for European society, the specificities of its procedure, and its position in the hierarchy of laws.

(a) Largest and most important international court in the world

In *quantitative* terms, the Court can indubitably be seen as the largest international court in the world.[3] A glance at the statistics bears this out:

– in 2006 a total of 50'500 applications were lodged with the Court, and it disposed of 29'720 cases (among which there were 1'560

[2] See here L. CAFLISCH / M. KELLER, Le Protocole additionnel no. 15 à la Convention européenne des droits de l'homme, in L. CAFLISCH et al (eds.), Liber Amicorum 'LUZIUS WILDHABER. Human Rights – Strasbourg Views (2007) 91 ff.

[3] It is difficult to compare the size of courts. On a national level, for instance, the *Zurich District Court*, the largest in Switzerland, deals annually with some 30'000 cases, www.bezirksgericht-zh.ch, i.e., about the same number of cases as the Strasbourg Court. The following two figures were obtained by the authors by means of personal inquiries: The *Los Angeles County Superior Court*, considered the busiest court in the USA and with it in the world, has around 400,000 active cases. The Moscow Regional Court has 132 judges and in 2006 dealt with some 1'000 criminal and civil cases at first instance, 26'000 cases at second instance, and 3'400 at the supervisory review stage. By contrast, the *International Court of Justice* in The Hague had at the beginning of 2007 currently 13 cases pending before it, www.icj-cij.org. The *European Court of Justice* in Luxembourg had at the beginning of 2006 740 cases pending, www.curia.europa.eu.

final judgments).[4] However, over 95% of the applications are declared inadmissible;

– the Court has 46 judges and a Registry with some 520 persons;

– the Court serves 46 members States with a total of approximately 800 million persons.[5]

Perhaps most dramatically, there are currently about 100'000 (on 1 September 2007: 103'500) cases pending before the Court. These are the Court's main current worry, and the strongest incentive for change. In fact, according to the above statistics, the Court would require some three years just to deal with its backlog.

History has seen other courts which appeared to be drowning in cases. The German poet and author JOHANN WOLFGANG VON GOETHE (1749-1832) wrote about his time spent in 1772 as a young intern (*Referendar*) at the Imperial Chamber Court (*Reichskammergericht*) in Wetzlar in Germany which was the highest court of the Holy Roman Empire (*Heiliges Römisches Reich*) from 1495 - 1806. It appears that some 20'000 cases had accumulated before that court, yet it could only deal with 60 cases a year. Certain cases had been pending for over a hundred years! Judges, the parties and their lawyers were, upon pronouncement of the judgment, at times dealing with the case in third generation. And in the proceedings some parties received expert opinions from universities which had been ordered thirty years earlier.[6]

Also in *qualitative* terms it is difficult to exaggerate the Court's importance as an international judicial body. Its case-law has influenced the legal orders, in particular the legislation and the case-law, of all 46 member States and in the most varied respects: as regards a great range of civil and criminal law (e.g., the presumption of innocence,

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4 See www.echr.coe.int.

5 This figure, which is often mentioned, appears misleading. In fact, it is unnecessary to have residence in one of the member States of the Convention in order to file an application. "Any person" (Article 34 of the Convention) anywhere in the world may file an application, as in Article 34 of the Convention, as long as s/he is claiming to be a victim.

6 G. KOHLER, Entscheidungszwang, Unparteilichkeit, Fairness, Neue Zürcher Zeitung of 17/18 February 2007, p. 72.

the hearing of witnesses, representation by lawyers), in respect of the position of foreigners, as regards the prohibition of inhuman treatment and torture, property rights, issues of freedom of opinion, religious belief, etc. This position has been confirmed and strengthened by the fact that in all 46 Member States today the Convention guarantees may be directly invoked before the national courts either as national or as European law. Indeed, all dualist States in Europe have incorporated the Convention into their domestic law, thereby making the Convention part of *"their own"* law.[7]

These developments can be explained to a large extent with reference to the right to individual application enshrined in the Convention.[8] They also follow from the fact that the Court's judgments are endowed with *binding effect*,[9] and that the Committee of Ministers of the Council of Europe will examine whether member States have complied with their obligations in respect of these judgments – which in turn enhances their pertinence.

The Convention and its Court are indeed a rare plant on the international level. The various international tribunals in The Hague in the Netherlands – the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court – do not envisage individual applications against a State. The various treaty bodies established under the UN for the protection of human rights in Geneva and New York do not give binding judgments. The European Court of Justice in Luxembourg offers individuals protection only in limited cases (N. 47). Solely the Inter-American Convention for Human Rights provides for judicial application procedures and results similar to those of the Strasbourg Court.[10]

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7 See L. WILDHABER, The European Convention on Human Rights and International Law, in: The European Court of Human Rights 1998-2006. History, Achievements, Reform (2006) 196.

8 See throughout this article: N. 7-8, 20, 25 and 51-53.

9 Article 46 § 1 of the Convention.

10 It remains to be seen how the African Court of Human Rights will operate in practice.

(b) Right to individual application

Everybody has the right to file an application.[11] The sweeping nature of this right, treating all applicants equally, reflects its truly democratic character. Without doubt, this is one of the main pillars of the legitimacy of the Court – and indeed, the 2006 Report of the Group of the Wise Persons regarded it as beyond any discussion (N. 39). The Court is not some distant international human rights body in an ivory tower engaged in a "glass bead game" removed from reality.[12] The more than 50'000 persons who annually file an application with the Court (N. 4) come from all over Europe, and indeed the world, and confirm the inherent need in modern European society for such an institution. There is thus a constant dialogue between the Court and the European citizen – as well as with the 46 member States that set up the Court.

By filing these applications, applicants manifest their confidence in the Court. Their confidence derives, *first*, from the Court's broad jurisdiction: it may examine any domestic act – this may exceptionally even include statutes, i.e. general and abstract acts[13] – whose compliance with the Convention and its protocols the applicant contests. *Second*, the applicant's position is strengthened in that the Convention guarantees in Articles 2-18 and in the additional Protocols are self-executing and may be invoked by any person before the domestic courts of any Member State (N. 5). *Third*, the applicants' faith derives from the judicial nature of the Court's proceedings, which implies the strict equality of arms between the applicant and the Government at all stages of the procedure. *Fourth*, confidence is further boosted by the binding nature of the judgments of the Court.[14] In other words,

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[11] See Article 34 on Individual Applications: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto ....".

[12] The term is taken from HERMANN HESSE's *magnum opus*, Das Glasperlenspiel (1943).

[13] See, as a classical example, *Marckx v. Belgium*, where the Court found that the applicants were entitled to file an application against a statute "if they [ran] the risk of being directly affected by it", Series A no. 31, § 27.

[14] See Article 46 on the Binding Force and Execution of Judgments, para. 1 of which provides that "the High Contracting Parties undertake to abide by the final judg-

the applicants know: the Court and its judgments matter! Finally, *fifth*, the applicants' appreciation of the Court is confirmed by various audits in the past years, which have all acknowledged the Court's high professionalism and competence.[15]

(c) Procedures before the Court

The Court's two-tiered procedures are the result of decades of debate between Governments and civil society *inter se* and with the Court, and of concomitant probing, tinkering and experimenting (N. 18-30). It can be said that the procedures are well established and relatively complex. They comprise, respectively, the stages of admissibility (with a decision on admissibility or inadmissibility) and the merits (with a judgment on compliance with the Convention). However, in practice the Court aims today as far as possible at combining the two stages in order to streamline the procedure and thus to save time for an in-depth examination of meritorious cases. Thus, this combination of the two stages, originally envisaged as an exception, has meanwhile (if not *contra*, then *praeter legem*) become the rule.[16] The practice is as follows: 95% of the cases are declared inadmissible by a Committee of three judges or, exceptionally, by a Section Chamber sitting in a formation of seven judges. The remaining cases, i.e. those which *prima facie* raise an issue, will be communicated (as a rule by the Section President, exceptionally by the Chamber). Once the parties' replies have been obtained, there will be a joint examination of both the admissibility and the merits of the case. In other words, this joint examination will be the only occasion for many meritorious applications to be brought before the Section. On the whole, this internal filtering system has proved to be very useful and quite successful. The most complex and/or important cases are dealt with before the Grand Chamber, consisting of 17 judges. Finally, the judgments of the Court are implemented by the Committee of Ministers of the Council of Europe.

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ment of the Court in any case to which they are parties".

15 See e.g., the Report by Lord WOOLF, Review of the Working Methods of the European Court of Human Rights (2005); see above, N. 32-33.

16 See Article 29 on Decisions by Chambers on Admissibility and Merits, para. 3 of which provides that "the decision on admissibility can be taken separately unless the Court, in *exceptional* cases, decides otherwise" (*italics added*).

The following are some typical principles and elements of the proceedings before the Court:

– there is strict equality of arms between the parties, including the right for each party to reply to or comment on every document in the case-file;

– at the outset, the applicant may file an application on his own. After communication, the applicant must be legally represented, though the President may make an exception in this respect; [17]

– after admissibility the applicant's representative is expected to employ one of the official languages, though again exceptions are possible;[18]

– public hearings are rare, as in most cases the file is complete by the time it reaches the Court;

– judgments are only rarely given publicly, i.e., read out in open court (mainly those of the Grand Chamber, N. 10). They may be consulted on internet as from the day of delivery;[19]

– if the Court finds a violation in a case, it may also award compensation for pecuniary and non-pecuniary damages and for costs and expenses;[20]

– the Court has the possibility of issuing preliminary measures which are binding;[21]

– the Parties are free to reach a friendly settlement of the case as a result of which the application is struck off the Court's list of cases;[22]

– the Court employs a policy of complete transparency of the proceedings. Thus, it is possible for anybody to come to the entrance of the Court's building in Strasbourg and request to consult any documents of pending cases.[23] As this situation favours individuals living in the

17 See Article 36 of the Rules of Court.

18 See Article 34 of the Rules of Court.

19 *www.echr.coe.int.*

20 Article 41.

21 See *Mamatkulov et al. v. Turkey*, application no. 46827/99 etc., judgment of 4 February 2005 [GC], ECHR 2005.

22 Article 39.

23 Article 40 § 2 (during office hours); with the exception of the Court's deliberations

Court's vicinity, the Court's registry plans to scan all documents and make them available to the public at large on the internet.

(d) The Court's interpretation and application of the Convention

It is impossible here to summarise the Court's case-law which has developed over thousands of judgments and tens of thousands of decisions. Indeed, it has become a major difficulty to keep abreast with the Court's fecund productivity. The case-law is based on the Convention guarantees stipulated in Articles 2-14 and in the Protocols to the Convention (N. 26). It is true that these guarantees reflect the traditional, basic fundamental rights which are known to all European (written or unwritten) constitutions. Given the approximately 50'000 annual applications filed with the Court (N. 4), it does not come as a surprise that the topics raised and examined concern all aspects of modern European society: from issues of inhuman treatment and torture in Chechnya[24] to questions of terrorism,[25] religious education,[26] decisions on the use of embryos,[27] and the many aspects of the protection of minorities.[28]

The Court decides as a rule after the domestic constitutional and supreme courts have considered the matter (to the extent that such instances exist in a given case). It would be tempting, therefore, to compare the Court's functions as well as the density and scope of its examination with that of a European constitutional court. This is not incorrect, but too limited a view that does not do justice to the

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and documents concerning friendly settlements.

[24] E.g., *Isayeva and Others v. Russia*, application no. 57947/00, concerning disproportionate use of force and currently pending before Section I; *Imakayeva v. Russia*, application no. 7615/02, judgment of 09.02.07 of Section I, concerning disappearances.

[25] E.g., *inter alia*, *Al-Moayad v. Germany*, application no. 35865/03, inadmissible 20.02.2007, concerning the extradition of a Yemeni national from Germany to the US.

[26] E.g., *Folgero and Other v. Norway*, application no. 15472/02, currently pending before the Grand Chamber.

[27] See *Evans v. United Kingdom*, application no. 6339/05, judgment of 10 April 2007.

[28] E.g., the schooling of Roma in the Czech Republic; see *D.H. v. Czech Republic*, application no. 57325/00, currently pending before the Grand Chamber.

Court's broader judicial functions of safeguarding human rights in *all* circumstances – whether seen from the vantage point of a constitutional body or otherwise.

When the Convention provisions are formulated in a general manner, e.g. as in Article 3 ("no one shall be subjected to torture or to inhuman or degrading treatment or punishment) the Court has employed a certain liberty in giving meaning and scope to these provisions, for instance, by employing thresholds in distinguishing the notion of inhuman treatment from that of torture.[29] Regarding the right to respect for private life, guaranteed by Article 8 of the Convention, the Court has developed a consistent *corpus* of case-law on environmental issues.[30] On the whole, the Court relies on the principle of effective interpretation which lets it view the Convention as a "living instrument" to be adapted to the ever-changing circumstances of society.[31]

As the Court stated in *Artico v. Italy*, the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[32] This includes, *inter alia*, the principle of contemporaneous interpretation, which is also found in general international law (*effet utile*) and which can hardly be considered extraordinary: it would appear strange (and indeed cynical) if the Court were requested today to interpret the Convention in the light of the views of the founding fathers of 1950 (N. 1).

(e) Subsidiarity

An important aspect governing the Court's interpretation of the Convention (N. 13) – and indeed its whole outlook to the protection

[29] See, *inter alia*, *Selmouni v. France* [GC], application no. 25803/94, ECHR 2001-VII.

[30] See, *inter alia*, *Lopez Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C.

[31] See *Tyrer, v. United Kingdom*, Series A no. 26, § 31 ("present-day conditions"). See also F. MATSCHER, Wie sich die 1950 in der EMRK festgelegten Menschenrechte weiterentwickelt haben, in: S. BREITENMOSER et al. (eds.), Liber amicorum LUZIUS WILDHABER (2008) 437 ff, citing *ibid.* 438: M. SØRENSEN, Les droits inscrits en 1950 dans la CEDH ont-ils la même signifaction en 1975? (1975, mimeographed).

[32] Series A no. 37, § 33.

of human rights – is that of subsidiarity.[33] The basis for this principle can be found in Article 1 of the Convention.[34] It implies that the protection of human rights shall occur above all within the domestic sphere. It is up to States primarily to guarantee and implement the rights enshrined in the Convention in respect of all individuals within their jurisdiction. They shall do so at all levels of government. The function of the Convention, and the Court, remains to provide a minimum European standard. The latter can be raised by the Court to the extent that States themselves unify and further develop the domestic protection of human rights. Examples of subsidiarity within the Convention include:

– the obligation to exhaust domestic remedies (Article 35 § 1 of the Convention);

– the "fourth instance"-doctrine according to which the Court will only exceptionally examine the outcome of domestic court proceedings;[35]

– the margin of appreciation left to States in taking evidence according to Article 6 § 1 of the Convention;

– the margin of appreciation left to States in the examination of the proportionality of a measure according to para. 2 of Articles 8-11;

– the responsibility of States in the implementation of the judgments of the Court (Article 46 § 1 of the Convention).

As with every national constitutional court, subsidiarity requires the Court to exercise considerable judicial restraint in its functions, and it will hesitate to act as a court of first instance. The situation is, of course, different if, in a concrete case, the domestic courts have not examined the matter, and the Court must, for instance, decide

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[33] See on this topic more extensively: M.E. VILLIGER, The Principle of Subsidiarity in the European Convention on Human Rights, in: M.G. KOHEN (ed.), Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum LUCIUS CAFLISCH, 623 ff.

[34] This provision provides: according to which "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

[35] E.g. *Schenk v. Switzerland*, judgment of 24 June 1988, Series A no. 140, 29, § 45.

to undertake a fact-finding mission as a "first instance". The Court is called upon to examine not the constitutionality of a measure, even less its lawfulness,[36] but solely the compatibility of the contested act with the Convention.

Contrary to what might be expected, the principle of subsidiarity does not effectively water down the protection of human rights. On the contrary, it implies the obligation that *States* implement all necessary measures to safeguard human rights. Where States fail to do so, it is up to the Court to step in and provide the protection.

(f) Conclusion

The system established under the Convention for the protection of human rights as it exists today is quite unique. Like every national and international court, the Strasbourg body is regularly faced, *inter alia*, with issues concerning the consistency of its interpretation of the Convention[37] and the implementation of its judgments (though in respect of the latter, the Convention raises the particular difficulty that the States are called upon to execute the judgments against themselves). By far the most serious problem, however, is the Court's backlog of cases (N. 4).

3. The Court's evolution

Having highlighted some of the major features of the Court as it operates today, the question arises how these features evolved, and how the present structures differ from the Convention and its institutions as they were originally set up (N. 1). The contrast is indeed quite striking.

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[36] But see such exceptions as in Article 5 § 1: "Nobody shall be deprived of his liberty save in the following cases and in accordance with a procedure *prescribed by law*" (*italics added*).

[37] An internal body, the CLCP (Case Law Conflicts Prevention)-Board, has been set up within the Court which watches out for possible discrepancies in the case-law between the five Sections.

(a) Situation in 1950

At the end of the Second World War, Europe set about picking up the pieces of a devastated continent. In 1946, Churchill postulated at the University of Zurich in Switzerland and later in Strasbourg the "United States of Europe" and exclaimed: "therefore I beg you, let Europe arise".[38] The Council of Europe was founded in 1949. The same year, preparatory work commenced on the Convention and within an extraordinarily rapid time – 14 months – the European Convention on Human Rights was adopted (N. 1). It entered into force in 1953 after 10 States had ratified.[39]

The Council of Europe, as also the UN, has provided the framework for numerous other instruments (and concomitant supervisory, i.e. non-judiciary bodies) and institutions concerned with the protection of human rights in the larger sense: the 1961 Social Charter; the 1987 European Convention for the prevention of torture and inhuman or degrading treatment or punishment; the 1994 European Framework Convention for the protection of national minorities; the 1996 European Convention on the exercise of children's rights; the 1997 Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine; the 1997 European Commissioner for human rights; and the 2002 European Commission against racism and intolerance.[40]

The Convention was revolutionary in that it envisaged individuals filing a complaint against a Convention State.[41] Still, in 1950 the only

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[38] These words are inscribed on a wall in the Aula of Zurich University.

[39] *United Kingdom, Norway, Sweden, Federal Republic of Germany, Saar* (later a *Bundesland* of the *Federal Republic of Germany*), *Greece, Denmark, Iceland, Turkey* and *Luxembourg*.

[40] The gap between the 1961 Social Charter (and the 1964 fourth Protocol to the Convention, N . 26) and the 1987 Convention for the prevention of torture demonstrates that for over 20 years the Council of Europe appeared to express less interest in human rights. This changed dramatically with the increase of member States (N. 28) and the 1983 6th Protocol which abolished the death penalty (N. 26).

