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COUNCIL OF EUROPE
1949 - 2024
CONSEIL DE L'EUROPE

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Date: 02/04/2024

DH-DD(2024)350

Meeting: 1501st meeting (June 2024) (DH)

Communication from Türkiye (28/03/2024) concerning the KAKOULLI and ISAAK groups of cases v. Turkey (Applications No. 38595/97, 44587/98).

Information made available under Rule 8.2a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1501e réunion (juin 2024) (DH)

Communication de la Türkiye (28/03/2024) relative aux groupes d'affaires KAKOULLI et ISAAK c. Turquie (requêtes n° 38595/97, 44587/98) ***[anglais uniquement]***.

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Memorandum on Kakoulli and Isaak Groups v. Turkey (Applications No. 38595/97, 44587/98) June 2024 (CM(DH))

This memorandum has been prepared to give a comprehensive overview of the measures in place and to respond to the questions identified in the decision of the Ministers' Deputies (CM(DH)) adopted at the 1468th meeting (5-7 June 2023) concerning the Kakoulli and Isaak groups.

The facts examined by the European Court of Human Rights (ECtHR) in the five judgments in these Groups relate to exceptional events which involved four killings and an injury in 1996 around the buffer zone in the Island of Cyprus at a time of a high level of violence and increased tension as it was during this time that two Turkish Cypriot soldiers were also shot on border guard duty by Greek Cypriots, which led to the death of one and serious injury of the other.[1]

Consultations with the Secretariat

Following the willingness expressed by the Turkish side to continue close cooperation with the Secretariat, which was welcomed by CM(DH) in paragraph 12 of its June 2023 decision, the Turkish side has conducted consultations with the Secretariat with a view to determining and resolving any outstanding issues concerning individual and general measures in relation to the Kakoulli and Isaak Groups on 15 November 2023.

After the submission of the draft memorandum to the Secretariat which was prepared in relation to the issues raised in the CM(DH) decision, within the time frame set in paragraph 13 of the CM(DH) decision, further exchanges were held with the Secretariat on 11 March 2024, based upon thorough preliminary comments and analysis of the Secretariat. This revised memorandum has been concluded based upon these exchanges and detailed comments of the Secretariat.

As regards individual measures in the Kakoulli Group

Kakoulli Group consists of two judgments in relation to the cases of *Kakoulli v Turkey* (38595/97) and *Kallis and Adroulla Panayi v Turkey* (45388/99). Both judgments relate to events which took place after a Greek Cypriot in camouflage combat uniform and a Greek Cypriot soldier respectively crossed the buffer zone unauthorized and then the TRNC border, entering illegally first degree military prohibited areas, after ignoring repeated warnings to stop. At the time, the guards on duty had to shoot enemy personnel in the buffer zone if they intended to cross the border and enter the military prohibited areas in the TRNC according to the instructions then in force at these two border guard posts.

[1] *Kakoulli*, para. 96 of the judgment.

The investigations into the events, as well as the subsequent reviews conducted by the TRNC Attorney-General's Office, concluded that the guards on duty acted in accordance with the instructions then in force.

***Kakoulli* Case:**

As it should be recalled, CM(DH) is examining the analysis of the TRNC authorities on the question of whether the guard on duty who fired at Petros Kakoulli had complied with the relevant provisions of domestic law, on the basis of the facts as established by the competent authorities after the Committee narrowed down the issues in its June 2021 meeting, in which the Committee also noted that the passage of time made it difficult to further clarify the facts.

In this connection, in paragraph 3 of its June 2023 decision, CM(DH) asked for an additional assessment so as to explain in more detail the way in which Rule 19 of Haşim 8 Guard Post instructions was applied at the time of the events to determine the lawfulness of the actions of the guard on duty at the border guard post.

As it can be recalled, a judicial inquest was conducted by the Gazimağusa District Court Judge on 25 August 1998 and the conclusion of the inquest was that Petros Kakoulli had died of injuries caused by shots fired by the guard on duty after he had illegally entered the TRNC and failed to obey warnings to stop.[2] The conclusion of the investigative officer who conducted the investigation was that the guard had acted in accordance with the instructions given to him and recommended the case to be classified as a "no case".[3]

ECtHR commented on whether the use of fire in the instant case was in compliance with the rules of engagement,[4] and neither the ECtHR nor the relevant authorities considered sections 53 and 54 of the Law No. 35/1986 on the Internal Functioning of the Security Forces Law (hereinafter Law No. 35/1986) applicable to the actions of the guard on duty.[5] While the relevant authorities relied on the correct reading of the instructions and Rule 19 therein to rule on the lawfulness of the actions of the guard on duty, ECtHR relied on an erroneous translation of Rule 19, cited in paragraph 76 of the judgment and opined that "it cannot be said either that the use of fire in the instant case was in compliance with the rules of engagement (see paragraphs 74 and 76 of the judgment)".[6]

[2] Para. 69 of the judgment.
[3] Para. 70 of the judgment.
[4] Para. 120 of the judgment.
[5] See, for example, page 1 of Addendum to Action Report, dated 31/3/2023, DH-DD(2023)428.
[6] Paragraph 19 of the Special Instructions referred to by the ECtHR in page 76 of the judgment was as follows:

> "When armed or unarmed military persons enter the buffer zone or cross the confrontation line, the guard on duty shall immediately inform the company's telephone exchange and take up position. If enemy personnel are inside the buffer zone and continue to approach after a warning is given for them to stop, they shall be aimed at and fired at. If the enemy personnel intend, after entering the buffer zone, to cross the confrontation line, the guard on duty shall not allow the removal of wounded or dead personnel from the

At the relevant time, Rule 19 instructed the guards on border duty at Haşim 8 Guard Post to aim and fire at enemy personnel who entered the UN-protected buffer zone, if they intended to proceed to cross the contact line/border and enter unlawfully to TRNC territory.

