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**PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS DURING THE
STATE OF EMERGENCY IN TURKEY**

***The crisis of the European Court of Human Rights in the face of authoritarian and
populist regimes***

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This conference has already heard a great deal about the situation of the State of Emergency in Turkey since in failed coup d'état in 2016. My colleague Kerem Altıparmak will speak about Turkey at greater length.

I am going to speak about the shocking deference of the Council of Europe (CoE) in the face of three states which have perpetrated gross violations of human rights in the context of internal armed conflict: Turkey, Russia, and the United Kingdom.

First, a few words about Kerem, and about my own experience taking cases against Turkey.

Ten years ago, in 2008, I participated in a conference in Ankara organised by Kerem. The following year he published an edited collection which contains my only article in Turkish.¹ In my presentation at the conference and in the article I reflected on 10 years of taking cases on behalf of Kurdish applicants against Turkey from 1992, and 8 years taking cases on behalf of Chechen applicants against Russia. My most important cases against Turkey (I was advocate in about 30 cases) were *Özgür Gündem v Turkey*², *Aktaş v Turkey*³, and *İpek v Turkey*⁴. These were important cases, but it will be noted that the first case took 7 years from

¹ Bill Bowring "Avrupa İnsan Hakları Mahkemesi İçtihadında Parçalanma, lex specialis ve Gerilimler", (Gökçen Alpkaya ile birlikte) 50. Yılında Avrupa İnsan Hakları Mahkemesi: Başarı mı Hayal Kırıklığı mı?, (Yay. Haz. Kerem Altıparmak), (2009) Ankara Barosu Yayınları, Ankara, s. 206-221. This appeared in English as Bill Bowring "Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights" v.14 n.3 (2009) *Journal of Conflict and Security Law* pp.485-498

² Application No. 22492/93, 16 March 2000; Turkish Kurdish newspaper, violations of Article 10, freedom of expression – also positive duty under Article 10 to protect freedom of expression

³ Application No. 24351/94, 24 April 2003; Death of young man in police custody – oral fact-finding hearing in Turkey – findings of torture and death by asphyxiation – violations of Articles 2 and 3

⁴ Application No. 25760/94, 17 February 2004; Abduction by Turkish army of two of the applicant's sons – oral fact-finding hearing in Turkey – violations of article 2 and 3

lodging the application, the second 9 years, and the third 10 years. Of course, the gross violations of human rights in each case pre-dated the application.

Of course, in Ankara I asked the question why on earth the applicants wanted to take a case to the European Court of Human Rights (ECtHR).

The applicant in İpek, Abdurrezak İpek, who was born in 1942, suffered the “disappearance” of his two sons, Servet and İkrım İpek, in the course of an operation conducted by security forces in his village on 18 May 1994. His village was also burned to the ground. He was then 52. From 18 to 20 November 2002, when he was 60, he gave evidence to the ECtHR sitting in the Turkish Supreme Court in Ankara. I represented him. The Court held that

... taking into account that no information has come to light concerning the whereabouts of the applicant's sons for almost nine and a half years, the Court is satisfied that Servet and İkrım İpek must be presumed dead following their unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for their death is engaged. Noting that the authorities have not provided any explanation as to what occurred following the İpek brothers' apprehension, and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for their death is attributable to the respondent Government. Accordingly, there has been a violation of Article 2 on that account.

That is, Turkey murdered his sons. The ECtHR awarded him € 51,400 in compensation.

I need not emphasise that Mr İpek did not go to the ECtHR and wait 10 years, 12 from the events concerned, in order to receive some money. His prime motivation in taking his case was not even the search for justice. The perpetrators of the murder of his sons have never been brought to trial. He, like my other Kurdish and Chechen clients, demanded vindication of the truth as to what had happened to them and to their children.⁵ In his own case the Turkish government went to extraordinary lengths for several years to try to persuade the Court that nothing had happened to Mr İpek or his sons, and that there was no case.

And I had personal experience of the consistent practice of the Turkish state in accusing advocates of the very crimes for which their clients are accused. For example, in the oral hearing in Strasbourg in *Özgür Gündem v Turkey*, the Turkish government representative turned to me in front of the judges and shouted “Professor Bowring is a terrorist! He is a

⁵ See for example Dermot Groome (2011) “The Right to Truth in the Fight against Impunity” 29 *Berkeley Journal of International Law* 175 ; Federico Fabbrini (2014) “The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism” v.14 n.1 *Human Rights Law Review* 85–106

member of the PKK!”, because I was representing a newspaper accused of inciting terrorism. The ECtHR held that the newspaper had not incited terrorism: in fact, it had used the words “Kurd” and “Kurdish”, which Turkey considered to be “separatism”, and therefore terrorism.