[41] See L. WILDHABER, De l'évolution des idées sur les missions de la Cour Européenne des Droits de l'Homme, in: M. G. KOHEN (ed.), Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum LUCIUS CAFLISCH, 639 ff: "[l]a Convention ... a été une réaction innovante, peut-être même révolutionnaire, aux génocides, aux atrocités et aux monstruosités de la

compulsory jurisdiction provided for related to inter-State applications. The right of individual application required further separate declarations by States. By 1954, the necessary number of States had accepted the competence of the European Commission of Human Rights as the "first instance" for individual applications and, in 1959, of the European Court of Human Rights as the "second".[42]

As its first preambular paragraph confirms, the Convention guarantees were inspired by, and based on, the 1948 UN Declaration of Human Rights. However, there was no previous example for setting up judicial machinery protecting the rights of individuals. An early model was the system established under the League of Nations for the protection of minorities,[43] and indeed, the Convention contains in Article 35 admissibility criteria which are derived *verbatim* from the League of Nations.

Clearly, foremost in everybody's mind was that the newly founded Commission and Court should once and for all prevent the atrocities committed by the Nazi *régime*. Even with the farthest stretch of imagination, the founding fathers could hardly have foreseen that the Court would eventually assume functions of a constitutional court relating to all aspects of modern European society.

The right of individual petition to the Commission and Court (N. 20) led to some apprehension among States of an abuse by individuals of the judicial machinery and that the Strasbourg institutions would overly encroach upon the sovereignty of States. The resulting procedure was a compromise containing three steps: (*i*) complex admissibility and meritorious stages before the Commission ensuring the most careful examination of a case, resulting in a final Report; (*ii*) the possibility of a final decision rendered as a rule by the Committee of Ministers of the Council of Europe, composed of the Foreign Ministers of the member States, by a two-thirds majority; and (*iii*) by the Court, but only if its jurisdiction had been accepted by the State concerned (N. 20).[44]

Second Guerre mondiale".

42 The terms "first" and "second instance" are not strictly correct, N. 22.

43 See generally on the subject P. THORNBERRY, International Law and the Rights of Minorities (1991).

44 Articles 20 ff of the 1950 Convention. See generally for the original Text: European Commission of Human Rights, Documents and Decisions 1955 – 1956

In fact, even where the State had accepted the Court's jurisdiction, there was no direct "appeal" from the Commission to the Court; the Commission itself had to decide whether to refer a case to the Court and soon came to represent the applicant, who had no standing, before the Court.[45] From the beginning and up to the present day, the Strasbourg institutions have declared a large part of the applications inadmissible (currently over 95% of all applications, N. 4). Still, even within these limits, it is striking that from the earliest days onwards the applicant has been treated on a par with the respondent Government. The Commission contributed considerably to this by envisaging itself as a quasi-judicial rather than an investigative body. Slowly but surely it crafted an extensive and widely-respected case-law, both on the Convention guarantees and on the conditions of admissibility.[46]

(b) Changes in the procedure from 1950-1998

Soon it transpired that the procedures were in part too complex, and occasionally even deficient. States gained confidence in the Strasbourg institutions. They saw that the latter respected their sovereignty, and that individuals did not abuse the right of application. Rather than amending the Convention itself, Member States concluded Protocols which (according to the principle *lex posterior derogat legi priori*) provided for various procedural changes:

– Protocol no. 2 of 1963 envisaged the possibility of the Court giving advisory opinions;[47]

– Protocol no. 3, also of 1963, did away with the Subcommission envisaged for certain investigative tasks of the Commission;

– Protocol no. 5 of 1966 revised the rules on election of Commission members;

– 1957 (1959).

[45] Article 48 of the 1950 Convention.

[46] See WILDHABER, Liber Amicorum CAFLISCH *ibid.* (footnote 42) 642: "la Commission ... se considérait de plus en plus comme un tribunal de première instance"; also *ibid.*: "une jurisprudence de plus en plus complète".

[47] Today's Article 47 of the Convention.

– Protocol no. 8 of 1985 provided for Chambers and Committees in the Commission, which were eventually taken over into the new Court;

– Protocol no. 9 of 1990 enabled applicants, who had "won" before the Commission,[48] directly to apply to the Court. Thus, before the Court, applicants no longer had to "hide" behind the Commission (N. 22). This protocol was not ratified by all States and became redundant with the entry into force of Protocol no. 11 (N. 24);

– for the same reason, Protocol no. 10 of 1992 did not enter into force; it did away with the two-thirds majority required for the Committee of Ministers' decision on Reports prepared by the European Commission of Human Rights (N. 22).

Most importantly, Protocol no. 11 of 1994, which entered into force on 1 November 1998, brought about a far reaching reform of the Convention resulting in the "new" Court as it stands and operates today (N. 3-17). States now accept the right to individual petition "automatically", i.e., together with the Convention as such (N. 20). The two-tiered system of Commission and Court was abolished and a single judicial instance was created, though its procedures continue to distinguish between admissibility proceedings (involving the task of "filtering" all applications) which was previously done by the Commission, and proceedings on the merits, leading to a judgment. When preparing the Protocol, fundamental differences arose between those States who insisted on a second degree of jurisdiction ("appeal") and others for whom one instance sufficed. As a compromise, the Grand Chamber was introduced (N. 9): While there is now only one Strasbourg Court, the institution of the Grand Chamber in fact enables internally a second examination of the case.

(c) Development of the right of individual application

An attempt to explain the continuing high number of individual applications filed with the Court can be found above (N. 7-8). At the

[48] I.e., their application had been declared admissible, and the Commission had prepared a final Report on their case according to Article 31 of the 1950 Convention.

outset after 1954, the situation was rather different. On the one hand, the right to individual application was then still made dependent on a separate declaration by the respondent State (N. 24). On the other, this right remained largely unknown to most European citizens and was mainly employed by persons remanded in custody or in psychiatric institutions.[49] The situation changed dramatically in the 1970's and early 1980's when British lawyers "discovered" the Convention and its complaints machinery and understood that the resulting judgment would be a useful tool to pursue the applicant's interests in the domestic sphere. With their well prepared briefs in occasionally spectacular cases, they set examples for lawyers in the other European States.[50] Today, some 50'000 applications are filed a year (N. 4) of which some 30% are presented by lawyers.

(d) Extension of guarantees; attempt at reducing them

With the changes in the Convention procedures (N. 23-24) States also recognised the need for the extension of the substantive guarantees. Not all extensions were as dramatic as Protocols no. 6 of 1986 and no. 13 of 2003 which prohibited the death penalty, respectively, in times of peace, and "in all circumstances". Other additional Protocols were:

– Protocol no. 1 of 1951 enshrining the protection of property, the right to education, and the right to free elections. Originally, these guarantees were discussed together with the Convention guarantees (N. 19). However, due to lack of unanimity, they were deferred until 1951 so as not to delay adoption of the Convention in 1950;

– Protocol no. 4 of 1963, *inter alia*, on rights of foreigners;

– Protocol no. 7 of 1984, enshrining, *inter alia*, the prohibition of *ne bis in idem*, and equality between spouses;

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[49] See, e.g., *Lawless v. Ireland (No. 1)*, Series A no. 1; *Neumeister v. Austria*, Series A no. 8; the "*Vagrancy*" cases (*de Wilde, Ooms and Versyp v. Belgium*), Series A no. 12.

[50] See, e.g., the following cases *v. the United Kingdom* between 1975 and 1981: *Golder*, Series A no. 18; *Handyside*, Series A no. 24; *Tyrer*, Series A no. 26; *Sunday Times (No. 1)*, Series A no. 30; *Young, James and Webster*, Series A no. 44; *Dudgeon*, Series A no. 45.

– Protocol. no. 12 of 2000, containing a free-standing, general guarantee of the prohibition of discrimination.[51]

Only exceptionally was there an attempt at "inverse" development. In 1988 in Salzburg a meeting took place of certain Government representatives and academics intending to set up an additional protocol which would have *reduced* the guarantees developed by the Court in its case-law.[52]

Participants' criticism, misunderstandings and warnings[53] were directed in particular against the Court's autonomous, and in their view extensive interpretation of the notion of "civil rights and obligations" within the meaning of Article 6 of the Convention. Not only did the prophesied calamities not come to pass, but these endeavours of limiting human rights came to a standstill (and in fact became obsolete) when the Berlin wall fell in 1989 and Europe aimed at extending human rights towards Central and Eastern Europe.

(e) Extension of the number of Convention States

Once ten States had ratified the Convention, it entered into force in 1953 (N. 19). Thereafter, ratifications by States occurred for some decades only gradually.[54] In 1974 France and Greece ratified (the latter after the end of the *régime* of the colonels), in 1978 Portugal (after the end of the SALAZAR *régime*) and in 1979 Spain (after the FRANCO

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[51] Article 14 of the Convention prohibits discrimination in respect of "the rights and freedoms set forth in [the] Convention".

[52] E.g. *Sporrong and Lönnroth v. Sweden*, Series A no. 234-B of 1982. See M.EISSEN, in F.MATSCHER (ed.), Verfahrensgarantien im Bereich des öffentlichen Rechts (1989) who at 157 criticised the entire project as amounting to a "protocol sous-tractionnel".

[53] See MÜNGER, in F. MATSCHER, *ibid.* (footnote 53) 29 ff, with particular reference to an interpretation of the Convention as intended by its founding fathers. At *ibid.* 171 f, he feared the "greatest difficulties" ("grösste Schwierigkeiten") arising from the Court's interpretation of Article 6; also VIGNY, *ibid. ibid.* 146: "la Cour a interprété *praeter legem* la notion de 'contestations sur les droits et obligations de caractère civil'".

[54] The term "ratification" is taken over from the website of the Council of Europe (www.coe.int). However, "accession" may appear more precise at least for those States which before 1950 were not among the negotiating States to the Convention and later became parties.

régime). In 1990, at the end of the Cold War, Finland ratified as the 24th and one of the last West European States.[55] After the fall of the Berlin Wall in 1989, Central and Eastern European States joined the Convention. The first two States were Hungary and Bulgaria in 1992, there followed many more States, *inter alia*, Russia in 1998 and Serbia as the 45th State in 2004. Monaco ratified as the 46th State in 2005.[56]

Western European States therefore had over 30 years to adjust their human rights to the international standards of the Convention. It is understandable that the new Central and Eastern European States equally required a certain time to do the same.

(f) Inter-State applications

Originally, the only compulsory machinery envisaged by the Convention was the inter-State application, i.e., an application filed by one member State against another.[57] (Individual applications required a separate declaration, N. 20). However, inter-State applications never acquired the popularity of individual applications (N. 25). So far 14, inter-State applications have been filed.[58] This low figure can at least partly be explained by the fact that to some extent the right to individual application has rendered inter-State applications obsolete. The procedures under the Convention differ partly from individual applications. Indeed, in these cases, the Court acts as first and last instance.

Most recently, on 26 March 2007 Georgia brought an inter-State application against Russia.[59] The application concerns events following

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55 But see the ratifications by Andorra in 1996 and Monaco in 2005.

56 On 11 May 2007 Montenegro joined the Council of Europe, and it is to be expected that it will in due course ratify the Convention. Otherwise, *Belarus* and the *Vatican* (*Holy See*) are the only European States which have not ratified the Convention.

57 See generally on the subject, S.C. PREBENSEN, Inter-State complaints under treaty provisions : the experience under the European Convention on Human Rights, Human rights law journal 20 (1999) p. 446 ff.

58 See the list in VILLIGER, *ibid.* (footnote 1) 118 ff; in addition *Cyprus v. Turkey* in 2001. Figures of the inter-State applications differ among the authors, as there are different ways of counting them.

59 See press release no. 190/2007 of the European Court of Human Rights of 27

the arrest in Tbilisi (Georgia) in 2006 of four Russian service personnel on suspicion of espionage. They were subsequently released by executive act of clemency. The applicant Government maintain that the reaction of the Russian authorities to this incident amounted to a pattern of official conduct giving rise to specific and continuing breaches of various provisions of the Convention and its Protocols. These breaches are said to derive from alleged harassment of the Georgian immigrant population in the Russian Federation together with widespread arrests and detention – of "at least 2,380 Georgians" – generating a generalised threat to security of the person and multiple interferences with the right to liberty on arbitrary grounds. The Georgian Government further assert that the collective expulsion of Georgians from the Russian Federation involved systematic and arbitrary interference with documents evidencing a legitimate right to remain, due process requirements and the statutory appeal process. In the Georgian Government's view, the closing of the land, air and maritime border between the Russian Federation and Georgia interrupted all postal communication, frustrating access to remedies for the persons affected.

(g) Conclusion

The above elements spanning the years 1950-1998 illustrate the long path which the Court has come since 1950. It is striking how the changes came about gradually but – so one may summarise – ever more quickly and further-reaching. The rhythm has clearly accelerated since the accession to the Convention by Central and Eastern European States. Obviously, the driving force behind all these developments has been the steady increase in the number of applications. While the many changes have helped the Court to raise its productivity dramatically,[60] it is still "chasing" applications, i.e., their number is ever growing and the reforms always come too late. Interestingly, there have been no attempts at tinkering with the Court's case-law (with one exception, N. 27). On the whole, it can be said that over the years the Member States have

March 2003.

[60] For instance, in 1992, the previous European Commission and Court of Human Rights dealt with altogether 16'384 applications; as compared to the 29'720 cases dealt with in 2006; see above, N. 4.

accepted even far-reaching changes. In fact, change has become part and parcel of the Convention. This gives us a clear signpost pointing the way to the Convention's future.

4. The Court's future

Having thus reviewed how the Court developed into the institution which it is today, we can now assess possible developments in the future. These developments are at the outset based on proposals made by Member States themselves and by eminent bodies and personalities. But as we peer further into the future, a broader view will be called for.

(a) Lord Woolf's Report

A first pointer to the future and how the Court should develop was provided by Lord Woolf's Report in 2005, which was intended as an audit on the Court's working methods.[61] Given the overwhelming problems facing the Court, it can be said that the Report was complimentary towards the Court and its Registry.[62] One of its main conclusions was that the Court's bottleneck lay not with the Judges but with the Registry and that it required considerably greater financial means to hire enough Registry lawyers.

The Report's recommendations are useful, though in fact they do not amount to major proposals. Even if taken together, they would hardly reduce the Court's case-load or speed up its procedures significantly. Thus, the Report proposes, *inter alia*:

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[61] Lord WOOLF et al., Review of the Working Methods of the European Court of Human Rights (2005).

[62] See *ibid.* (footnote 62) 15: "the Court has been extensively audited and reviewed, but despite possible 'audit fatigue' we found everyone we met to be open, welcoming and helpful. We were struck throughout by the dedication of staff, and their positive and pro-active attitude in the face of an ever-growing workload which would, in many situations, lead to low morale and apathy. The lawyers and judges of the Court are all extremely committed, and are constantly looking to innovate and improve, and try out new working methods. It is, in my view, to their credit that the Court continues to function in the face of its enormous and often overwhelming workload".

– the Court should deal only with properly completed application forms. Given the at times confused presentation of applications this would enable Registry staff to assess more efficiently whether or not a case appears meritorious and, accordingly, whether the application should be dealt with in Committee or in Chamber (N. 9). The difficulty with this proposal is that among the 800 million citizens of Europe – all potential applicants – knowledge of and experience in filling out forms will vary. Moreover, it will not always be the case that, for example, prisoners or hospital patients have adequate means at their proposal to prepare a formal application. To be too strict in admitting what may appear to be disorderly application forms would substantially reduce the right of access to the Strasbourg Court – most likely contrary to the meaning and scope of Article 34 which enshrines the right of individual application for every individual and non-governmental organisation.[63] Incidentally, this issue is an example where the Court's position in Europe can be seen as going beyond that of a pure constitutional court (N. 12);

– satellite offices should be established in key countries producing high numbers of inadmissible applications. The difficulty here is mainly to coordinate and ensure the same standards in all the satellite offices, and indeed uphold independence and impartiality. The proposals could also prove to be costly;

– greater use should be made of national ombudsmen and other methods of alternative dispute resolution be encouraged. This proposals, albeit useful, would not really reduce the Court's case-load;

– the Court should deliver more pilot judgments and then deal summarily with repetitive cases. The first such pilot case – *Broniowski v. Poland*[64] – opened the path for a settlement of a great number of claims of former proprietors. Such pilot judgments assume a large number of applications all raising the same issue. However, most applications filed with the Court are not "repetitive" in this sense;

– Judges should take case-files with them on holidays where they should work on them. While *prima vista* laudable, this proposal

[63] But see the alternative proposed below, N. 45.

[64] [GC], no. 31443/96.

overlooks that it is already a Herculean task for the Court's Central Office to organise the hundreds of thousands of case-files *within* the Court building[65] – let alone if the case-files are strewn over Europe. An alternative proposal would be for judges during the holidays to catch up on doctrinal writings on the Convention, or indeed on the Court's case-law.

(b) The 14th Protocol

The 14th Protocol of 2004 provides for procedural amendments in the tradition of many previous such instruments (N. 23-24). After the substantial reform of Protocol no. 11 (N. 24), this Protocol has also been named the "Reform of the Reform" – thereby implying that the gains of Protocol no. 11 have meanwhile been overtaken by the continuing increase in applications. So far, 45 of the 46 Member States to the Convention have ratified it, and it will enter into force three months after ratification by the last State, Russia. The Protocol envisages various means to streamline and accelerate the Court's procedures.

One change will introduce the single Judge (in addition to the Committee of three Judges, the Section Chamber of seven Judges and the Grand Chamber of 17 Judges; N. 9) who will henceforth undertake the functions of the Committee of three Judges, i.e., rejecting cases which do not comply with the various admissibility conditions.[66] The single Judge will be assisted by a non-judicial Rapporteur, i.e., a senior Registry lawyer who will supervise the preparation of cases to be brought before the single Judge. There will thus be a multiplication of judicial efforts. Moreover, the Committee of three Judges will be authorised to declare cases admissible and even find a violation of the Convention "if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court".[67] These two substantial procedural changes, it is estimated, should increase the Court's output by about 25 %.

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[65] The 95'750 pending applications (see above, N. 4), and numerous applications dealt previously by the Court.

[66] New Articles 26-27 of the Convention.

[67] New Article 28; § 1(b) of the Convention.