In this case, Petros Kakoulli entered the buffer zone unauthorized, and then crossed the TRNC border despite warnings to stop and was in the first degree military prohibited area on TRNC territory at the time he was shot as the ECtHR has also found it was "*undisputed that Petros Kakoulli was shot and killed … in the border area within the territory of the TRNC*."[7]

The Office of the TRNC Attorney-General reviewed extensively and repeatedly the investigation file after the delivery of the ECtHR judgment in light of the findings of the European Court and the discussions held in the CM(DH). In the three comprehensive reviews, conducted in 2007, in 2010 and most recently in 2021, the Attorney-General's Office, whose independence is guaranteed under Article 158 of the TRNC Constitution, confirmed that the (then) existing instructions authorized the use of firearms by the guard on duty at the border guard post after Petros Kakoulli crossed the buffer zone and then crossed the border (contact line) and entered a first degree military prohibited area in the TRNC illegally despite warnings to him to stop and firing of shots. The direction to which Petros Kakoulli was moving at the time of shooting did not matter after he crossed the border. The Office concluded that the soldier complied with the existing military instructions applicable at the time.[8]

In order to clarify whether section 53 of Law No. 35/1986 was applicable to the actions of the guard on duty at the border post, on 25 November 2023, additional clarifications had to be sought on the specific questions posed by CM(DH) in the decision it has adopted in June 2023 from the relevant department that implements the legislation, and accordingly, the Legal Affairs Division of the TRNC Security Forces supplied the information requested by CM(DH) in paragraph 3 of its June 2023 decision. In its response, the Legal Affairs Division confirmed that not only section 53, but also section 54 of Law No. 35/1986 was not applicable to the actions of the guard on duty.

The Legal Affairs Division clarified that the assessment of legality of the actions of the guard on duty was based on Haşim 8 Guard Post Instructions, Rule 19 inclusive. Those

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buffer zone or inside the confrontation line. The guard shall not allow the destruction of evidence. If need be he shall take aim and open fire. No personnel, in such a situation, shall enter the buffer zone."

whereas the correct translation is:

"When armed or unarmed military persons enter the buffer zone or cross the contact line, the guard on duty shall immediately inform the telephone operator and take up position. If the enemy personnel is inside the buffer zone and continues to approach after a warning to stop, they shall be aimed and fired. *If the intention of the enemy personnel is to cross the contact line across the buffer zone, he will be aimed and fired.* Those who are caught or die in the buffer zone or contact line shall not be permitted to be removed or evidence to be destroyed. If necessary, the guard shall take aim and open fire. In such circumstances, no personnel shall enter the buffer zone." (emphasis added)

[7] Para. 111 of the judgment.

[8] See, for example, DH-DD(2022)28 and DH-DD(2023)21.

Instructions were issued under section 45 of Law No. 35/1986 and section 33 of the Regulation thereunder, which provide for the Security Forces to determine the manner and form of duties of soldiers at border guard posts. Each Guard post has general and specific instructions related to the use of firearms ("Rules of Engagement") issued under section 45 of the Law No. 35/1986 and the Regulation.

The relevant Division explained that sections 53 and 54 of Law No. 35/1986 apply to other matters than border policing, namely they are relevant for internal security issues. Section 53 provides for the use of firearms of soldiers at stations, on patrol or those tasked with the duty to transfer a person or to protect (internal) public order. Section 54 regulates the use of firearms as part of maintaining (internal) public order. Thus, as the relevant Division did not consider section 54 applicable either, there is no need to assess whether the requirements of necessity and absence of other means than the use of firearms under section 54 were fulfilled, as previously sought by CM(DH).

Hence, while guards on duty at border posts are expected to comply exclusively with the clear and precise instructions[9] as to the manner and circumstances in which they should make use of firearms, and not sections 53 and 54 on internal security matters, Rule 19 of the instructions do not have to comply with sections 53 and 54 of the Law. This was another question asked by the CM(DH) in paragraph 3 of its June 2023 decision.[10]

With these further clarifications provided, CM(DH) is requested to close the examination of the individual measures in the case of *Kakoulli* case.

Kallis and Androulla Panayi* Case*:

In paragraph 4 of the CM(DH) decision of June 2023, the Committee asked for a similar analysis as that of *Kakoulli* case, by inquiring into the reasons for the conclusion that the relevant rules included in the Yıldırım Guard Post Instructions were complied with by the guard on duty at this border post, whether sections 53 and 54 of Law No. 35/1986 were applicable to the actions of the soldier, and whether the instructions complied with sections 53 and 54 of the said Law.

