

THE
KURDISH
Human
Rights

PROJECT

Legal Review

The Kurdish Human Rights Project

The 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.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and elsewhere
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

METHODS

- Monitoring legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms

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Contents

	Page No.
Abbreviations	15
Section 1: Legal Developments & News	17
Armenia faces contentious constitutional referendum	17
Amendments to Armenian freedom of assembly laws	17
Concern over political repression in Azerbaijan during November parliamentary elections	17
OSCE report on freedom of expression in Azerbaijan's media	18
CPT visits Azerbaijan	19
Turkey rated 98th in Press Freedom Ranking although concern over freedom of expression remains	19
Council of Europe's Committee of Ministers supervises Turkey's compliance with ECHR judgments	19
Armed conflict in Turkey restarts as EU agrees to accession negotiations	20
European Commission's 2005 regular Progress Report on Turkey reveals significant concerns regarding minority rights	21
UN Committee criticises Syria's human rights record	21
Iraqi population backs new Constitution	22
New missing persons centre to be established in Iraq	23

UN resolves to strengthen human rights by establishment of Human Rights Council	23
OSCE and the Council of Europe sign Declaration of Co-operation	24
OSCE activities and appointments	24
Group of ‘Wise Persons’ to ensure effectiveness of ECHR rulings	24
Mexico becomes 100th State party to the International Criminal Court	25
Tribal Society and the Bond to Land	27
Camille Hensler <i>KHRP Intern</i>	
Torture and the Interrogation of Prisoners: The Protections of a Vulnerable Person’s Basic Human Rights	57
Declan O’Callaghan <i>Barrister, 36 Bedford Row</i>	
Katherine Pretswell <i>Postgraduate Student, University of the West of England</i>	
Kurdish minority rights and Turkey’s Compensation Law for Internally Displaced Kurds	71
Sharon Linzey <i>Professor of Sociology and KHRP intern</i>	
The EU, Turkey and the Kurds: Second International Conference	79
Lucy Claridge <i>Legal Officer, KHRP</i>	

Section 2: Case Summaries and Commentaries

85

Category	Names of the Parties	Procedural Status	Page
<i>A. Case News</i>			
<i>Admissibility Decisions and Communicated Cases</i>			
<i>Right to Life</i>	<i>Kanlibaş v. Turkey</i> (32444/96)	Admissibility Decision	85
	<i>Osmanoğlu v. Turkey</i> (48804/99)	Communication	87
<i>Prohibition of Torture /Inhuman & Degrading Treatment</i>	<i>Karaoğlan v. Turkey</i> (60161/00)	Admissibility Decision	87
<i>Right to Liberty and Security</i>	<i>Amiryan v. Armenia</i> (31553/03)	Communication	90
	<i>Sapeyan v. Armenia</i> (35738/03)	Communication	91
	<i>Gasparyan v. Armenia</i> (35944/03)	Communication	92

	<i>Kirakosyan v. Armenia</i> (31237/03)	Communication	92
	<i>Karapetyan v. Armenia</i> (22387/05)	Communication	93
	<i>Mkhitaryan v. Armenia</i> (22390/05)	Communication	94
	<i>Ashot Davtyan v. Armenia</i> (22382/05)	Communication	95
<i>Right to Private and Family Life</i>	<i>Xenides-Arestis v. Turkey</i> (46347/99)	Admissibility Decision	96
	<i>Kalanyos v. Romania</i> (57884/00)	Admissibility Decision	97
<i>Freedom of Religion</i>	<i>Kimlya, Sultanov & the Church of Scientology v. Russia</i> (76836/01, 32782/03)	Admissibility Decision	100
<i>B. Substantive</i>			
<i>Right to Life</i>	<i>Akdeniz & Others v. Turkey</i> (25165/94)	Judgment	102
	<i>Ateş v. Turkey</i> (30949/96)	Judgment	105

	<i>Aydın v. Turkey</i> (25660/94)	Judgment	109
	<i>Çelikkilek v. Turkey</i> (27693/95)	Judgment	112
	<i>Kişmir v. Turkey</i> (27306/95)	Judgment	114
	<i>Koku v. Turkey</i> (27305/95)	Judgment	117
	<i>Taniş and Others v. Turkey</i> (65899/01)	Judgment	121
	<i>Toğcu v. Turkey</i> (27601/95)	Judgment	123
	<i>Dündar v. Turkey</i> (26972/95)	Judgment	126
	<i>Nesibe Haran v. Turkey</i> (28299/95)	Judgment	129
<i>Prohibition of Torture /Inhuman & Degrading Treatment</i>	<i>Dizman v. Turkey</i> (27309/95)	Judgment	132
	<i>Ostrovar v. Moldova</i> (35207/03)	Judgment	135