In my presentation in Ankara I spoke with guarded optimism about taking cases to the ECtHR, and why victims of violations should be encouraged to take their cases and to wait for years for a result. Ten years later, was my optimism justified?

Turkey

The attempted coup took place on 15 July 2016. On 6 June 2017 a chamber of the ECtHR ruled that the application in *Gökhan Köksal v Turkey*⁶ was inadmissible⁷. The case concerned a teacher’s dismissal by emergency Decree No. 672⁸, along with 50,875 other public servants who were regarded as having membership of or an affiliation, link or connection with terrorist organizations or structures, formations or groups determined by the National Security Council to engage in activities against the national security of the Turkish State.

The applicant complained of a breach of his right of access to a court, his right to be presumed innocent and his right to be informed of the accusation against him (Article 6 §§ 1, 2 and 3 (a) of the European Convention of Human Rights (ECHR)). He also complained that he had been dismissed on the basis of acts which did not constitute a criminal offence at the time they were committed (Article 7-no punishment without law), and that his rights and freedoms under Articles 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination) had been violated.

The Court dismissed the application for failure to exhaust domestic remedies, finding that a new remedy was available to the applicant, provided by Decree No. 685,⁹ which was adopted on 2 January 2017. Decree No. 685 provided for the creation of a commission, namely the ‘State of Emergency Inquiry Commission’, tasked with assessing the measures adopted directly by the emergency decrees issued in the context of the state of emergency, including the dismissals of civil servants. After several months, the rules of procedure of the

⁶ Application no: 70478/16

⁷ For analysis, see Emre Turkut “The Köksal case before the Strasbourg Court: a pattern of violations or a mere aberration?” 2 August 2017, at <https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/#more-3868>

⁸ Text in English at <https://rm.coe.int/16806a2e17>

⁹ Text in English via the Venice Commission at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)014-e)

Commission were finally published on 12 July and the Commission finally began receiving applications on 17 July.

Kerem Altıparmak has provided a highly convincing explanation as to why the Commission cannot be an effective remedy.¹⁰ Emre Turkut concluded that “... the Strasbourg Court has adopted a narrow approach in order to reduce the overwhelming number of pending cases before it and has thus turned a blind eye to the shattered lives of the purged public servants in Turkey.”¹¹ He pointed out that this is against the background of the fact the ECtHR is granting a wider margin of appreciation to states by providing more subsidiarity, particularly with regard to Article 35, over the past half-decade following the Brighton Declaration.¹² Oleg Soldatov and Gülden Deniz Tokmak went further¹³:

... some of the decisions of the European Court of Human Rights could be regarded as politically motivated: the way the judges are appointed to the Court¹⁴ and the dynamics of relationships between the Court and the Council of Europe Member States¹⁵ are vaguely hinting at this. At the same time, if one hypothesizes that this inadmissibility decision in the Köksal category of cases was part of the efforts of the Council of Europe community to “pacify” Turkey and to leave room for future negotiations on other issues, this tactic has most likely failed: Turkey withdrew its extra-budgetary funding of the Council of Europe¹⁶.

On 9 March 2018 the Rules Committee of PACE proposed that Turkish should be removed from PACE’s list of working languages. According to the committee, “the draconian reduction” of the Assembly’s budget for 2018 and 2019 – which is a consequence, among other things, of the Turkish decision to return to its original status as an ordinary contributor to the Council of Europe budget – “calls for drastic measures”.¹⁷

¹⁰ Kerem Altıparmak 23 February 2017 “Is the State of Emergency Inquiry Commission, Established by Emergency Decree 685, an Effective Remedy?” at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943518

¹¹ Turkut, *ibid*, note 7

¹² See on this Mikael Madsen “Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?” at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993222 , and v.9 n.2 (2018) *Journal of International Dispute Settlement*, 199–222

¹³ Oleg Soldatov and Gülden Deniz Tokmak “Köksal v. Turkey: Excessive Formalism or Strict Adherence to Admissibility Criteria?” 11 January 2018, at <https://www.rmediafreedom.eu/Tools/Legal-Resources/Koeksal-v.-Turkey-Excessive-Formalism-or-Strict-Adherence-to-Admissibility-Criteria>

