

# The Status of Internally Displaced Kurds in Turkey and Compensation Rights

Fact Finding Mission Report



September 2005



THE STATUS OF INTERNALLY DISPLACED KURDS  
IN TURKEY AND COMPENSATION RIGHTS

FACT FINDING MISSION

SEPTEMBER 2005

KURDISH HUMAN RIGHTS PROJECT  
BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES  
EU-TURKEY CIVIC COMMISSION

# Acknowledgements

This report was researched and written on behalf of the Kurdish Human Rights Project (KHRP) and Bar Human Rights Committee of England and Wales (BHRC) by Lucy Claridge (KHRP Legal Officer) and Sharon Linzey (KHRP Intern and Professor of Sociology). It was edited by Kerim Yıldız (KHRP Executive Director), Mark Muller (BHRC Vice-Chair), Mustafa Gundogdu (KHRP Countries Coordinator) and Rochelle Harris (KHRP Public Relations Officer).

The authors are grateful to several people for their cooperation and assistance in this project and in the Strategy and Discussion Meeting on the Situation of Internally Displaced Persons and the Law on Compensation for Damage Arising from Terror and Combating Terror (Law 5233), an event jointly organised by KHRP, Human Rights Watch, BHRC and the Diyarbakır Bar Association which took place in Diyarbakır on 11 June 2005. The authors would particularly like to thank Jonathan Sugden of Human Rights Watch, Mark Muller of BHRC, Tahir Elci, Sezgin Tanrikulu and others at the Diyarbakır Bar Association and Celil Kaya.

## **KHRP gratefully acknowledges the support of**

The Sigrid Rausing Trust (UK), Netherlands Ministry of Foreign Affairs (Netherlands), Open Society Institute (USA), Finnish Ministry for Foreign Affairs (Finland), Oak Foundation (USA), ACAT Suisse- Action des Chrétiens pour l'Abolition de la Torture (Switzerland), C.B. & H.H. Taylor 1984 Trust (UK), Oakdale Trust (UK), Rowan Charitable Trust (UK), Sticing Cizera Botan (Netherlands), The Bromley Trust (UK), UN Voluntary Fund for Torture (Switzerland) and UIA Foundation (UK).

*Layout & Design: Torske & Sterling Legal Marketing [www.torske.co.uk](http://www.torske.co.uk)*

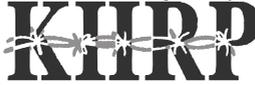
*Printed in Great Britain*

*Published by the Kurdish Human Rights Project*

*ISBN 1 900175 91 6*

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Established 1992

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Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.



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The EU-Turkey Civic Commission (EUTCC) is a non-profit association aimed at monitoring the Turkey-EU accession process and making recommendations to the EU, Turkish government and other stakeholders. It was established pursuant to the findings of the first *International Conference on Turkey, the Kurds and the EU* held at the European Parliament in Brussels in November 2004, organised by the Kurdish Human Rights Project, Bar Human Rights Committee of England and Wales, Rafto Foundation and medico international



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## Foreword

A fact-finding mission to Diyarbakır in south-east Turkey in June 2005, jointly organised by KHRP, the Bar Human Rights Committee of England and Wales (BHRC) and the EU-Turkey Civic Commission, investigated the current circumstances of the region's internally displaced persons (IDPs) and their rights to compensation. The mission was timed to coincide with a strategy and discussion meeting on Turkey's domestic Law on Compensation for Damage Arising from Terror and Combating Terror (Law No. 5233), which purports to provide a right to compensation for the region's IDPs. In conducting its research, the mission interviewed IDPs living in slums in Diyarbakır, local and national non-governmental organisation (NGO) representatives, and representatives of the political parties concerned with the law.

In April 2004, the Council of Europe's Parliamentary Assembly decided to discontinue monitoring procedures, which had been in place to evaluate Turkey since 1996.<sup>1</sup> In June 2004, the European Commission commenced the preparations of a report on Turkey's compliance with the Copenhagen Criteria. As a result, on 22 and 23 November 2004, an international conference on 'Turkey, the Kurds and the European Union' was held at the European Parliament in Brussels. The conference was sponsored and organised by the Bar Human Rights Committee, the Kurdish Human Rights Project, medico international and the Rafto Foundation. It brought together leading human rights institutions, political parties, academics, writers, legal experts and prominent Turkish and Kurdish intellectuals from Europe, the United States, Africa and the Middle East. The purpose of the conference was to exchange ideas and formulate a constructive and coherent response to Turkey's impending accession negotiations to the European Union (EU).

On 17 December 2004, the EU issued its groundbreaking decision that accession talks would be started with Turkey in October 2005. This decision was based on the Report and Recommendation on Turkey's implementation of pro-EU reforms issued by the European Commission in October 2004. This report noted in particular that, "Serious efforts are needed to address the problems of internally displaced persons," and described their situation as, "still critical". On 19 and 20 September 2005, the Second International Conference organised by the EUTCC will follow up on those same issues. This report is intended to assist with the discussions now being held

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1 PACE, Honouring of Obligations and Commitments by Turkey, Recommendation 1662 (2004)

which will determine the future for Turkey's EU membership and the livelihoods of its citizens.

KHRP, BHRC and the EUTCC<sup>2</sup> support Turkey's application for EU membership and welcomes recent legislative changes. For citizens of Turkey, EU accession offers an unprecedented opportunity finally to see Turkey embrace European standards on democracy, human rights and the rule of law. However, despite positive reforms, the authors continue to believe that there are a number of critical concerns in the application of human rights protection in Turkey, including the plight of the country's IDPs.

The majority of IDPs live well below the poverty line, frequently inhabiting shantytowns and squatter settlements. In the south-east cities of Diyarbakır, Batman and Mardin, around 80 per cent of IDPs are unemployed. Speaking only Kurdish, many are denied access to employment. There is no social security provision and begging, prostitution, burglary, pickpocketing, drug use among teenagers and child labour are all growing, exposing them to continual harassment from the police. IDPs' right to return is now enshrined in recent Harmonisation Packages, in the European Convention on Human Rights and in various international treaties, yet is not being exercised in reality. Turkey's enactment of the 'Law on Compensation for Damage Arising from Terror and Combating Terror' (Law No. 5233)<sup>3</sup> in July 2004 represented a promising and encouraging attempt to address suffering endured by IDPs. However, this fact-finding mission has found that the capacity of this law to bring about justice is dramatically reduced by the law's prohibitive provisions. Wholly unrealistic documentation requirements; an inadequate appeals process; a significant fee to launch an appeal; and the domination of the compensation commissions by state employees all prevent IDPs' access to any adequate means of redress. Law No. 5233 is therefore failing to dramatically improve the situation of IDPs in Turkey, and to protect their basic human rights.

This report focuses on the practical application and implementation of Law No. 5233 and investigates how it is working in reality. It complements a series of publications published by KHRP, BHRC or the EUTCC on a range of human rights issues affecting the Kurdish regions of Turkey. We hope these reports will assist governments and policy-makers seriously to address the IDP issue, which remains as important now as ever.

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2 Henceforth "the authors"

3 Henceforth "Law No. 5233"

## Background

In an effort ostensibly to combat the insurgency of armed Kurdish groups during the 1980s and 1990s, state security forces forcibly displaced thousands of rural communities in the Kurdish regions of Turkey. Over 3,000 towns and villages were destroyed during this time. Unlawful detentions, the endemic use of torture or ill-treatment and extra-judicial executions also took place, by both state forces and village guards. Today, the majority of these villages remain demolished and there are no plans for their reconstruction. Between 3 and 4 million villagers were forced from their homes<sup>4</sup> and are still not allowed to return. Most internally displaced people are unable to return to their homelands because of obstruction by village guards, landmines and poor socio-economic conditions.

In May 2003, the EU's Accession Partnership with Turkey required that, "the return of internally displaced persons to their original settlements should be supported and speeded up". On 17 July 2004, under pressure from the Council of Europe, Turkey passed the Law on Compensation for Damage Arising from Terror (Law No. 5233). This offers displaced villagers from south-east Turkey the possibility of full compensation for material losses, including land, homes and possessions, in the context of displacements that happened between 19 July 1987 and 17 July 2004.