A further change introduces a new ground of admissibility, i.e., the Court may declare an application inadmissible if "the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."[68] This new ground of admissibility, which might even exclude applications otherwise leading to a Convention violation, has a classic filtering function. It allows the Court to devote more time to "important" cases, seen both from the perspective of the applicant and the European public order. The two safeguards – respect for human rights and the previous examination by a domestic tribunal – ensure that cases which warrant an examination of the merits are not rejected. In order to enable the Court carefully to reflect on this new admissibility condition, it may be applied only by the Chambers and the Grand Chamber (and not by the single Judge and the Committees) for two years after the entry into force of the 14th Protocol.[69]

It is as yet unclear what gains in productivity this new admissibility criterion will enable – possibly another 5-10 %. In qualitative terms, however, it may be assumed that the criterion will have a powerful symbolic function by further strengthening the conviction among States and indeed among the Judges themselves that the Court should only deal with "important" cases. Incidentally, here lies the key, it is proposed (N. 53), to further substantial reforms of the Court's procedures.

Among various other changes, the Protocol provides the Committee of Ministers, when implementing the judgments of the Court (N. 9), with the possibility of obtaining two kinds of rulings from the Court: one when a question of interpretation of the judgment arises, the other when a State refuses to abide by a judgment. The Protocol further emphasises friendly settlements[70] and envisages the possibility of the European Union acceding to the Convention (N. 47-49).[71] It extends Judges' terms of office to a single period of nine years.[72]

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68 New Article 35, § 3 of the Convention.

69 See §§ 77-85 of the Explanatory Report to the 14th Protocol.

70 New Article 39 of the Convention.

71 New Article 59, § 2 of the Convention.

72 New Article 23, § 1.

Clearly, the 14th Protocol will accelerate the proceedings and increase the Court's output by about 30% (N. 35-36). However, judging by past experience (N. 30), the benefits could again be cancelled within the next years if the number of applications continues to grow. On the whole, the impression remains that Member States were well-intentioned when aiming at reforming the Convention, but in fact tinkered with procedural elements and did not substantially alter the Court's structure.

(c) Report of the Group of Wise Persons

In 2005 the Member States decided to set up a Group of Wise Persons to consider the long-term effectiveness of the Convention supervisory mechanism. The Group, comprising 11 personalities, finalised its Report in 2006.[73] It proceeds from the assumption that the 14th Protocol will enter into force (34-38). In fact, the Group was asked to go beyond the measures of reform proposed therein, while preserving the basic philosophy underlying the Convention (N. 51-53). Interestingly, the Group found that the institution of the individual application was beyond discussion.[74] The following is a review of some of the proposals made.

At the outset, the Group proposed to make reforms of the Convention more flexible, without requiring each amendment of the Convention to be ratified by all Member States.[75] This appears

[73] Report of 10 November 2006, document of the Committee of Ministers of the Council of Europe: SAGES(2006) 06 EN Def. See also the Opinion of the Court on the Wise Persons' Report, adopted by the Plenary Court on 2 April 2007.

[74] See § 42 of the Report: "[t]he Group also decided not to pursue the idea of giving the Court a discretionary power to decide whether or not to take up cases for examination (a system analogous to the *certiorari* procedure of the United States Supreme Court). It felt that a power of this kind would be alien to the philosophy of the European human rights protection system. The right of individual application is a key component of the control mechanism of the Convention and the introduction of a mechanism based on the *certiorari* procedure would call it into question and thus undermine the philosophy underlying the Convention. Furthermore, a greater margin of appreciation would entail a risk of politicising the system as the Court would have to select cases for examination. The choices made might lead to inconsistencies and might even be considered arbitrary."

[75] See §§ 44-50 of the Report

indeed to be a most useful suggestion which neatly corresponds with the steadily accelerating rhythm of reform (N. 30). Thus, while the substantive rights or the principles governing the judicial system should not come under the proposal,[76] provisions relating to the operating procedures of the Court could be amended by unanimous resolution of the Committee of Ministers and with the approval of the Court.

Another proposal of central importance relates to the establishment of a new judicial filtering mechanism.[77] While the previous two-tiered system of Commission and Court would not be revived (N. 24), a new Judicial Committee would deal with all cases which can be decided on the basis of well-established case-law of the Court allowing an application to be declared either manifestly well-founded or manifestly ill-founded. This takes up the model of the 14th Protocol as regards the Single Judge and the Committee (N. 35; and indeed, experience would have first to be gathered) and elevates them to a separate judicial body, albeit institutionally and administratively under the Court's authority. The Judicial Committee would thus relieve the Court in particular of inadmissible cases and enable it to focus on significant cases.

An interesting new proposal concerns the transferring to the national legal authorities the Court's function of assessing how much just satisfaction should be awarded to an applicant according to Article 41 of the Convention, if a violation is found.[78] Of course, the Court or, as appropriate, the Judicial Committee (N. 41) would have the power to depart from this rule and give its own decision on just satisfaction where such a decision was found to be necessary. If transferred to the State (preferably accompanied by appropriate guidelines issued by the Court), the domestic authorities would discharge their obligation to award compensation within the time-limit set by the Court. The amount of compensation should be consistent with the criteria laid

[76] See, e.g., § 49 of the Report, which excludes the following provisions from the proposal: Article 19 (Establishment of the Court); Article 20 (Number of judges); Article 21 (Criteria for office); Article 22 (Election of judges); Article23 (Terms of office and dismissal); Article 24 § 1 (Registry); Article 32 (Jurisdiction of the Court); Article 33 (Interstate cases); Article 34 (Individual applications); Article 35 § 1(Admissibility criteria); Article 46 (Binding force and execution of judgments); Article 47 (Advisory opinions); Article 51 (Privileges and immunities of judges).

[77] See §§ 51-65 of the Report.

[78] See §§ 94-99 of the Report.

down in the Court's case-law. The victim would be able to apply to the Court to set aside the national decision by reference to those criteria, or where the state failed to comply with the time-limit set for determining the amount of compensation.

Even though the proposal to "outsource" these functions raises various questions (in particular whether it will speed up the process), it is ingenious in that it puts a finger on one of the Court's duties which occupies a sizable part of its time yet does not appear to lie at the core of its judicial functions, i.e., establishing the precise financial amount of just satisfaction. An alternative could also lie therein in the transferral of these functions to the Committee of Ministers of the Council of Europe. The proposal also opens the door to transferring other functions, e.g., the negotiation of friendly settlements to the European Commissioner of Human Rights.

Further proposals in the Wise Persons' Report include:

– enhancing the authority of the Court's case-law in the States Parties by means in particular of dissemination of the Court's case-law (a proposal which has sadly been overlooked in the past decades);[79]

– enabling national courts to apply to the court for advisory opinions on legal questions relating to the interpretation of the Convention and the protocols thereto;[80]

– improving domestic remedies for redressing violations of the Convention, a corollary of the principle of subsidiarity (N. 14).[81] Indeed, at the San Marino Colloquy on the Wise Persons' Report in March 2007, the proposal was raised to adopt a separate Council of Europe Convention (apparently – and interestingly – going beyond the traditional use of Protocols to reform the Convention, N. 23) stipulating obligations for member States as regards the availability, functioning and effectiveness of domestic remedies, in particular concerning excessive length of proceedings;[82]

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[79] See §§ 66-75 of the Report.

[80] See §§ 76-86 of the Report.

[81] See §§ 87-93 of the Report.

[82] See the summary of this proposal in the paper prepared by MAUD DE BOER BUQUICCHIO, Deputy Secretary General, on the "Synthesis of the Colloquy".

– encouraging the Court to make the fullest possible use of the "pilot judgment" procedure (N. 33);[83]

– encouraging recourse to friendly settlements;[84]

– extending the duties of the European Commissioner for Human Rights.[85]

(d) A possible 15th Protocol

The proposals of the Group of Wise Persons are of a non-binding character, indeed, they still need to be formulated in legal terms. Their implementation would require a treaty text which in all likelihood would be the 15th Protocol.[86] That Protocol would include whatever proposals of the Wise Persons, Member States, the Court and civil society (N. 52) commend support. In addition, it would be an occasion to include further reform proposals which, for whatever reasons, have so far not been addressed.

CAFLISCH and KELLER have suggested as a topic for the 15th Protocol to abolish the Grand Chamber (N. 9).[87] The proposal certainly sounds tempting. With respect, however, this would overlook that the Court's enormous impact on the legal orders of all member States occurs mainly *via* its most thoroughly reasoned judgments, which indubitably are those of the Grand Chamber. The Sections/Chambers were never intended to deal with such cases, and have accordingly not been endowed with the procedures to deal with them. Abolishing the Grand Chamber would imply that each of the five Sections could, in future, deal with "Grand Chamber"-type cases – with all the risks of the diverging case-law. Indeed, such major decisions could, then, be issued by four judges out of the 46 judges of the Court, i.e., a majority of the seven judges of a Chamber! Above all, the Grand Chamber was a lynchpin in the compromise reached by States when setting up the

[83] See §§ 100-105 of the Report.

[84] See §§ 87-93 of the Report (with a further proposal above, N. 42)

[85] See §§ 109-113 of the Report.

[86] It is unlikely that further substantive guarantees will be codified in an additional protocol in the meantime (see above, N. 26-27).

[87] *Ibid.* (footnote 3) 107 ff.

11th Protocol (N. 24).[88]

A proposal not mentioned in the Wise Persons' Report and meriting further examination would be in particular the obligation for the applicant, when filing an application, to be assisted by a lawyer and to pay court fees.[89] Indubitably the former idea would facilitate the Court's work since it would be assumed that lawyers file well-prepared applications which could be examined more speedily by the Registry.[90] Indeed, already today applicants are required to be assisted by a lawyer once a case has been communicated to the respondent Government.[91] The latter idea would provide a certain check on frivolous applications. It is true that both proposals would imply a certain "chilling effect" on the right to individual application as in Article 34 of the Convention (N. 7-8). There is even a danger that it could substantially weaken the right to individual application, since among the potential 800 million applicants in Europe not all can afford a lawyer and/or to pay the court costs. However, the Court's President or one of its Section Presidents would be entitled to provide for exceptions and waive the requirements of court costs or of a lawyer upon request in a particular case.[92]

Finally, a proposal for the 15th Protocol concerns the Court's power to prioritise cases, i.e., to decide that certain cases merit speedy treatment whereas others would have to wait in particular until the "important"

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88 As a further proposal, the authors suggest expanding the notion of "abusive applications" within the meaning of Article 17 of the Convention, *ibid.* (footnote 3) 111-112. Currently, the Court applies this ground of inadmissibility sparingly (e.g. where applicants aim at tricking the Court), whereas CAFLISCH and KELLER proceed from "hundreds, even thousands" of frivolous applications ("les requêtes frivoles se comptent par centaines voire milliers", *ibid.* 111). This overlooks the wide spectrum of the backgrounds of applicants and the difficulties and potential misunderstandings of aiming at interpreting multicultural differences in the manner of filing applications. The possibility of declaring these applications manifestly ill-founded, as the Court does today, appears quite adequate and would spare the Court a further item of jurisdiction and also not further implicate the Registry.

89 This proposal is also put forward by WILDHABER, Liber Amicorum CAFLISCH *ibid.* 651. See *ibid.* 649-653, for a large number of other possible proposals.

90 This would to some extent cover Lord WOOLF's proposal that the Court should deal only with properly completed application forms; see above, N. 33.

91 See Rule 36 § 3 of the Court's Rules of Procedure.

92 As s/he can already do today according to Rule 36 § 3 of the Court's Rules of Procedure.

cases had been dealt with.[93] Currently, a Working Group in the Court is examining this proposal and in particular its feasibility within the current Convention mechanism. Of course, this proposal would assume that a list of criteria is prepared which carefully defines and establishes the grounds of prioritisation. Naturally, the Court must enjoy a certain leeway in prioritising certain cases. The problem here is that with the growth of the number of "important" cases, the waiting period for the "other" applications could soon become agonisingly long. Moreover, distinguishing one group from the other would require careful study of all incoming case-files which would lay an additional burden on the Court immediately after an application had been filed. On the whole, the proposal calls into question the principle that individuals filing applications are treated equally before the Convention.

(e) Relations with the European Union

Looming on the Court's horizon are the potentially competing endeavours of the European Union at protecting human rights.[94] Interestingly, the European Union Treaty only recently stated in its Article 6 § 2 that "the Union shall respect fundamental rights, as guaranteed by the European convention on Human Rights ... and as they result from the constitutional traditions common to the Member States as general principles of Community law". As the early European treaties did not expressly mention human rights, the European Court of Justice in Luxembourg filled this gap by formulating its own doctrine of the protection of fundamental rights as an unwritten part of the Community legal order, e.g., by considering that Community law (and with it unwritten fundamental rights) overrode national constitutional

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[93] See also the proposal by WILDHABER, Liber Amicorum CAFLISCH, *ibid.* (footnote 42) 652, to deal only with cases concerning "*le noyau des droits fondamentaux*" (*original italics*).

[94] See for paras. 47-49 the following selection among the extensive literature: J. FAIRHURST, Law of the European Union, 6th ed. (2007); K. DAVIES, Understanding EU law, 3rd ed. (2007); C. BLUMANN, Droit institutionnel de l'Union européenne (2005); M. HERDEGEN, Europarecht, 9th ed. (2007); A. ARNULL, The European Union and its Court of Justice, 2nd ed. (2006); S. BREITENMOSER, Praxis des Europarechts: Grundrechtsschutz (2006); P. MANIN, L'Union européenne: institutions, ordre juridique, contentieux, 7th ed. (2005).

law. These fundamental rights were formulated by having recourse to general principles of law common to the Member States. However, the European Court of Justice offers protection only in two respects, namely concerning community acts directly affecting individuals on the European level; and by way of preliminary rulings in respect of national cases submitted to the Court for examination of their compatibility with European law.

In its case-law, the Court of Justice has developed in particular the freedom of expression, the right to privacy, the right to property, the right to a fair hearing, the freedom to pursue one's trade or business (the so-called commercial freedom), the principles of equality and of non-discrimination (including gender equality and non-discrimination on the ground of nationality), and the principle of proportionality.

The Charter of Fundamental Rights of the European Union of 2001 now brings together into a single text a range of civil, political, economic and social rights of EU residents. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law. The Charter is divided into six sections, dealing with dignity, freedoms, equality, solidarity, citizens' rights and justice. The charter draws, *inter alia*, from the European Convention on Human Rights, the case-law of the Court of Justice (N. 47), national constitutional traditions and the Council of Europe's Social Charter. It goes beyond traditional human rights and addresses also modern issues such as bio-ethics and protecting personal data. The Charter furthermore gives the European Union the possibility to accede to the European Convention on Human Rights which is also envisaged in the 14th Protocol (N. 37).

The status of the Charter is currently uncertain. It was proclaimed at an EU summit in Nice in 2000, though it is not part of the EU Treaty. It was incorporated as part II of the draft Treaty establishing a Constitution for Europe, though this text has not yet been adopted.

After proclaiming the Charter in 2000, the European Council suggested examining the need for an Agency of human rights. In 2003 the European Union and its member States decided to extend the scope of the then European Monitoring Centre on Racism and Xenophobia

and to convert it into a Fundamental Rights Agency which would act within the general operating framework of the Community agencies on the basis of the Charter of Fundamental Rights. While the (substantial) budget of the Fundamental Rights Agency has already been settled, its precise role has yet to be defined and a legal basis found herefor. The Agency shall collect, update and analyse – by means "national focal points" in each Member State – information on how Community regulations and policies affect fundamental rights. As a result, it will, also in its annual reports, identify the situation in the EU institutions and in the various States. It has the right to formulate opinions to the Union institutions and to the Member States when implementing Community law.[95] The Agency took up its functions in 2007. The Agency aims at close co-operation with the Council of Europe in order to avoid overlapping activities, in particular by developing mechanisms to ensure complementarity.[96]

An appraisal of this situation leads to the following conclusions. For the time being, the new protection system established in the European Union will no doubt peacefully co-exist alongside the Court and the Convention. It can be imagined that sooner or later the broader issue of the *dual* protection of human rights in a single Europe will become topical, particularly if the European Union does *not* become a Member to the Convention.[97] It is true that neither the European Court of Justice nor the Fundamental Rights Agency may at present entertain applications filed by individuals. However, the European Union's achievements to date (e.g., introducing a new currency, extending Membership to the Central and Eastern European States) appear so vast and enormous that the introduction of a system of individual applications would not, in comparison, appear as an insurmountable obstacle.

As a result, the European Union remains a constant reminder to the Strasbourg Court to produce sterling judgments and indeed forever more to outdo itself – in order to prevent any calls for another, more

[95] See on this the press communiqué of the European Council on 5 December 2006.

[96] Press communiqué, *ibid.*

[97] *Inter alia*, if the 14th Protocol does not enter into force, see above, N. 37.

"efficient" human rights court in Europe.

(f) Abolishing the right to individual application, and other fundamental proposals

The general view assumes that the number of incoming applications will continue to grow in the future.[98] Will even more drastic measures than the proposals so far (N. 32-46) be required in the long run? As was pointed out above (N. 39), the Group of Wise Persons found that among the many possible proposals for reforming the Convention, the institution of the individual application was beyond any discussion. However, WILDHABER, argues that the increasing backlog of cases before the Court in fact erodes the right to individual application, for which reason he has advocated a system whereby its judges should "choose" the applications they wish to deal with – not unlike the *certiorari*-procedure employed by the US Supreme Court.[99]

With every respect, this author cannot agree. It is true that applications raising complex issues of fact and law today require a number of years until they are dealt with by the Court. It should nevertheless be pointed out that a considerable number of applications – in particular the clearly inadmissible ones – are in fact dealt with relatively speedily by the Committees (and occasionally even the Chambers),[100] often within 18 months or less. More importantly, it

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[98] WILDHABER, Liber Amicorum CAFLISCH *ibid.* (footnote 42) 651: "rien ne permet de tabler sur une stagnation du nombre des requêtes". The present author rather predicts a stabilisation of their number.

[99] See WILDHABER, *ibid.* (footnote 42) 651: "Un *système de "certiorari" ou d'autorisation de former un recours* laisserait à la Cour une grande liberté dans le choix des affaires à traiter. C'est précisément pour cette raison que les défenseurs d'un droit de recours individuel sans réserve critiqueraient probablement cette proposition. Or, aujourd'hui déjà, la Cour n'est plus en mesure de venir à bout de la multitude d'affaires dont elle est saisie ... Il serait donc souhaitable, ou du moins envisageable, de faire figurer un tel système (limité a certaines garanties prévues par la Convention ou à certaines catégories de problèmes) dans un train de mesures global" (*original italics*).

[100] See, e.g., the Chamber cases *Backzowski et al. v. Poland*, no. 1543/06, judgment of 3 April 2007, concerning Article 11, filed on 16 December 2005; and *Kozyyakova and Gureyev v. Russia*, no. 16108/06, judgment of 24 April 2007, concerning non-enforcement of a judgment, filed on 10 March 2006.

is recalled that the applicants themselves exercise, and thus patently prefer, their right to individual application. They would not otherwise be filing applications at the rate of 50'000 a year (N. 4). Above all, abolishing individual applications is so drastic a proposal that it goes beyond its purported (and "innocent" aim), i.e., further reducing the number of incoming applications before the Court. In particular, the Convention would completely lose its democratic legitimacy which is its current backbone (N. 7-8). Put differently, it is difficult to imagine that the right to individual application could be abolished but that the Court's position and functions in Europe could continue as if nothing had happened. The Court is a rare plant (N. 6), and the proposals for reform should strengthen, not destroy it.