¹⁴ Erik Voeten “The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights” *International Organization* 61, Fall 2007, pp 669–701, at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.493.2929&rep=rep1&type=pdf>

¹⁵ Roger Masterman “Supreme, submissive or symbiotic? United Kingdom courts and the European Court of Human Rights” October 2015, UCL Constitution Unit at <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf>

¹⁶ <https://www.dailysabah.com/politics/2017/11/10/turkey-withdraws-as-main-contributor-in-european-council-cites-monitoring-process>

¹⁷ <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6984&lang=2&cat=28>

At this conference in Istanbul, Kerem Altıparmak argued that the ECtHR should find that the actions of the Turkish Government since 2016 amount to an “administrative practice”¹⁸. The former Commission of Human Rights had stated, in the Greek case¹⁹, that, where "there is a practice of non-observance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus, if there were an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either be not instituted, or, if they were, would be likely to be half-hearted and incomplete."

Kevin Boyle and Hurst Hannum, counsel in *Donnelly v United Kingdom*²⁰, took the view²¹ that

It is difficult to consider separately the two primary holdings, concerning the competence of the individual to raise the substantive issue of the existence of an administrative practice contrary to the Convention and the effect of such an alleged practice on the exhaustion of domestic remedies rule, for each is strongly supportive of the other. In addition, it is clear from a reading of the Commission's decision that both are based on the similar premise of the inherent equality of procedures under Articles 24 and 25 (apart from the specific distinctions set out in Article 25 itself and Article 27(1) and (2)).

But even if the ECtHR held that Turkey was responsible for an “administrative practice”, so that Turkish applicants were no longer required to exhaust domestic remedies, there would be no guarantee that the ECtHR would find in their favour on the merits.

Russia

As I already mentioned, Turkey has withdrawn its extra-budgetary funding from the Council of Europe (CoE). Russia is now paying no money at all to the CoE. This poses a very serious problem: Turkey, Russia and the UK are three of the six states which contribute an exceptionally large amount to the CoE’s budget. On 16 March 2018 *The Guardian* reported that the CoE is facing “an unprecedented budgetary crisis”, following Russia’s decision to suspend payments in 2017 over its representation in the council’s Strasbourg assembly and

¹⁸ See Kevin Boyle and Hurst Hannum “Individual Applications Under the European convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case” v.68. n.3 (1974) *American Journal of International Law*, pp. 440-453

¹⁹ The Greek Case, Report of the Commission, 12 Yearbook 194 (1969).

²⁰ Application nos. 5577-5583/72, *Donnelly and others v. the United Kingdom*, dec. 15.12.75, DR 4 p. 4

²¹ Boyle and Hannum (1974) p.452

Turkey's decision to slash its contributions. The CoE faces a shortfall of at least €42.65m (£37.6m), 10% of its annual budget, meaning it could be forced to cut jobs.²²

Following Russia's illegal annexation of Crimea in 2014²³, the Parliamentary Assembly of the Council of Europe (PACE) imposed sanctions on the Russian delegation. On 28 January 2015 it decided to ratify the credentials of the Russian delegation, citing the need to "foster dialogue", but at the same time decided to suspend its voting rights and its right to be represented in the Assembly's leading bodies "as a clear expression of condemnation of continuing grave violations of international law in respect of Ukraine" by Russia. In addition, PACE also suspended – for the duration of the Assembly's 2015 session – the right of its Russian members to be appointed as a rapporteur, to observe elections or to represent the Assembly in other CoE or external bodies.²⁴ These sanctions have been continued.