Law No. 5233 compensates for material damage inflicted by armed opposition groups and security forces combating those groups. It provides for the establishment of provincial damage assessment commissions, which will investigate deaths, physical injury, damage to property and livestock, and loss of income arising from the inability of the owner to access their property between the applicable dates. The provincial commissions are comprised of a deputy provincial governor and six other members: five civil servants responsible for finance, housing, village affairs, health and commerce, and a board member of the local bar association. After assessing each claim, they propose a figure for compensation based on principles set out in tables of compensation levels and, for damage to property, levels established in laws

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4 The Ministry of Interior counts less than 400,000 IDPs, but its figure includes only persons displaced as a result of village and hamlet evacuations in the south-east, and does not include people who fled violence stemming from the conflict between the government and the Kurdistan Workers' Party (PKK), which included evacuations, spontaneous movement, displacement and related rural-to urban movement within the south-east itself. U.S. Committee for Refugees and Immigrants. <http://www.refugees.org/countryreports.aspx?id=1336>.

on compulsory purchases.

In terms of payment, Law No. 5233 offers two levels of opportunity. First, the assessment commissions may make reasonable offers to the displaced persons, which would provide an early injection of cash or materials which the villagers can use to re-establish themselves in their former homes. However, if the commission's offers are too low and do not adequately compensate the level of loss, the villagers can go to court to improve the offer.

The authors welcome any programmes which offer IDPs a chance to receive compensation for the loss of houses, livestock, farming equipment, farms and possessions. Law No. 5233 seemingly represents the first time that IDPs displaced between 1987 and 2004 have that opportunity in Turkey. However, upon closer examination of the law and its machinery, the authors identified a number of potential areas for concern. First, Law No. 5233 contains ample scope for claims and payments to be avoided, minimised and delayed. For example, the commissions are demanding that each claim should be supported by documentation and evidence of their forced evacuation; a requirement that many applicants will be unable to meet, since the unlawful destruction programme of the army and village guards tended to leave no trail of evidence. Further, in the past, Kurdish villagers have received justice and respectable sums of compensation – including non-pecuniary damages – in the European Court of Human Rights if adequate remedy cannot be found within the domestic courts.<sup>5</sup> However, the Compensation Law excludes payment for suffering and distress, symptoms commonly felt by internally displaced persons who saw their homes and crops destroyed and their livestock killed, among other inflictions of damage.

According to the head of the People's Democracy Party (DEHAP) Diyarbakır branch, Mesut Beştaş, the Turkish government did not consult any of the individuals or bodies with an involvement in the issue of IDPs when drafting Law No. 5233, including bar associations, political parties, or IDPs themselves.<sup>6</sup> Further, Şimdi Zamanı of the Republican People's Party (CHP) stated that his party has attempted to raise some issues in Parliament regarding their concerns with the law, but as their representatives are in the minority, they had not been successful.<sup>7</sup>

Law No. 5233 has the potential to be a far more powerful and effective mechanism for restitution that anything previously offered, since the Turkish Government's policy

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5 In *Akdivar v Turkey*, judgment of the ECHR, 1 April 1998, case no 21893/93 the ECtHR awarded non-pecuniary damages of £8,000 to each applicant for suffering and distress.

6 FFM interview with Mesut Beştaş, head of People's Democracy Party (DEHAP) Diyarbakır branch, Diyarbakır, 12 June 2005

7 FFM interview with Şimdi Zamanı, chair of the Republican People's Party (CHP) Diyarbakır branch, Diyarbakır, 12 June 2005

before the implementation of the law aimed to give the displaced no compensation at all.<sup>8</sup> However, the authors are concerned that many of the reforms recently implemented by the Turkish Government have been introduced for public relations purposes: lip-serve to enable the government to qualify for and meet the political requirements of EU candidacy. As a result, the implementation of Law No. 5233 provides a genuine test as to the authenticity of the Turkish government's desire for reconciliation with the Kurdish people. It provides an opportunity to determine the seriousness of the Government's resolve to accept them as full citizens of the Turkish state and to treat them with the full equality that the Constitution commands. It is against this backdrop that the authors decided to institute a fact-finding mission within south-east Turkey to investigate how Law No. 5233 is working in practice.

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8 Until recently, there was no acknowledgement by the Turkish Government of the human rights perpetrated by state security forces; even those adjudicated and therefore established by the European Court of Human Rights. For example, the Government ignored most of the recommendations in a 1995 report by the Turkish Parliament's Commission on Migration that documented the scale of the displacement and placed much responsibility with the gendarmerie.



## The machinery of the Compensation Law

Law 5233 was passed by the Turkish Parliament on 17 July 2004. Its main provisions are:

**Article 1** lays out the aim of the law, which is to grant compensation for pecuniary damages suffered by those due to terrorist acts or during the operations combating terrorism.

Under **Article 2**, displaced villagers from south-east Turkey are offered the possibility of full compensation for material losses, including land, homes and possessions in the context of displacements which happened between 19 July 1987 and 17 July 2004. There must be a direct causal connection between the fight against terror and the damage.

Regulations for implementing the law were published in the *Official Gazette* on 20 October 2004. The deadline for applications to be submitted for compensation for material loss was 27 July 2005, and the provincial loss-assessment commissions are to complete their work of assessments and compensation offers to villagers by January 2006 or April 2006 at the latest (a three month time extension is allowed).

Law No. 5233 compensates IDPs for material damage inflicted by armed opposition groups and security forces combating those groups. The law is not designed to compensate for non-pecuniary damages and the restricted application of the law in regard to “reasons of terror” or “combating terror” appears to be contradictory to the general aim of the law. Damage assessment commissions are established on a provincial level to investigate deaths, physical injury, damage to property and stock, and loss of income arising from the inability of the owner to access their property. These assessment commissions will propose a figure for compensation on each complaint on the basis of principles laid down in tables of compensation levels and, for damage to property, levels established in laws on compulsory purchase.

**Article 2** also sets out the damages that are excluded from the law and which are not going to be compensated by the State, as follows:

Damages that were previously compensated by the Government with the allocation

of land or house or by other means;

- a) Damages that were compensated in accordance with a court judgment;
- b) Compensation previously paid in accordance with a judgment or friendly settlement decision of the European Court of Human Rights;
- c) Damages which occurred as a result of economic and social migration, rather than terrorism, or as a result of voluntarily migration which was not motivated by security concerns;
- d) Losses that were incurred through the intentional acts of the individuals;
- e) Losses suffered by those who were convicted under the scope of Articles 1, 3 and 4 of the Anti-Terror Law and sentenced for aiding and abetting the PKK.

According to **Article 4**, the commissions were to be set up to review applications within ten days of passing Law No. 5233. Regional governors have the task of appointing the heads of the commissions. Each commission is comprised of a deputy provincial governor, five civil servants responsible for finance, housing, village affairs, health and commerce, and a board member from the local bar association.

**Article 6** provides that the commissions must decide claims within 6 months of being lodged, with a possible extension of 3 months if necessary.

Under **Article 8**, the damage will be determined according to the statement of the applicant together with information and evidence from the judicial, administrative and military authorities.

**Article 9** sets out the amount of compensation that can be awarded in situations of injury, death, and infringement of life. It is worth noting here that pecuniary compensation is less when compared to the Pecuniary Compensation Law, Law No. 2330, which relates to compensation to state agents subjected to damage when protecting security and public peace.

**Article 13** states that the losses shall be paid from the fund set out in the Interior Ministry budget, on the approval of the governor. The Interior Ministry must approve any payment over twenty billion Turkish Lira.

Under **Article 17**, a regulation setting out details of the implementation of Law 5233 is to be drafted by the Interior Ministry and issued by the Council of Ministers within 2 months of the law coming into force, that is, by 27 September 2004.

Applicants must apply to the governors for compensation and they have one year in which to do this.



## Lack of independence of assessment commissions

The constitution of the assessment commissions, with six civil servants and just one outside independent member is a curious mixture, inviting conflicts of interest. For obvious reasons, the six civil servants appointed by the government have a lot more at stake in the outcome of their determinations than the independent member, who is appointed by the local bar association where the commission operates. The mission was concerned that members might be motivated by an interest to reduce state liability for claims. In this aspect, future promotions, job security and politics may play a stronger role in how commission members make their decisions as to compensation levels than a disinterested sense of justice. In addition, there are no members from the chambers such as agriculture, engineering, architecture or trade. Members with knowledge of these fields would arguably be far more effective in assessing damages than lawyers or civil servants.