As it should be recalled, the conclusion of the investigation conducted into the death of Greek Cypriot soldier Stelyos Panayi and assessed by the Attorney-General's Office revealed that the guard on duty at the Yıldırım guard post used firearms in accordance with the applicable instructions at this border post at the relevant time, which ordered the guard to aim and shoot at enemy personnel when they intended to cross the TRNC border illegally after unauthorized crossing of the buffer zone. The instructions were

[9] Instructions are issued under section 45 of Law No: 35/1986 and section 33 of the Regulation thereunder.
[10] Haşim 8 Guard Post Instructions have subsequently been repealed, and the new Contact Line Guard Post Instructions currently in force, which comply with the TRNC Constitution and the binding international treaties, including the European Convention on Human Rights, have the necessary safeguards in place which, together with the necessary training, have proven effective in preventing the repetition of similar incidents at border guard posts.

enacted under the relevant legislation, section 45 of Law No. 35/1986 and section 33 of the Regulation thereunder.

In this case, Stelyos Panayi entered illegally first degree military prohibited area in the TRNC after he crossed unauthorized the UN protected buffer zone, and then the TRNC border, not stopping despite warnings. As part of the investigation, the Attorney-General's Office determined lawfulness of the guard's actions based on the Yıldırım Guard Post Instructions, enacted under the relevant legislation, section 45 of Law No: 35/1986 and section 33 of the Regulation thereunder, which were similar at the time to the instructions applicable at another guard post, Haşim Guard Post, and did not examine the lawfulness on the inapplicable sections 53 and 54 of Law No. 35/1986.[11]

In its correspondence dated 25 October 2023, the Legal Affairs Division of the TRNC Security Forces, in response to the issues posed by the Committee on this case in June 2023, also confirmed that the Yıldırım Guard Post Instructions were enacted in accordance with the authority vested under section 45 of Law No. 35/1986, which were subsequently amended, and that the Yıldırım Guard Post Instructions in force at the time were similar to the instructions applicable at Haşim 8 Guard Post.

When the ECtHR judgment is examined, it is clear that in this case the ECtHR did not assess the lawfulness of the actions of the guard on duty based on the applicable instructions.[12] Instead, the European Court merely commented on the independence of the investigation,[13] and access to humanitarian intervention,[14] both aspects of which have already been examined by CM(DH), following which the Committee decided no further general measures are required (a) on humanitarian interventions in its June 2022 decision[15] and (b) on the independence of the investigations concerning military personnel in its June 2023 decision.[16]

The Attorney-General's Office conducted an extensive review of the investigation file after the judgment in light of the discussions held in the CM(DH). On 30 December 2021, the Attorney-General's Office evaluated the detailed facts before it and found that the guards on duty acted in accordance with the instructions in force at the time when "Greek Cypriot soldier Stelyos Panayi" "violated the TRNC territory and crossed the contact line despite verbal warnings and warning shots in the air and on the ground". The Attorney-General's Office did not consider it necessary to conduct further investigation. In addition, the Attorney-General's Office considered that "the lapse of almost 25 years following the incident does not make it possible to conduct additional investigation".

[11] See, for example, DH-DD(2022)28.
[12] Paras. 34 and 71 of the judgment.
[13] Para. 72 of the judgment.
[14] Para. 66 of the judgment.
[15] For further details, please see DH-DD(2022)28.
[16] For further details on the explanations provided, please see DH-DD(2022)497, DH-DD(2022)28 and DH-DD(2023)428.

As explained in the *Kakoulli* case above, neither the initial investigation nor the review conducted by the Attorney-General's Office considered sections 53 and 54 of Law No. 35/1986 on internal security matters applicable to determine the legality of the guards' actions at this border guard post, the determination being made on the basis of the instructions then in force at the Yıldırım Border Guard Post.[17]

The clarifications provided above should enable the CM(DH) to proceed with the closure of the examination of the individual measures in the case of *Kallis and Androulla Panayi* case.

As regards general measures concerning the Kakoulli Group: the use of firearms by the military at the border guard posts[18]

As the ECtHR has also identified in its *Kakoulli* judgment, border security is the central and common issue in these two judgments in the Kakoulli Group.

The detailed measures that need to be in place to regulate the use of firearms by the military to address unlawful crossings or violent demonstrations at the border lines have already been indicated by the European Court in the case of *Kakoulli*. As it should be recalled, in paragraph 114 of the *Kakoulli* judgment, the European Court identified effective training for those officials operating at the border areas and clear and precise instructions as to the manner and circumstances in which they should make use of firearms for border policing to deal with unlawful crossings or violent demonstrations along the border lines as the necessary measures.

Effective training:

As part of execution of these judgments, effective training has been provided to the military personnel for the use of firearms who bear the primary responsibility for border policing.[19] This positive development had already been noted in the Committee's June 2021 and June 2023 decisions.

Clear and precise instructions for border policing:

Following the request from the Committee, the Legal Affairs Division of the TRNC Security Forces was contacted for further specific information on the relevant legal framework within which they operate for border policing.

[17] The applicable instructions, which were similar to Haşim 8 Guard Post Instructions, were also subsequently amended in accordance with the authority section 45 of the Law vested in the Security Forces Commandership, and the Contact Line Guard Post instructions in force today comply with the TRNC Constitution and the binding international treaties, while no compliance is sought with otherwise inapplicable sections 53 and 54 of the Law No.35/1986 on internal security. The Contact Line Guard Post Instructions currently in force, together with the necessary training given to the military personnel, have proven effective in preventing the repetition of similar incidents at this Guard Post as well, as recognized by CM(DH) most recently in its June 2023 decision.
[18] These general measures are also applicable to the other cases in the Isaak Group to the extent that the ECtHR found that military personnel may have been involved in the incidents.
[19] Please see pages 4-5 of the Action Report, which was distributed as DH-DD(2021)322, on 23 March 2021 for details on the training provided.