<i>Unlawful Detention</i>	<i>Tanrıkulu and Others v. Turkey</i> (29918/96, 29919/96, 30169/96)	Judgment	137
	<i>I.I. v. Bulgaria</i> (44082/98)	Judgment	140
	<i>Gurepka v. Ukraine</i> (61406/00)	Judgment	143
<i>Right to a fair trial</i>	<i>Hatip Çaplık v. Turkey</i> (57019/00)	Judgment	145
	<i>Öcalan v Turkey</i> (46221/99)	Grand Chamber Judgment	147
	<i>Mamtkulov & Askarov v. Turkey</i> (46827/99, 46951/99)	Grand Chamber Judgment	150
<i>Private & Family Life</i>	<i>Moldovan & Others v. Romania</i> (No.2) (41138/98 and 64320/01)	Judgment	153
<i>Freedom of Expression</i>	<i>Öztürk v. Turkey</i> (29365/95)	Judgment	157
	<i>Grinberg v. Russia</i> (23472/03)	Judgment	159
<i>Prohibition on Discrimination</i>	<i>Nachova & Others v. Bulgaria</i> (43577/98 and 43579/98)	Judgment	161

<i>Enjoyment of Property</i>	<i>Aslangiray & Others v. Turkey</i> (48262/99)	Judgment	163
Section 3: Appendices			165
Appendix 1			165
European Court of Human Rights – Judgments against Turkey in 2004 dealing exclusively with issues already examined by the Court			
Appendix 2			167
European Court of Human Rights – Evolution of cases against Turkey			
Appendix 3			169
European Court of Human Rights – Composition of the Court			
Appendix 4			173
Concluding observations of the Human Rights Committee on Syria’s implementation of the International Covenant on Civil and Political Rights			
Appendix 5			181
KHRP Publications			

Abbreviations

CAT	UN Convention Against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
The Convention	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
The Court	European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	<i>Demokrasi Partisi</i> (Democracy Party)
HADEP	<i>Halkın Demokrasi Partisi</i> (People's Democracy Party)
ICJ	International Court of Justice
İHD	<i>İnsan Hakları Danışma Kurulu</i> (Human Rights Association of Turkey)
NGO	Non-Governmental Organisation
ODIHR	The OSCE Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PKK	<i>Partiya Karkaren Kurdistan</i> (Kurdistan Workers' Party)

TRNC Turkish Republic of Northern Cyprus

UN United Nations

Relevant Articles of the European Convention on Human Rights

Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, non-governmental organisations or groups of individuals (formerly Article 25)
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber

Protocol No. 1 to the Convention

Article 1:	Protection of property
Article 3:	Right to free elections

Section 1: Legal Developments & News

Armenia faces contentious constitutional referendum

On 1 September 2005, Armenia's National Assembly adopted President Robert Kocharian's proposed changes to the constitution. The amends are designed to downplay presidential powers and gain approval of the Venice Commission, the Council of Europe advisory body for constitutional law. Besides the Council of Europe, the draft has been publicly endorsed by the OSCE's Yerevan mission and the US and British ambassadors. The amends are now subject to a referendum scheduled for 27 November 2005¹. However, despite pressure from members of the governing coalition and representatives of Western countries, the main opposition parties declared that they would not support the draft, creating tension with the international community. Further, considerable obstacles exist in securing a 'yes' vote, including putting voter lists in order, overcoming public apathy and promoting public awareness of the proposed changes. If adopted, the constitution would enter into force two years after the referendum.

Amendments to Armenian freedom of assembly laws

Since the adoption of Armenia's Law on Conducting Meetings, Assemblies, Rallies and Demonstrations in April 2004, Armenia has been under considerable pressure from the OSCE/ODIHR and the Venice Commission to introduce amendments to ensure it complies with the relevant international standards. On 4 November 2005, the OSCE/ODHIR gave their final opinion on the legislation, welcoming the removal of the blanket prohibition on assembling in specific locations, as well as the amendments relaxing the restrictions on spontaneous protests. However, the OSCE director pointed out that the test of the law's compliance with international human rights standards lies in how it is implemented.

