



ጋዜጣዊ መግለጫ ብዛዕባ ዳዊት ኢሳቕ

ሽወደናዊ ዜግነት ዘለዎ ጋዜጠኛ ዳዊት ኢሳቕ፡ ብዕለት 23 መስከረም 2001፡ ኣብ ኤርትራ ብዘይ ሕጋዊ መገዲ ምስ ተኣስረ፡ ክሳብ ሕጂ ናብ ፍርዲ ከይቀረበ ኣብ ትሕቲ ቀይዲ ዝርከብ ዘሎ ንጹህ ዜጋ ኢዩ። ዳዊት ኢሳቕ፡ ልክዕ ከም ካልኦት ጋዜጠኛታት፡ ሓሳብካ ብናጻ ናይ ምግባጽ መባእታዊ መሰሉ ተጠቂመ። ኣብታ ምስ ብጻቱ ኮይኑ ዘካይካዳ ዝነበረ ናይ ብሕቲ ጋዜጣ፡ ሰበ ስልጣን መንግስቲ ኤርትራ ዘይሰማምዕሉ ርእይቶ ስለ ዝገለጸ ኢዩ ክሳብ ሕጂ ኣብ ቀይዲ ብዘይ ሕጋዊ መገዲ ዝማሰን ዘሎ። ከም ዜጋ ናይ ሓንቲ ኤውሮጳዊት ሃገር መጠን ድማ፡ ኣብ ኤውሮጳዊ ውዕል ሰብኣዊ መሰላት ሰፊሩ ዘሎ መባእታዊ ሓርነታት ይምልከቶ ኢዩ። መንግስቲ ሽወደን፡ ከም ኣባል ኤውሮጳዊ ሕብረት መጠን፡ ነቲ ኣብቲ ኤውሮጳዊ ውዕል ሰፊሩ መባእታዊ መሰላት ናይ ዳዊት ኢሳቕ ከይግሃስን እንተተጋሂሱ ድማ ክከላኸለሉን ሓላፍነት ኣለዎ። እቲ ብውልዕ ሊዝበን ዝፍለጥ ኤውሮጳዊ ሕብረት ዝቐመሉ ሰነድ ውን፡ ኣባላት ሃገራት ኤውሮጳዊ ሕብረትን እቲ ሕብረት ባዕሉን ነቲ ተባሂሉ ዘሎ መባእታዊ ሰብኣዊ መሰላት ክከላኸልሉ ሓላፍነት ከም ዘሰከሞም ዝፍለጥ ኢዩ። እንተኾነ፡ ግን ክሳብ ሕጂ ብወገን ኤውሮጳዊ ሕብረት ይኸኑን ብወገን መንግስቲ ሽወደን ነዚ ተጋሂሱ ዘሎ መሰል ዳዊት ኢሳቕ ኣብ ምክባርን ንዳዊት ኢሳቕ ካብ ዘይሕጋዊ ቀይዲ ናጻ ኣብ ምግባሩን ዝተወሰደ ኣድማዒ ስጉምታት የለን። ኤርትራ ሓንቲ ካብተን ካብ ኤውሮጳዊ ሕብረት ዝለዓለ ናይ ረድኤት ሓገዝ ዝቐበላ ሃገራት ከም ምኃና መጠን፡ ኤውሮጳዊ ሕብረትን ሽወደንን በዚ መዳይዚ ጥራይ ዘድሊ ጸቕጥን ፖለቲካዊ ጸዕርን ክገብራ ዝግብኡን እኳ እንተነበረ፡ ከምዚ ዝድለ ኣይሰርሓሉን። ብሰሪ እዚ ድማ ዳዊት ኢሳቕ ንዝተናውሕ ስቅያት ተቓሊዑ ይርከብ ኣሎ። መንግስቲ ሽወደንን ኤውሮጳዊ ሕብረትን ዝተሰከምም ሞራላውን ሕጋውን ሓላፍነት ብግቡእ ዘይምፍጻምም ብሕጊ ኤውሮጳዊ ሕብረት መሰረት ተሓታትነት ክህልዎ ዝኸእል ጉድለት ስለ ዝኾነ፡ ኣብቲ እምነትዚ መሰረት ብምግባር፡ ሓው ንዳዊት ኢሳቕ ዝኾነ፡ ሽወደናዊ-ኤርትራዊ ኢሰያስ ኢሳቕ፡ ብሓገዝ ተጣብቐቲ ሰብኣዊ መሰላት ተደጊፉ፡ ኣብዚ ዝመጽእ ዘሎ ሰሌስ ዕለት 19 ጥቅምቲ 2010፡ ኣብ ከተማ ስትራስቡርግ፡ ሃገረ ፈረንሳ ኣብ ዝኸርብ ኤውሮጳዊ መጋባዳ ፍትሒ ክሲ ክምስርቱ ምድላዎት ወዲኦም ከም ዘለዉ ጠበቓታት ናይ ኢሰያስ ኢሳቕን ኢሰያስ ኢሳቕ ባዕሉን ሎሚ መዓልቲ ኣብ ዘካድዎ ጋዜጣዊ መግለጫ ኣፍሊጢም።