In response, the Legal Affairs Division confirmed that they operate on the basis of Instructions issued in accordance with the authority vested under section 45 of Law No. 35/1986, which were subsequently amended, and not under sections 53 and 54 of Law No. 35/1986.

As it should be recalled, TRNC authorities have also amended the applicable instructions in force at the border posts that prevented the repetition of similar incidents. The applicable instructions at Haşim 8 Guard Post, as well as Yıldırım Guard Post, were repealed and new instructions were introduced in accordance with the authority section 45 of the Law vested in the Security Forces Commandership. The new Contact Line Guard Post Instructions currently in force contain sensitive information, yet the appropriate sections have already been shared with the Committee.[20] The specific provisions in the instructions which ordered the guards on duty to use firearms at Haşim 8 and Yıldırım Guard Post have been repealed so as not to order or enable the use of firearms in circumstances similar to the incidents leading to the deaths.

The assessment of the Legal Affairs Division of the TRNC Security Forces was sought after the June 2023 CM(DH) on the compatibility of the instructions with Article 2 of the European Convention on Human Rights. The conclusion of the Department upon an assessment of the substantive rules was that the instructions in force enable the use of firearms that is proportional to the treat posed, in conformity with the principles of necessity and proportionality.

These instructions, which also regulate the use of firearms at border posts, issued under section 45 of Law No. 35/1986, must also comply with the substantive requirements on the protections of the right to life, reflected in Article 15 of the TRNC Constitution,[21] which regulates this fundamental right in a manner similar to the protections enshrined in Article 2 of the European Convention, itself incorporated into domestic law and has precedence over any other domestic legislation. The TRNC Courts have stressed the importance of the right to life in many cases[22]. In particular, in the case of *Mustafa İlhan*

[20] Please see page 7 of DH-DD(2022)28 for the relevant applicable instructions in force.
[21] Right to Life and Corporal Integrity
Article 15
(1) Every person has the right to life and corporal integrity.
(2) No person shall be deprived of his life except in the due execution of a sentence of a competent court upon his conviction of an offence for which the death penalty is provided by law.
A law may provide for such penalty only in cases of high treason in times of war, piracy and terrorism jure gentium or repeated conviction of an offence punishable with life imprisonment.
(3) Deprivation of life shall not be deemed to be inflicted in contravention of the provisions of paragraphs (1) and (2) when it results from the use of force which is no more than absolutely necessary
(a) in defending one's self or property against the infliction of a proportionate and otherwise unavoidable and irreparable evil; or
(b) in effecting an arrest or in preventing the escape of a person lawfully detained; or
(c) in action taken for the purpose of quelling a riot or insurrection, when and as provided by law.
[22] See, for example, *Çetin Sadrazam v. Attorney-General's Office*, Criminal Court Appeals Case No: 79/2015 and 82/2015; *Burak Güler v. Attorney-General's Office*, Criminal Court Appeals Case No: 54/2017; *Melih Arnavut v Attorney-General's Office* Criminal Court Appeals Case No: 6/2018; *İbrahim Erhalk v Attorney-General's Office* Criminal Court Appeals Case No: 40/2019.

Tuncay v Attorney-General's Office, the Court stated "*[t]he right to life is a human right that guarantees the continuation of a person's physical* existence *and is guaranteed as a fundamental right under Article 2 of the European Convention on Human Rights, and is the most fundamental of the fundamental rights and freedoms envisaged and guaranteed by the TRNC Constitution.*" [23]

In the TRNC legal system, the Constitution is the supreme law of the land. The Constitution not only defines the fundamental rights and freedoms, but it also gives effective remedies for their enforcement. The legislative, executive and judicial authorities are bound to secure, within their respective competence, the effective application of the Constitution relating to fundamental rights and freedoms.

Therefore, if a legislative enactment contravenes the provisions of the Constitution relating to fundamental rights and freedoms, such as the right to life, such an enactment or a specific provision thereof which is in contravention of a Constitutional provision, will be declared unconstitutional by the Supreme Court. More specifically, the constitutionality of legislative acts could be challenged by reference to the Constitutional Court. According to Article 148 of the TRNC Constitution, a party to any judicial proceedings, including proceedings on appeal, may, at any stage thereof, raise the question of the unconstitutionality of any law or decision or any provision thereof which is material for the determination of any matter at issue in such proceedings and thereupon the Court shall reserve the question for the decision of the Constitutional Court, and stay further proceedings until such question is determined by the Constitutional Court, unless a decision has been previously given by the Constitutional Court on the same or similar question regarding the unconstitutionality of any law or decision or any provision thereof, in which case, the Court may refuse to reserve the question for the decision of the Constitutional Court. The Constitutional Court shall, after hearing the parties, consider and determine the question so reserved for its decision and transmit its decision thereon to the court by which such question has been reserved. In the event that such decision is to the effect that the law or decision or any provision thereof is unconstitutional, such decision shall, unless the Constitutional Court decides to the contrary, so operate as to make such law or decision or any provision thereof inapplicable to such proceedings only.