However, on 22 January 2018 the Secretary General of the CoE, Thorbjorn Jagland, said that sanctions against the Russian Federation should be removed in order to restore its participation in PACE by 2019.²⁵

On 19-21 June 2018, Mr Jagland went to Russia on a working visit. The fact of his visit, to meet President Putin, Minister of Foreign Affairs Lavrov, and Human Rights Ombudsman Moskalkova, was reported very briefly on the CoE website.²⁶

The Russian Ministry of Foreign Affairs provided its own commentary on 19 June 2018.²⁷ It recalled that Russia had joined the CoE on February 28, 1996, becoming the 39th member state, and had ratified 65 conventions and protocols out of the 224 CoE legal documents, including the ECHR, the European Convention for the Prevention of Torture (CPT), the European Social Charter and the European Cultural Convention. In 2017-2018 alone, Russia had ratified six important Council of Europe documents, including the Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds

²² <https://www.theguardian.com/law/2018/mar/16/human-rights-body-faces-cash-crisis-after-clash-with-russia>

²³ See Bill Bowring "Who Are the "Crimean People" or "People of Crimea"? The Fate of the Crimean Tatars, Russia's Legal Justification for Annexation, and Pandora's Box" in Sergey Sayapin and Evhen Tsybulenko (eds) *The Use of Force against Ukraine and International Law* *Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (T M C Asser / Springer 2018) pp. 21-40, ISBN 978-94-6265-221-7

²⁴ <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5410&lang=2&cat=8>

²⁵ https://concorde.ua/rs/daily/item_72621/

²⁶ <https://www.coe.int/en/web/portal/-/secretary-general-jagland-to-meet-russian-president-putin-and-foreign-minister-lavrov-in-moscow>

²⁷ http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3263025

from Crime and on the Financing of Terrorism, and the Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health (Medicrime Convention).

The Russian MFA added:

Russia is currently actively involved in all the entities of the Council of Europe, except for its Parliamentary Assembly (PACE). Unfortunately, CE's parliamentary dimension was taken hostage by a rather small, albeit well-organised, group of people representing anti-Russia forces.

Seeking to express its concern over the deepening crisis within PACE, the Russian Federation decided not to pay its contributions to the Council of Europe for 2017 until the delegation of the Federal Assembly of the Russian Federation is fully and unconditionally restored in its rights within the Parliamentary Assembly. At the same time, the Russian Federation remains proactive within the Council of Europe, and continues to honour its commitments under conventions it has acceded to.

The Russian media reported that Mr Jagland had congratulated Russia on successfully hosting the football world championship.²⁸ Mr Jagland's comments were published verbatim on the Kremlin's website.²⁹ As to Russia's problems with the CoE, Mr Jagland said:

There is always a lot of focus on the European Court, and for all of the member countries there are judgments that they dislike, but, all in all, I would say that the justice of the court has been very important for all of the member states.

We have here a small brochure, which shows how the court has influenced, in a positive way, many ways of life in the Russian Federation. This is, actually, the meaning of the court: to help its member states come closer together by adopting laws that are in conformity with the Convention. So again, thank you for all these twenty years and thank you for your strong commitment to the Council of Europe.

Mr Lavrov said, in his meeting with Mr Jagland:

Today, we cannot fail to mention that the organisation is going through a system-wide crisis related to the situation within the Parliamentary Assembly of the Council of Europe. We greatly appreciate your efforts to find a way out of this crisis, Mr Secretary General. The solution must be based on the principles that govern the work of the Council of Europe and were devised by its founding fathers. One of these principles is equality among all member countries.³⁰

Mr Jagland did not raise the question of Ukrainian political prisoners with Mr Putin, although it was reported that he had raised it with Mr Lavrov and Ms Moskalkova.³¹

²⁸ <http://www.tvc.ru/news/show/id/140043>

²⁹ <http://kremlin.ru/events/president/news/57818>

³⁰ https://ireland.mid.ru/web/ireland/_home/-/asset_publisher/jMdOKPys2LHL/content/foreign-minister-sergey-lavrov-s-opening-remarks-at-the-talks-with-secretary-general-of-the-council-of-europe-thorbj-rn-jagland-moscow-june-20-2018?inheritRedirect=false

³¹ <https://www.unian.info/politics/10163789-coe-secretary-general-jagland-to-submit-petition-to-putin-for-pardoning-sentsov.html>

Finally, on 24 June 2018, Mr Jagland finally submitted a petition to Russia in his capacity as Secretary General of the CoE, pursuant to the ECHR, calling on President Putin to pardon the Ukrainian filmmaker Oleh Sentsov, illegally convicted in Russia.³² And on 19 September 2018 the EU's Justice Commissioner Věra Jourová called on Russian Justice Minister Alexander Kononov to release Mr Sentsov from the Russian prison where he has been in custody for more than four years.³³ Mr Sentsov was arrested in 2014 and sentenced to 20 years in jail on terrorism charges. He is a vocal critic of Russia's annexation of Crimea. He has been on hunger strike since May 2018, calling for the release 64 Ukrainians he says are also political prisoners.