Concern over political repression in Azerbaijan during November parliamentary elections

In June 2005, the Parliamentary Assembly of Council of Europe (PACE) issued a

1 The outcome of the referendum is not known at the time of writing

Resolution welcoming the release of over a hundred political prisoners in Azerbaijan, including high-ranking members of opposition parties. However, PACE also condemned what it described as the 'serious dysfunction' of the Azerbaijani judicial system, and the continual detention and mass arrests of political activists. Concern over political repression continued to grow, despite a Presidential Decree on 11 May 2005 ordering local authorities to authorise political rallies. On 19 October 2005, the Head of the OSCE Office in Baku expressed deep concern over the detention and arrests of reportedly around 200 opposition activists just two weeks before the Parliamentary elections on 6 November 2005.

In a joint undertaking of the OSCE/ODIHR and the parliamentary assemblies of the OSCE, Council of Europe and NATO, as well as the European Parliament, an International Election Observation Mission was composed to observe the Parliamentary elections. The mission deployed 665 observers from 42 countries for the 6 November 2005 election, visiting more than half of all polling stations in the country. On Monday, 7 November 2005, the mission issued a preliminary statement on its observation results at a press conference in Baku. Whilst the mission reported some improvements in the run up the election, it concluded that the election itself had failed to meet Azerbaijan's international commitments. The observers assessed the ballot counting as bad or very bad in 43 per cent of counts observed and noted a wide range of serious violations, including tampering with result protocols, intimidation of observers, and unauthorised persons directing the process. A final report will be released approximately six weeks after the completion of the electoral process.

OSCE report on freedom of expression in Azerbaijan's media

On 14 July 2005, the OSCE released a report on the state of the media in Azerbaijan. According to this report, there has been a decline in violence against journalists and libel actions against the press by politicians. However, it described television stations, the primary source of information for the vast majority, as 'leaning towards the government', and said that whilst the written press was diverse and political opposition is well represented, it was seriously limited by its financial weakness. The report recommended the abolition of criminal libel laws, proper disciplinary proceedings against police committing acts of violence against journalists, reforms of the television stations, privatisation, financial support and training for print journalists, and a new draft law on public information access.

CPT visits Azerbaijan

A delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out an ad hoc visit to Azerbaijan from 16 to 20 May 2005. It was the CPT's third visit to Azerbaijan. The CPT examined the situation at Gobustan Prison, which holds all Azerbaijan's life-sentenced prisoners and other long-term prisoners, and also visited Strict Regime Penitentiary Establishment No. 15 in Baku. The visit was also an opportunity to take stock of recent developments in the Azerbaijani prison system.

Turkey rated 98th in press freedom ranking: concern over freedom of expression remains

The international organisation *Reporters without Borders* released the 2005 World Press Freedom index report in October 2005, ranking 167 countries according to the level of freedom of the press. Turkey was ranked 98th, fifteen places higher than last year. Its position improved because of a reduction in the number of infringements of press freedom since 2004. However, prosecutions of journalists and publishers continue, and concerns remain over the new Penal Code, which came into effect on 1 June 1995. Only seven of the 23 provisions highlighted by the Representative on Freedom of the Media for the OSCE in May 2005 have been brought in line with international standards. Three major areas of concern remain, namely the absence of journalists' right to discuss public interest issues, the rights of access to and disclosure of information, and the continued existence of criminal defamation laws.

Council of Europe's Committee of Ministers supervises Turkey's compliance with ECHR judgments

On 7 June 2005, the Committee of Ministers adopted an interim resolution under Article 46(2) of the Convention, which authorises it to supervise judgments of the Court.² The resolution dealt with Turkey's compliance with 74 judgments regarding the action of the security forces in Turkey. The Committee began by referring to the context of the ECHR cases and reiterated that member States must respect their obligations under the Convention. The Committee welcomed the adoption of a number of important reforms by the Turkish Government, noting the introduction of the new Penal Code and the

2 See also KHRP, 'CoE's Committee of Ministers supervises Turkey's execution of ECHR judgments', Newline 2 2005 Issue 30. The Committee referred to 74 specific cases as measures of that compliance; over 77 per cent of which were brought by KHRP

Code of Criminal Procedure, as well as the May 2004 amendments to the Constitution and the precedence given to the Convention and the Court's jurisprudence. It welcomed the authorities' adoption of a 'zero tolerance' policy on torture and emphasised the importance of Turkey's compliance with the CPT. The Committee also noted the improvement of professional training for the security forces and efforts to increase the accountability of the security forces and prosecuting authorities through reforms in Turkey's administrative laws.