Mehmet Dinler, the bar association member of the Şırnak local assessment commission, told the mission that, in his experience, the term “commission” is synonymous with “governor”.<sup>9</sup> He explained that there are two local assessment commissions in Şırnak. Neither is independent, as all the members work under the direct leadership of the governor. Mehmet Dinler explained that he has no input in the decisions reached by the commissions: whatever the governor decides and directs, the other members simply agree. For example, one applicant was claiming 500,000,000 Turkish Liras for damages to his farm, which had been burned down. This amount was determined by experts. However, the governor refused to pay more than 195,000,000,000 Turkish Liras, on the grounds that he could not make the state pay such a large amount. According to Mehmet Dinler, the commission’s “intention is to protect the government, the state, and to pay less money – just token money to make it look good”.<sup>10</sup> This is also true in Bingöl. Indeed, Abdurrahman Kurt, Chairman of the Diyarbakır branch of the Justice and Development Party (AKP), stated that too many officials within the commissions are creating obstacles.<sup>11</sup>

Attendees at the strategy and discussion meeting in Diyarbakır voiced similar

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9 FFM interview, Mehmet Dinler, Diyarbakır, 11 June 2005

10 *ibid.*

11 FFM interview, Abdurrahman Kurt, Diyarbakır, 12 June 2005

concerns regarding the independence of the commissions.<sup>12</sup> Many agreed that the commission members are bureaucrats who have adjudication rights but no juridical experience. The lack of education or training regarding the procedure of assessing the damages was a further concern. Oğuz Dilek, a member of the Tunceli local assessment commission, stated that his commission has a sub-commission composed of experts, including agricultural and civil engineers, veterinarians, and a representative from the land registration department, who are involved in the assessment process.<sup>13</sup> However, the mission was not clear that this was true of every commission. Mesut Beştaş, head of Diyarbakır branch of DEHAP, told the mission has stated that it would be much better for someone from the Chamber or Union of Agriculture Engineers to actually be part of the commission, in order to properly understand the damage and the value of the loss, and reach a much more accurate valuation.<sup>14</sup> In his opinion, lawyers were included on the commission as an afterthought and purely in an attempt to validate the commission.

The mission was particularly concerned about the extent to which a state official who is a member of an assessment commission can be expected to be independent in his or her decision. A civil servant will understandably be worried about awarding applicants large amounts of compensation, if such a decision might result in his or her dismissal, or prevent him or her from career advancement.

It is a requirement of international law that the assessment commissions must be independent and impartial. This can be tested by investigating who appointed the commission members. In the ECtHR cases of *Incal v Turkey* and *Öcalan v Turkey*, the Applicants succeeded on the merits by showing that the state security courts were not independent. The manner in which the military judges were appointed was unfair. Mehmet Dinler explained that the governor's assistant and civil servants were appointed to sit in judgment on claims relating to state destruction by the Minister of Interior.<sup>15</sup> If the scenario resembles that in *Incal* or *Öcalan*, all that would need to be proven is that it appears to the applicant that the structure of the court is objectively and subjectively unfair.

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12 Authors' observation of Strategy and Discussion Meeting on the Situation of Internally Displaced Persons and the Law on Compensation for Damage Arising from Terror and Combating Terror (Law 5233), organised by KHRP, Human Rights Watch, BHRC and the Diyarbakır Bar Association, Diyarbakır, 11 June 2005

13 FFM interview, Oğuz Dilek, Diyarbakır, 11 June 2005

14 FFM interview, Mesut Beştaş, Diyarbakır, 12 June 2005

15 FFM interview, Mehmet Dinler, Diyarbakır, 11 June 2005

## Automatic exclusion from compensation

Many applicants are automatically excluded from applying to the commission, for the following reasons:

### **i. Exclusion of people who have already been compensated**

In 1999, before the general election, the government gave small symbolic amounts of compensation, such as 50 million Turkish Lira or a few packages of cement, to displaced persons. Many people will therefore have settled for this compensation – the most available until now – in the light of the lack of eligibility for other compensation. The authors maintain that elimination of these people from compensation claims under the Compensation Law is unfair. Instead, any amounts paid in the past should be deducted from current settlement figures rather than eliminating their entire claims.

### **ii. ‘Voluntary’ evacuees are excluded from filing claims**

Law No. 5233 does not protect those who were forced to migrate for non-security reasons. However, many villagers are unable or afraid to state the real reason for which they abandoned their home, for a variety of reasons.

First, in 1999, a Return to Village and Rehabilitation Project was established, and those who wanted to apply for assistance were required to sign a specially printed form, choosing the reason they left their homes from a range of given alternatives. However, there was no option relating to intimidation or forced evacuation by state forces. Villagers who resisted signing this form were often beaten, threatened or refused access to the village. Now, those who did sign these forms, which have pre-determined reasons for leaving their homes, are excluded from Law No. 5233. The authors maintain this seems grossly unfair and inappropriate.

Secondly, as explained to the mission by Mesut Beştaş, during the conflict in the 1980s and 1990s, some villagers chose to become village guards.<sup>16</sup> The rest of the

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<sup>16</sup> *op cit.*

villagers refused and were therefore forced to leave their village. When applying to the commissions for damages, they claim that they left the villages for security reasons. However, the state is very likely to respond that, if some of the villagers could stay and become village guards, the others did not have to leave, and therefore find that they left voluntarily.<sup>17</sup> This is an impossible situation.

In the absence of documentation or other evidence confirming the real reason IDPs were forced to leave their homes, the commissions must fully investigate each claim and must not rely on past documents with forced signatures or inappropriate assumptions about the security situation to deny compensation claims.

### **iii. Exclusion of those sentenced under the Anti-Terror Law**

Those IDPs who were convicted under Articles 1, 3, and 4 of the Anti-Terror Law for aiding and abetting the PKK are excluded from filing applications under Law No. 5233. This contradicts Article 10 of the Turkish Constitution, which relates to “equality before the law” and, in effect, places the claimant in a “double jeopardy” situation, having to pay twice for “sheltering members of an armed organisation”. In addition, many of the Turkish courts’ findings in this regard were the result of unfair court procedures. It is worth noting that the European Court has found frequent violations of Article 6 of the ECHR in cases brought against Turkey for the denial of fair trials, many relating to application of the Anti-Terror Law.<sup>18</sup> State security courts have regularly been found to have violated the independent and impartial standard of Article 6. In south-east Turkey, the judgments of the domestic courts are rife with judicial error. The objective of Law No. 5233 is to compensate displaced people for damages due to displacement, not to punish them or to deny them effective remedy depending on their alleged political opinions.

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<sup>17</sup> Interview, 12 June 2005

<sup>18</sup> Within the past couple years the ECtHR found lack of independence and impartiality of the tribunals in the Republic of Turkey the following cases: *Halis v Turkey*, *Maraşlı v Turkey*, *Kalin v Turkey*, *Canevi v Turkey*, *Unal v Turkey*, *Özüpek v Turkey*, and *Taskin v Turkey*.

## Provision of acceptable forms of evidence

Law No. 5233 is designed to compensate not only for material damage inflicted by state security forces, but also for damages resulting from armed opposition groups. However, in deciding each claim, the assessment commissions are demanding documents evidencing the destruction which are often impossible for the villagers to produce, since the unlawful destruction programme of the army and village guards usually left no trail of evidence. It is well known that there was no administrative decision by the official authorities to evacuate the villages after the state of emergency was imposed in 1987. In all cases, members of the local gendarmerie were the ones who kept any official records of the destruction of villages, if they were kept at all.