According to the judgments of the Supreme Court, "law" includes subsidiary legislation.[24] Consequently, whether instructions applicable at border posts, which are enacted with authority vested by law, meet the substantive requirements on the right to life, as set out in Article 15 of the Constitution, can be subject to challenges in judicial proceedings as provided for in Article 148 of the Constitution.

[23] *Mustafa İlhan Tuncay v Attorney-General's Office*, Criminal Court Appeals Case No: 87-88-89-90/2016.

[24] Please see, for example, the judgment of High Administrative Court, YİM 81/2007 (D. 4/2009), dated 27 February 2009 and the judgment of the Supreme Court, Yargıtay/Hukuk 5/83, dated 1 April 1983 in which the Supreme Court clarified that regulations and by-laws enacted under the authority vested by laws were within the scope of "laws".

Furthermore, according to Article 90 of the Constitution, international treaties which have been duly put into operation shall have the force of law, but have superior effect to any other domestic law as recourse cannot be made to the Supreme Court sitting as the Constitutional Court in respect of such treaties on the grounds of unconstitutionality. The European Convention on Human Rights is considered to be such a treaty and is directly applicable in the TRNC.

According to the jurisprudence of the TRNC Constitutional Court, for example, in case no. 3/2006, TRNC courts are to even interpret the Constitution in a manner such as to reconcile it with international law, including the European Convention on Human Rights.

CM(DH) has already noted the explanations provided on the safeguards enshrined at the constitutional level, as well as the direct effect of the Convention in the domestic legal system in June 2023.

Furthermore, CM(DH) was informed of a legislative amendment introduced to hold criminally liable a public officer in the event of use of firearms in case they exceed the limits of the authority to use force. The amendment came into force in 2014, with Law No. 45/2014, which amended section 107 of the Criminal Code, Cap. 154. This amendment introduced "the offence of exceeding the limits of the authority to use force" as a felony. The Code now stipulates that public officers who exceed the limits of their authority to use force by exerting more force than is defined as warranted by his duties and the circumstances, that is "absolutely necessary", shall be guilty of a felony and is liable to imprisonment for five years. Both military and police can be prosecuted under this provision.

Moreover, information already provided to the CM(DH) on the amended instructions has also been evaluated by the Committee which decided in June 2022 to note "with interest the amendments of the secondary legislation on the use of firearms by military officers".

Subsequently, in its June 2023 decision, CM(DH) noted with interest the information that no similar incidents involving the use of firearms by the military have occurred since 1996, and considered this to be an indication of the positive impact of training and the amendment of secondary legislation concerning the use of firearms by the military, as well as an indication that the primary legislation concerning the military has been applied in a manner which has not resulted in loss of life contrary to Article 2 of the Convention.

In light of the amendments to the applicable legislation, accompanied by training, which prevented the repetition of similar incidents at the border, as confirmed by CM(DH), the examination of the general measures in the Kakoulli Group should be closed.

As regards individual measures in the Isaak Group

Isaak Group consists of three judgments, namely *Isaak v Turkey* (44587/98), *Solomou and Others v Turkey* (36832/97) and *Andreou v Turkey* (no. 45653/99). The judgments relate to two demonstrations which took place at the same place around the buffer zone in the Island of Cyprus shortly after one another in 1996 at a time of high tension.

The investigation conducted into the events in issue revealed that the TRNC authorities considered the protest of the Greek Cypriot groups as acts of border infiltration or border violation, as a result of which the police have resorted to exceptional measures to address the serious threat perceived.

***Isaak* Case:**

Further to the call of CM(DH) for a continuation of our cooperation with the Secretariat to find a flexible solution as regards the VAT payment in the *Isaak* case in paragraph 8 of the CM(DH) decision of June 2023, an arrangement on the modalities of payment had been found, and the total sum calculated by the Department for the Execution of Judgments of the European Court of Human Rights in the amount of 2,903.26 Euros had been paid on 11 January 2024. The supervision of this part of the individual measures in the case of *Isaak* can thus be closed.

***Isaak* and *Solomou* Cases:**

In paragraphs 5 and 6 of the CM(DH) decision of June 2023, the Committee asked for a further review in the case of *Solomou* and additional review in the case of *Isaak*, taking into account the extensive contemporaneous evidence set out in both judgments, to assess which investigatory steps can still be taken and which can no longer be taken and on the means deployed to overcome obstacles.

In the analysis of the Secretariat prepared ahead of the June 2023 meeting, the contemporaneous evidence reflected in the CM(DH) decision was specified to be the photographic evidence and video evidence, by reference to paragraphs 112, 124 and 42-55 of the *Isaak* case, and by reference to paragraphs 72 and 31 in the *Solomou and Others* case.

As it should be recalled, in 1996, the Chief Inspector assessed the events in issue in the Isaak Group and in his report, shed light on the perception of the TRNC authorities on the threats posed by border infiltration, and the high risk associated with demonstrations leading to widespread violence, which prompted them to react in the way they deemed necessary to counter the threat posed at the time.

While the investigations conducted in 1996 focused more on the risk of escalation of violence, the Attorney-General's Office reviewed the existing file exercising its authority to supervise investigations twice, in 2011 and in 2021, the latter following the request of this Committee, and concluded, *inter alia*, that as the incidents took place (then) 25 years ago, it is not possible now to take further investigatory steps and/or conduct further investigation into these cases.

New review by the Police:

Yet, following the June 2023 decision, the Directorate of Police reviewed the 1996 report upon the request of the CM(DH), and clarified that it was based on assessments and examination of the scene of crime.