To this author, a long-term solution going beyond those put forward so far would lie in raising the threshold of the admissibility for applications. Thus, individuals should continue to be able to file applications, though the Court should increasingly be able to declare applications inadmissible which do not attain a certain threshold of relevance. The proposal of the 14th Protocol – according to which the Court shall declare inadmissible an application if "the applicant has not suffered significant disadvantage" (N. 36) – could serve as a useful basis. Such admissibility conditions have been employed by the German Federal Constitutional Court for many years.[101] They differ from the proposed "pick-and-choose"-procedures (N. 51) in that the right to individual application remains intact. The applicant will still have his or her "day in court" (however brief), and is thus reassured that the Court has examined his application, even if it has been declared inadmissible – just as German complainants are aware that the Federal Constitutional Court (however briefly) has looked at their constitutional complaints.

In order to ensure the Court's position in Europe, it would appear

[101] According to subparas. 2(a) and (b) of Section 93 a of the German Federal Constitutional Court Act (*Bundesverfassungsgerichts-Gesetz*) a constitutional complaint (*Verfassungsbeschwerde*) is only accepted "(a) insofar as it has fundamental constitutional significance; (b) if this [i.e. the acceptance] is indicated in order to enforce the rights referred to in Article 90 § 1 above [i.e., *inter alia*, the basic rights referred to in the Basic Law/*Grundgesetz*]; this can also be the case if the complainant suffers especially grave disadvantage as a result of refusal to decide on the complaint".

essential for *civil society* to become more involved in future reforms. Currently, various NGO's are regularly invited to comment on any proposed changes, e.g. draft Protocols – but only as a matter of courtesy. However, the final decision on any changes remains with the Member States who adopt the Protocols and eventually ratify them (N. 23-24). In this respect, the Convention remains truly an instrument of traditional international law. Given the Convention's singular outreach – it concerns individuals as much as States – it would be appropriate that civil society be accorded a formal role in the reform process.

(g) Will the Court celebrate its 100th anniversary?

While the Convention came about in 1950 as a reaction to the Second World War and its atrocities (N. 21), States and their societies have meanwhile changed and in particular opened towards Europe. So, too, has the Court changed in how it views its own role: Today it has become a faithful mirror of European society. This is due, on the one hand, to the large number of applications filed annually with the Court (N. 4) which give it a very good picture of the developments in the 46 Convention Member States, and, on the other, to the considerable influence of its judgments in the legislation and the case-law of the Member States themselves (N. 5). Thus, whether the Court will celebrate its 100th birthday in the year 2050[102] will largely depend on the situation of European society in the future.

It is true that all signs indicate that integration will continue, though of course one cannot exclude stagnation or, however improbable, disintegration (which would call in question an important basis of the court as it stands today). On the assumption, however, that integration does continue (and the competing issues with the European Union are resolved, see above N. 47-50), the Court surely will play an important role in Europe. It will continue to serve as a focal and reflection point for all aspects of European society: its needs, its difficulties, its values, its relations to other continents and societies, its views and its assessment of the past and its appreciation of the future. If the European States were

[102] This is the 100th anniversary of the Convention. The Court itself commenced operating in 1959 (see above, N. 20).

collectively to approach statehood even more closely, the functions of the Strasbourg Court, themselves increasingly constitutional (N. 12), would be taken over by a constitutional court. Change alone is certain: the 100th anniversary will again see a different Court – just as today's Court differs starkly (though not completely!) from that conceived 57 years ago. And by 2050 the Court will have ensured, together with other institutions, *100 years' of democracy in Europe*!

5. Conclusion

Given the many changes in its procedures so far and probably still to come, it is doubtful whether the Strasbourg Court will in fact drown. What is most likely to happen in practice is that the procedures will last ever longer, and that there will be ever more frequent calls for reform. The bottom line is, however, that the *Court's problems are those of success, not of failure.*[103] There is nothing to indicate that the Court has severe inherent and structural difficulties such as would hinder its further development and reform. It is suggested that the Court will not be remembered for having broken record after record and for having dealt with 100'000 or more cases each year. It should be remembered for having combined sterling case-law with the right to individual application: a challenge comparable to that facing the founding fathers of the Convention in 1950.

[103] This is a formulation taken over from the former President of the Court, Luzius Wildhaber, which he employed orally at a meeting in the Court in January 2007.

Weltgesellschaft, Globalisierung und gesundheitliche Volksversorgung*

Günsel KOPTAGEL- ILAL**

Der Begriff von "Weltgesellschaft" erweckt Hoffnungen auf ein Leben wo Genuss und Leid von allen Menschen gemeinsam erlebt werden, wo alle Menschen von den Vorteilen der Fortschritten gleichberechtigt profitieren und für die Abschaffung deren Nachteilen gemeinsam sorgen werden, wo, mit sinnvoller Kommunikation in den zwischenmenschlichen Beziehungen, das gegenseitige Fremdgefühl und die Feindseligkeiten vermindert werden und eine kollektive Kreativität aufgepeitscht wird, so dass ein Weltwohlstand zustande kommen und den Weg zum Weltfrieden bahnen wird. Kurzum: Wo die Lebensqualität aller Menschen auf der Welt verbessert wird!

So wie wir es verstehen, oder verstehen möchten, ist es, theoretisch gesehen, das Ziel der "Globalisierung". Nun aber, in Betracht auf den gegenwärtigen Entwicklungzustand, ist zu bedenken ob diese eine realisierbare Hoffnung oder ein Trugbild ist. Ob sie zur weiteren Ausbeutung, bzw. Enttäuschung der unterprivilegierten Menschengruppen die Türen breiter öffnen wird.

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Obwohl die Herstellung einer "Weltgesellschaft" immer ein sehnenswertes Ziel war, ist man, seit Beginn der Diskussionen über Globalisierung, darauf ambivalent eingestellt. Da heute die "Globalisierung" genannte Entwicklung sich vor allem in der Weltwirtschaft erweist und nicht nur auf die Entwicklung der technischen Mittel, sondern auch auf dem Siegeszug der Liberalisierung des Geldverkehrs und des Kapitalverkehrs beruht, bestehen, besonders in Ländern der dritten Welt, bedenken über deren weitgespannten Einfluss. So sagt z.B. die indische Ekologin Vandana Shiva: "Globalisierung der Wirtschaft ist eine neue Art von gesellschaftliche Kolonisierung der armen Länder und der Armen in den reichen Länder".[1] Der kanadische Kommunikationstheoretiker McLuhan hatte bereits im Jahre1962 von einer "Global Village" (Globaler Dorf)[2] geredet. Nun fragt sich der englische Soziologe Anthony Giddens (Direktor der London School of Economics), ob durch die Globalisierung, wie sie im Gange ist, die Global Village eine "Global Pillage" (d.h.globale Plünderung) sein wird.[3]

Zunächst, verläuft der Globalisierungsprozeß, mit Einschaltung der Weltbank, vorwiegend auf die wirtschaftliche Ebene nach dem von westlichen Wohlstandsländern entworfenen Modell der Wirtschaftsstrategie wo Liberalisierung des Handels und Privatisierung der staatlichen Unternehmungen in den Vordergrund gerückt wurde. Auch die gesundheitlichen Versorgungssysteme sind in diesem Prozess eingeschlossen und es ist vorgesehen das Gesundheitswesen in dieser Richtung umzubauen. Während diese Liberalisierung die Produktivitätserhöhung der großen Unternehmen ermöglicht, führt diese ökonomische Globalisierung langsam zu einem ökonomischen Kompetenzverlust der nationalen Regierungen.[4] Damit besteht die Gefahr der Verschwächung staatlicher soziale Sicherungssysteme die sich auch auf die gesundheitliche Versorgungsmaßnahmen verbreitet. Die Gesundheitsversorgung der Bevölkerungsschichten mit begrenztem Einkommen wird dadurch erheblich erschwert. Das weltweit verbreitete

1 One World Net:http://www.oneworld.org./guides/globalisation/index.html
2 Martin M (1999) The pearl of success,Shell World, July 1999,26-29.
3 Giddens A (1999) Local colour on a global landscape, Shell World,July 1999, 10-12.
4 Schmidt H (1999) Globalisierung,Stuttgart, Siedler DTA.

Angebot von Produkte der Hochtechnologie ist ohne Zweifel ein Gewinn für die Medizin und erleichtert die ärztliche Tätigkeit. Wenn aber diese Mittel wie Handelsware in die Praxis eingeführt werden und ihre Anwendung mit allen handelsüblichen Methoden propagiert wird, besteht die Möglichkeit dass ein, sich zügellos verbreitende, Gesundheitsmarkt zustande kommt und am Endeffekt ausbeuterisch wirkt. Die Zeichen einer solchen Entwicklung sind in der Türkei bereits spürbar.

Seit einigen Jahren wurden in den Großstädten zahlreiche Privatkrankenhäuser, Privatpolikliniken und Laboratorien geöffnet. Die sind alle mit vielen medizinischen Hi-Tech Apparaten ausgestattet und leider funktionieren wie rein Handelsunternehmen. Die Zahl der MR-Geräte in Istanbul sind mehr als die Zahl der MR-Geräte im ganzen Großbritannien und die Zahl dieser Geräte in Izmir übersteigt die Zahl der Geräte im ganzen Holland.[1] Die Hinterleger wollen ihre Einlagen ausgeglichen haben und die dort tätigen Ärzte sind direkt oder indirekt dazu gezwungen diese mit Erhöhung der Umsatz zu ermöglichen. Es entsteht dadurch eine unnötige Verwendung dieser Mitteln was, insbesondere unter den jüngeren Ärztegeneration die daran gewöhnt werden, sich zum Nachteil der salutogene menschliche Arzt-Patient-Beziehung in der Behandlungsstrategie entwickeln wird.

Mit dem weltweit verbreiteten Kommunikationsnetz ist es heute fast überall möglich von den Weltgeschehen sofort informiert zu werden und sie gemeinsam zu erleben. Es ist, meines Erachtens, ein positives Merkmal und der wichtigste Schritt zum Aufbau der Weltgesellschaft. Man ist einander nicht mehr so fremd wie früher. Medientechnologie ist, immerhin, einer der wichtigsten Waffen unseres Jahrhunderts. Öffentliche Medien besitzen enorme Einwirkungskraft und es gibt eine zunehmende Neigung zur Monopolisierung dieser Medien. Wenn aber diese Einrichtungen, ohne Alternative, vorwiegend unter der

[1] Aksakoğlu G (2000) Küreselleşmeyle gelen sağlıksızlık, Cumhuriyet 1.11.2000,2.

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Herrschaft und Kontrolle von einigen mächtigeren Gruppen stehen, ist es bedenklich, inwieweit sie zugunsten aller Menschen funktionieren werden. Es kann allmählich zu einer von oben herab diktierte uniforme Lebens-, Denkens-, Wissens- und Redensart und zu einer Schrumpfung indivueller Identitäten kommen. Mit Einschmelzen verschiedener Kulturen und lokaler Eigenschaften ist es möglich, dass die Welt ziemlich verblasst und aufregungsloser wird.

Im medizinischen Gebiet, besonders im psychischen Untersuchungsverfahren, erscheint die Neigung den zwischenmenschlichen Einzelinterview mit den nach den internationalen Kodierung formulierten Fragebögen zu ersetzen und die Diagnosestellung der Komputerauswertung zu überlassen. Es ist überflüssig hier zu wiederholen wie wichtig es in der ärztlichen Beziehung ist, den Patienten als ein Individuum aufzufassen und im Gespräch die lokalen Eigenschaften samt den metaphorischen Ausdrücken richtig zu erkennen.

Wenn die soziale Ordnung der Weltgesellschaft sich nur nach den für die hoch entwickelte Wohlstandsländer passenden Kriterien richtet, ist damit zu rechnen, dass es mehr Unglück als Glück bringen wird, weil es nicht immer leicht und ohne Nachfolgen ist, die nationale Identität aufzugeben und sich in einem neuen, globalen, bzw. undefinierbaren Identität einzuschmelzen. Wie Jaurès sagt: "Internationalismus und Nationalismus stehen im gegenseitigen Verhältnis zu einander: Weniger Nationalismus entfernt vom Internationalismus und weniger Internationalismus entfernt vom Nationalismus." Die Einführung der Globalisierung ohne Rücksicht auf die nationale Identität der Gesellschaften, kann zum Zusammenstoß der Zivilisationen ("clash of civilisations") (Samuel Huntington) führen. Globalisierung, bzw. die Entstehung einer Weltgesellschaft, soll deshalb erkannt werden als ein transkulturelles Übergangsphänomen wo alle Geschehen mit gegenseitiger Toleranz und Aufmerksamkeit betrachtet und behandelt werden muss. Bei der Zusammenstellung, bzw. beim Gleichmachungsvorgang, muss auch die Infrastruktur beachtet und entsprechend vorbereitet werden. Diese kann nicht übernacht geschehen.

Hier kann man denken an den folgenden Worten von Mohandas Gandhi, wer über den Verlauf seines lebenslanges Strebens sagte: *"Ich weiß, dass der Fortschritt zur Ungewalttätigkeit ein schrecklich langsamer Fortschritt ist, aber aus Erfahrung habe ich gelernt, dass es der sicherste Weg zum gemeinsamen Ziel ist"*

JUDGEMENT

of the European Court of Justice (The Court of Justice of the European Communities) 20 September 2007 (*)

(EEC-Turkey Association Agreement – Article 41(1) of the Additional Protocol – *'Standstill'* clause – Scope – Legislation of a Member State introducing, after the entry into force of the Additional Protocol, new restrictions regarding the admission of Turkish nationals to their territory for the purpose of the exercise of freedom of establishment)

In Case C-16/05,

REFERENCE for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by decision of 2 December 2004, received at the Court on 19 January 2005, in the proceedings

The Queen, on the application of:

Veli Tum / Mehmet Dari

v

Secretary of State for the Home Department,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Klučka, R. Silva de Lapuerta and L. Bay Larsen, Judges,

Advocate General: L.A. Geelhoed,

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* Language of the case: English.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0016:EN:HTML#Footnote

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2006,

after considering the observations submitted on behalf of:

– V. Tum and M. Dari, by N. Rogers and J. Rothwell, Barristers, and by L. Baratt and M. Kuddus, Solicitors,

– the United Kingdom Government, initially by M. Bethell, and subsequently by E. O'Neill, acting as Agents, and by P. Saini, Barrister,

– the Netherlands Government, by C.M. Wissels, acting as Agent,

– the Slovak Government, by R. Procházka, acting as Agent,

– the Commission of the European Communities, by C. O'Reilly and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 41(1) of the Additional Protocol, which was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60) ('the Additional Protocol').

2. The reference was made in the context of two sets of proceedings between Mr Tum and Mr Dari, Turkish nationals, and the Secretary of State for the Home Department *('the Secretary of State')*, regarding decisions refusing them permission to enter the territory of the United Kingdom of Great Britain and Northern Ireland for the purpose of establishing themselves in business on their own account and ordering them to leave the country to which they had been admitted only on a provisional basis.

Legal context

The Association between the EEC and Turkey

3. According to Article 2(1) of the Agreement establishing an Association between the European Economic Community and Turkey, which was signed on 12 September 1963 at Ankara by the Republic of Turkey and the Member States of the EEC and the Community, and which was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1, *'the Association Agreement'*), the aim of that agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties which includes, in relation to the workforce, the progressive securing of free movement for workers (Article 12 of the Association Agreement), the abolition of restrictions on freedom of establishment (Article 13) and on freedom to provide services (Article 14), with a view to improving the standard of living of the Turkish people and facilitating the accession of Turkey to the Community at a later date (see the fourth recital in the preamble and Article 28 of that agreement).

4. To that end, the Association Agreement involves a preparatory stage, enabling the Republic of Turkey to strengthen its economy with aid from the Community (Article 3 of the agreement), a transitional stage covering the progressive establishment of a customs union and the alignment of economic policies (Article 4) and a final stage based on the customs union and entailing closer coordination of the economic policies of the Contracting Parties (Article 5).

5. Article 6 of the Association Agreement is worded as follows:

'To ensure the implementation and progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred on it by this Agreement.'

6. According to Article 8 of the Association Agreement, in Title II headed *'Implementation of the transitional stage'*:

'In order to attain the objectives set out in Article 4, the Council of Association shall, before the beginning of the transitional stage and in accordance with the procedure laid down in Article 1 of the provisional Protocol, determine the conditions, rules and timetables for the

implementation of the provisions relating to the fields covered by the Treaty establishing the Community which must be considered; this shall apply in particular to such of those fields as are mentioned under this Title and to any protective clause which may prove appropriate.'

7. Articles 12 to 14 of the Association Agreement also appear in Title II thereof, under Chapter 3 headed *'Other economic provisions'*.

8. Article 12 provides:

'The Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing free movement for workers between them.'

9. Article 13 provides:

'The Contracting Parties agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them.'

10. Article 14 states:

'The Contracting Parties agree to be guided by Articles [45 EC], [46 EC] and [48 EC] to [54 EC] for the purpose of abolishing restrictions on freedom to provide services between them.'

11. Article 22(1) of the Association Agreement provides as follows:

'In order to attain the objectives of this Agreement, the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the parties shall take the measures necessary to implement the decisions taken. ...'

12. The Additional Protocol, which, according to Article 62 thereof, forms an integral part of the Association Agreement, lays down, in Article 1, the conditions, detailed arrangements and timetables for implementing the transitional stage referred to in Article 4 of that agreement.

13. The Additional Protocol includes Title II, headed *'Movement of persons and services'*, Chapter I of which concerns *'[w]orkers'* and Chapter II of which concerns *'[r]ight of establishment, services and transport'*.

14. Article 36 of the Additional Protocol, which is included in

Chapter I, provides that freedom of movement for workers between Member States of the Community and Turkey is to be secured by progressive stages in accordance with the principles set out in Article 12 of the Association Agreement between the end of the 12th and the 22nd year after the entry into force of that agreement and that the Council of Association is to decide on the rules necessary to that end.

15. Article 41 of the Additional Protocol, which is in Chapter II of Title II, is worded as follows:

'1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.

The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.'

16. It is common ground that, to date, the Council of Association, set up by the Association Agreement consisting, on the one hand, of members of the Governments of the Member States, of the Council of the European Union and of the Commission of the European Communities and, on the other hand, of members of the Turkish Government ('the Association Council'), has not adopted any decision on the basis of Article 41(2) of the Additional Protocol.