However, the Committee expressed regret at statistics suggesting limited success in complaints lodged since and stressed the importance of the efficacy of the said reforms. The Committee encouraged the authorities in Turkey to consolidate their efforts to improve the procedural safeguards surrounding police custody and reorganise the basic training of the police and gendarmerie. They also stressed the importance of 'mainstreaming' the ECHR in the Turkish judiciary.

On 11 October 2005, the Committee met again and discussed measures taken by Turkey regarding violations of the Convention by security forces as well as Turkey's responses to findings that journalists' rights to freedom of expression had been violated in defamation proceedings. They also discussed the implementation of the *Cyprus v. Turkey* judgment, which concerned the violation of convention rights in northern Cyprus, in particular in regard to missing persons, the right to education and freedom of religion.

Armed conflict in Turkey restarts as EU agrees to accession negotiations

On 6 October 2005, the Kurdistan Workers' Party (PKK) ended a unilateral ceasefire against Turkey and said that now the EU had opened accession talks with Ankara, this was a problem not just for Turkey but for the whole EU. The PKK declared a one-month ceasefire in their fight against the Turkish state on 19 August 2005 which was extended till 3 October 2005, the day Ankara won EU approval to start accession negotiations.

The EU negotiations are to consider areas of reform in Turkey's laws which must be reformed in order to align it with EU legislation. The Turkish government's record on security and human rights, and its relationship with the Kurdish population were amongst the many factors debated by Turkey and the EU over the issue of accession.

On 7 October 2005, the EU Enlargement Commissioner, Olli Rehn, made a speech during a visit to Kayseri in central Anatolia at the university in the city. Mr Rehn said 'there will be a strong link between the pace of negotiations and the pace of political

reforms. Turkey will need to continue its process of internal transformation. It will need to speed up its transition towards a fully fledged liberal democracy respectful of human rights and minorities.’

European Commission’s 2005 regular Progress Report on Turkey reveals significant concerns regarding minority rights

On 9 November 2005, the European Commission released its regular Progress Report on Turkey’s preparation for membership of the EU. Although this noted that Turkey has made some progress with regard to adopting international human rights instruments and executing ECtHR judgments, it emphasised that the institutional framework dedicated to the promotion and enforcement of human rights has not been modified, and requires urgent consolidation and strengthening of its capacity. In addition, the report voiced concern that Turkey’s attitude towards minority rights remains unchanged, whilst the situation in the east and south-east, where most people are of Kurdish origin, has seen slow and uneven progress, and in some cases has even deteriorated.

The report stated that, since October 2004, the ECtHR has delivered 129 final judgments against Turkey, finding violations in 120 of these cases and concluding seven friendly settlements. The two main problems highlighted in these recent judgments related to a lack of government cooperation with the ECtHR in the investigation of cases and the right to return to villages in the south-east. In addition, the report noted that provisions enabling retrial still do not apply to cases that were pending before the ECtHR prior to 4 February 2003, including the case of *Öcalan v Turkey*. The urgency of reopening these cases was emphasised, noting that it is still not clear to date what measures the Turkish authorities will take to ensure compliance with the *Öcalan* judgment.

Turkey has still not signed the Council of Europe Framework Convention for the protection of National Minorities nor the European Charter for Regional or Minority Languages, and has not yet ratified Additional Protocol 12 to the ECHR on the general prohibition of discrimination by public authorities. The report noted that this is particularly important given that minorities are often subject to *de facto* discrimination within Turkey.

UN Committee criticises Syria’s human rights record

On 29 July 2005, the United Nations Human Rights Committee concluded its consideration of Syria’s reports on its implementation of the provisions of the

International Covenant on Civil and Political Rights. The Committee welcomed the accession of other international human rights instruments but 'noted with concern that the recommendations it had addressed to Syria in 2001 had not been fully taken into consideration and regretted that most subjects of concern remain.' The Committee noted that the state of emergency declared in Syria in the 1960s was still in force without any justification. It criticised the number of offences carrying the death penalty and expressed 'deep concern at continuing reports of torture'. It also criticised the detention of human rights defenders in Syria, and the difficulties faced in registering NGOs. The Committee declared that Syria should take firm measures to prevent torture and unlawful detention, and ensure that independent mechanisms are established to investigate alleged abuses, providing effective remedies and rehabilitation to victims. The Committee also referred to the situation of the Kurds in Syria, calling on Syria to take 'urgent steps to remedy the situation of statelessness of Kurds in Syria' and to 'ensure that all members of the Kurdish minority enjoy effective protection against discrimination and are able to enjoy their own culture and use their own language'.