Furthermore, following an archival search on the submissions by the relevant parties to the ECtHR concerning the *Isaak* and *Solomou and Others* cases, TRNC Ministry of Foreign Affairs found the contemporaneous evidence set out in the Court's judgments mentioned in the June 2023 CM(DH) decision, namely photos and video recordings mentioned in the judgments of the European Court of Human Rights.

The Directorate of Police was requested to assess whether the specified contemporaneous evidence could be the basis on which further additional investigatory steps could be taken.

The Police first assessed, *inter alia*, whether the contemporaneous evidence mentioned in the CM(DH) decision, namely photos and video recordings referred to in both judgments were authentic. The Image Analysis Expert in summary found that "*[t]here are "differences" in terms of "camera framing/angles" and "location features" in most of the fragmentary images that make up the video recordings under review; there is compilation/editing of created video recordings"* and it was said "*that it is not possible to express any opinion as to whether it was created for the purpose of manipulation (changing the semantic integrity of the video recording created from fragmentary images by changing the fragmentary images)*". Furthermore, the Report went on to state that the "*recording resolution (the number of pixels that make up the images) of the images under review is low, there is a time difference in the images subject to examination (images stated to be from 1996) and the biological age appearance of the individuals, which affects a healthy image comparison, the persons in the images under review were not in the appropriate distance/proximity angle and position according to the cameras recording the recordings*." Moreover, "*in some of the images subject to review, the ambient lighting conditions were not at a suitable level and some images subject to review contained backlight conditions*."

The Police concluded that under these circumstances, it was not possible to take additional steps or a new investigation based upon them. As it should be recalled, ECtHR did not make a definitive ruling on the authenticity of the photographic evidence and the videos submitted by the applicants and/or the "third-party", restricting its comments to the fact that the respondent Government did not contest their authenticity.[25] The domestic investigative authorities, on the other hand, cannot build a criminal case based on photos and video recordings that appear not authentic.

The reality that the passage of time since the events which gave rise to the findings of the ECtHR under Article 2 of the Convention has a detrimental effect on the additional

[25] Para. 112 of the *Isaak* case and para. 72 of the *Solomou* case.

steps that can be taken in respect to investigations has been recognized by the CM(DH), as a review of its practice shows that CM(DH) does not expect the reopening of criminal proceedings when there is, for example, statute of limitations concerning the opening of criminal proceedings, in cases when ECtHR found Article 2 violation.[26]

While there is no statute of limitations in the TRNC concerning criminal investigations, the passage of time weighs in heavily on any assessment on whether further investigatory steps can be taken. This is also acknowledged by CM(DH) in its practice as in one case, when the Supreme Prosecutor had analyzed the case and found that considerable time had elapsed since the events (10 years), a new investigation carried out by an independent body which would carry out measure remedying the defects in the original investigation indicated by the Court, could not provide new elements capable of clarifying the circumstances of death, and supervision was closed by CM(DH)[27]. Thus, the practice of the Attorney-General's Office to comprehensively review, yet make a reasoned decision not to take further investigatory steps and/or instruct the police to conduct further investigation falls on all fours with CM(DH) practice.

In line with this practice, and given the fact that the necessary additional payment had been effected in the case of *Isaak*, no further individual measures in the cases of *Isaak* and *Solomou and Others* are necessary.

Andreou Case:

In paragraph 7 of the CM(DH) decision of June 2023, the Committee stated that it is unclear how the assessment of the Attorney-General considered the available contemporaneous evidence, and invited the authorities to carry out a concrete examination of the information available.

In the case of *Andreou*, the European Court did not examine the procedural limb of Article 2, consequently supervising the investigation falls outside the scope of supervision of examination of the judgment by the CM(DH).

Nevertheless, the Office of the Attorney-General had analyzed the situation and concluded that it was not possible to carry out an assessment in its 2021 report. It is also clear from the facts that the investigation conducted after the events in 1996 which was shared with the CM(DH) in respect to the cases of *Isaak* and *Solomou and Others*, in which the protest of the Greek Cypriot groups was perceived as an imminent threat of border infiltration or border violation, that the reaction of Turkish Cypriot authorities at the time of shootings which caused the injury of the applicant in *Andreou* was not a pre-

[26] *Jasinskis v Latvia* 45744/08, *Mulini v Bulgaria* 2092/08, *Mircea Pop v Romania* 43885/…, *Barsukovyy & 13 other cases v Ukraine* 23081/07, *Angelova & Iliev & 7 other cases v Bulgaria* 55523/00, *Bekirski v Bulgaria* 71420/01, *Bajic and 3 other cases v Crotia* 41108/10, *Nachova and Others v Bulgaria* 43577/98, *Iordanovi v Bulgaria* 10907/04, *Juozaitienė and Bikulčius v Lithuania* 70659/01, *ScavuzzoHager and others v Switzerland* 41773/98.
[27] *Eremiášová and Pechová v The Czech Republic* 23944/04 supervision closed in 2014.

organized response, thus preventing the authorities to establish 28 years after the events, a clear responsibility for the orders to shoot even if a new assessment were to be conducted. The recent evaluation of the Police on the shortcomings associated with the "contemporaneous evidence" put before the ECtHR, which included recordings of the demonstration in which the applicant was injured, that appeared not authentic, suggests that it cannot lead to a different assessment than the one reached by the Attorney-General's Office upon the request of the Committee in 2021.