17. The Association Council did, however, adopt Decision No 1/80 on the development of the Association ('Decision No 1/80') on 19 September 1980.

18. Article 13 of Decision No 1/80 which belongs to Chapter II, *'Social provisions'*, section 1, concerning *'Questions relating to employment and the free movement of workers'*, is worded as follows:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

National legislation

19. Section 11(1) of the Immigration Act 1971 defines 'entry into ... [the] United Kingdom' as follows:

'A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention ...'

20. As at 1 January 1973, the date on which the Additional Protocol came into force with regard to the United Kingdom, the relevant Immigration Rules for the purposes of establishment in business and provision of services were contained in the Statement of Immigration Rules for Control on Entry (House of Commons Paper 509, *'the 1973 Immigration Rules'*.)

21. Paragraph 30 of the 1973 Immigration Rules, under the heading *'Businessmen'*, was worded as follows:

'Passengers who are unable to present ... [an entry] clearance [for the purpose of establishing themselves in business] but nevertheless seem likely to be able to satisfy the requirements of one of the next 2 paragraphs should be admitted for a period of not more than 2 months, with a prohibition on employment, and advised to present their case to the Home Office.'

22. Paragraph 31 of those Rules referred to the need for the applicant to have sufficient funds to put into a business, if already established, and to bear his share of its losses. It provided, inter alia, that the applicant must be able to support himself and his dependants and that he must be actively concerned in the running of the business.

23. Paragraph 32 of the Rules provided:

'If the applicant wishes to establish a business in the United Kingdom on his own account, he will need to show that he will be bringing into the country sufficient funds to establish a business that can realistically be expected to support him and any dependants without recourse to employment for which a work permit is required.'

24. Since then, the United Kingdom has progressively introduced immigration rules that are significantly more onerous with regard to those seeking to enter the United Kingdom with a view to establishing a business or providing services.

25. In that regard, detailed provisions are set out in paragraphs 201 to 205 of the Immigration Rules adopted by the House of Commons in 1994 (United Kingdom Immigration Rules 1994, House of Commons Paper 395), as applicable since 1 October 1994 and at present in force as amended ('the 1994 Immigration Rules').

26. It is common ground that the 1994 Immigration Rules, currently in force in the United Kingdom, are more restrictive as regards the way in which applications for entry clearance from persons intending to establish a business on their own account are dealt with than the corresponding provisions of the 1973 Immigration Rules.

The disputes in the main proceedings and the question referred for a preliminary ruling

27. It is apparent from the order for reference that Mr Tum and Mr Dari arrived in the United Kingdom by ship, Mr Tum in November 2001 from Germany and Mr Dari in October 1998 from France.

28. As their applications for asylum were refused, their removal was ordered pursuant to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1), but that measure was not put into effect by the competent national authorities, with the result that the persons concerned are still in United Kingdom territory.

29. As, under section 11(1) of the Immigration Act 1971, they were granted only temporary admission to the United Kingdom, which

does not amount to formal clearance for entry to the United Kingdom for the purposes of its national legislation and was, moreover, subject to a restriction on taking employment, Mr Tum and Mr Dari applied for visas to enter the United Kingdom for the purposes of establishing themselves in business on their own account.

30. To that end, the parties concerned relied on the Association Agreement, claiming in particular that, under Article 41(1) of the Additional Protocol, their applications for leave to enter the host Member State should be assessed on the basis of the national Immigration Rules applicable at the date of the entry into force of that protocol with regard to the United Kingdom, namely the rules in force on 1 January 1973.

31. The Secretary of State, however, applying the national Immigration Rules in force at the time when Mr Tum and Mr Dari's applications were lodged, refused to grant those applications.

32. Mr Tum and Mr Dari applied for judicial review of the decisions rejecting their applications; their cases were heard together by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), and determined in their favour by judgment of that court of 19 November 2003. That decision was essentially upheld by the judgment of the Court of Appeal (England and Wales) (Civil Division) of 24 May 2004. According to those courts, the position of the two Turkish nationals was not based on deception of any kind and did not call in question the protection of a legitimate national interest such as public policy, public security or public health. Those courts also found that the parties concerned were entitled to rely upon the 'standstill' clause set out in Article 41(1) of the Additional Protocol and claim that their applications to enter the United Kingdom for the purpose of establishing themselves in business on their own account should be considered on the basis of the 1973 Immigration Rules.

33. The Secretary of State was then given leave to appeal to the House of Lords.

34. Since the parties to the main proceedings disagree as to whether the *'standstill'* clause set out in Article 41(1) of the Additional Protocol applies to the United Kingdom rules on first admission as regards

Turkish nationals seeking to benefit from freedom of establishment in that Member State, the House of Lords decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 41(1) of the Additional Protocol ... to be interpreted as prohibiting a Member State from introducing new restrictions, as from the date on which that Protocol entered into force in that Member State, on the conditions of and procedure for entry to its territory for a Turkish national seeking to establish himself in business in that Member State?'

The question referred for a preliminary ruling

Observations submitted to the Court

35. According to the United Kingdom Government, foreign nationals who, like Mr Tum and Mr Dari, have never been formally admitted into the territory of the United Kingdom are not entitled to the protection established by the *'standstill'* clause set out in Article 41(1) of the Additional Protocol. The sphere of application of that provision is restricted to foreign nationals who, like the Turkish national in the case which gave rise to the judgment in Case C-37/98 *Savas* [2000] ECR I-2927, lawfully entered a Member State and subsequently sought to establish themselves there by setting up a business. The fact that Mr Tum and Mr Dari made an application in the prescribed manner with a view to their entry into the United Kingdom is irrelevant.

36. The United Kingdom Government concludes from this that, as regards the two Turkish nationals concerned in the main proceedings who did not 'enter' the United Kingdom within the meaning of Article 11(1) of the Immigration Act 1971, it was entitled to apply the 1994 Immigration Rules, currently in force, which are more restrictive than those which were applicable as at 1 January 1973, in that they impose, inter alia, a new condition, according to which foreign nationals who intend to exercise freedom of establishment in United Kingdom territory are required to present a valid entry clearance.

37. In support of that line of argument, the United Kingdom Government relies on *Savas*, maintaining that it is apparent from paragraphs 58 to 67 thereof that a person who has not been lawfully

admitted into a Member State is to be treated as not entitled to any of the benefits of Article 41(1) of the Additional Protocol, since that provision governs only the conditions of establishment and, as a corollary, of residence. In that regard, there is an important distinction between the decision to grant first entry to the United Kingdom to a Turkish national and the decision to allow a Turkish national who has already been lawfully admitted into the United Kingdom to remain there as a businessman. The *Savas* case established only the proposition that, where a Turkish national has already lawfully entered a Member State, he may seek to claim the benefits of the 'standstill' clause set out in Article 41(1) of the Additional Protocol even if, at the time when he relies on that clause, the party concerned is no longer lawfully resident in that State. On the other hand, that provision simply has no application where a first entry clearance is sought by such a national. As long as the Republic of Turkey is not a Member State of the European Union, that matter will continue to fall within the exclusive competence of each Member State (see, to that effect, inter alia, *Savas*, paragraph 58).

38. In the alternative, the United Kingdom Government submits that the Additional Protocol is not intended to confer any rights upon failed asylum seekers otherwise properly returnable to another Member State under the Dublin Convention of 15 June 1990. In those circumstances Turkish nationals, such as Mr Tum and Mr Dari, who have been granted no right of asylum in the United Kingdom, must be excluded from entitlement to all the advantages provided for by the Additional Protocol. Any other interpretation could result in an abuse of rights.

39. At the hearing, the Netherlands Government essentially took the same view as that of the United Kingdom Government.

40. Mr Tum and Mr Dari accept that the *'standstill'* clause set out in Article 41(1) of the Additional Protocol does not, in itself, confer any right of establishment, right to stay or right of entry in the territory of a Member State and that disputes relating to such rights must in principle be examined by reference only to the domestic law of the Member State concerned. However, they argue that the scope of that clause includes not only conditions of establishment and stay, but, logically, also those conditions directly linked to them, namely conditions relating to the

entry of Turkish nationals into the territory of the host Member State. They submit that, as a result, their applications for leave to enter to establish themselves in business on their own account in the United Kingdom have to be examined in the light of immigration rules which are no more restrictive than those that were in force on 1 January 1973.

41. In support of their case, Mr Tum and Mr Dari rely on the following arguments:

– the above interpretation is consistent with the aims of the Association Agreement and the Additional Protocol, namely the progressive abolition of restrictions on freedom of establishment;

– under Community law, freedom of establishment has been interpreted by the Court as being concerned with the conditions of both entry and stay in the territory of a Member State as the necessary corollaries to freedom of establishment (see, to that effect, inter alia Case 48/75 *Royer* [1976] ECR 497, paragraph 50; Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, paragraph 15; and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraphs 44, 50, 58 and 83) and there is no reason why the 'standstill' clause set out in Article 41(1) of the Additional Protocol cannot also be interpreted to that effect, particularly bearing in mind the objective set out in Article 13 of the Association Agreement;

– the 'standstill' clause would be rendered meaningless and redundant if Member States were permitted to make more difficult or even impossible the entry of Turkish nationals into their territories, in so far as the protection of the status quo as regards the conditions of their establishment and/or their stay would thus have no practical significance;

– there is nothing in the wording of the 'standstill' clause or, more generally, in the legislation relating to the EEC-Turkey Association to suggest that the application of that clause is limited to conditions of stay and establishment, excluding conditions of entry. The difference in wording between the *'standstill'* clause in Article 41(1) of the Additional Protocol and the similar clause in Article 13 of Decision No 1/80 relating to workers is significant in that regard. Furthermore, the relevant case-law of the Court is general in nature.

42. Mr Tum and Mr Dari submit that their view is supported by *Savas*, from which it is apparent that the first of the 'standstill' clauses in Article 41(1) of the Additional Protocol applied to a person who had been unlawfully present in the United Kingdom for some 11 years, whereas they themselves have made applications for entry to the United Kingdom in the prescribed manner. As the Court held that Mr Savas was entitled to rely on that clause and thereby have his case determined by national rules that were no more stringent than those in force as at 1 January 1973, Mr Tum and Mr Dari maintain that they should similarly benefit from such an interpretation.

43. Lastly, the refusal of Mr Tum and Mr Dari's applications for asylum is of no relevance for the determination of whether Article 41(1) of the Additional Protocol applies to their circumstances.

44. The Slovak Government and the Commission of the European Communities to a large extent support the interpretation advocated by Mr Tum and Mr Dari.

The Court's reply

45. For the purpose of a reply to the question referred by the national court, it must be borne in mind that, as was noted in paragraph 29 of this judgment, Mr Tum and Mr Dari were regarded, under section 11(1) of the Immigration Act 1971, as not having entered the United Kingdom, as their temporary physical admission, although they have no entry permit for that Member State, does not, under the relevant national legislation, amount to actual clearance for entry to the United Kingdom.

46 In that context, it is not disputed that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, clearly, precisely and unconditionally, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see *Savas*, paragraphs 46 to 54 and 71, second indent, and Joined Cases C-317/01 and C-369/01

Abatay and Others [2003] ECR I-12301, paragraphs 58, 59 and 117, first indent).

47. Furthermore, it is common ground that, if Article 41(1) of the Additional Protocol applies to the first admission into a Member State of Turkish nationals who intend to exercise their freedom of establishment there by virtue of the Association Agreement, the Immigration Rules which the Secretary of State applied in deciding on the applications of Mr Tum and Mr Dari constitute a *'new restriction'* within the meaning of that provision of the Additional Protocol, since it is accepted by the parties to the main proceedings that those national rules, which have applied as from 1 October 1994, have the objective, or at the very least the result, of making the entry of Turkish nationals into the United Kingdom subject to more stringent substantive and/ or procedural conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State, namely 1 January 1973.

48. As regards the material scope of the *'standstill'* clause set out in Article 41(1), it must be borne in mind that the very wording of that provision prohibits new restrictions inter alia *'on the freedom of establishment'*.

49. In that context, it is clear from the case-law of the Court that the 'standstill' clause precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to the Member State concerned (see *Savas*, paragraph 69, and *Abatay and Others*, paragraph 66).

50. That case-law does not refer expressly to the first admission of Turkish nationals into the territory of the host Member State.

51. Furthermore, in the cases which gave rise to the judgments in *Savas* and *Abatay and Others*, the Court did not have to rule on that issue, since both Mr Savas and the lorry drivers concerned in the cases which gave rise to the judgment in *Abatay and Others* had been admitted to the Member States concerned under visas issued in accordance with the relevant national legislation.

52. As regards the meaning of the *'standstill'* clause set out in Article 41(1) of the Additional Protocol, it is also apparent from the case-law that neither that clause nor the provision containing it are, in themselves, capable of conferring upon a Turkish national a right of establishment or, as a corollary, a right of residence derived directly from Community provisions (see *Savas*, paragraphs 64 to 71, third indent, and *Abatay and Others*, paragraph 62). The same finding also applies as regards the first entry of a Turkish national into the territory of a Member State.

53. On the other hand, in accordance with that case-law, such a 'standstill' clause is to be understood as prohibiting the introduction of any new measures having the object or effect of making the establishment of Turkish nationals in a Member State subject to stricter conditions than those which resulted from the rules which applied to them at the time when the Additional Protocol entered into force with regard to the Member State concerned (see *Savas*, paragraphs 69, 70 and 71, fourth indent, and *Abatay and Others*, paragraphs 66 and 117, second indent).

54. Article 41(1) of the Additional Protocol does not therefore have the effect of conferring on Turkish nationals a right of entry into the territory of a Member State, since no such positive right can be inferred from the Community rules currently applicable but, on the contrary, remains governed by national law.

55. It follows that a *'standstill'* clause, such as that in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law it replaces, but as a quasi-procedural rule which stipulates, *ratione temporis*, which are the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State.

56. In those circumstances, the argument of the United Kingdom Government that the construction put forward by the applicants in the main proceedings would entail an intolerable infringement of the principle of the exclusive competence of Member States on immigration matters, as it has been interpreted by the settled case-law of the Court, cannot be upheld.

57. While it is true that it is apparent from that case-law that, as Community law stands at present, a Turkish national's first admission to the territory of a Member State is, as a rule, governed exclusively by that State's own domestic law (see, inter alia, *Savas*, paragraphs 58 and 65, and *Abatay and Others*, paragraphs 63 and 65), the Court made that finding for the sole purpose of giving a negative answer to the question whether the 'standstill' clause in Article 41(1) of the Additional Protocol could, as such, confer the benefit of certain positive rights in respect of freedom of establishment upon a Turkish national (*Savas*, paragraphs 58 to 67, and *Abatay and Others*, paragraphs 62 to 65).

58. However, that *'standstill'* clause does not call into question the competence, as a matter of principle, of the Member States to conduct their national immigration policy. The mere fact that, as from its entry into force, such a clause imposes on those States a duty not to act which has the effect of limiting, to some extent, their room for manœuvre on such matters does not mean that the very substance of their sovereign competence in respect of aliens should be regarded as having been undermined (see, by analogy, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 121).

59. The Court cannot accept the interpretation of the United Kingdom Government to the effect that it is apparent from *Savas* that a Turkish national can rely on the 'standstill' clause only if he has entered a Member State lawfully as it is irrelevant whether or not he is legally resident in the host Member State at the time of his application to establish himself, while, conversely, that clause does not apply to the conditions governing a Turkish national's first admission to the territory of a Member State.

60. It is important to point out in that respect that Article 41(1) of the Additional Protocol refers, in a general way, to new restrictions inter alia 'on the freedom of establishment' and that it does not limit its sphere of application by excluding, as does Article 13 of Decision No 1/80, certain specific aspects from the sphere of protection afforded on the basis of the first of those two provisions.

61. It must be added that Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute

prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision of the Additional Protocol thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Abatay and Others*, paragraphs 68 and 72). Even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained (see, by analogy, Case 77/82 *Peskeloglou* [1983] ECR 1085, paragraph 13, and *Abatay and Others*, paragraph 81), it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment.

62. To date, it is true, the Association Council has not adopted any measure on the basis of Article 41(2) of the Additional Protocol with a view to the actual removal by the Contracting Parties of existing restrictions on freedom of establishment, in accordance with the principles set out in Article 13 of the Association Agreement. Furthermore, it is apparent from the case-law of the Court that neither of those two provisions has direct effect (*Savas*, paragraph 45).

63. For those reasons the *'standstill'* clause set out in Article 41(1) of the Additional Protocol must be regarded as also applicable to rules relating to the first admission of Turkish nationals into a Member State in whose territory they intend to exercise their freedom of establishment under the Association Agreement.

64. Lastly, as regards the alternative argument of the United Kingdom Government that failed asylum seekers such as the applicants in the main proceedings should not be allowed to rely on Article 41(1) of the Additional Protocol, since any other interpretation would be tantamount to endorsing fraud or abuse, it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68) and that the national courts may, case by case, take account – on the basis of objective evidence – of

abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely (see inter alia Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 25).

65. However, in the cases in the main proceedings, it is apparent from the documents sent to the Court by the national court that the courts which gave rulings on the substance of the cases currently pending before the House of Lords expressly stated that Mr Tum and Mr Dari could not be accused of any fraud and that the protection of a legitimate national interest, such as public policy, public security or public health, was not at issue either (see paragraph 32 of this judgment).

66. Moreover, the Court has been shown no specific evidence to suggest that, in the cases in the main proceedings, the individuals concerned are relying on the application of the *'standstill'* clause in Article 41(1) of the Additional Protocol with the sole aim of wrongfully benefiting from advantages provided for by Community law.

67. In those circumstances, the fact that Mr Tum and Mr Dari had, prior to their applications for clearance to enter the United Kingdom for the purpose of exercising freedom of establishment, made applications for asylum which had, however, been refused by the competent authorities of that Member State, cannot be regarded, in itself, as constituting abuse or fraud.

68. Furthermore, Article 41(1) of the Additional Protocol does not lay down any restriction as regards its scope, in particular in so far as concerns Turkish nationals to whom those authorities have refused the status of refugees, with the result that the refusal of the asylum applications of Mr Tum and Mr Dari is of no relevance for the purpose of deciding whether that provision is applicable in the cases in the main proceedings.

69. Having regard to all the foregoing considerations, the answer to the question referred for a preliminary ruling must be that Article 41(1) of the Additional Protocol is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the

exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.

Costs

70. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 41. (1) of the Additional Protocol, which was signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, is to be interpreted as prohibiting the introduction, as from the entry into force of that protocol with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.