The UN Committee's criticism followed reports of civil unrest in June 2005, when Syrian police broke up riots in Qameshli, opening fire on the crowd. A policeman died during the incident although the cause of death is unknown. The unrest followed the death of Sheikh Muhammad Mushuq al Khaznawi, a prominent Kurdish cleric, who locals believe was killed by the intelligence service. The government denied that Sheikh Khaznawi's was arrested by security forces. In March 2004, events in Qameshli led to widespread riots in the Kurdish regions of Syria which left 25 people dead and hundreds injured.

Iraqi population backs new Constitution

On 15 October 2005, Iraq held a referendum on its draft constitution. According to the Iraqi Electoral Commission, 78 per cent of voters backed the charter whilst 21 per cent opposed it. Reports indicate that the majority Shia community and Kurds strongly supported the constitution, while the provinces where the poll was rejected by more than two-thirds of voters, Anbar and Salahuddin, are both strongly Sunni.

Whilst some Sunni figures spoke of widespread fraud following the announcement, Carina Perelli, head of the UN's Electoral Assistance Division said "the result is accurate. It has been checked according to the processes that we all follow when we have elections."

The Constitution provides for a federal Iraq, a parliamentary democracy with official languages to be Arabic and Kurdish. Islam is to be the official religion with religious freedoms and equal rights guaranteed for all.

Elections are due to be held by 15 December 2005, with a new government sworn in by 31 December 2005.

New missing persons centre to be established in Iraq

From 25 to 29 September 2005, under the auspices of the United Nations Assistance Mission for Iraq (UNAMI), Iraqi interests groups and some international organisations met in Amman to discuss the establishment of a National Centre for the Missing and Disappeared Persons in Iraq. The group established a Transitional Committee responsible for establishing the centre, which is intended to identify missing persons and assist the survivors to resume their lives.

UN resolves to strengthen human rights by establishment of Human Rights Council

In September 2005, the UN hosted the Millennium+5 Summit, the purpose of which was to evaluate progress on goals agreed in the UN Millennium Declaration. Following weeks of negotiations and numerous draft texts, the General Assembly approved a final outcome document for the Summit. In this document, the UN resolved to 'strengthen the UN human rights machinery' in order to ensure the 'effective enjoyment by all of all human rights and civil, political, economic, social and cultural rights, including the right to develop.' The UN said it would strengthen the Office of the United Nations High Commissioner for Human Rights by doubling its regular budget over the next five years (previously only 1.7 per cent of the total U.N. budget) and by supporting its cooperation with other UN bodies.

The UN also resolved to set up a Human Rights Council in 2006, which is intended to 'address situations of violations of human rights,' 'make recommendations thereon' and 'promote effective coordination and the mainstreaming of human rights within the UN system.' Details regarding the status, mandate, membership and methods of the proposed Council were left open for further negotiations and now rests with the General Assembly. The proposed Council will replace the discredited United Nations Commission on Human Rights, which has been criticised for its ineffectiveness and the status it has afforded to abusive governments.

OSCE and the Council of Europe sign Declaration of Co-operation

On 17 May 2005, the OSCE and the Council of Europe signed an accord aiming to draw together the organisations' experience and expertise on issues of human rights and the rule of law. According to OSCE Chairman-in-Office Dimitrij Rupel, "the partnership must be anchored in a strong set of common values. While the architecture Europe may change the foundations stay the same. Democratic values and respect for human rights and fundamental freedoms remain at the core of the OSCE's concept of comprehensive security."

OSCE activities and appointments

On 10 June 2005 the OSCE appointed senior French diplomat Ambassador Marc Perrin de Brichambaut, as OSCE Secretary General for a three-year term. Ambassador de Brichambaut worked as a senior advisor to several French foreign and defence ministers, has worked at the United Nations in New York, and has had diplomatic assignments in Washington and Vienna.

The OSCE Human Dimension Implementation Meeting was held in Warsaw, Poland, between 19 and 30 September 2005. This meeting is intended to review the implantation of OSCE commitments in the field of human rights and democracy ("the human dimension") by participating states. The meeting was attended by OSCE participating states, NGOs and international organisations and institutions. Key issues discussed included methods to prevent and combat torture, rule of law and tolerance and non-discrimination, including gender equality and minority rights.³

Group of Wise Persons to ensure effectiveness of ECHR rulings

On 14 September 2005, the Council of Europe's Committee of Ministers agreed on the names of the Group of Wise Persons, assigned to draw up a comprehensive strategy to secure the long-term effectiveness of the European Convention on Human rights and enforcing mechanisms. The group, which acts as an independent investigative body, is scheduled to submit an interim report on its work to the Committee of Ministers in May 2006.