It would be in line with the practice of CM(DH) mentioned above to conclude that no individual measures are necessary in the case of *Andreou* in the upcoming CM(DH) meeting.

As regards general measures in the Isaak Group

The common issue in the Isaak Group is the way in which the Police have tried to cope with an extraordinary incident of violent demonstrations that took place at the border in 1996. The events in issue were also exceptional in the way they engaged the two otherwise separately regulated responsibilities of the Police; one that relates to the primary responsibility of the Police in demonstrations, and the other on unlawful crossings, at a time of high tension caused by Greek Cypriot demonstrations around the buffer zone.

Legislative framework on the use of force and firearms by the Police in demonstrations:

In the cases of *Isaak* and *Solomou and Others*, the applicable section of the Police (Establishment, Duties and Powers) Law, Law No. 51/1984, that related to the role of the Police in demonstrations, which was relied on by the TRNC authorities to make a determination on the lawfulness of the actions of the Police in the report prepared by the Attorney-General's Office in 2011 and 2021, is primarily section 87(1) of the Law.[28]

Section 87(1) of Law No. 51/1984 provides that if a person or a crowd (group of demonstrators) is not in possession of firearms, a police officer that is subject to an attack or resistance must make the necessary warnings depending on the degree of attack or resistance, that s/he will use a firearm. If they do not obey the warning, the police officer uses firearms starting from the point where compliance can be achieved. Section 88(2) of Law No. 51/1984, which was also applied by the Attorney-General's Office in its reports into the cases of *Isaak* and *Solomou and Others*,[29] clarified what is meant by "the use of firearms" in the Law. Section 88(2) expressly states that this does not necessarily entail actually firing at a person, but firearms can be used as the last resort. The section sets out the sequence of events before a person is fired at by stating that initially, a police officer must fire a warning shot in the air, then towards the foot. In case the person or the crowd continue to conduct their activities in a dangerous

[28] See, for example, DH-DD(2022)28.
[29] DH-DD(2022)28.

manner, random shots may be fired without target, for the specific cases listed in the Law where the use of firearms are allowed.

In the cases of *Isaak* and *Solomou and Others*, the last resort measures had to be invoked under sections 87(1) and 88(2) of the Police Law due to the exceptional threat perceived with the presence of a large group of violent Greek Cypriot demonstrators at the TRNC border who created a serious risk of border infiltration. Consequently, the shootings in the cases of *Solomou and Others* and *Andreou* cannot be treated as shootings of non-violent demonstrators, and isolated from the general threat posed by the demonstrations to which they have participated.

By contrast, the usual provisions applicable in cases of demonstrations, which have been previously shared with the Committee, are different.[30]

To summarize, section 8(13) of the Police Law gives the police the duty to intervene and disperse unlawful assemblies, which are defined in section 70 of the Criminal Code, Cap. 154.

According to section 7(2) of the Assemblies and Processions Law, Cap. 32, any police officer may arrest without a warrant all persons taking part in an unlawful assembly and may use such force that is reasonably necessary to effect dispersal. Section 9 of the Criminal Procedure Law, Cap. 155 regulates arrest. It indicates that if the person to be arrested forcibly resists or attempts to evade arrest, the person making the arrest may use all the means necessary to effect the arrest and that nothing shall be deemed to justify the use of greater force than was reasonable in the circumstances and necessary for the arrest of the offender.

In a judgment of the TRNC Supreme Court, dated 5 November 2020, the Court held that disproportionate force used even for legitimate purposes or any force that is used against a person in violation of a legal right will not be considered as part of fulfilling legal duties.[31]

The European Court of Human Rights has analyzed in the case of *Protopapa v. Turkey* in 2009 the legislative framework within the context of arrest of a demonstrator who took part in an unlawful assembly and then entered the TRNC illegally. The Court held the deprivation of liberty of the applicant demonstrator who was arrested by the TRNC police for committing the offence of "taking part in an unlawful assembly" and illegal entry into TRNC territory, as well as on the ground that the applicant [was committing offences punishable by imprisonment] in the presence of the police, to be justified under Article 5 of the Convention. ECtHR further held there was "*nothing to show that the police used excessive force when, as they allege, they were confronted in the course of their duties with resistance to arrest by the demonstrations, including the applicant*."

[30] See, for example, DH-DD(2021)323, DH-DD(2022)497.
[31] For details, please see for example , DH-DD(2022)28.

As the CM(DH) was informed in the action report,[32] two legislative amendments were introduced to the applicable legal framework on the use of force and firearms by the Police since the judgments.

The first legislative amendment, introduced in 2011 by Law No. 38/2011, enabled the Police Services Committee to discharge any police officer from the Force on conviction for an offence punishable with imprisonment according to the amended section 71 of the Police Force (Establishment, Duties and Powers) Law.

The second legislative amendment came into force in 2014 with the enactment of Law No. 45/2014 and amended section 107 of the Criminal Code, Cap. 154. This amendment introduced "the offence of exceeding the limits of the authority to use force" as a felony. The Code now stipulates that public officers who exceed the limits of their authority to use force by exerting more force than is defined as warranted by his duties and the circumstances, that is "absolutely necessary", shall be guilty of a felony and is liable to imprisonment for five years. Both military and police can be prosecuted under this provision.