ድሕሪ እቲ ዝነበረ ጋዜጣዊ መግለጫ ኢሰያስ ኢሳቕ ናብ ናይ ሽወደን ወጻኢ ሚኒስትሪ ከይዱ ናይቲ ክሲ ቅዳሕ ን ናይ ሽወደን ወጻኢ ጉዳይ ሚኒስትር ካርል ቢልድት ኣረኪብም።

ሚሮን እስቲፋኖስ

2010-10-18

መግለጫ ናይ ጠበቓታት ኢሰያስ ኢሳቕ ብኢንግሊሽ እዚ ዚሲብን እዩ።

LEGAL OPINION CONCERNING DAWIT ISAAK

1. Introduction

We have been instructed by Esayas Isak (Dawit Isaaq's brother) and Björn Tunbäck (Reporters Without Borders sweden) to look at Dawit Isaaq's case from a legal perspective.

Our legal opinion is presented below.

2. Background

Dawit Isaaq is a journalist, author and playwright. He was born on October 27, 1964, and came to Sweden as a refugee in 1987. He has been a Swedish citizen since 1992. Dawit has a wife, three children and several siblings in Sweden.

Dawit was arrested in Asmera, Eritrea, on 23 September 2001 after having participated in the independent press. He has since then been imprisoned without charges or legal hearing. Information about his living conditions and health status is scarce. However, reliable information has revealed that Dawit is subjected to torture. According to a report from a former prison guard, Dawit and his fellow prisoners are living under inhumane conditions that are directly life-threatening (no access to fresh water, psychological torture, excruciating heat during summer etc.).

In 1993, Eritrea became an independent state after a thirty-year long war against Ethiopia. The war hurt the economy greatly. Eritrea is therefore today one of the world's poorest countries and is experiencing tremendous financial difficulties. As a consequence Eritrea is to a relatively large extent depending on foreign aid. Eritrea has a population of about 5.5 million inhabitants and its GDP per capita in 2007 was 365 USD (Sweden, 37 520

USD in 2008). The total GDP of Eritrea amounted to 1.8 billion USD in 2007 (no 155 out of 180 IMF member states, Sweden, 346 billion USD, no 34). The ruling party "People's Front for Democracy and Justice" is the only permitted political party. No free elections have been held in Eritrea.

After Eritrea became independent, the country entered the so-called Cotonou Agreement with the EU. During 2002 to 2007, 96.8 million EUR was given in aid to Eritrea under the Country Strategy Paper and National Indicative Programme (2002-2007).

According to the Country Strategy Paper and National Indicative Programme for Eritrea, for the period 2009-2013 a total amount of 122 million EUR will be given in aid from the EU. The aid is basically unconditional, its purpose is to promote the development of food production and transportation systems, the judiciary and public administration.

3. Regarding humanitarian aid within the EU

On 1 December 2009, the Lisbon Treaty entered into force. According to Article 6.1 of the EU Treaty (consolidated version of the Treaty on European Union), "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

According to Article 6.2, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. Under Article 6.3, Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

According to Article 214 (1) EU Treaty (consolidated version of the Treaty on the Functioning of the Union) The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union.

Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other..

According to Article 214 (2) humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination, and Article 214 (3), the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

4. ECHR and positive obligations

The European Convention on Human Rights and Fundamental Freedoms (ECHR) constitute Swedish law since 1 January 1995. All EU member states are members of the European Convention.

The rights in the Convention are primarily intended to prohibit states from violating human rights – the individual must in other words have a private sphere where she is protected against interference by the authorities.

Such obligations are usually called "negative obligations", the state is forbidden to act in a certain way that violates the individual's human rights. However, these negative obligations are often also linked to a positive duty to act – the state must ensure that the individual will benefit from the rights and it can therefore not simply remain passive.

In some respects, a positive obligation follows explicitly from the Convention. However, most positive obligations have been developed by the European Court of Human Rights and thus follows from case law (Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights, p 19).

In Article 3, there is a ban on torture – no one shall be subjected to torture or to inhuman or degrading treatment or punishment. According to Article 5, everyone has the right to liberty

and security of person and no one shall be deprived of his liberty unless in accordance with a procedure prescribed by law.

Everyone charged of crimes has the right to a fair trial according to Article 6. This includes a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In addition, Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 9 also entails everyone the right to freedom of thought, conscience and religion, and according to Article 10 everyone has the right to freedom of expression.

Sufficient evidence exists for claiming that Eritrea's actions against Dawit Isaak constitute violations of all the above mentioned rights, in particular Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), Article 6 (right to a fair trial) and Article 10 (freedom of expression).

According to Article 1 of the European Convention, The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.

Sweden, and all the Member States of the EU (and soon also the European Union as an entity) are members to the ECHR and therefore required to abide by its provisions. The member states are thus bound both by the European Convention of Human Rights and the European treaties. The state of Eritrea is obviously not member to the European Convention.

European Convention sets a so-called European minimum standard for protection of human rights. This means that no state may fall below the minimum standard. All affiliated parties must ensure that legislation and law is consistent with the requirements of the Convention. The European Union is not yet connected to the Convention, but according to Article 351 of the EUF, the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more

Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

According to Article 1 of the ECHR, not only the citizens of a country are protected by the Convention and can benefit from the possibility of complaint to the European Court, but also everyone who live or stay there, or otherwise are affected by a decision taken by the State authority.

As a general rule, only those who are within a Member State's territorial boundaries are deemed to be under that State's jurisdiction. However, in the case law of the European Court, exceptions to this general rule has been established. Even if a State has no influence over a non-Member State acts and deeds, a Member State can be held responsible for a non-Member State's actions, if the Member State's actions had a decisive impact on a human rights violation that an individual was exposed to by the other state. In *Soering v United Kingdom* (7 July 1989), the Court stated:

“In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society ". (Para 87)

“In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”. (para 91)

The European Court thus stated, that a Member State can be held liable for an act that– as a direct consequence – subjects an individual to a human rights violation in another State.

In *Z and others v United Kingdom* (10 May 2001) the European Court stated that the

obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (para 73).

How far this positive obligation extends is not yet settled in the case law of the European Court of Human Rights (see Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, p. 20).

In *Ilaşcu and others against Moldova and Russia* (8 July 2004) The European Court stated the following.

“The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory”. (Para 313)

The European Court further added that it “has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention”. (Para 314)

Responsibility may therefore arise for a Member State, even when the State's conduct is taking place or has effects outside of its territory. However, the question is whether such liability could also include a positive duty to act, or refrain from acting.

The European Court has held that the assessment of a State's positive obligations must take particular regard to the general interest and the individual interest and the State's options, with regard to priorities and resources. A positive obligation should not be interpreted as such that it gives a Member State an impossible or disproportionate burden (*Özgür Gündem v. Turkey*, para 43, and *Ilaşcu*, para 332).

The case law of the European Court shows that such positive obligations, however, can reach quite far. In *Ilaşcu*, the Court stated the following.