The village of Şırnak, for example, was destroyed during the night of 19 September 1992. The city was bombed and homes were shot at. Eighteen people died. Although this has been confirmed by numerous eyewitnesses, no official documents exist to confirm the events. How therefore can applicants in Şırnak claim in the assessment commissions? Abdurrahman Kurt, Chairman of the Diyarbakır branch of the Justice and Development Party (AKP), has admitted that it is difficult for victims to prove claims and provide the necessary evidence, particularly when so much time has passed since they were forced to flee their homes.<sup>19</sup>

### **Lack of documentation to prove property ownership**

According to Mesut Beştaş, within south-east Turkey it is very rare to have documentation to prove property ownership.<sup>20</sup> Many people just owned their land in practice, rather than through the official land registration system: they used the land and there were no objections to this. However, they did not officially own it. Once has been used in this way, after twenty years, ownership passes to the person tending it, through laws of cessation. It is therefore not exactly clear which villager owned which piece of land, unofficially or not, especially now that much is overgrown and difficult to identify. In addition, much of the land that is not registered belongs to the Treasurer of the State – yet the villagers have been using it for as long as they can remember, for example, for growing pistachio trees. Some

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19 *op cit.*

20 *op. cit.*

of the families also had rights to take benefit from the forests. Without official proof of these rights, it will be very difficult for applicants to obtain any kind of compensation.

## **Gendarmes**

Naci Yıldız, the bar association member of the Hakkari local assessment told the mission that this commission had recently refused 267 applications on the grounds of lack of evidence.<sup>21</sup> The commission had asked the local gendarme station to declare why the village was empty. Although the villagers had been forcibly evacuated, the gendarmes replied that there had been no such evacuation and the villagers had left voluntarily. The applications were therefore refused. Cavit Torun, MP for the Justice and Development Party (AKP) in the Turkish Parliament and Vice Chair of Human Rights Investigation Commission of Turkish Parliament, agreed that it is a mistake to ask the gendarmes if a village has been burned. No gendarme will admit this: there is too much contradiction.<sup>22</sup>

A member of the Diyarbakır Bar Association from Kulp district told the mission<sup>23</sup> that he had recently been called to an evacuated village where soldiers were filming. The soldiers had explained that they were collecting proof in favour of the state and against the villagers. They brought village guards from a different village, who were filmed stating that the owner of one of the houses had left for economic reasons, and that as the house was not being looked after, it had fallen into disrepair. Apparently the soldiers and police were collecting this evidence in several of the villages, for which they were receiving illegal benefits. However, when the member of the Bar Association brought this to the attention of the local governor, he claimed this was happening without his knowledge.

In Şırnak, 7,381 people from have applied to the commissions, of which 829 have been examined so far. Yet only 31 applications were successful, presumably because of lack of evidence.

On the other hand, in Bingöl, the commission had actually visited the villages and seen that the houses were in ruins and that the trees had been burned, and therefore had accepted that the damages were acceptable in 46 cases. Although the mission found that this is an exceptional case, it should certainly be encouraged.

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21 FFM interview, Naci Yıldız, Diyarbakır, 11 June 2005

22 FFM interview, Cavit Torun, Diyarbakır, 12 June 2005

23 FFM interview, Diyarbakır, 11 June 2005

## Current use of land

According to one attendee at the strategy and discussion meeting,<sup>24</sup> after the conflict ended in 2000, some of the villagers were able to return to their old homes and start using their fields and gardens again, for the summer at least. However, this presents a problem: if commissions do visit and see that the gardens are now in use, they will presume that the applicant has suffered no loss. So, who will determine what happened when there is no documentary proof, and how will applicants be compensated for having to rebuild their home and gardens, not forgetting the moral damage?

## Eyewitness evidence

The implementing regulation for Law No. 5233 requires that information about the extent of damage should be collected from, “public bodies and organisations,”<sup>25</sup> and include, “the declaration of the person who has suffered the loss, and information from judicial, administrative and military bodies.”<sup>26</sup> It also states that in cases of property damage, assessment commissions will work on the basis of, “incident reports describing how the damage occurred and its extent... and all forms of document relating to the assessment of damage.”<sup>27</sup> This means that eyewitness testimony of fellow villagers, who may have seen the destruction of property, is excluded, since it is not mentioned in the regulation. In addition, national and international NGOs and humanitarian organisations have reported incidents of house destructions and evacuations and made visits to the regions where these activities have transpired. Such reports should be allowed to form part of the evidence.

Disallowing the use of eyewitness testimony of others than the applicant, or NGO reports, may be unfair under Article 6 if the commission is considered a ‘court’ or a tribunal, under the European Court of Human Rights standards. If the commissions are not considered as tribunals but form part of the state apparatus, then until the administrative court can fully investigate a case and call for all the normal evidence, it will be an unfair trial under Article 6. It is also unlikely to be considered an effective remedy and therefore fall foul of Article 13.

According to a member of the Diyarbakır Bar Association, Turkey’s Foreign Minister recently sent a circular requesting that commissions take an open-minded

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24 *Op. cit.*

25 Regulation on the Compensation of Damage Arising from Terror and Combating Terror, Article 12.

26 *Ibid*, article 16

27 *Ibid*, article 17

approach to evidence, proposing the use of different types of evidence, for example, statements of witnesses and officials. This represents a much more helpful approach, although the mission found that none of the politicians subsequently interviewed seemed to have heard of this suggestion and the mission was unable to discover any further information about it. The mission therefore remains doubtful that it will be put into effect.<sup>28</sup>

### Testimony of *muhtars*

The testimony of the local *muhtar* will be critical to proving the true account of events in many claims. However, the history of influence and pressure on the *muhtars* by the gendarmerie and governors is well known, and threats of violence or withdrawal of official favours and funding has been common. *Muhtars* may be reluctant to provide evidence to the commissions concerning the destruction of villages by state security forces in the light of past abuse by state authorities.<sup>29</sup> The reality is that those who testify or who give evidence may experience reprisals if they implicate security forces or village guards in acts of house destruction and forced evacuation. *Muhtars* cannot be expected to undertake such a risky venture if nothing would come of it. Commissions should therefore be empowered to protect witnesses who choose to provide evidence, and to thoroughly investigate any allegations of intimidation – yet current time pressures and lack of resources do not allow for this.

For example, Mesut Beştaş told the mission that he had recently helped some applicants in their claim to a local commission.<sup>30</sup> He took many photos of the village where they had lived, depicting holes in the walls of the homes that had been caused by the bombs dropped from planes. The governor then instructed gendarmes to go to the village and question the *muhtar*. However, the *muhtar* lived close by and gave evidence stating that the villagers had left of their own free will. He could not tell the truth because he feared repercussions from the state security forces.<sup>31</sup>

It is feared that the commissions will eventually have to resort to a makeshift method of reckoning that will produce inadequate and unjust offers. These offers will be

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28 *Op. cit*

29 At the peak of the displacements, several *muhtars* were murdered. Mehmet Gürkan, *muhtar* of Akçayurt in Diyarbakır province, was forcibly evacuated on 7 July 1994, after holding a press conference wherein he had reported that gendarmes had tortured him to tell television journalists that the PKK had destroyed his villages, when in fact the security forces had burned Akçayurt. A month later an eye-witness saw soldiers detain Gürkan and take him away in a helicopter. He was never seen again. See Amnesty International report *Policy of Denial*, February 1995, at 3.

30 *op cit*.

31 *ibid*.

made to thousands of families spread over a huge area and these families will have just twenty days to make their decisions as to whether to accept these offers.



## Lack of compensation for suffering and distress

Non-pecuniary damages are not covered under Law No. 5233. It covers only damages related to “reasons of terror” or “combating terror”. The requirement of a strict causal connection between the damages and terrorism is contradictory to the general aim of Law No. 5233. There may be cases where damages have been caused where there is no causal connection to terrorism. It seems inappropriate to include this causal connection given that the objective responsibility of the state to fight terrorism is not part of Law No. 5233.

It is well-documented that many IDPs have suffered psychological trauma. A 1998 medical study carried out on a group of internally displaced Kurds found that 66 percent were suffering from post-traumatic stress disorder, 29.3 percent showed profound depression,<sup>32</sup> and 9.5 percent suffered from mental illness which arose during or after displacement.<sup>33</sup> Post-traumatic stress disorder, psychological depression, and mental illnesses are common forms of medical harm that have accompanied the forced displacement of these refugees.<sup>34</sup> It would seem a travesty of justice if there were no compensation offered for the trauma that surrounded the international crimes of torture, extra judicial killings and forced disappearances. Indeed, Abdurrahman Kurt admitted that the lack of non-pecuniary damages is a serious flaw in Law 5233.<sup>35</sup>

Compared to past judgments where the ECtHR has ordered non-pecuniary damages as well as pecuniary compensation for the suffering and distress of the applicants and their families for house destruction,<sup>36</sup> Law No. 5233 is both unfair

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32 Dr Aytakin Sır, Dr Yener Bayram and Dr Mustafa Özkan, “A preliminary study on PTSD after forced migration,” *Turkish Journal of Psychiatry*, 1998, at 173-180.