The amendments have been implemented after their enactment. The Attorney-General's Office investigated complaints against a police officer for alleged ill-treatment that took place in September 2016 and brought charges against the police officer for "the offence of exceeding the limits of the authority to use force".

The legislative amendments provide additional safeguards to the already existing provisions against excessive use of force and firearms which, accompanied with training, prevented repetition of similar incidents at the TRNC border. In June 2022, CM(DH) noted zero-tolerance message on police-ill treatment and the possibility to remove from office a police officer following a conviction for excessive use of force. The positive developments are also reflected in the June 2023 decision of CM(DH) which considered the absence of similar incidents involving the use of firearms by the Police since 1996 as an indication that the primary legislation concerning the Police has been applied in a manner which has not resulted in loss of life contrary to Article 2 of the Convention. Furthermore, in the same decision, CM(DH), noted with interest the training of police officers to use the least possible force towards demonstrators who do not themselves pose a threat.

As it should be recalled, CM(DH) previously welcomed the information on the measures taken to ensure peaceful running of demonstrations at its June 2021 CM(DH) meeting.[33] Also, in June 2022, the Committee noted the positive information that demonstrations take place in a calm atmosphere.

Consequently, the primary legislation in place which prevented repetition of similar events ensure peaceful running of demonstrations, for which the Police is trained to use the least possible force towards demonstrators who do not themselves pose a threat, as

[32] DH-DD(2021)323.
[33] For a comprehensive review of the measures, please refer to DH-DD(2021)323.

acknowledged by CM(DH). As a result, no further measures are necessary in this respect.

Legislative framework on the use of force and firearms by the Police in cases of unlawful crossings into the TRNC:

Section 86(2)(h) of the Police Law states that police could use their firearms at "those who intend to enter or exit through the "first degree military prohibited areas" ("the area between the border and 500 meters from the border") as determined by Military Prohibited Areas Regulation, the TRNC territorial sea or at border crossings, without fulfilling the necessary formalities and permission, and during which they run away not obeying the order to stop, (use of firearms are allowed) to capture them or if there are no other options to capture them." This was another provision referred to in the reports of the Attorney-General of 2011 and 2021 concerning the cases of *Isaak* and *Solomou* to be applicable in making a determination on the lawfulness of the actions of the Police. As no other sub-section of 86(2) was invoked, apart from 86(2)(h), they are not relevant to the execution of the present case.

This provision was invoked at a time when there were no crossing points between the North and the South. Since the events, authorized crossing points have been opened by mutual agreement of the Turkish Cypriot Side and the Greek Cypriot Side in 2003 to enable people to cross between the North and the South.

Although unlawful crossings continue to take place, the police at the crossing points have not resorted to the use of firearms or use of force to address border violations, the current legal framework providing for the detention or arrest of the perpetrators instead.

The analysis of the European Court of Human Rights in the case of *Protopapa v. Turkey*, also included illegal entry into TRNC territory, for which ECtHR found the deprivation of liberty of the applicant demonstrator who was arrested by the TRNC police for committing this offence to be justified. This incident reflects the usual practice of police which is to proceed with the arrest of those who illegally enter TRNC, rather than resorting to the last resort measure of using firearms to capture those who enter the TRNC through first degree military prohibited areas and who do not obey the orders to stop.

This fact is also acknowledged by CM(DH) which has, in June 2023, noted with interest that the primary legislation concerning police was applied in a manner which has not resulted in loss of life contrary to Article 2 of the Convention.

In light of the above, no further measures are necessary on the use of force or firearms by the police for unlawful entries into the TRNC.

Measures in place to ensure effective and independent investigations:

These cases do not disclose a problem with the quality of investigations in the TRNC, necessitating a separate analysis on the measures in force, which were previously

examined by the ECtHR in numerous other cases. Furthermore, the CM(DH) has already closed its supervision in the case of *Adalı* upon its examination of the general measures introduced to remedy procedural violations of Article 2 of the Convention in the TRNC.[34]

Also, CM(DH) has already examined the independence of the investigations conducted by the military, and in June 2023, welcomed the information that sufficient arrangements exist in practice to ensure that investigative officers do not belong to the same military body as those involved in an offence or that serious offences are investigated by the police and considered that no further measures are needed to ensure the independence of the investigations concerning military personnel.

Thus, no other measures are necessary under this heading.

Training and awareness-raising measures as regards the use of force and firearms:

As the CM(DH) has been informed previously, the use of firearms and use of force are possible only in cases of absolute necessity in demonstrations and counter-demonstrations, and all personnel are trained in the Police Basic Training Course and In-Service Training Courses and at "Intervention Training in Social Incidents" periodical training. Trainings are supervised at the highest level and are repeated in short intervals.[35]

The positive impact of the training given to the police have been linked by CM(DH) to the non-occurrence of similar events since 1996 in the June 2023 decision, in which the training of the police to use the least possible force towards demonstrators who do not themselves pose a threat was also taken note with interest. No further measures are needed in this respect.

Conclusion

TRNC authorities consider that the necessary individual measures have been taken in the Kakoulli and Isaak Groups, and the general measures currently in place are effective as they have ensured non-repetition of similar incidents in or around the Buffer Zone since 1996. Consequently, no further measures are necessary in these two Groups.

[34] Detailed information on the measures in place for effective investigations were included in the Action Report in relation to this Group (DH-DD(2021)323).

[35] See, for example, DH-DD(2023)21.