LEGISLATION

A selected list of Laws and International Instruments adopted in 2006 and 2007 and Published in OG (*Official Gazette; Resmi Gazete*)

LAWS

OG 21 January 2006/26056

5448 Law Authorizing the Ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage

OG 01 February 2006/26067

5451 Law Authorizing the Ratification of the Memorandum of Understanding between The State Planning Organization of the Republic of Turkey and The State Planning Commission of the Syrian Arab Republic

OG 28 February 2006/26094

5463 Law Authorizing the Ratification of the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region

OG 07 March 2006/26101

5469 Law Authorizing the Ratification of the Association Agreement Establishing A Free Trade Area Between the Republic of Turkey and the Syrian Arab Republic

5470 Law Authorizing the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of Mongolia on Sale of the Embassy Building to the Government of the Republic of Turkey

OG 17 March 2006/26111

5468 Law Authorizing the Ratification of the Optional Protocol to the International Covenant on Civil and Political Rights

OG 24 March 2006/26118

5474 Law Authorizing the Ratification of the Agreement on Industrial Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Tunisia

OG 04 April 2006/26129

5480 Law Authorizing the Ratification of the Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL-PROXIMA)

OG 08 April 2006/26133

5482 Law Authorizing the Ratification of the Protocol on Cooperation between the Republic of Turkey and the Republic of Macedonia

5484 Law Authorizing the Ratification of the Agreement between the Republic of Turkey and the Republic of South Africa for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with respect to Taxes on Income

5486 Law Authorizing the Ratification of the Protocol on the Establishment of the Consultation and Cooperation Mechanism on Quality and Safety of Industrial Products between Undersecretariat of the Prime Ministry for Foreign Trade of The Republic of Turkey and General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China

OG 20 May 2006/26173

5501 Law Authorizing the Ratification of the International Road Transport Agreement between the Government of the Republic of Turkey and the Government of Islamic Republic of Pakistan

OG 24 May 2006/26177

5506 Law Authorizing the Ratification of the United Nations Convention against Corruption

OG 03 June 2006/26187

5509 Law Authorizing the Ratification of the Notes and the Negotiation Minutes between the Government of Japan and of the Government of the Republic of Turkey on the Construction of Kaman - Kalehöyük Archaeological Museum by Grant

OG 06 June 2006/26190

5512 Law Authorizing the Ratification of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention

5513 Law Authorizing the Ratification of the Agreement between the Government of Republic of Turkey and the Government of the State of Qatar for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with respect to Taxes on Income

5514 Law Authorizing the Ratification of the Convention between the Republic of Turkey and Bosnia and Herzegovina for the Avoidance of Double Taxation with Respect to Taxes on Income and On Capital

5515 Law Authorizing the Ratification of the Convention and Its (Additional) Protocol between the Republic of Turkey and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

5516 Law Authorizing the Ratification of the Addendum to the Basic Agreement between the Government of the Republic of Turkey and the United Nations World Food Programme

5517 Law Authorizing the Ratification of the Agreement on Cooperation in the Field of Health between the Government of the Republic of Turkey and the Government of the Islamic Republic of Afghanistan

OG 07 July 2006/26221

5542 Law Authorizing the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Mongolia on the Construction of Bilge Khan Route between Kharkhorin and Khoshoo Tsaidam

OG 03 October 2006/262308

5546 Law Authorizing the Ratification of the Protocol amending the European Social Charter

5547 Law Authorizing the Ratification of the European Social Charter (Revised)

OG 16 December 2006/26378

5563 Law Authorizing the Ratification of the Association Agreement Establishing A Free Trade Area Between the Republic of Turkey and the Egypt Arab Republic

OG 27 January 2007/26416

5575 Law Authorizing the Ratification of the Agreement on Cooperation for Facilitating Assistance for the Purpose of Prevention of the Proliferation of Weapons of Mass Destruction between the Government of Republic of Turkey and the Government of United States of America

OG 03 March 2007/26451

5585 Law Authorizing the Ratification of the Economic Cooperation Organisation Trade Agreement

5586 Law Authorizing the Ratification of the Economic Cooperation Organisation Transit Transport Framework Agreement

5587 Law Authorizing the Ratification of the Charter of the Economic Cooperation Organisation Educational Institute

OG 17 March 2007/26465

5598 Law Authorizing the Accession to the Amendment of the Convention on the Grant of European Patents (European Patent Convention)

5599 Law Authorizing the Ratification of the Convention and Its (Additional) Protocol between the Government of the Republic of Turkey and the Government of Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

5600 Law Authorizing the Ratification of the Convention between the Republic of Turkey and Cabinet of Ministers of Serbia and Montenegro for the Avoidance of Double Taxation with Respect to Taxes on Income and On Capital

5601 Law Authorizing the Accession to the International Convention for the Protection of New Plant Species dated 2 December 1961, revised on 10 November 1972, 23 October 1978 and 19 March 1991 in Geneva

OG 20 March 2007/26468

5605 Law Authorizing the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of Georgia on the Joint Usage of the Batumi International Airport

5606 Law Authorizing the Ratification of the Air Transport Agreement between the Government of the Republic of Turkey and the Government of Georgia

OG 04 April 2007/26483

5616 Law Authorizing the Ratification of the Agreement on Educational, Defence Industry, Technical and Scientific Cooperation in the Field of Military between the Government of the Republic of Turkey and the Government of the Republic of Chile

5617 Law Authorizing the Ratification of the Agreement on Cooperation in the Fields of Culture, Education, Science, Mass Media, Youth and Sports Between the Government of the Republic of Turkey and the Government of the Federal Democratic Republic of Ethiopia

5618 Law Authorizing the Ratification of the Memorandum of Understanding between the Republic of Turkey and the International Maritime Organization on the Holding of the Eighty-Second Session of the Maritime Safety Committee in Istanbul, from 29 November to 8 December 2006

5619 Law Authorizing the Ratification of the Agreement between the Government of the Turkish Republic and International Maritime Organization on the Organization, Fulfilment and Financing of 2006 International Telecommunication Union Plenipotentiary Conference

OG 01 May 2007/26509

5629 Law Authorizing the Ratification of the Convention between the Government of the Republic of Turkey and the Government of Kingdom of Bahrain for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

5630 Law Authorizing the Ratification of the Framework Agreement between the European Union and the Republic of Turkey for the Participation of the Republic of Turkey to the European Union Crisis Management Operations

5631 Law Authorizing the Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the State of Qatar concerning the Reciprocal Promotion and Protection of Investments

5632 Law Authorizing the Ratification of the Agreement on Trade and Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of South Africa

5633 Law Authorizing the Ratification of the Agreement on Economic Cooperation between the Government of the Republic of Turkey and the Government of Republic of Hungary

OG 08 May 2007/26516

5639 Law Authorizing the Ratification of the Agreement on Technical and Scientific Cooperation for the Infrastructure of Road Transport between the Government of the Republic of Turkey and the Government of the Kingdom of Morocco

5640 Law Authorizing the Ratification of Framework Agreement on Educational, Technical and Scientific Cooperation in the Field of Military between the Government of Republic of Turkey and the Government of the Republic of Congo

5641 Law Authorizing the Ratification of the Agreement on Trade and Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Kenya

5642 Law Authorizing the Ratification of the Agreement on Commercial Exchange and Economic, Technical, Scientific and Cultural Cooperation between the Republic of Turkey and the Sultanate of Oman

5643 Law Authorizing the Ratification of the Agreement on Trade, Economic and Technical Cooperation between the Government of the Republic of Turkey and the Republic of Madagascar

5644 Law Authorizing the Ratification of the Agreement on Trade, Economic and Technical Cooperation between the Government of the Republic of Turkey and the Islamic Republic of Mauritania

5645 Law Authorizing the Ratification of the Agreement for Cooperation in the Field of Industrial Research and Development between the Government of the Republic of Turkey and the Government of the State of Israel

5646 Law Authorizing the Accession to the WIPO Performances and Phonograms Treaty

5647 Law Authorizing the Accession to the WIPO Copyright Treaty

OG 18 May 2007/26526

5638 Law Authorizing the Ratification of the Headquarters Agreement between the Government of the Republic of Turkey and the Economic Cooperation Organization (ECO) Trade and Development Bank

5658 Law Authorizing the Ratification of the Agreement on the Amendments to be inserted in the Headquarters Agreement between the Republic of Turkey and the Organization of the Black Sea Economic Cooperation

OG 20 May 2007/26527

5657 Law Authorizing the Ratification of the Privileges, Immunities and Facilities of the Organization of the Black Sea Economic Cooperation Business Council International Secretariat in Turkey

OG 08 June 2007/26546

5687 Law Authorizing the Ratification of the Agreement between the Government of Turkey and the Government of Ukraine concerning Cooperation in the Exploration and Use of Outer Space

OG 01 September 2007/26630

2007/12572 Law Authorizing the Ratification of the Agreement between the Government of the Turkish Republic and International Maritime Organization on the Organization, Fulfilment and Financing of 2006 International Telecommunication Union Plenipotentiary Conference

OG 09 October 2007/26668

5688 Law Authorizing the Ratification of the Agreement between the Government of the Republic of Turkey and the Cabinet of Ministers of Bosnia Herzegovina on Cooperation in the Field of Tourism

5689 Law Authorizing the Ratification of the Memorandum of Understanding on Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Moldova

OG 10 October 2007/26669

5690 Law Authorizing the Ratification of the Agreement on Cooperation in the Field of Health between the Government of the Republic of Turkey and the Government of the Republic of Greece

5691 Law Authorizing the Ratification of the Trade Agreement between the Government of the Republic of Turkey and the Government of the Republic of Côte d'Ivoire

5692 Law Authorizing the Ratification of the Agreement on Economic and Technical Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Côte d'Ivoire

OG 15 October 2007/26671

5693 Law Authorizing the Ratification of the Agreement between the Republic of Turkey and the Republic of Slovakia on Judicial Cooperation in the Legal and Commercial Matters

5694 Law Approving the Protocol between the Government of the Republic of Turkey and the Government of the Islamic Republic of Afghanistan on Technical, Scientific and Economic Cooperation in the Field of Agriculture

5695 Law Authorizing the Ratification of the Protocol on Cooperation between the Ministry of Justice of the Republic of Turkey and the Ministry of Justice of Bosnia and Herzegovina

5696 Law Authorizing the Ratification of the Agreement on Cooperation in the Field of Health between the Government of the Republic of Turkey and the Government of the Mongolia

INTERNATIONAL CONVENTIONS and AGREEMENTS

OG 14 January 2006/26049
2005/9869 Decree on Ratification of the Agreement Concluded by Exchange of Notes on extending the Term of the Agreement between the Government of the Republic of Turkey and United Nations Industrial Development Organisation (UNIDO) Regarding the Establishment of the Centre for Regional Cooperation in Turkey"

OG 19 January 2006/26054
2005/9866 Decree on Ratification of the Joint Committee Decision No 2/2005 of the Republic of Turkey and the State of Israel, amending Protocol B of the Free Trade Agreement concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Cooperation on the base of the Pan-European-Mediterranean Model Origins Protocol

OG 25 January 2006/26060
2005/9882 Decree on Ratification of the Agreement concluded by Exchange of Notes on Procedures Concerning Inspection of Conventional Armaments and Equipment subject to the Protocol on Inspection of the Treaty on Conventional Armed Forces in Europe (CFE) belonging to the United States, of equipment and of material belonging to the United States, and of structures or premises utilized by the United States, present on the territory of the Republic of Turkey

2005/9918 Decree on Ratification of the Protocol of the First Session of the Turkish-Yemeni Joint Commission for Tourism (*sic.*)

OG 26 January 2006/26061
2005/9904 Decree on Ratification to be effective from 23 April 1995 of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Finland for the Reciprocal Promotion and Protection of Investment

2006/9932 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the State of Kuwait Concerning Co-operation in the Field of Internal Security

2006/9939 Decree on Ratification of the Notes Amending the Visa Facility Agreement between the Government of Georgia and the Government of the Republic of Turkey

OG 30 January 2006/26065
2005/9920 Decree on Ratification of the Agreement on the International Occasional Carriage of Passengers By Coach and Bus (INTERBUS Agreement)

OG 09 February 2006/26075
2006/9957 Decree on Ratification of the Agreement on Cooperation in the Fields of Culture, Education, Science, Mass Media, Youth and Sports Between the Government of the Republic of Turkey and the Government of the Grand-Duchy of Luxembourg

2006/9960 Decree on Ratification of the Agreement Between the Government of the Republic of Turkey and the Federal Government of the Federal Republic of Yugoslavia on Cooperation in the Fields of Education, Science, Culture and Sports

OG 11 February 2006/26077
2006/9959 Decree on Ratification of the Agreement Between the Government of the Republic of Turkey and the Government of the Czech Republic on Cooperation in the Fields of Culture, Education, Science, Youth and Sports

OG 12 February 2006/26078
2006/9959 Decree on Ratification of the Agreement on Cooperation in the Cultural and Scientific Fields between the Government of the Republic of Turkey and the Government of the Republic of Cameroon

OG 19 February 2006/26085
2006/9989 Decree on Ratification of the Protocol of the Turkish - Russian Road Transport Joint Commission Meeting

OG 20 February 2006/26086
2006/9993 Decree on Ratification of the Executive Programme for Bilateral Cooperation in the Fields of Oil, Gas and Mineral Exploration between the Ministry of the Energy and Natural Resources of the Republic of Turkey and the Ministry of Oil and Minerals of the Republic of Yemen for the Years 2005-2008

OG 27 February 2006/26093
- Guarantee and Loan Agreements and Supplemental Letters between the International Bank for Reconstruction and Development and Republic of Turkey and Boru Hatları ile Petrol Tasima A.S.

OG 28 February 2006/26094
5463 Law Authorizing the Ratification of the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region

OG 02 March 2006/26096
2006/10030 Decree on Ratification of the Cultural and Educational Programme between the Government of the Republic of Turkey and the Government of the Argentine Republic for the Years 2005-2008

2006/10031 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and The General Directorate of Archives of Kosovo

OG 03 March 2006/26097
2006/10029 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and the General Directorate of State Archives of the Council of Ministers of the Republic of Bulgaria

OG 05 March 2006/26099
2005/10101 Decree on Ratification of the Memorandum of Understanding of the Fifth Session of the Joint Industrial Working Group between the Republic of Turkey and Romania

OG 06 March 2006/26100
- Guarantee Agreement between the International Bank for Reconstruction and Development and İller Bankası

OG 07 March 2006/26101
2006/10095 Decree on Ratification of the Protocol of the Turkish - Azerbaijan Road Transport Joint Commission Meeting

OG 11 March 2006/26105
2006/10132 Decree on Ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage

OG 31 March 2006/26125
2006/10160 Decree on Accession to the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures

OG 24 April 2006/26148
2006/10232 Decree on Ratification of the Action Plan on Cultural Cooperation of the Council of Ministers of Culture of South East Europe for the Period of 31/3/2006 - 31/3/2007

2006/10256 Decree on Ratification of the Framework Agreement on Technical Cooperation between the Government of the Republic of Turkey and the Republic of Costa Rica

OG 27 April 2006/26151
- Energy Community of South East Europe Program Guarantee and Loan Agreements and Supplemental Letters between Turkiye Elektrik İletim A.Ş. and International Bank for Reconstruction and Development

OG 28 April 2006/26152

2006/10275 Decree on the Entry into Force of the Agreement Concerning Loan and Supplemental Letters for Financing the Secondary Education Project regarding the Reform of the Secondary Education System that would be implemented by the Ministry of National Education between the Republic of Turkey and International Bank for Reconstruction and Development

OG 02 May 2006/26156

2006/10338 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Moldova on Exchange of Land Plots and Diplomatic Representatives Buildings

OG 10 May 2006/26164

2006/10385 Decree on Ratification of the Agreement concluded by Exchange of Notes on Mutual Allocation of the Land Plots for the Construction of Diplomatic Representatives Buildings between the Government of Republic of Turkey and the Kingdom of Bahrain

2006/10393 Decree on Ratification of the Memorandum of Intent between the Government of the Republic of Turkey and the Cabinet of Ministers of Ukraine on Cooperation in the Fields of Technical Regulations, Standardization, Metrology, Conformity Assessment and Consumers' Rights Protection

OG 11 May 2006/26165

2006/10386 Decree on Accession with Declarations to the Convention on the Registration of Objects Launched into Outer Space

OG 12 May 2006/26166

2006/10388 Decree on Ratification of the Loan Agreement and the Supplemental Letters for the financing of the Railways Restructuring Project that would be executed by the State Railways General Directorate of the Republic of Turkey between the Republic of Turkey and the International Bank for Reconstruction and Development

OG 15 May 2006/26169
2006/10366 Decree on Ratification of the Protocol of Turkish - Ukrainian Intergovernmental Commission on Commercial and Economic Cooperation Fifth Session Meeting

OG 30 May 2006/26183
2006/10402 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Germany concerning Financial Cooperation regarding Loan and Grant contribution for the Projects titled "Municipal Infrastructure Programme IV" and "Introduction of Micro-Finance Services in the Private Sector"

OG 04 June 2006/26188
2006/10436 Decree on Ratification of the Agreement on Industrial Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Tunisia

OG 05 June 2006/26189
2006/10443 Decree on Ratification of the Agreement between the Republic of Turkey and the Republic of Paraguay on Suppression of Visa Requirements

OG 19 June 2006/26203
2006/10458 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of Mongolia on Sale of the Embassy Building to the Government of the Republic of Turkey

OG 23 June 2006/26207
2006/10479 Decree on Ratification of the Memorandum of Understanding between The State Planning Organization of the Republic of Turkey and The State Planning Commission of the Syrian Arab Republic

OG 27 June 2006/26211
2006/10534 Decree on Ratification of the Project Document concerning the "Implementation Support to Health Transition Project" Between the Ministry of Health of the Republic of Turkey and the United Nations Development Programme (UNDP)

OG 03 July 2006/26217
- Finance Contract, Guarantee and Indemnity Agreements between the Republic of Turkey and the European Investment Bank

OG 05 July 2006/26219
2006/10565 Decree on Ratification of the Addendum No 1 to the Memorandum of Understanding on the Establishment of A Central Finance and Contracts Unit between the Government of Turkey and the European Commission

OG 09 July 2006/26223
2006/10584 Decree on Ratification of the Agreement and the Annex Agreed Minute for Cooperation between the Republic of Turkey and the United States of America concerning Peaceful Uses of Nuclear Energy

OG 10 July 2006/26224
2006/10597 Decree on Ratification of the Protocol on the Establishment of the Consultation and Cooperation Mechanism on Quality and Safety of Industrial Products between Undersecretariat of the Prime Ministry for Foreign Trade of The Republic of Turkey and General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China

OG 13 July 2006/26227
2006/10652 Decree on Ratification of the Second Additional Protocol on Economic and Financial Cooperation between the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus

OG 05 August 2006/26250

2006/10692 Decree on Ratification with Declarations and Reservations, of the Optional Protocol to the International Covenant on Civil and Political Rights

OG 07 August 2006/26252

2006/10699 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of Australia relating to Work and Holiday Visas

OG 08 August 2006/26253

2006/10703 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Colombia on "Mutual Suppression of Visa Requirements for Holders of Diplomatic, Official, Service and Special Passports"

2006/10745 Decree on Ratification of the Agreement between the Government of Turkey and the European Space Agency concerning Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes

2006/10748 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and the Department for the Archives and Libraries of the Ministry of Cultural Heritage and Activities of the Italian Republic

2006/10752 Decree on Ratification of the International Treaty on Plant Genetic Resources for Food and Agriculture

2006/10779 Decision for the Entry into Force of the Loan Agreement and its Supplemental Letters regarding the Partial Financing of the Avian Influenza and Human Pandemic Preparedness and Response Project between the Republic of Turkey and the International Bank for Reconstruction and Development

OG 12 August 2006/26257
- Loan Agreement between the Republic of Turkey and the International Bank for Reconstruction and Development

OG 17 August 2006/26262
2006/10855 Decree on Ratification of the Agreement between the Republic of Turkey and the Lebanese Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income

OG 26 September 2006/26301
2006/10869 Decree on Ratification of the Decision No. 2/2005 of the Joint Committee of the Free Trade Agreement between Turkey and Croatia amending Protocol III to the Free Trade Agreement concerning Definition of Concept of "Originating Products" and Methods of Administrative Cooperation

OG 27 September 2006/26302
2006/10883 Decree on Ratification of the Protocol on Economic and Financial Cooperation between the Government of Turkish Republic and the Government of Turkish Republic of Northern Cyprus

OG 30 September 2006/26305
2006/10881 Decree on Ratification of the Resolution concerning the Increase of Capital Stock of the Islamic Development Bank

OG 01 October 2006/26306
2006/10887 Decree on Ratification of the Note of Accession of Ukraine to the Agreement on the Establishment of the Coordination Committee in the Framework of the South-Eastern Europe Defence Ministerial Process

OG 06 October 2006/26311
2006/10957 Decree on Ratification of the Agreement on Security Cooperation between the Government of Republic of Turkey and the Government of the Kingdom of Bahrain

OG 07 October 2006/26312

2006/10930 Decree on Ratification of the Maritime Merchant Shipping Agreement between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria

2006/10990 Decree on Ratification of the Memorandum of Understanding between the Turkish Standards Institution and the Thai Industrial Standards Institute

2006/11007 Decree on Ratification with declarations of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space

OG 08 October 2006/26313

2006/10920 Decree on Ratification of the Protocol of the Turkish - Bulgarian Joint Commission on Road Transport

2006/10975 Decree on Ratification of the Additional Protocol on Combating Terrorism to the Agreement among the Governments of the Black Sea Economic Cooperation Participating States on Cooperation in Combating Crime, In Particular in Its Organized Forms

2006/10978 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Federative Republic of Brazil regarding the Establishment of a High Level Cooperation Commission

2006/11022 Decree on Ratification of the Agreement between the Republic of Turkey and the Republic of Tajikistan on the (Mutual) Allocation of the Diplomatic Missions in Ankara and Dushanbe

OG 09 October 2006/26314

2006/10922 Decree on Ratification of Amendments on the Economic Commission for Europe Customs Convention on the International Transport of Goods Under Cover of TIR Carnets

OG 11 October 2006/26316
2006/10994 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Latvia on Exemption of the Visa Requirement for Holders of Diplomatic, Special and Service Passports and the Facilitation of Visa Procedures for Ordinary Passport Holders

OG 16 October 2006/26321
- Guarantee and Loan Agreements and Supplemental Letters between the Republic of Turkey and International Bank for Reconstruction and Development *(on the Electricity Generation Rehabilitation and Restructuring Project)*

OG 21 October 2006/26326
2006/11078 Decree on Ratification of the Protocol of the Eighth Session of the Turkish-Albanian Economic, Commercial, Industrial and Technical Cooperation Joint Commission

OG 22 October 2006/26327
2006/11047 Decree on Ratification of the Appendixes No. 3 and 4 on Accession of Iraq and Libya to the General Interconnection Agreement for the Electrical Interconnection Among the Five Electric Power Companies of Egypt, Iraq, Jordan, Syria and Turkey

OG 26 October 2006/26328
2006/11049 Decree on Ratification of the First Executive Programme of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Italy on Scientific and Technical Cooperation for the Years 2006-2009

OG 02 November 2006/26334
2006/11071 Decree on Ratification of the Project Document titled "Support to Human Rights Education of Inspectors of the Ministry of Interior" between the Government of Republic of Turkey and the United Nations Development Programme

OG 03 November 2006/26335
2006/11094 Decree on Ratification of the Long-term Technical, Economic and Industrial Cooperation Programme and the Execution Plan between the Governments of the Republic of Turkey and the Government of the Republic of Tajikistan

2006/11095 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Uzbekistan on Immovable Properties and Financial Aspects of Mutual Activities of the Embassies

2006/11132 Decree on Ratification of the Protocol of the Turkish-Slovenian Joint Commission Meeting on Road Transport

OG 04 November 2006/26336
2006/11117 Decree on Ratification of the Convention on the European Forest Institute

OG 05 November 2006/26337
2006/11119 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Kazakhstan on Mutual Allocation of Land Plots for the Construction of Diplomatic Representatives Buildings

OG 06 November 2006/26338
2006/11099 Decree on Ratification of the Protocol of the Fifth Session Meeting of Turkey - Tajikistan Joint Economic Commission

OG 06 November 2006/26338 (bis)
2006/11044 Decree on Ratification of the Association Agreement Establishing A Free Trade Area Between the Republic of Turkey and the Syrian Arab Republic

OG 09 November 2006/26341
2006/11096 Decree on Ratification of the Cultural Exchange Program Between the Government of the Republic of Turkey and the Government of the Kingdom of Thailand for the Years 2006-2010

OG 17 November 2006/26349
2006/11183 Decree on Ratification of the Financing Agreement between European Commission and the Government of the Republic of Turkey on the Project regarding Participation in Community Programmes and Agencies

OG 18 November 2006/26350
2006/11163 Decree on Ratification of the Agreement between the Republic of Turkey and the Republic of Azerbaijan on Cooperation on Disaster Management

OG 19 November 2006/26351
2006/11147 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Moldova concerning the Construction of Potable Water-Supply System and Intraurban Water Pipelines in Ceadir - Lunga

OG 20 November 2006/26352
2006/11144 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and the Libyan Historical Research Jihad Centre of the Great Socialist People's Libyan Arab Jamahiriya

2006/11161 Decree on Ratification of the Agreement between the Republic of Turkey and the Republic of South Africa for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with respect to Taxes on Income

OG 28 November 2006/26360
2006/11148 Decree on Ratification of the Decision no 1/2006, 2/2006 and 3/2006 of the Joint Committee concerning the Amendments to the Annexes of the Agreement between the European Free Trade Association and Turkey

OG 07 December 2006/26369
2006/11227 Decree on Ratification of the Protocol between Turkey and Georgia on the Purchase and Sale of Electricity

OG 08 December 2006/26370
2006/11195 Decree on Ratification of the "Protocol on Cooperation" between the Turkish Standards Institution (TSE) and Agency on Standardization, Metrology, Certification and Trade Inspections (TADJIKSTANDARD) under the Ministry of Economy and Trade of the Republic of Tajikistan

2006/11223 Decree on Ratification of the Protocol of the Eighth Session Meeting of the Turkish – Russian Transportation Commission

OG 10 December 2006/26372
2006/11221 Decree on Ratification of the Memorandum of Understanding for Cooperation between the Centre for Strategic Research of the Ministry of Foreign Affairs of the Republic of Turkey and the Diplomatic Academy of the Ministry of Foreign Affairs of the Kyrgyz Republic

2006/11225 Decree on Ratification of the Memorandum of Understanding between the Ministry of Foreign Affairs of the Republic of Turkey and the Ministry of External Relations of the Federal Republic of Brazil on the Cooperation between the Diplomatic Academies of both Countries

OG 11 December 2006/26373
2006/11232 Decree on Ratification of the Protocol of the Turkey - Iraq Joint Commission on Road Transport

2006/11244 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Republic of Azerbaijan on Cooperation in the Field of Environmental Protection

OG 13 December 2006/26375
2006/11262 Decree on Ratification of the Educational, Scientific, Cultural, Youth and Sports Exchange Program between the Government of the Republic of Turkey and the Government of the Islamic Republic of Iran for the Years 2006-2009

2006/11270 Decree on Ratification of the "Educational Cooperation Program" between the Government of the Republic of Turkey and the Government of the Lebanese Republic

OG 14 December 2006/26376

2006/11261 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Palestinian Authority and the Joint Declaration between Turkey and Israel

2006/11278 Decree on Ratification of the Cooperation Protocol between the Turkish International Cooperation Administration of the Prime Ministry of the Government of the Republic of Turkey and the Ministry of Agriculture, Forestry and Water Economy of the Government of the Republic of Macedonia on the Development of Bee-Keeping in Macedonia

2006/11287 Decree on Ratification of the Protocol of the Third Session of the Turkish-Pakistan Joint Commission on Tourism (*sic.*)

OG 15 December 2006/26377

2006/11196 Decree on Ratification of the Protocol of the Fourth Session of the Turkish - Mongolian Joint Economic and Trade Committee (*sic.*)

2006/11337 Decree on Ratification of the Convention and Its (Additional) Protocol between the Republic of Turkey and the Portuguese Republic for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

OG 16 December 2006/26378

2006/11316 Decree on Ratification of the Addendum to the Basic Agreement between the Government of the Republic of Turkey and the United Nations World Food Programme

OG 17 December 2006/26379

2006/11295 Decree on Ratification of the Agreement on Economic and Technical Cooperation between the Government of the Republic of Turkey and the Government of Romania

OG 18 December 2006/26380

2006/11246 Decree on Ratification of the Joint Communiqué on the Establishment of Diplomatic Relations between the Government of the Republic of Turkey and the Republic of Palau

2006/11334 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Republic of Sudan on the Establishment and Activities of the Programme Coordination Office of the Turkish International Cooperation Administration (TICA) in Khartoum

OG 19 December 2006/26381

2006/11279 Decree on Ratification of the Additional Protocol on Cooperation in the Field of Trafficking in Human Beings to the Agreement between the Ministry of Interior of the Republic of Turkey and the Ministry of Interior of the Kyrgyz Republic on Cooperation Against Crime and Ensuring Public Security

OG 20 December 2006/26382

2006/11285 Decree on Accession with Declaration to the Convention on International Liability for Damage Caused by Space Objects

OG 22 December 2006/26384

- Guarantee, Indemnity and Finance Agreement between the Republic of Turkey and the European Investment Bank

OG 27 December 2006/26389

2006/11294 Decree on Ratification of the Protocol of the Seventh Session Meeting of the Turkey – Russian Federation Industry and Technology Joint Working Group

2006/11393 Decree on Ratification of the Turkey-Bulgaria Joint Committee Decision No 1/2006 amending Protocol B of the Free Trade Agreement between the Republic of Turkey and the Republic of Bulgaria, concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Co-operation

OG 09 January 2007/26398
2006/11428 Decree on Ratification of the Memorandum of Understanding between the Republic of Turkey and the Competent Authorities of the Turkish Republic of Northern Cyprus on Cooperation in Exchange of Intelligent Financial Information in Money Laundering

OG 10 January 2007/26399
2006/11500 Decree on Ratification of the Turkey-Israel Joint Committee Decision No. 1/2006 amending Protocol A of the Free Trade Agreement between the Republic of Turkey and the State of Israel, concerning the Further Improvement of Preferential Regime in Agricultural Product

OG 12 January 2007/26401
2006/11499 Decree on Ratification of the Protocol of the Turkish - Spanish Joint Commission on Road Transport

OG 13 January 2007/26402
2006/11535 Decree on Ratification of the Notes amending the Memorandum of Understanding on Work and Holiday Visas between the Government of the Republic of Turkey and the Government of Australia

OG 15 January 2007/26404
2006/11509 Decree on Ratification of the Executive Protocol to the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Pakistan Regarding Technical and Scientific Cooperation

OG 18 January 2007/26407
2007/11542 Decree on Ratification of the Protocol of the First Session of the Joint Turkish-Belarusian Commission for Tourism (*sic.*)

OG 20 January 2007/26409
2006/11537 Decree on Ratification of the Agreements on the Termination of the "The Free Trade Agreement between the Republic of Turkey and Romania", "Convention between the Government of the Republic of Turkey and the Government of Romania in the Field of Quarantine and Plant's Protection" and "The Convention between the Republic of Turkey and Romania in the Sanitary Veterinary Field" (*sic.*)

OG 22 January 2007/26411
2007/11544 Decree on Ratification of the Protocol between the Government of the Republic of Turkey and the Government of the Republic of Moldova on Cooperation in the Field of Trafficking in Human Beings in the Framework of the Agreement on Fighting Against International Illicit Drug Trafficking, International Terrorism and Other Organized Crime

OG 27 January 2007/26416
2007/11563 Decree on Ratification of the Agreements on the Termination of "Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria on Facilitation of Road Transport of Passengers and Goods" and "Free Trade Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria"

OG 30 January 2007/26419 (bis)
2007/11557 Decree on Ratification of the Association Agreement Establishing A Free Trade Area Between the Republic of Turkey and the Egypt Arab Republic

OG 09 February 2007/26429
2007/11576 Decree on Ratification of the Agreed Minutes of the Sixth Session Meeting of Turkey – New Zealand Joint Commission on Economic and Technical Cooperation

OG 16 February 2007/26436

2007/11611 Decree on Ratification of the Financing Agreement on "Pre-accession Financial Assistance of the 2005 Programme" between the Republic of Turkey and the European Commission

2007/11668 Decree on Ratification of the Financing Agreement on "Pre-accession Financial Assistance Programme addressing the outbreak of avian influenza in the Republic of Turkey in 2006" between the Republic of Turkey and the European Commission

OG 17 February 2007/26437

2007/11602 Decree on Ratification of the Decision No 2/2005 of the Joint Committee for Amending the Protocol 2 concerning the Definition of the Concept "Originating Products" and Methods of Administrative Cooperation to the Free Trade Agreement between the Republic of Turkey and the Republic of Macedonia

OG 19 February 2007/26439

2007/11608 Decree on Ratification of the Protocol of the Third Session of the Turkish - Greek Joint Economic Commission (*sic.*)

OG 20 February 2007/26440

2007/11601 Decree on Ratification of the Agreement concluded by Exchange of Letters on "Regional Workshop for Central Asia and the Caucasus on International Cooperation against Terrorism and Transnational Organized Crime" between the Republic of Turkey and the United Nations Office on Drugs and Crime

OG 23 February 2007/26443

2007/11651 Decree on Ratification of the Protocol of the Turkish - Belarus Joint Commission on Road Transport

OG 27 February 2007/26447

2007/11632 Decree on Ratification of the Protocol of the Turkish – Czech Joint Committee Meeting on International Road Transport

OG 04 March 2007/26452
2007/11710 Decree on Ratification of the "Youth Programme Agreement on Decentralised Actions" between the Republic of Turkey and European Commission *(sic.)*

OG 08 March 2007/26456
2007/11678 Decree on Ratification of the Protocol of the Turkish - Moldavian Intergovernmental Joint Economic Commission Fourth Session Meeting

2007/11729 Decree on Ratification of the Memorandum of Understanding of the Sixth Session of the Joint Industrial Working Group between the Republic of Turkey and Romania (*sic.*)

OG 09 March 2007/26457
2007/11726 Decree on Ratification of the Protocol of the Twenty Third Session of the Turkish-Romanian Joint Economic Commission (*sic.*)

2007/11730 Decree on Ratification of the Agreed Minutes of the Fifth Session of the Turkish-Austrian Joint Economic Commission

OG 10 March 2007/26458
2007/11716 Decree on Ratification of the Protocol of the Fifth Session Meeting of Turkey-Belarus Joint Economic Commission

OG 11 March 2007/26459
2007/11676 Decree on Ratification of the Protocol of the Fourth Session Meeting of the Turkish - Kirghiz Joint Economic Commission

2007/11685 Decree on Ratification of the Memorandum of Understanding between the European Community and the Republic of Turkey on the Participation of the Republic of Turkey in the Community Programme on the Interoperable Delivery of Pan-European E-Government Services to Public Administrations, Business and Citizens (IDABC)

2007/11694 Decree on Ratification of the Memorandum of Understanding on Cooperation in the Field of Tourism between the Ministry of Culture and Tourism of the Republic of Turkey and the Tourism Administration of Guangdong Province of the People's Republic of China

OG 12 March 2007/26460

2007/11675 Decree on Ratification of the Protocol of the Fourth Session Meeting of Turkey - Kazakhstan Joint Economic Commission

2007/11677 Decree on Ratification of the Cultural, Educational and Scientific Exchange Programme between the Government of the Republic of Turkey and the Government of Mongolia for the Years 2005-2008

OG 15 March 2007/26463

2007/11699 Decree on Ratification of the "Protocol of Implementation on the Project of Fortification of Süleyman Shah Mausoleum" along with the "Minutes of the Meeting between the Turkish and Syrian Delegations on the Project of Implementation of the Project of Fortification of Süleyman Shah Mausoleum" and its Annex "Document Relating to the Borders of Souleyan Shah Mausoleum" and its Appendixes between the Governments of the Republic of Turkey and the Syrian Arab Republic

OG 23 March 2007/26471

2007/11757 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Republic of Italy on the Facilitation of Visa Procedures for Ordinary Passport Holders

2007/11758 Decree on Ratification of the Protocol of the Twenty Second Session of the Turkish-Romanian Joint Economic Commission *(sic.)*

2007/11767 Decree on Ratification of the Protocol of the Turkish - Croatian Joint Commission Meeting on Road Transport

2007/11768 Decree on Ratification of the Memorandum of Understanding on the Cooperation in the Field of Tourism between the Government of Republic of Turkey and the Government of the Republic of Tajikistan

2007/11784 Decree on Ratification of the Protocol of the Third Meeting of the Turkish -Albanian Joint Commission for Tourism *(sic.)*

2007/11790 Decree on Ratification of the Protocol of the Fourth Session of the Turkish - Georgian Joint Economic Commission *(sic.)*

2007/11820 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and the National Archives of the Ministry of the Administration and Interior of Romania

OG 24 March 2007/26472

2007/11743 Decree on Ratification of the Protocol on Cooperation between The General Directorate of State Archives in the Prime Ministry of The Republic of Turkey and The National Centre for Documents and Archives in the Court of the Cabinet Presidency of the Kingdom Of Saudi Arabia