33 Göç Edenler Sosyal Yardımlaşma ve Kültür Derneği, “Sociological Analysis of the Migration Concept: Migration Movements in Turkey and Their Consequences,” (2002), by Mehmet Barut, Mersin University, see Table 243.

34 See, Dr. Aytakin Sır, Dr. Yener Bayram and Dr. Mustafa Ozkan, “A preliminary study on PTSD after forced migration,” *Turkish Journal of Psychiatry*, (1998), at 173-180.

35 FFM interview, Abdurrahman Kurt, Diyarbakır, 12 June 2005

36 In the KHRP case of *Binbay v Turkey* the plaintiff was granted 45,000 euros for beating, destruction of property and denial of effective remedy. In *Hasan İlhan v Turkey*, 14,500 euros were awarded for non-pecuniary damage in addition to 33,500 euros for pecuniary damages. In *Çelik and İmret v Turkey*, Çelik was awarded 10,000 euros, and İmret 5,000 euros for non-pecuniary damages plus costs and expenses. The ECtHR awarded non-pecuniary damages of £8,000 to each plaintiff in the

and insufficient. Internally displaced people who have seen their homes and crops burned, their livestock killed and who have been forcibly evicted from their homes with nowhere to stay will have suffered quite substantial distress, quite aside from the ill-treatment, torture and disappearances which often accompanied the clearances. The fact that non-pecuniary damages will not be awarded adds insult to injury.

It is commonly believed that most IDPs feel Law No. 5233 fails to adequately address the loss they have suffered. The mission interviewed three internally displaced families living in the slums in Diyarbakır.<sup>37</sup> One family, with seven children, moved from their village in Mardin province in 1992. Their village was burnt down by the state security forces, leaving their house in cinders and their belongings destroyed. They had no choice but to flee with only the clothes on their backs, leaving their animals and their livelihood behind. They had applied to the commission for compensation but, at the time of interviewing, had not received a response. They now have to rent their house and have very little income. The father sometimes finds irregular construction work, earning 50,000 to 60,000 Turkish lira per month. There is no unemployment pension. They now have no other way of supporting themselves.

Another family from Derik, in Mardin province, who have been living in the Diyarbakır slums for the past 10 years, used to own their own house, 300,000 square acres of grape orchards, 50 sheep and 15 cattle.<sup>38</sup> They were forced to leave their village as they were under pressure to become village guards, were surrounded by soldiers and one of the sons was imprisoned. Two of the daughters now earn money through seasonal work in the fields and selling handicrafts. They earn 5,000,000 Turkish Lira per day. Their house is not officially owned by them, and has very basic facilities with no running water. These conditions are dramatically different to their previous lives in Derik, where they were able to support themselves.

A third family, who left Lice and have been living in the slums since 1993, left their home when it was bombed by security forces. They have applied to their local commission but have little faith that they will; receive any compensation. The father now earns approximately 80,000,000 Turkish Lira per month through seasonal construction work, having been forced to leave his home, livelihood and means of supporting his family behind him. They had applied for compensation but were not hopeful that they would receive adequate damages.

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KHRP case of *Akdivar v Turkey*. But these latter plaintiffs were still unable to return to their homes. The Council of Europe's Committee of Ministers is charged with enforcing the ECtHR judgments and for ensuring that plaintiffs can return to their property. But they have had no more success in this than it has had in persuading the Turkish Government to implement an effective general return for IDPs.

37 FFM interview with IDPs, names withheld for reasons of confidentiality, Diyarbakır, 12 June 2005

38 *Ibid*

Principle 28 of the UN Guiding Principles on Internally Displaced Persons provides that competent authorities have the, “primary duty and responsibility to establish conditions, as well as provide the means, to allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.” This is also stressed in the Economic and Social Councils’ Draft Principles on Housing and Property Restitution for Refugees and Displaced Persons, various UNGA resolutions<sup>39</sup> and Security Council resolutions.<sup>40</sup> Yet Law No. 5233 makes no mention of restoring IDPs to their former lands, farms, orchards and homes. It merely offers pecuniary compensation on a ‘take it or leave it’ basis – and does not offer any financial compensation for the suffering they have gone through. According to Mesut Beştaş, many applicants would like to return to their villages, although this depends on the individual conditions and circumstances of each village. It is not simply a question of paying them some money. In his words, “It’s impossible to provide restitution for what they lost.”<sup>41</sup>

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39 See UNGA Res. 1672 (XVI); Res 3212 (XXIX), Res 194 (111); Res 51/126 and Res 51/114

40 See UNSC Res 1287 (2000), 1036 (1996), 971( 1995) and 876 (1993); UNSC Res 853 (1993); Res 752 (1992); Res 745 (1992); Res 1009 (1995); Res 361 (1974); Res 1244 (1999) and 1199 (1998); Res 687 (1991); Res 385 (1976) and Res 999 (1995)

41 *op cit.*



## Failure to provide legal aid for applicants

Law No. 5233 contains no provision for legal aid to assist applicants in preparing their claims, or assessing an amount of compensation proposed by the commissions. It expects poorly educated farmers from a region where 35 per cent of the villagers are illiterate to assemble comprehensive and complex documentation in order to establish their eligibility for compensation.<sup>42</sup> Unsurprisingly, the standard of applications is quite poor. Lawyer and commission member Abdullah Alakuş has stated that most of the petitions received by the Bingöl assessment commission were improperly submitted.<sup>43</sup> People who have filled out their claims incorrectly stand a high risk of having their claims denied, which may give rise to human rights claims under Article 13 of the European Convention. Legal aid services of Bar Associations or individuals or other project staff could provide this aid if the Government did not take a dim view of NGO involvement.

Sezgin Tanrıkulu, president of the Diyarbakır Bar Association has strongly criticised the Compensation Law for failing to include any provision for representation by a lawyer to the commissions.<sup>44</sup> Some villagers have appointed lawyers to handle their claims; others have asked for their applications to be handled by the Human Rights Association or Göç-Der in spite of official advice given to community leaders not to involve NGOs. According to Mesut Beştaş, many lawyers are helping applicants on a pro bono basis, not even asking for expenses.<sup>45</sup> Mr Beştaş himself has been assisting applicants on that basis. Although they may receive some payment if the applicant is successful in his claim, this will be a minimal amount which must be privately agreed between the lawyer and his client. A family from Lice that the mission interviewed in the slums in Diyarbakır explained that they had agreed to pay their lawyer 20 per cent of any money they receive.<sup>46</sup>

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42 Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, June 3, 1998, Humanitarian Situation of the Kurdish Refugees and Displaced Persons in South-East Turkey and North Iraq, Doc 8131.

43 HRW interview with Av. Abdullah Alakuş, Bingöl, November 22, 2004; see also "Still Critical," HRW Report.

44 FFM interview, Sezgin Tanrıkulu, Diyarbakır, 11 June 2005

45 *op cit.*

46 FFM interview with IDPs, names withheld for reasons of confidentiality, Diyarbakır, 12 June 2005



## Inappropriate time limit

The mission was informed that there were approximately 70,000 applicants at the time of the visit, although three to four million internally displaced Kurds from Turkey have been scattered in the diaspora. Turkey's Ministry of Interior released the final figures in response to a parliamentary questionnaire in early August 2005, revealing that 104,734 people have applied to compensation commissions. Applicants had just one year, which expired on 27 July 2005, to apply for remedy under Law No. 5233. According to Naci Yıldız, this is creating enormous pressure on applicants and lawyers alike, who are being pushed to prepare their applications as soon as possible, which may adversely affect the quality of their submissions.