Mr Sentsov complained to the European Court of Human Rights following his arrest in 2014, and on 8 July 2014 his application was given priority. On 21 June 2018 Natasha Dobrova, Sentsov's lawyer at the ECHR and a representative of the international human rights group Agora reported that the ECtHR is asking the Russian authorities to provide all available information about the state of health of Mr Sentsov, on the 38th day of a hunger strike. She said: "The Court sent a request to the Government of Russia on information on compliance with the requirements of articles 2 (the right to life), 3 (prohibition of torture) and 4 (prohibition of forced labor) of the Convention for the Protection of Human Rights and Fundamental Freedoms in connection with [Sentsov's] hunger [strike]."³⁴

According to Ms Dobrova, the ECHR also asked for the provision of information about Mr Sentsov's current condition, as well as his medical documentation prior to June 27.

A politically motivated denial of justice?

Despite these recent interventions, it remains the case that Mr Sentsov's application was lodged with the Court, and given priority status, more than four years ago. A recent comment asks whether the ECtHR is guilty of a political motivated denial of justice.³⁵ The article cites Pavel Chikov, who leads Agora and is another lawyer in the case, as saying that he believes that the Court is taking so long to consider Mr Sentsov's case because it does not want to address the issue of Russia's annexation of Crimea. He added that there is no point in

³² Ibid

³³ <https://www.unian.info/politics/10266075-eu-calls-on-russia-to-release-ukrainian-filmmaker-oleh-sentsov-media.html>

³⁴ <https://www.uawire.org/european-court-of-human-rights-asks-russia-to-provide-information-about-sentsov-s-health>

³⁵ Halya Coynash 31 August 2018 "The European Court of Human Rights' politically-motivated denial of justice for Oleg Sentsov" at <http://khpg.org/en/index.php?id=1535462098>

expecting a judgment in less than a year and that the ECtHR is somewhere “in the middle” of the process. In fact, even a year seems optimistic as there is no sign of movement at all.

Asked on *Hromadske Radio* why the ECtHR is taking its time with the case, Mr Chikov suggested that the issue cannot be resolved without addressing the issue of Crimea’s legal status. The Sentsov case is very complex, he says, and unquestionably political. “It concerns the legal status of Crimea which arouses very serious discussion within the Council of Europe and European Court of Human Rights. The European Court is evidently unwilling to raise the issue and give its assessment.” This is despite universal condemnation of Russia’s annexation of Crimea, and findings by authoritative bodies that it was illegal. Halya Coynash added that that it was impossible not to agree with Mr Chikov that the ECtHR’s delaying tactics do not cast them in a good light. While it is not at all guaranteed that Mr Sentsov would be released merely on the basis of an ECtHR judgment, the lack of such a judgment helps Russia continue lying both about the charges against him, and about the fact that he has only Ukrainian citizenship.³⁶

Foreign Agents

The case of Mr Sentsov is not the only controversial case in which the ECtHR has more than taken its time. In July 2012, the Russian parliament enacted legislative amendments concerning civil society organisations (CSOs), which are collectively known as the ‘Foreign Agents Act’.

Russian organisations receiving any funding at all from any foreign donors, or from other Russian organisations receiving foreign funding, and which engage in ‘political activity’ very widely defined, are required to register as ‘foreign agents’. Any organisation carrying that label is subject to stricter accounting requirements than other CSO, and must report to the Ministry of Justice more frequently on how they spend their funds. Publications by ‘foreign agents’ must be labelled as such; failure to comply with this provision, leads to the risk of substantial fines. The term ‘foreign agent’ implies spying and illicit activity as a result of the term’s usage during the Soviet era. CSOs are faced with a difficult choice: either receive foreign funding and accept the repercussions of the label; or rely exclusively on Russian sources, including presidential or governmental grants, which may result in a loss of independence and self-censorship. In June 2018, according the Ministry of Justice, there were

³⁶ See Halya Coynash 29 June 2018 Halya Coynash “Russia pushes lies and defamation while hiding Sentsov who is reportedly very weak” at <http://khpg.org/index.php?id=1530232129>

currently 76 NGOs on the ‘foreign agents’ register. A total of 158 groups have been designated as ‘foreign agents’ to date, including 30 which have shut down rather than bear the label, and over 40 which have stopped accepting foreign funding.³⁷

On 6 February 2013 the European Human Rights Advocacy Centre (EHRAC) lodged a “collective complaint” to the ECtHR on behalf of several of the affected CSOs, and altogether there are now 49 applications to the ECtHR³⁸.

