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CURRENT LEGAL DEVELOPMENTS

Öcalan v. *Turkey*: Some Comments

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Abstract
In the *Öcalan* case the European Court of Human Rights found itself faced with several issues that asked for a new interpretation of the European Convention on Human Rights. It had to decide on the extraterritorial scope of the Convention, on the question whether Abdullah Öcalan was arrested lawfully or illegally abducted, and on the death penalty. This article analyzes the decisions taken by the Court and puts them in a perspective of international law beyond the European Convention.

Key words
abduction; abolition of death penalty; European Court of Human Rights; extraterritorial application of European Convention on Human Rights

1. INTRODUCTION

On 15 February 1999 Abdullah Öcalan (the applicant) was arrested by the Turkish authorities on the charge of terrorist activities as leader of the Kurdistan Workers' Party (PKK) that endangered the territorial integrity of Turkey. The circumstances of his arrest, the ensuing detention and trial, and the death sentence that was imposed on him as a result of this trial constituted the basis of his proceedings at the European Court of Human Rights (the Court).[1]

This case has been referred to as 'one of the most significant and high-profile cases ever to come before the European Court'[2] and understandably so. It deals with Turkey's most wanted man, with terrorism, with the death penalty, and with fundamental human rights as laid down in Articles 2, 3, 5, and 6 of the European Convention on Human Rights (the Convention). The case also fits in with a whole series of cases dealing either with the relationship between the fight against terrorism and the rights under the Convention – right to a fair trial, prohibition of arbitrary detention – or with violations of human rights by Turkish officials. The United Kingdom in particular has been accused of transgressing the limits of the

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1. *Öcalan v. Turkey*, Appl. No. 00046221/99, Judgement of 12 March 2003, http://hudoc.echr.coe.int/hudoc (hereafter '*Öcalan*').
2. J. Cooper, quoting Öcalan's council on 9 Jan. 2001. See http://www.justice.com/news/jc_010109html and also *Öcalan*, para. 210.

Convention in its fight against terrorism.[3] As for the violations of human rights by Turkish officials the number of cases before the Court is almost endless.[4]

The Court decided that there has been a violation of Articles 3, 5(3), 5(4), 6(1), 6(3)(b), and 6(3)(c): the applicant was unable to challenge the lawfulness of his detention, has not had a fair trial and has been subjected to inhuman treatment as a result of receiving the death sentence after an unfair trial. In pronouncing judgement on the death penalty and the arrest of the applicant, the Court applied the provisions of the Convention taking notice of current developments, thereby considering it as a 'living instrument which must be interpreted in the light of present day conditions'.[5] Although the Court reiterated that states must have a margin of appreciation in the fight against terrorism, which may result in a more restricted application of the Convention, it emphasizes again that certain fundamental rights must be enjoyed by anyone, whether or not suspected of terrorist crimes.[6]

This is not the final judgement in this case, since both the Turkish government and the applicant have appealed against it. Nevertheless, it shows some important new developments and should therefore be analyzed on its own merits.

This comment will deal with the two major issues that may have an impact on the development of international law beyond the Council of Europe: the extraterritorial scope of the Convention in relation to the arrest of the applicant in Kenya, and the compatibility of the death penalty with the Convention and the implications of Turkey's obligations regarding this issue. To begin with, I shall provide a short background to the position of the applicant as a leader of the PKK and the reasons why his arrest was so important to Turkey.

2. Background

In 1924 Turkey banned the most basic forms of the expression of Kurdish cultural identity. Ever since, the relationship between Turkey and its Kurdish minority has been tense if not explosive. The views on the degree of self-determination and independence of the Kurds differ widely. One of the latest expressions of this is the firm resistance of Turkey against an independent Kurdistan in northern Iraq in the

3. See, e.g., the following judgements: *Averill v. United Kingdom*, (Rep. 2000-VI) Appl. No. 00036408/97; *Brannigan & McBride v. United Kingdom*, (Ser. A, no. 258-B) Appl. Nos. 00014553/89; 00014554/89; *Brennan v. United Kingdom*, (Rep. 2001-X) Appl. No. 00039846/98; *Brogan and Others v. United Kingdom*, (Ser. A, no. 145-B) Appl. Nos. 00011209/84; 00011234/84; *Magee v. United Kingdom*, (Rep. 2000-VI) Appl. No. 00028135/95; *John Murray v. United Kingdom*, (Rep. 1996–1) Appl. No 00018731/91 and *O'Hara v. United Kingdom*, (Rep. 2001-X) Appl. No. 00037555/97, http://hudoc.echr.coe.int/hudoc.

4. Since 1 Jan. 2001, a violation of Art. 2 and/or 3 has been established in no less than 15 cases; see http://hudoc.echr.coe.int/hudoc. See for reports of other human rights instruments on torture in Turkey *Aksoy v. Turkey*, (Rep. 1996-VI) Appl. No. 00021987/93 http://hudoc.echr.coe.int/hudoc, para. 46, referring to the ECPT's Public Statement on Turkey (15 Dec. 1992), the UN CAT, Summary Account of the Results of the Proceedings Concerning Inquiry on Turkey (9 Nov. 1993) and the UN SR on Torture's Report (E/CN.4/1995/34). On systematic torture in Turkey, see also Amnesty International's reports AI Index EUR 44/026/2002 and EUR 44/040/2002.