It also appears that many potential applicants simply do not know about Law 5233 and the compensation commissions. According to Şimdi Zamanı, Chair of the Diyarbakır branch of the Republican People's Party (CHP),<sup>47</sup> many officials in the districts, towns and villages did not know about Law 5233 when it came into effect. According to them, it was not well publicised. CHP therefore sent copies to the regions in the east and south-east of Turkey.

There are likely to be many cases where the claimants may be forced to apply to the ECtHR due to the unacceptable time limit, which has left them with no effective remedy. Here was a law that was supposed to deal with pecuniary compensation, but instead has taken away all a claimant's rights for non-pecuniary loss and moral claims. Prof. Dr. Walter Kälin, member of the UN Human Rights Committee and a key drafter of the Guiding Principles on Internal Displacement, has suggested that an extension to the time limit was necessary to allow all internally displaced persons entitled to receive compensation a reasonable chance to submit their claims. However, no time extension was granted. It is therefore likely that many applicants have missed the deadline and have therefore simply not been able to apply for compensation.

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47 FFM interview, Şimdi Zamanı, Diyarbakır, 12 June 2005



## Delay in processing claims

The local commissions have only nine months in which to process these claims. Even if no more than 70,000 applicants make claims, observers question how all of these applications can be processed within the nine-month deadline. In addition, although Article 4 provides that the commissions should have been established within ten days of Law No. 5233 coming into effect (July 2004), many of the commissions were considerably delayed and were not created until 2005. There are already signs that the assessment commissions have fallen behind in their work. The commissions cannot be anything other than overwhelmed by the volume of work they are facing.

At the beginning of August 2005, the Minister of Interior Affairs Abdulkadir Aksu stated that that 104,734 people have applied to compensation commissions under Law 5233. Of these, only 5,239 applications have been examined so far, of which 1,190 people have received compensation. 4,049 applications were refused because they were not “genuine” applications.

According to Oğuz Dilek, the bar association appointed member of the Tunceli local assessment commission,<sup>48</sup> the commission was only set up in mid-April 2005, yet by early June 2005, 10,600 cases had been lodged. At the time of the 27 July 2005 deadline, this figure had increased to 11,363. Of these, the commission has only been able to consider the loss of life cases, which are being considered first, of which there were between 60 and 70. The rest of the cases concern village evacuation, lack of access to land due to the conflict and the fact that applicants’ buildings, trees, gardens and fields have not been cared for many years and have therefore fallen into ruin. Ninety per cent of these cases concern the resultant loss of income.

Naci Yıldız, the bar association member of one of the Hakkari assessment commissions, explained to the mission that there are five local commissions within his region.<sup>49</sup> The first, in Hakkari, was established on 1 August 2004. The others, in Van, Bitlis, Muş and a second one in Hakkari were all set up during 2005, therefore late. At the time of interviewing him, there were 4785 cases pending before the Bitlis commission, of which 176 had been accepted and 1 had been refused. In

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48 *Op cit.*

49 FFM interview, Naci Yıldız, Diyarbakır, 11 June 2005

Muş, there are 7189, of which 7 have been accepted and 10 refused. In Van, there were 3313, of which 107 had been accepted and 140 refused. All of the applications which had been considered by these commissions concerned loss of life – none of the applications concerning internally displaced persons and village destruction had been considered yet. In addition, there were 7753 cases pending before the Hakkari commission – of which 174 had been accepted and 267 had been refused. This had increased to 8,925 by the 27 July deadline. The accepted claims all concern loss of life, and the rejected claims all concern village destruction. Of the Hakkari village destruction cases, Mr Yıldız estimated that approximately 85 per cent had suffered damage as a result of the state security forces, the remainder suffered at the hands of the PKK.<sup>50</sup>

In Diyarbakır, 18,240 people have applied to the commission. Only 800 of these applications have been processed so far, 500 of which were accepted and 300 were refused.<sup>51</sup> The commission in Mardin is faced with with 9,068 applications. 7,381 people from Şırnak Province have applied to the commissions – yet only 829 have been considered so far. Of these, only 31 received compensation. The successful applicants in Şırnak received 97,685,000,000 Turkish Lira in total.

Law No. 5233 provides that local assessment commissions must be established within one month of the act coming into force. However, there has been some considerable delay in setting up the commissions in practice. According to Mesut Beştaş,<sup>52</sup> the Diyarbakır commission was not established until some 5 months after the Law came into effect. Mr Beştaş stated that this delay resulted from confusion about this new unfamiliar law, in particular in the case of the governors who were supposed to be establishing the commissions.

Participants at the strategy meeting in Diyarbakır stated that applicants are often ready to accept less than the amount that the commission would award because they do not want to wait.<sup>53</sup> The fact that none of the cases has been decided yet is actually discouraging potential applicants from applying.

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50 *Ibid.*

51 Mesopotamian News Agency, 26 July 2005

52 *op. cit.*

53 *op. cit.*

## Approval needed for large claims

The Diyarbakır and Bingöl Bar Presidents have both raised concerns that Law No. 5233's requirement that payments of more than 20 billion Turkish Lira require Interior Ministry approval will cause delays or obstruct payments, particularly since most claims are likely to exceed that figure. Abdurrahman Kurt stated that the amount which must be approved by the Internal Affairs Minister should be increased as this is causing unnecessary delays.<sup>54</sup> The ECtHR has held that where the state is able to reverse a decision of a commission, that commission is not a properly independent and impartial tribunal under Article 6. Again, it may be that the assessment commission mechanism does not provide an effective remedy.

Law No. 5233 provides a variety of mechanisms that would allow civil servants to reduce awards. Those in power, who feel that disbursing large sums of State funds to the internally displaced would not be in their best interests, may reduce such awards by caveat. This is discussed under 'Lack of Independence of Assessment Commissions', *supra*.

In addition, many of the attendees at the strategy meeting in Diyarbakır complained that applicants to the assessment commissions stand to recover much less for their suffering than village guards who were displaced due to security concerns.<sup>55</sup> Under Turkey's Pecuniary Compensation Law number 2330, compensation paid to state agents for damages to property were much higher than that being offered to internally displaced persons, in some cases more than tenfold. This shows a clear lack of equality.

Further, there is no regulation for the time limit of payment to internally displaced people after awards are given. The governors may have the opportunity or the right to reject the peace agreement or to leave it in abeyance. A time limit imposed for payment should be imposed, as one does not currently exist.

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54 FFM interview, Abdurrahman Kurt, Diyarbakır, 12 June 2005

55 *op. cit.*



## Appeals mechanism

There is no internal appeals procedure within the machinery of the local assessment commissions. The procedure for accepting or rejecting an award is as follows. First, the assessment commission will deduct any state payments or benefits already received in respect of the losses and produce a detailed account with a proposed figure for compensation. The applicant has the choice to accept or reject the proposal. If the applicant rejects the proposal or fails to respond to it within twenty days, the proposal will be considered void. If the applicant is not satisfied with the level of compensation offered, the next step is to appeal to the municipal administrative court, for which there is a substantial administrative fee. Appealing to the Administrative Court is also a lengthy process.

However, the administrative court does not simply carry out a judicial review of the commission's findings, but uses a different test. For the applicant to succeed on appeal, the court must be satisfied that the state is criminally liable for the damage suffered and that the sum already proposed by the commission is insufficient to cover that damage. However, it is unlikely that assessment commission rulings will find criminal liability on the part of the state, so villagers will therefore have to prove such liability in court, as well as demonstrate the need for a higher level of compensation. Moreover, villagers will have to pay a substantial sum to pursue their court challenge, a factor likely to discourage many from going to court. The appeals procedure is therefore only open to those that can show that the state destroyed their house. This is entirely unfair and inappropriate, since an appeals process should be a straightforward evaluation of the lower commission's decision.

According to Mesut Beştaş,<sup>56</sup> a recent claim for 60 billion Turkish Lira was only awarded 600,000,000,000. The case concerned a militant organisation which bombed a police checkpoint in Diyarbakır, which was then followed by security forces into Hevsel Gardens. The security forces created roads for their panzers to pass through the gardens, destroying them and the trees that were used for carpentry. Heavy weapon machinery made holes in the trees. An application was made to the commission for compensation due to the damage to the gardens. Both the governor's delegation and the applicants prepared fact-finding documents. However, there was a huge contradiction between the reports, so the matter has

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56 *op. cit.*

now been referred to the Administrative Court. This may take several years to resolve. Mr Beştaş held the opinion that this will be a common problem with the compensation claims.