3 See also KHRP, 'Human rights violations against Kurds in Turkey – Submission to OSCE Human Dimensions Implementation Meeting 2005' (2005)

Mexico becomes 100th State party to the International Criminal Court

On 28 October 2005, Mexico deposited its instrument of ratification of the Rome Statute of the International Criminal Court (ICC), becoming the 100th State party. Mexico faced great obstacles to achieving ratification, including pressure from the United States, which continues to oppose the Court. The US has threatened countries with the loss of aid in an effort to secure bilateral agreements exempting US personnel from prosecution at the ICC. Judge Philippe Kirsch, the President of the International Criminal Court, welcomed the 100th ratification by Mexico, stating that, 'Universality remains one of our key objectives'. The significant landmark followed the issuing of the Court's first arrest warrants on 13 October 2005 for five leaders of the Ugandan Lord's Resistance Army.

Camille Hensler, KHRP intern

Tribal Society and the Bond to Land

“The white man does not understand the Indian for the reason that he does not understand America. He is too far removed from its formative processes. The roots of the tree of his life have not yet grasped the rock and soil. The white man is still troubled with primitive fears; he still has in his consciousness the perils of this frontier continent...

But in the Indian the spirit of the land is still vested; it will be until other men are able to divine and meet its rhythm. Men must be born and reborn to belong. Their bodies must be formed of the dust of their forefather’s bones.”⁴

--Luther Standing Bear, 1933

For some cultures, the tie to the land transcends the present and the physical and becomes a manifestation of history, culture and religion, a tie that is immutable and central to their spiritual well-being. This is the case with many tribes of Native Americans in the United States, as well as with the Kurds in Iraq. The Native Americans came to the present day United States between 15,000-40,000 years ago. Likewise the Kurds have inhabited the Zagros mountain range, which form the intersection between Iraq, Iran and Turkey, since the second millennium B.C.⁵ Over time, these historical ties have deepened and developed to have deep cultural meaning as well as spiritual or religious meaning. Similar tribal cultures, histories and ties with the land make a comparison of Native Americans and Kurdish peoples an illuminative one regarding the potential success and recognition of Kurdish culture within the new Iraqi state. In particular, I will focus on access to culturally or religiously significant areas of land and through this comparison determine ways the Kurds might seek to establish legal protections of sacred lands within the emerging legal regime. An analysis of Native American rights and experience under the United States Federal system, and protection of sacred areas in particular, will offer insight into peaceful methods to achieve possession or access to culturally significant land in Iraq.

4 ROBERT CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM, 137 (4th ed., 2003).

5 DAVID McDOWALL, THE KURDS, 6 (Minority Rights Group International, 1996).

The Kurds of Iraq may learn lessons about the protection of culturally significant lands under the Interim-Iraqi Constitution from the negative experiences of Native American efforts to protect sacred sites off reservation under the U.S. Constitution. This comparative examination suggests that the Kurds will be most successful in securing protections of culturally significant lands through: 1.) their active participation in the drafting committee responsible for the new Iraqi Constitution 2.) specific demarcation of Kurdish territory within the Constitution 3.) clear enumeration of the rights and powers retained by the territories and delegation of powers to the central government 4.) addressing the jurisdiction of courts (federal and territorial) and deference given to regional customs and 5.) a clear articulation of the duties and obligations of the central government to territories and cultural minorities. These are five main areas that Native Americans have fought to retain or regain throughout their history with the United States government and that the Kurds should protect at the outset.

This paper focuses particular attention on avenues tribal cultures may take to ensure political power and territorial protection in a hierarchical federalist system, and begins with a discussion of the comparison at hand and the different manifestations of federalism. I will then offer a brief overview of the links between Native American culture and its legal status under American Constitutional law, particularly in regards to securing protections of tribal lands. I will likewise explore Kurdish culture, their status under the new Iraqi Constitution and possible avenues to protection of cultural lands under the interim-Constitution. With this foundation, I will compare my findings and draw conclusions as to the lessons the Kurds might learn from the largely unsuccessful efforts of Native Americans to secure legal protections for culturally significant lands.