However, these cases were not communicated to Russia until 22 March 2017³⁹, four years after lodging the application, despite the fact that the Act had been condemned by the CoE’s own Commissioner for Human Rights in 2013⁴⁰ and 2015⁴¹, the CoE’s Venice Commission in 2014⁴², the Human Rights Resource Centre in 2015, and Amnesty International in 2016. On 5 July 2017 the Commissioner lodged a Third Party Intervention in the case⁴³, as did Amnesty International and the International Commission of Jurists on 3 October 2017.⁴⁴ On 12 March 2018 EHRAC lodged its Reply to the Russian Government Observations. Again, the case is highly unlikely to be decided for at least a year.

It is not possible to find out what has been going on behind closed doors at the CoE in Strasbourg. But it is clear from the public materials reviewed above that the COE, led by Mr Jagland, is doing everything it can to prevent Russia from “crashing out” of the ECHR system because of sanctions imposed because of the annexation of Crimea. Mr Jagland is on record as insisting that sanctions must be lifted by 2019; and his efforts are greatly appreciated by Russia.

The United Kingdom

³⁷ See European Human Rights Advocacy Centre (EHRAC) 12 March 2018 “The ‘Foreign Agents Act’ is stifling independent civil society”

at <http://ehrac.org.uk/news/foreign-agents-act-stifling-independent-civil-society/>

³⁸ Application no. 9988/13 ECODEFENCE and others against Russia and 48 other applications

³⁹ <http://hudoc.echr.coe.int/eng?i=001-173049>

⁴⁰ <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-on-the-legislation-of-the/16806da5b2>

⁴¹ “Council of Europe Commissioner for Human Rights reiterates his call to bring Russian NGO legislation in line with European standards” 9 July 2015 at

<https://www.coe.int/en/web/commissioner/-/council-of-europe-commissioner-for-human-rights-reiterates-his-call-to-bring-russian-ngo-legislation-in-line-with-european-standards?desktop=true>

His Opinion is at <https://rm.coe.int/16806da772>

⁴² [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2014\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e)

⁴³ <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087>

⁴⁴ <https://www.icj.org/russia-icj-and-amnesty-international-intervene-on-foreign-agents-law/>

As I indicated at the start, the United Kingdom has joined Turkey and Russia as a state which, in the context of the internal armed conflict in Northern Ireland from 1969 to 1997, is being shown surprising deference by the ECtHR.

During the Troubles in Northern Ireland, the UK government arrested hundreds of men suspected of terrorism as part of “Operation Demetrius” in the summer of 1971. Some 342 people were interned (imprisoned without trial) as part of the Operation. 14 men were chosen for 'special treatment' and were taken to a secret interrogation centre. The men were forced to wear hoods and were thrown to the ground from low-flying helicopters while hooded. These 14 men became commonly known as the 'Hooded Men'. On top of brutal beatings and death threats, the men were then subjected to what would become known as the five techniques, authorised at a high level: Hooding; Stress positions; White noise; Sleep deprivation; Deprivation of food and water. None of the 14 men were ever convicted of any criminal offence.⁴⁵

The case was investigated by Amnesty International. What they found was shocking. The men were severely beaten, and when they collapsed, the beatings would start again. Some were still black and blue with bruises. Some felt they were on the brink of insanity – one alleged he tried to kill himself by banging his head against some metal piping in his cell. Their findings were clear: this was a case of brutality and torture by the British state.

The Irish government made history by taking the UK government to the ECtHR – the first time a state took a case against another state. This was an “interstate case”. The UK denied torture, but the (former) European Commission on Human Rights disagreed, ruling in 1976 that the UK had tortured the men, a violation of Article 3 of the ECHR. The UK government appealed to the ECtHR, which in 1978 (seven years after the complaints were filed) found that the techniques amounted to 'inhuman and degrading treatment' - but not torture.