5. *Öcalan*, para. 193. See also *Tyrer v. United Kingdom*, (Ser. A, no. 26) Appl. No. 0005856/72, http://hudoc.echr.coe.int/hudoc, para. 31.

6. *Öcalan*, para. 106. The Court refers to its established case law on this issue (*Brogan & Others v. United Kingdom*, *supra* note 3).

fear that the Turkish Kurds will join the Iraqi Kurds, but history shows a series of violent encounters between the Turkish government and Kurdish opposition. Kurds have been fighting Turkish dominance, and, in order to increase control over them, from 1987 Turkey governed the four Kurdish provinces (among others) under a state of emergency, finally lifting this in the two remaining provinces to be so ruled in November 2002.

Öcalan founded the PKK in 1978, aiming initially at the establishment of an independent Kurdish state. In 1984 the PKK began its armed battle for independence, deploying terrorism among other means as a way of achieving this goal. The response of the Turkish government was a violent one and resulted in massive arrests, civilian casualties, and a total ban on everything that could be linked to the PKK or the Kurdish cause, including restrictions on the freedom of expression and a general decline in respect for human rights in the Kurdish regions.

In 2002 the PKK announced that it was changing its name to the Congress for Freedom and Democracy in Kurdistan (KADEK) and would campaign peacefully for Kurdish rights, abandoning its initiative for an independent Kurdish state. Although KADEK initially proclaimed that it would try to attain its goals through peaceful and political means, it abandoned its cease-fire on 1 September 2003.[7]

To the Turkish authorities, the most important step taken in their battle against the PKK was the arrest of Öcalan, its leader.

3. The *Öcalan* case in international law

3.1. Extraterritoriality and abduction

The applicant was arrested in Kenya by Turkish officials. He argued that his abduction was unlawful because Turkey lacked jurisdiction on Kenyan territory and that the extradition process had not been carried out properly, since he had not been able to challenge his deportation. He would not accept that this course of events was regarded as a lawful co-operation between Kenya and Turkey in the combat against terrorism,[8] since he saw himself not as a terrorist but rather as the leader of an organization that aimed at asserting the 'right of the population of Kurdish origin to self-determination'.[9] He submitted that his arrest had therefore been in violation of Article 5(1) of the Convention. The conditions of his arrest furthermore constituted a violation of Article 3 of the Convention.

The Turkish government on the other hand maintained that the government had no responsibility with regard to the applicant's arrest on Kenyan territory and that the applicant had been arrested 'in accordance with a procedure prescribed by law, following co-operation between two States'.[10] The Court should follow its earlier

7. For up-to-date information on the Kurdish question and the trial of Öcalan, see the short fact sheets of several international newspapers and news agencies, e.g. *Le Monde* (via http://www.lemonde.fr), *Guardian* (via http://www.guardian.co.uk), *International Herald Tribune* (via http://www.IHT.com), BBC (via http://news.bbc.co.uk), *Washington Post* (via http://www.washingtonpost.com).
8. *Öcalan*, para. 78–82.
9. *Ibid.*, para. 82.
10. *Ibid.*, para. 84.

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rulings[11] and decide that 'co-operation between States confronted with terrorism was normal in such cases and did not infringe the Convention'.[12] The arrest, therefore, could not be regarded as unlawful.

The Court had to decide on two points. The applicant argued that his arrest was in violation of Article 5, so that it was up to the Court to decide whether he had been unlawfully abducted or lawfully arrested. However, in order to decide on the alleged violation of the Convention with regard to the arrest, the Court also had to establish the applicability of the Convention, since the arrest happened outside Turkey's territory and thus was not prima facie within its jurisdiction.

3.1.1. The extraterritorial application of the Convention

The jurisdiction laid down in Article 1 of the Convention is 'essentially territorial',[13] but exceptions can and have been made to this principle. Extraterritorial application of the Convention is assumed in situations in which a state party has effective control outside its national territory. One of the leading cases in this respect is the *Loizidou* case.[14] Turkey was held responsible for a violation of the Convention in Northern Cyprus, since it exercised effective (military) control. This kind of extraterritoriality was elaborated on in the *Banković* judgement. In this case, Banković and others argued that the NATO bombings in the former Yugoslavia constituted a violation of the Convention, although they took place outside the territory of any of the states parties. In its judgement, the Court reiterated that 'the jurisdictional competence of a State is primarily territorial'[15] and that 'recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional'[16] but by no means excluded: 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, [exercising] all or some of the public powers normally to be exercised by that Government', extraterritorial responsibility and thereby jurisdiction within the meaning of Article 1 of the Convention can be incurred.[17] Additionally, the exercise of jurisdiction of a state on board an aircraft registered in or flying the flag of that state may be recognized, not only by the Court but also in (customary) international law.[18] Notwithstanding these criteria the Court considered in *Banković* that the NATO bombings did not fulfil the requirements of an extraterritorial application of the Convention. Effective control over an airspace and the flying of aircraft of national air forces apparently would not be sufficient to establish jurisdiction in the sense of Article 1 over the effects of those acts.[19]

11. See *infra* section 3.1.3.
12. *Öcalan*, para. 85.
13. *Ibid.*, para. 67.
14. *Loizidou v. Turkey* (Preliminary Objections, Ser. A, no. 310), Appl. No. 00015318/89, and *Loizidou v. Turkey* (Merits and Just Satisfaction, Rep. 1996-VI), Appl. No. 00015318/89, http://hudoc.echr.coe.int/hudoc.
15. *Banković and others v. Belgium and 16 Other Contracting States*, (Rep. 2001-XII) Appl. No. 00052207/99, http://hudoc.echr.coe.int/hudoc, para. 59 (hereafter '*Banković*').
16. *Banković*, para. 71.
17. *Ibid.*
18. *Ibid.*, para. 73.
19. *Ibid.*, para. 75.