Significance of the comparison

The western legal tradition has dominated the world for centuries, imbuing geopolitical maps with disproportionate size representations of American and European political boundaries and dominating other cultures with colonization, hierarchy and linear power. This era is gradually coming to an end, as indigenous peoples the world over are making their cultures and rights known, and political bodies such as the United Nations Permanent Forum on Indigenous Peoples are listening. However, this new accommodation of indigenous people's rights is still within the realm of the western legal tradition, since these cultures must rely on the Anglo-European judicial model to achieve a voice, rather than their own intricately developed legal systems and traditions. As a result, Native Americans form an excellent case study for emerging indigenous and cultural groups, since the North American Indian tribes have existed under a western federalist tradition for over 200 years, and perhaps provide the best example of a tribal

culture's interaction with a hierarchical structure. Given the fragmenting nature of our present societal and world order, there are a number of important reasons for trying to develop a better understanding of these Native American tribal visions of law, peace, and justice between different peoples.⁶

Perhaps the best example of an American Indian tribal vision of law and peace between different peoples is the *Gus-Wen-Tah* or the Two Row Wampun Treaty belt. This belt symbolises a treaty between the Iroquois Nation and the European settlers.⁷ The *Gus-Wen-Tah* is made up of white wampum shell beads, symbolizing the sacredness and purity of the treaty agreement between the two parties, and two parallel rows of purple wampum beads that represent the separate paths travelled by the two sides on the same river.⁸ Each side travels in its own vessel: the Indians in a birch bark canoe, representing their laws, customs, and ways, and the whites in a ship, representing their laws, customs and ways.⁹ The vision of the *Gus-Wen-Tah*, with its ideal of parallel and respectful relations between separate but equal peoples was never fully realised in North America.

However, a representative of the Iroquois nation presented the belt at the 1988 session of the United Nations Human Rights Commission's Working Group on Indigenous Populations in Geneva, Switzerland.¹⁰ The Two Row Wampun may symbolise a fresh start for indigenous peoples and cultures all over the globe, and may serve to guide the efforts of the Kurds in Iraq in forging meaningful legal and political relationships with the emerging national governmental body.

The meeting of different cultures with varied traditions, cultures and ways of life can be a recipe for crisis and bloodshed. The Kurds have a history rife with conflict, and such conflict and military prowess have become a part of their culture. The re-emergence of Iraq post-Saddam provides an opportunity for second chances in forging a political system that fosters peaceful co-existence amongst culturally differentiated groups. This is why an understanding of tribal culture and how that culture may function within a federalist society is particularly important for the Kurds. They have an opportunity to begin to attain the vision of the Two Row Wampun.

Currently, the Kurds have the opportunity that Europeans and tribes had in the early Encounter era, when radically different peoples were required to negotiate as rough

6 ROBERT A WILLIAMS, *LINKING ARMS TOGETHER*, 5-6 (Oxford University Press, 1997).

7 *Id.* at 4.

8 *Id.*

9 *Id.*

10 *Id.*

economic, military, and political equals for survival on the land.¹¹ If the Kurds can learn from the Native American tribes, and achieve recognition in a new power-sharing Iraqi government, they may at least start to attain the vision of the *Gus-Wen-Tah*. This is important not only to avoid more bloody conflict in a war torn area, but also to signify the re-emergence and success of indigenous peoples and minority cultures.

In order to fully understand the comparative value and application insights from the comparison it is important to understand how claims to culturally significant lands are treated in the United States and Iraqi federalist systems. The two federalist systems, the United States and Iraq, treat these spiritual/cultural claims to land quite differently. The Native American claims are viewed as religious and have been pursued under the First Amendment to the U.S. Constitution. Under the Interim-Iraqi Constitution, Kurdish cultural ties to certain territory are treated as a political and historical claim, rather than one of religious or cultural significance. However, while these claims to sacred lands are treated differently, a comparison will still provide many valuable lessons for the Kurds. Unfortunately, Tribes in the United States have been mostly unsuccessful in securing legal protection for sacred sites in litigation premised on the Free Exercise Clause of the Constitution.¹² Although some positive aspects of Native American experiences from other areas of Federal Indian law may provide some relevant lessons for the Kurds, most of the comparative lessons are drawn from the negative experiences of Native Americans seeking protection for sacred sites off-reservation under the U.S. Constitution.