New information came to light in a television documentary, *The Torture Files*, by the Irish broadcaster RTÉ in 2014. Files had been discovered in the UK state archives suggesting that the UK had misled the ECtHR in 1978. The documents show that the UK knew that the torture techniques had long-term health impacts on the victims, and had been authorised at the very highest levels of UK government. In 2014, following Judicial Review proceedings initiated by the Hooded Men, the Irish Government requested the ECtHR to revise its 1978

⁴⁵ <https://www.amnesty.org.uk/hooded-men-torture-uk-ireland>

judgment, and to find, on the basis of the new information, that use of the techniques was indeed torture.

On 20 March 2018, the Chamber of the ECtHR, by six votes to one, decided to dismiss the application.⁴⁶ There was a very strong dissenting opinion by the Irish judge, Síoifra O’Leary. She concluded⁴⁷:

In my view, it was the Court and the Convention system and not the respondent State which was primarily under scrutiny in the context of this revision request. I regret that my colleagues in Chamber were not able or willing to see this. Revision must remain exceptional and requests should, where appropriate, be defeated by the very legitimate and fundamental principle of legal certainty. However, in the present case it is difficult to avoid the impression that it is the Court which has sought to shelter itself behind that principle. By doing so it risked damaging the authority of the case-law which that principle seeks to safeguard and overlooking its own responsibilities pursuant to Article 19 of the Convention. I can only conclude with regret – in a similar vein to my predecessor in the original case – that there is much in the general approach of the original and revision judgments that must discourage Member States from invoking Article 33 of the Convention and, regrettably, much to encourage future respondent States with reference to which that article may be invoked.

In his analysis published on *Strasbourg Observers*, Dr Alan Greene of Durham University described what had happened as a “missed opportunity”.⁴⁸ The ECtHR had in his view “... missed an opportunity to correct an historic wrong; one that has had a pernicious effect across the globe.” He added that “... the public interest in this case is particularly salient in light of the fact that the original judgment was utilised by, amongst others, the United States to legitimise and defend what it termed ‘enhanced interrogation techniques’ during the war on terror.”

On 12 June 2018 it was reported that not only the Hooded Men themselves but the Irish Government had requested a referral to the Grand Chamber of the ECtHR – in effect an appeal.⁴⁹ This request is highly likely to be granted. At the same time, also with the support of Amnesty International, the Hooded Men have a case pending at the Belfast court of appeal, seeking permission to bring a case against former members of the military and the Royal Ulster Constabulary, whom the 14 men claim were responsible for beating and torturing them in 1971 during a mass security clampdown known as internment. Grainne Teggart, Amnesty

⁴⁶ *Ireland v. the United Kingdom*, Application no. 5310/71 (request for revision of the judgment of 18 January 1978)

⁴⁷ Paragraph 77

⁴⁸ Alan Greene 25 April 2018, at

<https://strasbourgobservers.com/2018/04/25/ireland-v-the-uk-and-the-hooded-men-a-missed-opportunity/>

⁴⁹ <https://www.bbc.co.uk/news/uk-northern-ireland-44455415>

International’s Northern Ireland campaigns manager, said: “The torture of these men was authorised at the highest levels of government. In line with the UK’s international human rights obligations, those responsible for sanctioning and carrying out torture, at all levels, must be held accountable and, where possible, prosecuted.”⁵⁰

This is against the background of the group of historic cases from Northern Ireland concerning the inadequacy of the investigation of the use of lethal force by State agents (the so-called "McKerr Group", which comprises six cases: *McKerr*, *Jordan*, *McShane*, *Shanaghan*, *Kelly* and *Finucane*)⁵¹. Patrick Finucane, commonly known as Pat Finucane, was an Irish human rights lawyer, a practising solicitor, who was allegedly killed by loyalist paramilitaries acting in collusion with the British government intelligence service MI5. In all these cases the UK was found by the ECtHR to have violated the right to a prompt and effective investigation following a suspected killing by state agents. Every year CoE’s Committee of Ministers, which supervises the execution of judgments of the ECtHR, records that the UK has so far failed to comply with its obligations.