When we turn to the present case, it may seem obvious why the Court decided to declare the Convention applicable to the arrest of Öcalan: Turkish officials arrested him and he was forced by them to return to Turkey.[20] It is important, however, to recognize the fact that the Court extended the application of the Convention to situations that do not amount to a military occupation or to effective control over a certain territory. While it would not recognize the NATO bombings as an exercise of public powers, it now considered the arrest of the applicant by state officials as sufficient to bring the events within the scope of Article 1 of the Convention. The very narrow application of the territoriality in *Banković* has thereby been abandoned.

Lastly, the Court did not find that Turkey had violated the territorial integrity of Kenya as it assumed that there had been active co-operation or at least consent from the part of the Kenyan authorities.[21] Since a Kenyan official had driven Öcalan to the aircraft in which Turkish officials were waiting, this conclusion is obvious.[22]

3.1.2. Abduction in international law

Having established the applicability of the Convention, the next question to be answered was whether the arrest was lawful under Article 5(1) or whether the applicant had been unlawfully abducted. Abduction is an old and persistent phenomenon. It takes various forms, but for the purposes of this article we shall concentrate on abduction by a state of one of its nationals who has taken refuge in another state.[23] As the abducting state will have to enter the territory of the host state or obtain co-operation of the host state, international abduction first brings up the question of territorial sovereignty. As early as in the *Island of Palmas* case, this principle was established: '[t]erritorial sovereignty . . . involves the exclusive right to display activities of a State.'[24] Unless the abducting state obtains consent from the host state, the former will be acting in violation of the principle of territorial sovereignty and of non-intervention in matters that are essentially within the domestic jurisdiction of the host state.[25] Matters related to the arrest and detention of persons present on the territory of a state usually do fall within the domestic jurisdiction and may not be performed by foreign agents.[26] Or, as Gluck puts it, 'no state may exercise its police power in the territory of another state without

20. *Öcalan*, para. 93.
21. *Ibid.*, paras. 95–103.
22. Although not relevant to the Court, since it could not be raised by Kenya before this Court, even if Kenya were to deny all involvement, it would have waived its rights to an international claim against Turkey. See *infra* note 31 and accompanying text.
23. Another form would be the abduction of a foreign national, as in the case of H. Alvarez-Machain, who was abducted from his country of nationality, Mexico, to the United States. See J. A. Gluck, 'The Customary International Law of State-Sponsored International Abduction and United States Courts', (1994) 44 *Duke Law Journal*, at 612 and footnotes for more details on this case and other examples.
24. *Island of Palmas Case (Netherlands v. United States of America)*, Permanent Court of Arbitration, 4 April 1928, R.I.A.A. II, at 838.
25. In the *Alvarez-Machain* case, Mexico protested repeatedly against the infringement of its territorial sovereignty by the United States. References to these protests were inserted in the Supreme Court decision. *United States v. Alvarez Machain*, 504 US 655 (1992), 112 S.Ct., no. 91–172, at 4: 'letters from the Mexican Government to the United States Government served as an official protest', at 15: 'Mexico has protested the abduction . . . through diplomatic notes'.
26. C. J. R. Dugard, *International Law – A South African Perspective* (2000), 173.

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consent of the host state'.[27] Abduction thus constitutes an internationally wrongful act violating territorial sovereignty (and eventually leading to arbitrary detention and arrest; see below), so that the host state can claim reparation based on state responsibility.[28] Usually, the host state will request that the abducted person be returned, and according to Gluck state practice supports the view that the abducting state is obliged to comply with this demand.[29] On the other hand, if the host state consents to the abduction, there is no violation of the aforementioned principles of international law, since consent constitutes a circumstance precluding wrongfulness.[30] Consent can take several forms. Explicit consent removes the illegality but co-operation has the same effect. Moreover, if the host state fails to complain about the abduction, it will probably waive its rights to bring a claim against the abducting state.[31] Since abduction without consent is unlawful, the consequence should be that the court that is to try an abducted person refuses jurisdiction over the case.[32]

However, co-operation does not necessarily legitimize the abduction itself. Although it no longer violates the principle of territorial sovereignty and non-intervention, it can still lead to arbitrary detention and arrest,[33] and ultimately result in a denial of justice, since the abducted person is not able to challenge the abduction and to prevent it by legal means. International abduction would therefore, second, constitute a violation of international human rights law. In several instances the UN Human Rights Committee has held states parties to the International Covenant on Civil and Political Rights (ICCPR) responsible for violating Article 9(1) of the Covenant by internationally abducting their nationals.[34] For instance, in the *Lopez Burgos* case the Committee concluded that 'the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention'.[35] As we shall see, in the present case the European Court did consider the violation of territorial sovereignty in case of abduction, and concluded that Kenya had consented and thereby taken away the illegality, but the Court refrained from judging on abduction in itself as a violation of human rights law, in particular Articles 5 and 6 of the Convention.