Further, if the test in the appeals process is completely different, then there is no effective remedy under Article 13. Therefore, if a client rejects the award granted by the assessment commission, he can either try his luck through the traditional Turkish court system or he may be qualify for the European Court of Human Rights, even though he has not exhausted local remedies, due to the fact that they are ineffective.<sup>57</sup>

If the domestic venue does not satisfy the claimant and grant full or just satisfaction, then the ECtHR may be available as the last course of action. This entire process could take years to address the applicant's complaint, and obviously will be expensive. Most of the applicants are recognisably poverty-stricken and lack the wherewithal to pursue even domestic remedies, much less those available in the ECtHR. Since there is no guarantee that their efforts will pay off in the long run, many IDPs are likely to be tempted to settle for what is offered, rather than what they lost and were promised under Law No. 5233. If a fraction of their loss is granted through the compensation mechanism, there is a serious risk that this will fuel current resentment against the state and will be interpreted as one more sign of ill-will and bad faith.

In the mission's view, these villagers cannot afford to wait. They need to get back to their lands with sufficient capital to re-establish their homes and livelihoods. By far the most practical and satisfactory result would be to ensure that the assessment commissions operate fairly, with an adequate mechanism for appealing against their decisions. Ensuring this will require great vigilance throughout 2005 from the Turkish Interior Ministry, the villagers' legal representatives, nongovernmental organisations, intergovernmental organisations involved in return issues, and the EU, which has asked Turkey to address the problem of internal displacement. In view of the critical importance of the Law No. 5233, it would seem advisable for the government to conduct a review after provincial assessment boards have processed an initial group of assessments.

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<sup>57</sup> See, *Akdivar v Turkey*, and *Xenides-Arestis v Turkey*.

## Failure to allocate sufficient funds and giving up rights to other claims

The Diyarbakır and Bingöl Bar presidents have both expressed unease that, to their knowledge, no allocation has been made in the central Government budget for payments under the Compensation Law, and the law provides no time limit for the Government to settle agreed claims.<sup>58</sup> According to Mesut Beştaş, there is not enough money in the public budget to pay all the applicants, which in turn impacts on the lack of independence of the commissions. A governor who knows that there is no extra money in the state finances to pay successful applicants will no doubt be very reluctant to offer applicants large amounts of compensation.

Under Law 5233, accepting an award from a compensation commission means giving up all rights to other claims.

For example, in Diyarbakır, 268 successful applicants have decided to withdraw their cases before the compensation commission after receiving some compensation. 158 of these applicants are from Şaklat, in the district of Kocaköy, while the other 110 are from Gömeç in the district of Hani. Those from Gömeç have been offered 1.5 trillion Turkish liras in total.

In *Xenides v Arestis*, the ECtHR said that signing an agreement to give up all your rights, that is, by accepting the commission's award, does not mean that the award granting mechanism is fair or is an effective remedy. If the compensation mechanism pressures you to sign a 'peace agreement' by the way the assessment commission mechanism is structured, it may still be fundamentally unfair, especially if it means you have to renounce all sorts of other fundamental rights. What if the claimant does not want money, but wants to go back home to his village? By denying restitution under the UN Guidelines on Displaced Persons, the Compensation Law may be denying effective remedy and the ECtHR may be the next destination of the case.

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58 *Op. cit.*



## Conclusion

Law No. 5233 has the potential to become a far more powerful and effective mechanism for restitution than anything previously offered, since the Government's policy to date has not offered the displaced any compensation at all. Yet the law and implementing regulation contain ample opportunity to avoid, minimise and delay payment of claims, opportunities which are being seized in practice. In the words of a representative of the Tunceli Bar Association, "the objective of Law 5233 is to prevent internally displaced people applying to the European Court of Human Rights, since in the past, applicants have been able to obtain high financial awards in that court." It would seem that the objective of Law No. 5233 is not actually to compensate for damages suffered, but to appease the EU within Turkey's accession negotiations. In the mission's opinion, Law No. 5233 is a paper reform which lacks the necessary tools to address the situation in practice.



## Recommendations

KHRP, BHRC and the EUTCC have the following recommendations regarding Law No. 5233:

1. Enhance the independence of Compensation Law assessment commissions, and ensure their work is timely, fair and consistent;
2. Enlarge the membership of the Compensation Law commissions to include appropriate experts, such as civil and agricultural engineers;
3. Increase the range of evidence which is acceptable by the Commissions, to include eye-witness evidence;
4. In order to ensure that those who have relevant information are willing to come forward, commissions should undertake not to disclose the identity of witnesses or the content of their evidence to other government agencies where witnesses have asked for these details to be withheld, and should make arrangement to safeguard anonymity in commission hearings where witnesses request this;
5. Commissions should undertake to investigate thoroughly any reports of intimidation of, or reprisals against, witnesses or prospect witnesses, and refer evidence of any abuses to the judicial authorities;
6. Create an independent appeals body to review decisions by Compensation Law assessment commissions;
7. Ensure that sufficient funds are provided to meet payments under the compensation law;
8. Increase the limit of compensation which must be approved by the Interior Ministry;
9. Provide for pecuniary damages and/or the possibility for IDPs to return to their homes;

10. Conduct a review of the operation of the law in late 2005 after provincial assessment commissions have processed an initial group of applications;
11. Task the European Commission Delegation to Ankara with monitoring the operation and working methods of Compensation Law assessment commissions. The delegation should provide an evaluation on the work of the assessment commissions in mid-2005 for inclusion in the next regular report on Turkey;
12. Urge the Turkish Government to ensure that the work of the Compensation Law assessment commissions is timely, fair, and consistent;
13. Consider funding projects for the return of IDPs and the support of the return of IDPs in the cities;
14. **Urge the Turkish Government to seriously reconsider its policy towards IDPs**

# Annex

## Translation of Compensation Law

### **Law pertaining to compensation of damages resulting from terrorism or the struggle to combat terrorism**

Law no. 5233

date of acceptance: 17.7.2004

#### **Aim**

**Article 1** – the aim of this law is to define the principles and procedures pertaining to the paying of compensation to persons suffering losses caused by terrorist actions or activities carried out in the struggle against terrorism.

#### **Scope**

**Article 2** – this law encompasses provisions concerning the principles and procedures pertaining to the peaceful paying of compensation to real persons and legal persons suffering losses as a result of actions within the context of articles 1, 2 and 3 of Anti-Terror Law no. 3713 or activities carried out in the struggle against terrorism.

The following losses are excluded from the scope of this law:

- a) Losses met by the state through the allotment of land or house or by other means.
- b) Losses met in accordance with a court decision or articles 30 and 31 of Law no. 4353 pertaining to certain amendments made to duties of the Legal Consultant's Office of the Treasury, procedures of the pursuance of public

cases and permanent positions in central and provincial government.

- c) Losses met by order of the European Court of Human Rights on the grounds that article 41 or protocols of the Convention protecting Fundamental Rights had been violated or compensation paid as a result of friendly settlement envisaged by provisions of the Convention.
- d) Losses incurred as a result of economic or social causes other than terrorism and losses incurred by those who left their homes of their own accord without security worries.
- e) Losses resulting from persons' own activities.
- f) Losses suffered by those convicted of offences within the scope of articles 1, 3 and 4 of Law no. 3713 and those convicted of the offence of assisting and harbouring in terrorist incidents as a consequence of these actions.

No action may be taken in accordance with this law regarding ongoing prosecutions opened concerning offences listed in paragraph (f) until their conclusion.

## **Definitions**

**Article 3** – Terms used in this law:

- a) Commission: Commission establishing damages
- b) Ministry: Interior Ministry
- c) Minister: Interior Minister

## **Commission establishing damages**

**Article 4** – commissions establishing damage shall be set up in provinces within 10 days of receipt of applications within the scope of this law.