“The State in question must endeavor, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.” (Para 333-334)

States must thus make an effort, with all legal and diplomatic means available, to ensure each of the rights and freedoms set out in the Convention. If a Member State fails to act, it is the European Court of Justice's duty to examine the extent to which any kind of effort was possible and whether it therefore should have been taken. This is considered especially important in cases concerning violations of absolute rights such as Article 2 and 3.

5. Jus protectionis

International law gives states the right to intervene diplomatically in order to protect the interests of its citizens abroad ("jus protectionis"). This right is reflected in the Vienna Convention on Diplomatic Relations (SÖ 1967:1) and the Vienna Convention on Consular Relations (SÖ 1974:10). The principle is also considered customary international law.

The right to request diplomatic protection is a right given to the State, and not the individual who has had her rights violated under international law. A violation of a citizen's rights is considered to be a direct violation also of her State, thus when a State calls upon the right to diplomatic protection, it is defending its own rights.

Through the EU Treaty a right to request diplomatic protection has also been given to the individual. This right is given to all EU citizens outside its borders who are victims of a violation of international law. All EU citizens thus have the right in that situation to demand that the EU shall use its right to exercise diplomatic protection against third countries.

6. Conclusions

From the above mentioned, the following can be noted.

i) A Member State to the European Convention has in some cases jurisdictions even for events that occur outside its territorial limits.

ii) When deciding if a Member State must take positive action, regard must be taken to, inter alia, the general interest and the individual interest and the Member State's options with regard to priorities and resources.

iii) The State has an obligation to uphold the human rights protection for an individual who is under its jurisdiction in the broad sense defined above, even in situations where the individual is located outside the State's territorial boundaries. This obligation, based on the Convention, means that all available and appropriate legal and diplomatic means shall be used to guarantee the individual's rights and freedoms. The obligations are accentuated in the case of a violation of an absolute right, such as the right not to be subjected to torture or inhuman or degrading treatment or punishment. A State must show that proper and sufficient measures have been taken in every particular case.

iv) The EU and its Member States has a right towards all third countries to call for diplomatic protection, in order to safeguard the interests of its citizens.

There is evidence to claim that Dawit Isaak not only has been detained without trial for almost nine years, but also that he has suffered from life-threatening torture and inhuman and degrading treatment. The main question is whether it therefore can be held that an

obligation for Sweden and other EU states, and indirectly the EU, has emerged, that require them to resort to every available diplomatic and legal means to seek to ensure that Dawit Isaak's human rights are not violated.

Such a positive obligation corresponds to the right – and obligation – for the EU to exercise its diplomatic protection of its citizens. The assumption is that Dawit Isaak for a long time has been subjected to serious violations of absolute human rights. The crucial question then, is to consider whether there are any practical ways to prevent further violations of his human rights.

It is clear that Eritrea is one of the world's poorest countries and to a relatively large extent, is dependent on aid from the EU. Given Eritrea's vulnerable situation and its relative dependence on financial aid from the EU, a demand for Dawit Isaak's immediate release in exchange for financial aid, could be such an active diplomatic mean to prevent that Dawit Isaak is not subjected to further violations of his human rights. An absolute prediction of the effects of such measures can clearly not be done, but the obligations in the Convention implies that the State must show that it has taken all actions that could have the desired effect. This is also in accordance with international law regarding diplomatic protection.

The financial aid from the EU to Eritrea can – in a real world assessment – have such effects, that the Member States must be considered exercising their jurisdiction in Eritrea. In that situation, the Convention requires all States to use all legal and diplomatic means to ensure that Dawit Isaak human rights are not violated. With regard to the general interest and Dawit Isaak interest, and the States options with regard to priorities and resources, it could be claimed that an obligation for the EU to act appropriately to protect Isaak's human rights has emerged.

Thus, the EU Member States, can in the light of the above stated be considered to have not only moral but also a legal duty to urgently take decisive action in their relations with Eritrea to comply with the above mentioned obligations. This may be done by combining the delivery of aid with a categorical requirement for Dawit Isaak's immediate release or in other ways exercise the right of diplomatic protection of the EU citizen Dawit Isaak's rights.

Stockholm, 23 September, 2010

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