27. Gluck, *supra* note 23, at 620.
28. See Art. 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) on 10 Aug. 2001: *Report of the International Law Commission, Fifty-Third Session*, A/56/10. The provisions in Art. 31 form part of general international law, as is stated in the ILC Commentary to Art. 31, at 223–31, referring to the *Factory at Chorzow* case, Jurisdiction, 1927 PCIJ, Ser. A, No. 9, at 21 and Merits, 1928 PCIJ, Ser. A, No. 17, at 47.
29. Gluck, *supra* note 23, at 630.
30. See Art. 20 of the Draft Articles, *supra* note 28. The ILC also considers this rule to be part of general international law. See ILC Commentary, *supra* note 28, at 173–77.
31. Gluck, *supra* note 23, at 623–6. There exists some disagreement on the question whether the waiver has to be explicit, which is reflected in Gluck.
32. As was the result of the *S. v. Ebrahim* case ((1991) 2 *South African Law Review* 553 (A)). See Dugard, *supra* note 26, at 136 and 173–7.
33. See H. A. Blackmun, 'The Supreme Court and the Law of Nations', (1994) 104 YLJ at 41–2.
34. *Casariego v. Uruguay* (R.13/56), ICCPR, A/36/40 (29 July 1981) 185 (CCPR/C/13/D/56/1979); *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia* (623, 624, 626 and 627/1995), ICCPR, A/53/40 vol. II (6 April 1998) 95 (CCPR/C/62/D/623/1995); *Burgos v. Uruguay* (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 (CCPR/C/13/D/52/1979).
35. *Burgos v. Uruguay*, *supra* note 34, para. 13.

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3.1.3. Abduction before the European Court

In the history of the Convention, this is not the first case in which some form of abduction (whether or not recognized as such) resulted in an arrest. In 1987 the Court decided that the circumstances leading to the arrest of Stocké in the Federal Republic of Germany did not amount to a violation of the Convention[36] and in 1996 the case of Illich Sanchez Ramirez (also known as 'Carlos the Jackal') was declared inadmissible.[37] The latter case in particular bears some resemblance to the *Öcalan* case. Sanchez Ramirez was abducted in Sudan and taken to France by aircraft. On his arrival in France he was arrested by the French authorities and subsequently detained. The major difference is that the presence of French officials in Sudan and on the aircraft, let alone control over the aircraft, was not established beyond doubt, as a result of which the then European Commission of Human Rights – deciding upon admissibility – concluded that the Convention was not applicable. In *Öcalan*, the Court came to a different conclusion, and declared the Convention applicable to the events surrounding the arrest of the applicant. Although this conclusion is a logical sequence to existing case law, we shall see that it has some far-reaching implications.

The Court states that co-operation between two states in arresting a fugitive is not in itself unlawful under the Convention.[38] Moreover, the Convention contains no provisions on extradition and 'even an extradition in disguise cannot as such be regarded as being contrary to the Convention'.[39] Combined with the fact that Turkey had issued several international warrants for the applicant's arrest for acts that constituted criminal offences under Turkish law, the Court considered the arrest lawful, since it was in accordance with a 'procedure prescribed by law' and 'for the purposes of bringing him before the competent legal authority on reasonable suspicion of having committed an offence'. The Court could find no violation of Article 5(1). As we have seen, the Court does not consider the issue of abduction. The arrest and detention of the applicant were the result of co-operation between two states and therefore can be regarded as an extradition in disguise. One of the major differences between abduction and extradition being that the latter should be carried out according to legal procedures whereas the former is not, it is remarkable that the Court could find a 'procedure described by law' in the absence of an extradition treaty or even an extradition agreement between Turkey and Kenya.

The applicant also accused Turkey of a violation of Article 3 of the Convention, arising out of the conditions in which he was transported to Turkey. The Court rejected his complaints under Article 3. Although it reiterated that Article 3 enshrines one of the fundamental values of democratic societies and that it contains a non-derogable right,[40] it decided that Öcalan's treatment did not transgress the minimum level of severity. It considered his treatment step by step and decided that

36. *Stocké v. Federal Republic of Germany*, (Ser. A, no. 199) Appl. No. 00011755/85, http://hudoc.echr.coe.int/hudoc.
37. *Illich Sanchez Ramirez v. France*, (Comm. dec. DR 86) Appl. No. 00028780/95, http://hudoc.echr.coe.int/hudoc.
38. *Öcalan*, para. 90.
39. *Ibid.*, para. 91.
40. *Ibid.*, para. 218. See also *Ireland v. United Kingdom.* (Ser. A, no. 25) Appl. No. 00005310/71, http://hudoc.echr.coe.int/hudoc, paras. 162 (minimum level of severity) and 163 (non-derogability).