The commission shall consist of a chairman and six members. A deputy governor to be appointed by the governor shall be the commission chairman, and one expert working in the public sector in each of the following; finance, public works, agriculture and village affairs, health, industry and trade shall be members determined by the

governor, and a lawyer appointed from the Bar administration when such a body is established. The chairman and members of the commission shall be re-established in the first month of each January. Members may be re-appointed. Depending on the volume of work more than one commission may be established in the same province. The commission shall meet on the basis of a quorum and decisions taken with an absolute majority of the total members of the commission. The working principles and procedures of the commission shall be defined by regulation.

### **Tasks of the commission**

**Article 5** – the tasks of the commission are as follows:

- a) To establish, on application by person suffering loss or his heir, whether the loss comes within the scope of this law.
- b) To prepare drafts for the payment of amounts, either pecuniary or in kind, in accordance with articles 9 or 10, taking into account assistance rendered by the Social Assistance and Solidarity Fund, contributions from public sector or professional organisations or compensation from insurance companies or treatment and funeral expenses met by social security institutions.
- c) To compile a record in the event of a draft not being accepted or deemed to not be accepted according to paragraph 2 of article 12 and send a copy to those concerned and to the Ministry.
- d) To compile a record in the event of it being established that the applicant has incurred no losses within the terms of this law and to send a copy to the person concerned and to the Ministry.

### **The period, form, examination and concluding of the application.**

**Article 6** – Application shall be made by the person suffering loss, or heir or by their authorised representatives within sixty days, or at the most one year, of the incident being discovered, to the Governor or district governor's office whereupon the necessary procedures shall be commenced. Applications made after these periods have lapsed may not be accepted.

The commission has to complete procedures with regard to applications made by

those suffering losses within six months of the application being lodged. When absolutely necessary this period may be extended for a further three months by the Governor.

The commission may appoint an expert from those employed in the public sector and also require all manner of information from public bodies and institutions. The commission may employ or obtain opinions from those experts it considers necessary.

The commission chairman and members may not participate in meetings of the commission regarding their own losses or losses of their spouses, or of relations, including in-laws, to the third degree.

The secretarial services of the commission shall be carried out by the provincial special administration.

Payments shall be made per diem to persons appointed as experts in accordance with indicator no. 500 multiplied by the public servant monthly coefficient. These payments shall not be subject to any tax or deduction apart from the stamp tax. The expenses of the commission shall be met from the ministry budget.

Applications made within the time period shall freeze the case lodging period until notification of conclusion of the application.

### **Losses to be met.**

**Article 7** – The losses to be met in accordance with the provisions of this law are as follows:

- a) All manner of damage to livestock, trees, crops and other movable or immovable property.
- b) Losses incurred such as injury, disablement and death and treatment and funeral expenses.
- c) Financial losses caused by persons being unable to access property on account of activities being carried out within the scope of anti-terror measures.

## **Establishing losses**

**Article 8** – the losses defined in article 7 shall be established by the commission, taking into consideration the declaration of the person suffering loss, the information from the judicial, administrative and military authorities, precautions taken by the person suffering loss, taking into account whether there was neglect on the part of the person suffering loss, with the mediation of the expert in harmony with the economic conditions of the day.

As regards establishing losses to immovable property the principles of value outlined in article 11 of law no. 2942 concerning Compulsory Purchase shall be implemented.

## **Payments to be made in the event of wounding, disabling or death.**

**Article 9** – The amount shall be paid in a pecuniary manner in the event of wounding, disabling or death, multiplying the public servant monthly coefficient according to by indicator no. 7000, as follows:

- a) To those who are wounded, not more than six times the sum depending on the degree of injury.
- b) To those who lose the ability to work, ascertained by health institutions to the third degree from four times to twenty four times the sum.
- c) To those who lose the ability to work, ascertained by health institutions to the second degree from twenty five times to forty eight times the sum.
- d) To those who lose the ability to work, ascertained by health institutions to the first degree from forty nine times to seventy two times the sum.
- e) To heirs of those who die at fifty times the sum.

The amount to be paid shall be calculated on the basis of the indicators and coefficients valid on the date of the approval received from the governor or minister.

When the pecuniary payment detailed in paragraph (e) is transferred to heirs the provisions of the Turkish Civil Law no. 4721 shall be implemented.

The Council of Ministers is authorised to increase the amount of the indicator for

payment by up to thirty per cent or to reduce it to the legal minimum.

Payments made to legal persons on account of losses within the scope of this law cannot be revoked by the state.

The form of pecuniary payment, sum and the principles and procedures of establishing the degree of injury and disablement shall be defined by regulation.

### **The form of meeting losses**

**Article 10** – losses mentioned above in paragraphs (a) and (c) of article 7 shall be met in kind or in a pecuniary way. However, as much as possible payment will be carried out in kind. This may be realised within the framework of individual or general projects. The principles and procedures regarding payment in kind shall be defined by regulation.

### **Amounts to be accounted.**

**Article 11** – Amounts ascertained according to paragraph (b) of article 5 shall be subtracted from the gross total calculated according to articles 8 and 9.

The principles and procedures of calculation of amounts to be accounted shall be defined by regulation.

### **Draft pertaining to the meeting of losses.**

**Article 12** – The commission, after making its findings, either directly or by means of an expert, shall establish the net amount, of losses in accordance with article 8, the pecuniary amount to be paid in case of wounding, disablement and in the event of death in accordance with article 9, the implementation according to article 10, taking into consideration the amount to be accounted in accordance with article 11. A copy of the draft shall then be notified to the person concerned along with an invitation.

In the invitation it shall be stated that the person concerned or his authorised representative should attend the commission within twenty days in order to sign the draft document, otherwise he will be deemed not to have accepted the draft

while his legal right to redress is reserved.

In the event of the person concerned or his legal representative accepting the draft it shall be signed by them and by the chairman of the commission.

In the event of the draft not being accepted or it being deemed to have not been accepted in accordance with paragraph two a record shall be drawn up and copies sent to the person concerned and the Ministry.

The right to legal redress is reserved for those parties that cannot achieve reconciliation.

### **Meeting losses.**

**Article 13** – losses detailed in the draft shall be paid from the fund placed in the Ministry budget for this purpose on the approval of the governor following the signing of the draft.

The Ministry may decide on payments in kind or of a pecuniary nature of over twenty billion Turkish lira on the approval of the Minister. This sum shall increase every year in accordance with article 298 of the Taxation Procedure Law no. 213.

The state reserves the right to revoke in accordance with general provisions.

### **Supervision and responsibility.**

**Article 14** – The commissions shall be supervised by the Ministry.

Offences committed against those employed in the ascertaining of losses shall be dealt with as offences against public servants and offences committed by those employed in this task shall be dealt with according to provisions covering public servants.

### **Exceptions and exemptions**

**Article 15** – Applications, statements, documentation and official procedures in public offices and notary public and donations made to used for this purpose shall

be exempt from all tax and expenses.

Tax deductions regarding donations made to be utilised for the purposes laid down in this law shall be defined by regulation.

### **Official notification.**

**Article 16** – The provisions of Notification law no. 7201 shall be implemented regarding notification concerning this law.

### **Regulation.**

**Article 17** – The principles and procedures of the commission, procedures to be followed during the ascertaining of losses and the establishing of net amount, the form of pecuniary payment and other matters shall be covered in a regulation to be prepared by the Ministry within two months of the publication and implemented by the Committee of Ministers.

**Provisional article 1** – The provisions of this law shall be implemented concerning applications made within a year of this law coming into effect to governors or district governors' offices regarding losses caused by offences committed between 19.7.1987 and the coming into force of this law within the scope of articles 1, 3 and 4 of the Anti-Terror Law no. 3713 or counter terror activities undertaken to combat terrorism.

Applications made in accordance with this article shall be concluded within two years of application.

**Provisional article 2** – Those public servants or their heirs who suffered losses while on duty in the struggle against terrorism between 19.7.1987 and the date this law came into force and received compensation in accordance with the relevant legislation may apply within a year of the publication of this law to the relevant governor or district governor's office. In the event of the compensation they received being less than that envisaged under this law they shall receive the difference including legal interest. If the amount they received is more than envisaged under this law no demand will be made for repayment.

Applications made in accordance with this article shall be concluded within at the latest a year from the date of application.

**Validity.**

**Article 18** – This law shall come into force on the date of publication.

**Administration.**

**Article 19** - The Council of Ministers shall administer the provisions of this law.





ISBN 1900175916



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