2007/11769 Decree on Ratification of the Letter of Agreement between the Republic of Turkey and the International Plant Genetic Resources Institute on the International Plant Genetic Resources Institute (IPGRI) and member countries of the European Cooperative Programme for Crop Genetic Resources Networks (ECP/GR)

OG 26 March 2007/26474

2007/11817 Decree on Ratification of the Country Programme Action Plan (2006-2010) between the Government of the Republic of Turkey and the United Nations Children's Fund

OG 06 April 2007/26485
2007/11840 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of Australia on Cooperation to Combat Terrorism and Organised Crime

OG 07 April 2007/26486
2007/11846 Decree on Ratification of the Protocol on Cooperation between the General Directorate of State Archives of the Prime Ministry of the Republic of Turkey and Historic Documentation Centre of the General Directorate of Historical Monuments and Museums of the Ministry of Culture of the Syrian Arab Republic

OG 08 April 2007/26487
2007/11844 Decree on Ratification of the Protocol of the Seventh Session Meeting of the Turkish - Russian Joint Economic Commission

2007/11895 Decree on Ratification of the Convention between the Republic of Turkey and Bosnia and Herzegovina for the Avoidance of Double Taxation with Respect to Taxes on Income and On Capital

OG 09 April 2007/26488
2007/11907 Decree on Ratification with Declaration of the European Social Charter (revised)

OG 10 April 2007/26489
2007/11893 Decree on Ratification of the Protocol of the Republic of Turkey – Republic of Serbia Joint Commission Meeting on Road Transport

OG 12 April 2007/26491
2007/11896 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic on Re-admission of Illegal Migrants

OG 13 April 2007/26492
2007/11894 Decree on Ratification of the Agreed Minutes of the Second Session of the Turkish-Lebanese Joint Economic Committee (*sic.*)

OG 16 April 2007/26495
2007/11906 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Socialist Republic of Vietnam on Mutual Abolition of Visas for Holders of Diplomatic, Official, Service and Special Passports

OG 20 April 2007/26499
2007/11951 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and Palestine National Authority on Exchange of Land Plots for Building Embassy and Residence of Head of Mission of the Two Countries

OG 21 April 2007/26500
2007/11955 Decree on Ratification of the Cooperation Programme between the Government of the Republic of Turkey and the Government of the Hashemite Kingdom of Jordan in the Fields of Education, Science, Culture and Arts, Media, Youth and Sports

OG 22 April 2007/26501
2007/11940 Decree on Ratification of the Agreement on the Termination of the "The Convention between the Republic of Turkey and the Republic of Bulgaria on Cooperation in the Sanitary Veterinary Field" and "The Convention between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria on Cooperation in the Field of Plant's Protection and Quarantine"

2007/11941 Decree on Ratification of the Protocol of the Meeting of the Turkish - Romanian Joint Commission on Road Transports

2007/11949 Decree on Ratification of the International Road Transport Agreement between the Government of the Republic of Turkey and the Government of Islamic Republic of Pakistan

OG 24 April 2007/26502
2007/11942 Decree on Ratification of the Project between the Republic of Turkey and the United Nations Development Programme on Localizing the UN Millennium Development Goals in Turkey through the Local Agenda 21 Governance Network

OG 03 May 2007/26511
2007/11990 Decree on Ratification of the Agreement Between the Government of the Republic of Turkey and the Government of Georgia on the Joint Usage of the Batumi International Airport

OG 09 May 2007/26517
2007/11977 Decree on Ratification of the Protocol of the Ninth Session of the Turkish-Albanian Economic, Commercial, Industrial and Technical Cooperation Joint Commission

2007/12027 Decree on Ratification of the Protocol of the Third Session of the Turkish-Croatian Joint Economic Commission

2007/12070 Decree on Ratification of the Agreement to Amend the Visa Agreement between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria

OG 10 May 2007/26518
2007/11980 Decree on Ratification of the Agreed Minutes of the First Session of the Turkish - Afghan Joint Economic Commission (*sic.*)

OG 12 May 2007/26520
2007/12055 Decree on Ratification of the Turkey - Israel Joint Committee Decision No. 1/2007 on Further Improvement on Preferential Regime in Agricultural Product subject to the Free Trade Agreement between the Republic of Turkey and the State of Israel

OG 15 May 2007/26523
2007/12056 Decree on Ratification of the Notes on Termination of the "Trade and Maritime Agreement between the Government of the Republic of Turkey and the Government of the Republic of Bulgaria"

2007/12066 Decree on Ratification of the Notes and the Agreed Minutes of Negotiation Minutes between the Government of Japan and of the Government of the Republic of Turkey on the Construction of Kaman - Kalehoyuk Archaeological Museum by Grant

2007/12068 Decree on Ratification of the Protocol between the Republic of Turkey and the Republic of Montenegro Joint Commission Meeting on Road Transport

OG 16 May 2007/26524
2007/12018 Decree on Ratification of the Protocol of the Seventh Session of the Turkish – Cuban Joint Commission on Trade, Economic and Industrial Cooperation

2007/12043 Decree on Ratification of the Protocol of the Fourth Session of the Turkish – Croatian Joint Economic Commission *(sic.)*

OG 24 May 2007/26531
2007/12086 Decree on Ratification of the Economic Cooperation Organization Trade Agreement

OG 24 May 2007/26531 (bis)
2007/12074 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the United Kingdom and the Government of the Northern Ireland on Cooperation against Terrorism, Serious Crimes and Organized Crime

OG 25 May 2007/26532
2007/12124 Decree on Ratification of the Air Transport Agreement between the Government of the Republic of Turkey and the Government of Georgia

OG 03 June 2007/26541
2007/12114 Decree on Ratification of the Protocol of the Republic of Turkey and the United Kingdom Joint Commission Meeting on Road Transport

OG 13 June 2007/26551
2007/12194 Decree on Ratification of the Agreed Minutes of the Sixth Session of the Joint Commission for Economic and Technical Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Indonesia

OG 17 June 2007/26555
2007/12151 Decree on Ratification of the Memorandum of Understanding between the Republic of Turkey and the International Maritime Organization on the Holding of the Eighty-Second Session of the Maritime Safety Committee in Istanbul, from 29 November to 8 December 2006

OG 22 June 2007/26560
2007/12241 Decree on Ratification of the Protocol of the Second Session of the Turkish - Greek Joint Tourism Committee *(sic.)*

OG 23 June 2007/26561
2007/12245 Decree on Ratification of the Agreed Minutes of the Joint Working Group Meeting on Tourism between Turkey and India

2007/12266 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of Georgia Concerning the Immovable Properties of Their Embassies

OG 24 June 2007/26562
2007/12261 Decree on Ratification of the Agreement on Trade and Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Kenya

OG 25 June 2007/26563
2007/12248 Decree on Ratification of the Agreed Minutes of the Seventh Session of the Turkish – New Zealand Joint Commission for Economic and Technical Cooperation *(sic.)*
2007/12263 Decree on Ratification of the Agreement on Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of Hungary

2007/12264 Decree on Ratification of the Protocol of the Turkish – Dutch Joint Commission Meeting on Road Transport

OG 26 June 2007/26564

2007/12249 Decree on Ratification of the Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the State of Kuwait on Mutual Entry Visa Exemption for Diplomatic, Special and Service Passport Holders

2007/12262 Decree on Ratification of the Protocol of the Second Session of the Turkish – Bosnian and Herzegovinian Joint Economic Commission *(sic.)*

OG 26 June 2007/26564 (bis)

2007/12252 Decree on Ratification of the Protocol between the Government of the Republic of Turkey and the Government of Malaysia on the Reciprocal Allocation of Land Plots in Ankara and Putrajaya for the Construction of Premises for Diplomatic Missions

OG 27 June 2007/26565

2007/12268 Decree on Ratification of the Agreed Minutes of the Third Session of the Turkish – Vietnamese Joint Economic and Trade Committee *(sic.)*

OG 29 June 2007/26567

2007/12330 Decree on Ratification of the Memorandum of Understanding between the European Community and the Republic of Turkey on the Participation of the Republic of Turkey in the Culture programme (2007 to 2013)

2007/12331 Decree on Ratification to be effective from 1 January 2007 of the Memorandum of Understanding between the European Community and the Republic of Turkey on the Association of the Republic of Turkey to the Seventh Framework Programme of the European Community for Research, Technological Development and Demonstration Activities (2007-2013)

OG 30 June 2007/26568

2007/12318 Decree on Ratification of the Memorandum of Understanding between the European Community and the Republic of Turkey on the Participation of the Republic of Turkey in the Youth in Action Programme and in the Action Programme in the Field of Lifelong Learning (2007-2013)

OG 03 July 2007/26571

2007/12289 Decree on Ratification of the Protocol on the Procedure to Be Followed in the Case of Deportation of Passengers, Luggage, Cargo and Mail Specified by "The Agreement Between the Government of the Republic of Turkey and the Government of Georgia on the Joint Usage of the Batumi International Airport" by the Competent Authorities of the Both Contracting Parties or of the Third Countries

2007/12314 Decree on Ratification of the Headquarters Agreement between the Government of the Republic of Turkey and the Economic Cooperation Organization (ECO) Trade and Development Bank

OG 04 July 2007/26572

2007/12290 Decree on Ratification of the "Agreement on Trade, Economic and Technical Cooperation" between the Government of the Republic of Turkey and the Republic of Madagascar

2007/12292 Decree on Ratification of the Protocol of the Third Session of the Turkish – Slovene joint Economic Commission *(sic.)*

2007/12298 Decree on Ratification of the "Agreement on Trade, Economic and Technical Cooperation" between the Government of the Republic of Turkey and the Islamic Republic of Mauritania

2007/12308 Decree on Ratification of the Protocol of the Fourth Session Meeting of Turkish – Macedonian Joint Economic Commission

2007/12309 Decree putting into force the Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Germany concerning Financial Cooperation in 2005 regarding Resource Allocation for the Projects titled "Municipal

Infrastructure Programme V" and "Management of Solid Waste in Samsun"
2007/12311 Decree on Ratification of the Protocol of the Tenth Session Meeting of the Turkey – Sudan Interagency Joint Trade and Economic Cooperation Commission

OG 07 July 2007/26575
- Guarantee and Loan Agreements and Supplemental Letters between the Republic of Turkey and International Bank for Reconstruction and Development

OG 08 July 2007/26576
2007/12329 Decree on Ratification of the Agreement on the Amendments to be inserted in the Headquarters Agreement between the Republic of Turkey and the Organization of the Black Sea Economic Cooperation

OG 09 July 2007/26577
2007/12285 Decree on Ratification of the Protocol of the Meeting of the Turkish-Danish Joint Commission on International Road Transport

OG 14 July 2007/26582
2007/12380 Decree on Ratification of the Loan Agreement and Its Supplemental Letter to be put into force on the date of signature, between the Republic of Turkey and the International Bank for Reconstruction and Development for the Purpose of Supporting the Reforms that would be Implemented In the Fields of Investment Environment, Labour Market, Credit and Capital Markets and Information and Technology Use in the Context of the Economic Programme that is in Force

OG 19 July 2007/26587
2007/12358 Decree on Ratification of the Turkey United Nations Development Assistance Framework 2006-2010

OG 21 July 2007/26589

2007/12348 Decree on Ratification of the Joint Communiqué on the Establishment of Diplomatic Relations between the Republic of Turkey and the Federated States of Micronesia

OG 28 July 2007/26596

2007/12433 Decree on Accession to the International Convention for the Protection of New Plant Species dated 2 December 1961, revised on 10 November 1972, 23 October 1978 and 19 March 1991 in Geneva

OG 02 August 2007/26601

2007/12424 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the State of Qatar concerning the Reciprocal Promotion and Protection of Investments

OG 08 August 2007/26607

2007/12427 Decree on Ratification of the Convention between the Government of the Republic of Turkey and Cabinet of Ministers of Serbia and Montenegro for the Avoidance of Double Taxation with Respect to Taxes on Income and On Capital

2007/12464 Decree on Ratification of the Protocol of the Third Session Meeting of the Turkey – Ukraine Joint Commission on Tourism

2007/12471 Decree on Ratification of the Cooperation Programme in the Field of Tourism between the Republic of Turkey and Ukraine for the Years 2007-2008

OG 09 August 2007/26608

2007/12449 Decree on Ratification of the Protocol of the Third Session Meeting of the Republic of Turkey – the Czech Republic Joint Economic Commission

2007/12450 Decree on Ratification of the Convention and Its (Additional) Protocol between the Government of the Republic of

Turkey and the Government of the Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

OG 10 August 2007/26609

2007/12452 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Cabinet of Ministers of Ukraine on Bilateral Cooperation in the Field of Environmental Protection

2007/12486 Decree on Ratification of the Protocol on Economic and Financial Cooperation between the Government of the Republic of Turkey and the Government of the Turkish Republic of Northern Cyprus

OG 11 August 2007/26610

2007/12474 Decree on Ratification of the Agreed Minutes of the First Session Meeting of Turkey – Senegal Trade, Economic and Technical Cooperation Joint Commission

OG 13 August 2007/26612 (bis)

- Guarantee and Indemnity Agreements on Global Loan for the Development of Small and Medium Sized Enterprises and Loan Agreement between the Republic of Turkey and the European Investment Bank
- Guarantee and Indemnity Agreements and Financing Contract for Antalya Light Rail Train Project between the Republic of Turkey and the European Investment Bank

OG 14 August 2007/26613

2007/12498 Decree on Ratification of the Agreement for Cooperation in the Field of Industrial Research and Development between the Government of the Republic of Turkey and the Government of the State of Israel

OG 15 August 2007/26614

2007/12503 Decree on Ratification of the Protocol between the Ministry of Health of the Republic of Turkey and Ministry of Health

of the Turkish Republic of Northern Cyprus on the Issuing of Health Certificates of the Sea Man

OG 21 August 2007/26620
2007/12487 Decree on Ratification of the Convention and Its (Additional) Protocol between the Government of the Republic of Turkey and the Government of the Kingdom of Bahrain for the Avoidance of Double Taxation and the Prevention of the Fiscal Evasion with Respect to Taxes on Income

OG 31 August 2007/26629
2007/12542 Decree on Ratification of the Agreement on Trade and Economic Cooperation between the Government of the Republic of Turkey and the Government of the Republic of South Africa

2007/12547 Decree on Ratification of the Agreement on Cooperation in the Fields of Culture, Education, Science, Mass Media, Youth and Sports between the Government of the Republic of Turkey and the Government of the Federal Democratic Republic of Ethiopia

2007/12570 Decree on Accession to the Amendment of the Convention on the Grant of European Patents (European Patent Convention)

2007/12573 Decree on Ratification of the Additional Protocol 3 to the General Trading Agreement for Electrical Interconnection between Five Countries "Egypt, Iraq, Jordan, Syria and Turkey"

2007/12577 Decree on Ratification of the Agreed Minute of the Third Session Meeting of Turkey – Israel Joint Economic Committee

OG 02 September 2007/26631
2007/12519 Decree on Ratification of the Agreement between the Government of Turkey and the Government of Ukraine concerning Cooperation in the Exploration and Use of Outer Space

2007/12529 Decree on Ratification of the Agreement between the Republic of Turkey and the United Nations Development Programme

on the Actualization of the Transfer of the Material Contribution of Turkey to the United Nations Peace-Building Commission

OG 03 September 2007/26632
2007/12520 Decree on Ratification of the Protocol of the Sixteenth Session Meeting of the Turkish – Bulgarian Joint Committee on Economic and Technical Cooperation

2007/12521 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Islamic Republic of Mauritania on Mutual Suppression of Visa Requirements for Holders of Diplomatic and Official Passports

2007/12536 Decree on Ratification of the Protocol between the Republic of Turkey and Aviation Authorities of Georgia on Flight Safety, Aviation Safety and Customers' Needs in the Batumi International Airport

OG 04 September 2007/26633
2007/12533 Decree on Accession to the 1988 Protocol relating to the 1966 International Convention on the Load Lines

OG 11 October 2007/26670
2007/12610 Decree on Ratification of the Agreement between the Government of the Republic of Turkey and the Government of the Saint Vincent and Grenadines on Mutual Suppression of Visa Requirements for Holders of Diplomatic and Official Passports

2007/12614 Decree on Ratification of the Protocol of the Fourth Session Meeting of Turkey – Azerbaijan Joint Economic Commission

OG 08 August 2006/26253
2006/10693 Decree on Ratification of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention

OG 17 August 2006/26262
2006/10827 Decree on Making Reservation to the International Convention on Harmonization of the Frontier Controls of Goods

OG 01 September 2006/26276
Guarantee and Loan Agreements between the Republic of Turkey and the Council of Europe Development Bank

OG 02 October 2006/26307
2006/10885 Decree on Ratification of the United Nations Convention against Corruption

OG 17 November 2006/26349
2006/11158 Decree on Ratification of the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region

OG 19 November 2006/26351
2006/11171 Decree on Ratification of the "Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention" on Civil Liability for Nuclear Damage and Third Party Liability in the Field of Nuclear Energy

OG 20 December 2006/26382
2006/11285 Decree on Accession with Declaration to the Convention on International Liability for Damage Caused by Space Objects

OG 25 March 2007/26473
2007/11745 Decree on Ratification of the Amendments to the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets

BIS IN HAC REGIONE QUAM
COLIMUS IUS RENOVATUM
ET FIRMATUM EST PRAESTANTI
MENTE VIRI OPERA:
IUSTINIANI IMPERATORIS OLIM
CUM IS ANNO DXXX AD DXXXIV
CORPUS IURIS COLLIGENDUM
CURAVIT,
GAZI (MUSTAFA KEMAL ATATÜRK)
CUM ANNO MCMXXIV AD XXVII
IUS TURCHIAE REDINTEGRATAE
CONDIDIT.

SICUT ENIM IUSTINIANI MANDATIS
CORPORIS IURIS ORDINANDI ROMANARUM
LEGUM NOTITIA ET SCIENTIA NOBIS
SERVATA EST, ITA
GAZI (MUSTAFA KEMAL ATATÜRK),
CUM LEGES NOVAS ADOPTANDAS
DECREVISSET, TURCARUM NOSTRI TEMPORIS
IURIS PRUDENTIAE FUNDAMENTA
IECIT.ATQUE, UT IUSTINIANI MULTA
SAECULA OPUS MANSIT, ITA
GAZi (MUSTAFA KEMAL ATATÜRK)
NOSTRI ISTUD TANTAE MOLIS OPUS
IN PERPETUUM STATUET IURIS
PRUDENTIAM GENTIS SUAE.

ORD. PROF. DR. RICHARD HONIG
(University of Istanbul)
(April 1934- CAPITOLIVM)

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