the components (handcuffing, blindfolding, public exposure) taken separately do not by themselves constitute a violation of Article 3. Surprisingly, it did not contemplate the effects of these components taken together, but accepted the government's argument that they were necessary for the safety and security of the applicant. This way of considering the treatment is markedly different from the Court's approach in other cases, where the Court would consider the treatment as a whole rather than judge upon the constituent parts as such. In the *Selmouni* case, for instance, the Court took this approach and decided that France had violated Article 3 of the Convention.[41] Although some of the injuries inflicted on Selmouni were not of a very serious nature, while others were not established beyond doubt, the Court nevertheless held that the circumstances taken as a whole must be regarded as torture.[42] It did not subject the individual injuries to the test of a minimum level of severity, but found that the fact that they occurred while Selmouni was held in police custody and that they were inflicted with the purpose of obtaining a confession were sufficient to define the treatment taken as a whole as torture under Article 3 of the Convention. Admittedly, the injuries caused to Selmouni were of a more serious nature than the treatment complained of by Öcalan, but the approach in *Öcalan* is rather curious. The Court's established approach – considering the treatment as a whole – might have led to a different conclusion.

The applicant's complaint that his abduction in itself constituted a violation of Article 3 of the Convention was also rejected. The Court was very brief on this issue, stating that the arrest was lawful and that therefore the abduction overseas could not constitute inhuman or degrading treatment.[43]

Although we might understand the Court's reasoning in this case and although the Court came *mutatis mutandis* to the same conclusion in both the *Stocké* case and the *Sanchez Ramirez* case, we must note that the decision may have some – possibly unwanted – implications. By not finding any violation of the Convention in the circumstances leading to the arrest and in the arrest itself, the Court left the door open for 'co-operation' between states in order to arrest suspects of crimes by means of extradition in disguise or abduction. With the current fear of terrorism and the development of communication technologies, certain forms of co-operation might seriously endanger individual liberty and security and indeed lead to arbitrary arrest and detention. Herewith the Court apparently adheres to the *male captus bene detentus* doctrine, notwithstanding efforts to prohibit abduction and even raise this prohibition to the level of peremptory norms of international law.[44] Apart from the

41. *Selmouni v. France*, (Rep. 1999-V) Appl. No. 00025803/94, http://hudoc.echr.coe.int/hudoc, para. 105: 'Under these circumstances, the Court is satisfied that the physical and mental violence, *considered as a whole*, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Art. 3 of the Convention' (emphasis added).
42. See *supra* note 41.
43. *Öcalan*, para. 227.
44. 'Even with the consent of the foreign sovereign, kidnapping a foreign national flagrantly violates peremptory human rights norms.' See Blackmun, *supra* note 33, at 41–2. For the prohibition of abduction see also Security Council Resolution 138 (1960), UN Doc. S/4349 and Resolution 579 (1985), UN Doc. S/RES/579; Dugard, *supra* note 26; Gluck, *supra* note 23; J. Paust, 'After Alvarez-Machain: Abduction, Standing, Denials of Justice and Unaddressed Human Rights Claims', (1993) 67 *St. John's Law Review* 551.

possibly traumatizing effects of abduction, being outside one's country of residence may complicate challenging the lawfulness of detention and requesting habeas corpus. It is hard to see how this matches with the tendency to extend and improve the protection of the individual.

On the other hand, prohibiting international co-operation in the suppression of crime may lead to impunity. Notwithstanding the increase of individual legal security, impunity by means of crossing borders is unacceptable, since it seriously hinders the prevention of human rights violations. The *Soering* case already demonstrated the Court's rejection of so-called safe havens: 'the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person, but also tend to undermine the foundations of extradition'.[45] The same increase in communication technologies also allows for increasing internationally organized crime, which can only be combated through international co-operation. This constitutes an argument of considerable weight. The Court's reference to the *Soering* case clearly shows that it still holds this view and that it applied it in the present case.

3.2. The death penalty before the European Court

The fact that Öcalan was sentenced to death led the Court to consider the death penalty in general and its compatibility with the Convention. It referred to the *Soering* case,[46] in which it decided that the application of the death penalty could under certain circumstances be contrary to the Convention, although the death penalty as such could not be held to be in violation of the Convention. Taking *Soering* as a starting point, the Court further considered the legality of the death penalty, and took the view that nowadays it can be argued to be incompatible with the Convention. In section 3.2.2. below I shall elaborate on the position of the death penalty in international law, especially in the states parties to the Council of Europe.

Another interesting issue arising out of the consideration of the death penalty is the Court's view on the interim obligation as laid down in Article 18 of the Vienna Convention on the Law of Treaties. As we shall see in the next section, the Court's position is clear, but not univocally supported in international law.

3.2.1. The obligation under Article 18 of the Vienna Convention on the Law of Treaties

The Court begins its consideration of the death penalty by saying that the threat of implementation of the death penalty in case of Öcalan has been 'effectively removed'.[47] Having said that, it continues with a short but interesting paragraph stating that Turkey would violate its international obligations by carrying out the death sentence, since it has signed (but not ratified) Protocol No. 6 to the Convention (ETS 114), concerning the abolition of the death penalty, of 28 April 1983 (hereafter the 6th Protocol).[48] It refers to Article 18 of the Vienna Convention on the Law of

45. *Soering v. United Kingdom*, (Ser. A, no. 161) Appl. No. 00014038/88, http://hudoc.echr.coe.int/hudoc (hereafter '*Soering*'), para. 89.
46. *Ibid.*, paras. 100–104.
47. *Öcalan*, para. 184.
48. *Ibid.*, para. 185.