On 26 June 2018 the United Kingdom Supreme Court was told that the UK government had “subverted the rule of law and obstructed justice” by refusing to hold an inquiry into the 1989 murder of Mr Finucane. Their barrister said that the decision to conduct a paper review meant government officials “have been insulated from further scrutiny”. He added: “The army, police and security service officers responsible for facilitating the murder of a solicitor whose only ‘crime’ was to represent his clients effectively have all been guaranteed impunity.” He said the question for the Supreme Court was whether the refusal to hold a public inquiry “could ever be regarded as compatible with either the rule of law or article 2 of the ECHR [which guarantees the right to life].” The murder was “exactly the kind of case where the court needs to interfere in a hard-edged way to discharge its constitutional obligations and to protect the rule of law, not to mention Mrs Finucane’s human rights,” he said. “Where the

⁵⁰ <https://www.theguardian.com/uk-news/2018/apr/18/hooded-men-seek-northern-ireland-torture-investigation>

⁵¹ *Jordan v the United Kingdom*, judgment final on 4 August 2001; *Kelly and Ors v the United Kingdom*, judgment final on 4 August 2001; *McKerr v the United Kingdom*, judgment final on 4 August 2001; *Shanaghan v the United Kingdom*, judgment final on 4 August 2001; *McShane v the United Kingdom*, judgment final on 28 August 2002; *Finucane v the United Kingdom*, judgment final on 1 October 2003
See <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13005.htm> and <http://www.patfinucanecentre.org/european-convention-human-rights/pfc-submission-committee-ministers-re-mckerr-ors-v-uk>

executive has subverted the rule of law and obstructed justice, they should not expect the guarantors of law and justice to look the other way.”⁵²

What is the ECtHR for, anyway?

In his recent book *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention*,⁵³ Marco Duranti shows on the basis of thorough research that the CoE and ECHR were indeed the brainchild of Winston Churchill, in whose mind acceding to a binding human rights treaty and the jurisdiction of an international court were necessary in the context of the Cold War, as a bulwark against Communism in the shape of the USSR and its allies – and the spectre of socialism in the UK, especially following Labour’s landslide victory in 1945. This was also despite the long Conservative tradition in England, since 1789, of horror at the implications of the Declaration of Rights of Man and of the Citizen.⁵⁴ The Declaration was regarded by Edmund Burke, Jeremy Bentham, and William Pitt the Younger as at best nonsense and at worst intellectual terrorism.⁵⁵ Karl Marx declared that “... so-called rights of man, the *droits de l’homme* as distinct from the *droits du citoyen*, are nothing but the rights of a member of civil society – i.e., the rights of egoistic man, of man separated from other men and from the community”.⁵⁶

It is not hard to see that the ECHR is almost word for word the Declaration; and the First Protocol to the ECHR, promulgated simultaneously with the ECHR, contains a right to private property; a right of parents to decide the (religious) education of their children⁵⁷; and a right to regular elections which has been the basis of excluding a former Communist, my client Tatjana Zdanoka, from standing as a candidate for the Latvian Parliament.⁵⁸ The

⁵² <https://www.theguardian.com/uk-news/2018/jun/26/finucane-inquiry-refusal-subverted-rule-of-law-court-told>, and <https://www.bbc.co.uk/news/uk-northern-ireland-44620236>

⁵³ Oxford University Press, 2017, at <https://global.oup.com/academic/product/the-conservative-human-rights-revolution-9780199811380?cc=gb&lang=en&>

⁵⁴ See Bill Bowring “England’s terror of the French Revolution: the historical roots of resistance to the Rights of Man and the case against the Human Rights Act” in Frederick Cowell (ed) *Critically Examining the Case Against the 1998 Human Rights Act* (Abingdon, Routledge, 2017)

⁵⁵ Jeremy Waldron *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Abingdon, Routledge, 2014)

⁵⁶ Karl Marx *On the Jewish Question* published in February 1844 in *Deutsch-Französische Jahrbücher*; at <https://www.marxists.org/archive/marx/works/1844/jewish-question/>

⁵⁷ Bill Bowring “Geopolitics and the right to education, and why ‘no person’ is in fact a child” v.26 n.2 (2014) *Child and Family Law Quarterly* pp.196-215

⁵⁸ Application no. 58278/00, Grand Chamber judgment of 16 March 2006

Labour Party and the trade union movement were, unsurprisingly, for the most part strongly opposed both to the CoE and the ECHR.

In the cases of the Irish Republicans against the UK, the Chechens against Russia, and the Kurds against Turkey, the ECHR became the means by which peoples in struggle for self-determination could re-awaken the revolutionary content of the Declaration, even though the ECtHR was very reluctant to see other than individual rights.⁵⁹

Will the ECHR system survive?

⁵⁹ For a more lengthy presentation of these ideas, see Bill Bowring “Human rights and public education” v.42 n.1 (2012) *Cambridge Journal of Education* pp.53-66