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Treaties of 23 May 1969 (the Vienna Convention) in which states parties are obliged 'not to defeat the object and purpose of a treaty' after signature or expression of their consent to be bound. In the Court's opinion, one execution would defeat the object and purpose of the 6th Protocol – the abolition of the death penalty[49] – which means that Turkey is obliged to refrain from executing Öcalan.

It is quite understandable that the Court holds this view, bearing in mind that the question concerns the death penalty. An execution is irreversible and would cost the life of a human being. Moreover, the Court finds that there are reasons for prohibiting the death sentence in general, as we shall see below. It is important to notice, however, that the Court's view is not the standard interpretation of Article 18.

Although the obligations under Article 18 of the Vienna Convention are arguably part of customary international law,[50] it is difficult to define the scope of the article and to determine what action would actually *defeat the object and purpose* of a treaty.[51] It is exactly this vagueness of Article 18 that gives rise to the debate on its scope.[52] The principle underlying the obligation under Article 18 is that of good faith. Other states must be able to trust the signatory state in its willingness properly to ratify a treaty unless it explicitly states that it will refrain from ratifying.[53] However, this does not necessarily lead to the conclusion that a state defeats the object and purpose of a treaty by a single act that is prohibited in one of the provisions of the treaty. As Jan Klabbers, taking an anti-torture convention as an example, argues, '[o]ne cannot seriously maintain . . . that a single act of torture defeats the object and purpose of the treaty concerned.'[54] Similarly, the Dutch Council of State held that the refusal to grant a child the right to family life under the Convention for the Rights of the Child – *in casu* to be reunited with its father – was permissible, since the Netherlands had signed but not yet ratified this Convention. It could not be held that this would prevent the Netherlands from properly ratifying the treaty.[55] Along these lines one could argue the following: presuming that the abolition of the death penalty is part of the object and purpose of the 6th Protocol, Turkey is able to ratify

49. See the 'Explanatory Report' on the 6th Protocol, published on http://conventions.coe.int next to the 6th Protocol or the 'Opinion' (no. 233,2002) of the Parliamentary Assembly to the 13th Protocol (prohibiting the death penalty in all circumstances), which is cited in *Öcalan*, para. 57.
50. See J. S. Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma', (1992) 25 *George Washington Journal of International Law and Economics* 74–85.
51. One remark must be made: in the case of contractual treaties, the scope of Art. 18 is clear. If state A cedes a certain part of its territory to state B but uses this territory for dumping radioactive material after signature but before ratification of the treaty, state A obviously violates its obligations. Likewise, the application in the case of peace treaties is less difficult. After signing a peace treaty, a state is no longer allowed to kill soldiers of the other state or send its military to that state.
52. See A. Aust, *Modern Treaty Law and Practice* (2000), 94.
53. See P. McDade, 'The Interim Obligation between Signature and Ratification of a Treaty', (1985) *Netherlands International Law Review* 9–13, and *cf.* the well-known example of the United States with regard to the International Criminal Court. The United States signed the Statute of the Court, but later indicated that it had no intention of ratifying the Statute, whereby it would not be prohibited from defeating the object and purpose of the Statute.
54. J. Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent', (2001) 34 *Vanderbilt Journal of Transnational Law* 293.
55. See *S.E.B. v. State Secretary for Justice*, Council of State, Judicial Division, 9 July 1992, Institute's Collection No. 3696. See (1994) *Netherlands Yearbook of International Law* 528 for a summary of the decision.

and implement properly the 6th Protocol and to abolish the death penalty even after carrying out a death sentence. In principle this would not violate the obligation under Article 18 of the Vienna Convention. This line of reasoning is problematic. The vagueness of Article 18 leaves us without a means of determining whether two executions would defeat its object and purpose or whether there is any hierarchy of acts that are prohibited, making certain violations worse than others. Aust suggests that 'if the treaty obligations are premised on the status quo at the time of signature, . . . doing something which would prevent the State from performing the treaty would be a breach of the article'.[56] The obligations under the 6th Protocol could not be premised on the status quo in Turkey upon signature, since Turkey had not then abolished the death penalty, and neither would a single death sentence prior to ratification *prevent* Turkey from performing the obligations under the Protocol after ratification.

However, Turkey must refrain from acting in bad faith and contrary to the object and purpose of the 6th Protocol, which is to abolish the death penalty and to create a 'zone free of capital punishment'.[57] Until Öcalan's trial, Turkey had acted in compliance with the Protocol, since it has abstained from implementing the death penalty since 1984. Under these circumstances, it could indeed be interpreted as a sign of bad faith if Turkey were suddenly to change its policy in the case of Öcalan. It would show Turkey's determination, or, as Jan Klabbers defines it, 'manifest intent' not to ratify the 6th Protocol properly. 'Manifest intent' can be established by the following test: 'if behaviour seems unwarranted and condemnable, it may be assumed to have been inspired by less than lofty motivations and ought to be condemned, regardless of . . . actual proof of bad faith'.[58] The sudden change of long-term policy would qualify as such. However, this would mean a departure from the traditional and strict interpretation of Article 18 of the Vienna Convention[59] which is essentially what the Court did by recalling Turkey's obligations under the 6th Protocol as a signatory state.

There is another point to make in the light of the Court's remark on Turkey's obligations under the Vienna Convention. Even assuming that Turkey is bound by the obligations under the 6th Protocol as a signatory state, it is not established beyond doubt that Turkey could in no way reconcile the execution of Öcalan with the 6th Protocol, which makes an exception for executions in times of war or imminent threat of war;[60] Turkey could argue that the activities of the PKK as a separatist movement amounted to an imminent threat of war. It is highly questionable whether such a line of reasoning to allow for the execution of Öcalan would be accepted,[61] but it is not unthinkable.

56. Aust, *supra* note 52, at 94.
57. *Öcalan*, para. 195.
58. See Klabbers, *supra* note 54, at 330.
59. *Ibid.*
60. See Art. 2 of the 6th Protocol: 'A State may make provisions in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions'.
61. Scholars argue that civil strife or civil war is excluded from the meaning of Art. 2 of the 6th Protocol. See W. Schabas, *The Abolition of the Death Penalty in International Law* (2002), 289.

Although I fully agree with the Court's judgement on this point, it is regrettable that the Court refrains from elaborating on these points, especially with regard to the rejection of possible counter-arguments. The scope and application of Article 18 in relation to human rights treaties is far from clear, which makes an interpretation by the most important European human rights instrument more than welcome.

3.2.2. Abolition of the death penalty by the member states of the Council of Europe[62]

The applicant's conviction was deemed by the Court to be the result of an unfair trial, and the Court holds that the death sentence is unacceptable after an unfair trial, especially since the applicant had to 'suffer the consequences of such imposition for more than three years'.[63] Having established a violation of Article 6 of the Convention,[64] the imposition of the death penalty thus amounts to inhuman treatment, a violation of Article 3. It is part of customary international law that strict procedural safeguards must be observed in the case of the death sentence,[65] and the European Court has repeatedly emphasized the importance of a fair trial in such cases.[66] This being so the Court did not 'reach a firm conclusion' on the compatibility of the death penalty as such with the Convention,[67] notwithstanding the fact that the applicant maintained that the death penalty per se constitutes inhuman and degrading treatment, that Article 2 could not be construed as permitting such treatment and that the imposition of the death sentence in violation of Articles 5 and 6 would also violate Article 2.[68] The Court found that it should not consider this issue under Article 2 but rather under Article 3, and Article 3 should be seen in the light of Article 2, since Article 2 explicitly allows for the death penalty.[69] In this case the death penalty would thus not be considered contrary to the right to life, but would constitute an inhuman or degrading treatment or punishment.

However, this did not prevent the Court from considering the issue of the death penalty in general and its compatibility with the two articles of the Convention in an absolute sense. It came to the conclusion that it is no longer appropriate to the status quo of the Council of Europe and its member states.[70] The question is whether the provision in Article 2(1) of the Convention, allowing the death penalty, must be abandoned, resulting in a prohibition of the death penalty under the Convention as a whole. In 1989, in the *Soering* case, the Court came to the conclusion that Article 3 could not be interpreted as generally prohibiting the death penalty, but times have changed since that decision, and the interpretation of the Convention must be

62. See Schabas, *supra* note 61, at 259–99, for a detailed description of Art. 2 of the Convention and the 6th Protocol.
63. *Öcalan*, paras. 212–13.
64. *Ibid.*, paras. 169–70.
65. W. Schabas, 'International Law and Abolition of the Death Penalty', (1998) 55 *Washington & Lee Law Review* 812.
66. See para. 203 of the judgement for references to the Court's case law.
67. *Öcalan*, para. 198.
68. *Ibid.*, paras. 176–9.
69. *Ibid.*, para. 188.
70. This tendency finds support in the entry into force of Protocol No. 13 (ETS 187), prohibiting the death sentence also in times of war, on 1 July 2003. However, on 12 March 2003, when the Court gave its first judgement in *Öcalan*, only a few states had ratified the Protocol, although many had signed it. Needless to say, Turkey has neither ratified nor signed Protocol No. 13. For the status of ratifications see http://conventions.coe.int/treaty/EN/cadreprincipal.htm.

'influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe'.[71] In particular, the fact that 43 of the 45 contracting states have abolished the death penalty *de jure* and that 41 states have ratified the 6th Protocol, could be interpreted as a sign that Article 2(1) has become a dead letter or has at least been modified.[72] The Court now comes to the conclusion that 'capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment, which is no longer permissible under Article 2',[73] and that it 'can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3'.[74] The determination of the Court to prohibit the death penalty can furthermore be read from the first line of paragraph 202 of the judgement. The phrase '[e]ven if the death penalty *were still permissible* under Article 2' implies that indeed it is not.[75] Later on the Court comes back to these statements and declares that the death penalty is 'no longer seen as having a legitimate place in a democratic society',[76] which leads to the conclusion that the Court indeed finds the death penalty in itself to be in violation of the Convention, and possibly even of international law applicable in the member states of the Council of Europe. In its view on the death penalty the Court is in line with the UN Human Rights Committee, which has stated that abolition is desirable and that the death sentence should be restricted to the 'most serious crimes', a term that should be interpreted narrowly.[77] Case law indicates that 'most serious crimes' must be restricted to murder.[78] Furthermore, the UN Human Rights Committee equally condemns the death sentence after an unfair trial.[79] Moreover, the Committee has recently held that 'for countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application'.[80] *In casu* it concluded that Canada had violated Article 6(1) of the ICCPR in extraditing Judge to the United States. With this judgement, the Human Rights Committee has shown its commitment to interpreting the ICCPR as a 'living instrument' and to adapt its interpretation to 'present day conditions'.[81] It has thereby abandoned its previous jurisprudence[82] and shown itself to be strongly in favour of the abolition of the death penalty.[83] Having found a violation of Article 6,

71. *Öcalan*, para. 194.
72. *Ibid.*, para. 196.
73. *Ibid.*
74. *Ibid.*, para. 198.
75. *Ibid.*, para. 202 (emphasis added).
76. *Ibid.*, para. 207.
77. CCPR General Comment No. 6 (16th Session, 1982): Art. 6, Right to Life, A/37/40 (1982) 93, para. 6.
78. *Cox v. Canada* (539/1993), ICCPR; A/50/40 II (31 Oct. 1994) 105 (CCPR/C/52/D/539/1993), para. 16.2. The Committee reiterated this view in both *Thompson v. St. Vincent and the Grenadines* (806/1998), ICCPR, A/56/40 II (18 Oct. 2002) (CCPR/C/70/D/806/1998) and *Kennedy v. Trinidad and Tobago* (845/1999), ICCPR, A/67/40 (2 Nov. 1999), (CCPR/C/67/D/845/1999). See also Schabas, *supra* note 61, at 110–11.
79. *Reid v. Jamaica* (250/1987), ICCPR, A/39/40 (21 Aug. 1990), (CCPR/C/39/D/250/1987), para. 11.5. See also Schabas, *supra* note 61, at 112–132, for a detailed description of procedural guarantees considered by the Human Rights Committee.
80. *Judge v. Canada* (829/1998), ICCPR, (13 Aug. 2003), CCPR/C/78/D/829/1998, para. 10.4 (emphasis in original).
81. *Ibid.*, para. 10.3.
82. In *Ng v. Canada*, the Human Rights Committee held that Canada violated neither Art. 6(1) nor Art. 6(2) of the ICCPR, since the death penalty imposed on Ng was compatible with the ICCPR. *Ng v. Canada* (469/1991), ICCPR, A/49/40 (7 Oct. 1994), (CCPR/C/49/D/469/1991), para. 15.1–15.7. See also *Kindler v. Canada* (470/1991) ICCPR, (13 July 1993), (CCPR/C/48/D/470/1991).
83. As Schabas puts it nicely, the HRC has a 'licence to promote abolition', *supra* note 61, at 138–9.

it regrettably did not address the question whether it could amount to a violation of Article 7 of the ICCPR.

Similarly, because the Court had already found a violation of the Convention in the fact that the death penalty was imposed after an unfair trial, it did not take a decision on the death penalty on itself. Although it implied that it would consider the death penalty as incompatible with the Convention, it did not answer the applicant's arguments in that respect explicitly.

4. Conclusion

The European Court of Human Rights has once more asserted its position in the interpretation and development of international (human rights) law. In the *Öcalan* case, various issues ask for a wider application of the Convention or even go beyond its scope and demand an interpretation and application of general rules of international law. The extraterritorial scope of the Convention, its applicability to cases of abduction, the issue of obligations under the Vienna Convention and the status of the death penalty have all been dealt with, and the way in which the Court interprets and applies these issues will certainly influence subsequent practice and the development of international law. However, the judgement also leaves some questions unanswered or insufficiently explained. The Court apparently accepts 'co-operation' between states with regard to criminal suspects, but to what extent would it accept this? If it had not been Kenya but a member state of the Council of Europe, would it (like the UN Human Rights Committee) prohibit co-operation resulting in extradition on the basis of the 6th Protocol? And does its consideration of the interim obligation under Article 18 of the Vienna Convention mean that any act incompatible with provisions in a treaty or protocol by a signatory state would be a violation of Article 18?[84] Or is that only in the case of the death penalty, considering its seriousness and its irreversibility? And, finally, would the Court find there to be a violation of Articles 2 and 3 of the Convention in case of the death penalty if there were no violation of Article 3 in the form of an unfair trial? The Court refrains from taking a firm position on these issues and subsequent case law will have to show whether these questions will be answered in the affirmative.

84. This implies that not only Turkey, but also the Russian Federation and Serbia-Montenegro, are prohibited from implementing the death penalty as signatory states to the 6th Protocol, which in its turn would indeed lead to a complete prohibition of the death penalty in peace-time, and thus a modification of Art. 2(1), within the jurisdiction of the Council of Europe, since all member states have signed the Protocol. For signatures and ratifications see http://conventions.coe.int/Treaty/EN/cadreprincipal.htm.