Federalism

Federalism is a political system that includes a constitutionally mandated division of powers between a central government and two or more subunits, defined on a territorial basis, such that each level of government has sovereign authority over certain issues.¹³ Federalism is thought of as the ideal system with which to accommodate diverse aspirations of national minorities. In nation states that seek to protect group identities and minority rights, federalism can be accommodating to diverse groups. Both historically multi-national federations, like Switzerland and Canada, and more recent multi-national federations, like Belgium and Spain, have not only managed the conflicts arising from their competing national identities in a peaceful and democratic way, but have also secured a high degree of economic prosperity and individual freedom for their citizens.¹⁴

11 WILLIAMS, *supra* note 3 at 10.

12 N. BRUCE DUTHU, Conversation. Vice-Dean of Academic Affairs, Vermont Law School, (Jan. 18, 2005).

13 WILL KYMLICKA, *POLITICS IN THE VERNACULAR* 94 (Oxford University Press, 2001).

14 *Id.* at 92.

Federalism can also be structured to favour the individual, and give the individual precedence over group or minority rights. The form of federalism adopted in the United States was not designed as a response to ethno-cultural pluralism, and the federal units (states) do not correspond in any way to distinct ethno-cultural groups who desire to retain their self-government and cultural distinctiveness.¹⁵ A federal system, therefore, does not necessarily equate minority rights and cultural freedom.

The keystone of success for minorities in a federal system is the intent on the part of the framers of a Constitution and federal system for the inclusion of minorities. In the United States the founders' intent in the arrangement of the federal system—from drawing boundaries, to the division of powers and the role of the judiciary—was to consolidate and then expand a new country, and to protect the equal rights of individuals within a common national community, not to recognise the rights of national minorities to self-government.¹⁶

The United States federalist structure is made up of the federal government and subunits called states. None of the states reflect the cohesive voice of various minority groups, but rather the voices of individuals. In fact, insofar as national minorities in the United States have achieved self-government, it has been outside—and to some extent, in spite of—the federal system, through non-federal units such as the “commonwealth” of Puerto Rico, the ‘protectorate’ of Guam, or the ‘domestic dependent nations’ status of the American Indian tribes.¹⁷ The “commonwealth” of Puerto Rico and “protectorate” of Guam are fairly homogenous in their populations, and in a federalist system would be able to have an influence not only as individual citizens, but also group rights giving voice through state representatives and Congressional delegates. However, their status outside the federal units of states, does not allow for an ethno-cultural group voice on the federal stage.

The current federalist system in the United States is the result of several factors, and was shaped largely as a reaction against the colonist's experience of the British Imperial Constitution. While the United States federalist system allows for more freedom and protection of rights than does the British Imperial Constitution, the United States structure and its focus on the individual also make it quite hierarchical and difficult for minorities, such as Native Americans, to obtain certain recognition. Thus, on a continuum of hierarchy and responsiveness to minority cultures, the United States is less rigid than the British Imperial Constitution, but much more hierarchical than that to which Native American cultures are accustomed.

15 *Id.* at 93.

16 KYMLICKA *supra* note 10 at 99.

17 *Id.* at 99.

The rights of the colonists in North America were largely informed by the royal prerogative, and Parliament.¹⁸ English common law had debatable impact on the colonists, but played an important role in defining the scope of the royal prerogative.¹⁹ *Calvin's Case*, decided contemporaneously with the settlement of Jamestown in 1607, drew from ancient feudal precedents the basic prerogative framework within which the first century of colonisation was to take place: if the King conquers a Christian kingdom, the laws of that kingdom remain in effect until the King changes them, except that English subjects there have their rights as Englishmen; but if an infidel kingdom is conquered, its laws are abrogated and the King and his judges govern by natural equity until "certain laws are established" among the inhabitants.²⁰ In either case, if the King gives the inhabitants the laws of England, the laws may thereafter be changed only by Parliament.²¹

The impact of Calvin's case and this view of the new world was that the colonies were viewed as personal holdings of the King and were thus ruled by the King directly through the prerogative as though he were their medieval feudal lord.²² This royal power was exercised formally through the Privy Council and practically through the cabinet.²³ Consequently, the colonies were not subject to the body of common law and statutes that had developed to define and limit the prerogative within the context of the complex feudal relationships that existed within the realm.²⁴ With no voice in Parliament, and limited access to the judicial system in London, the colonists quickly grew disenchanted with the British Imperial Constitution and its system of governance in the colonies.

As a result, when the framers met at the Constitutional Convention to draft the Constitution of the United States, they regarded it as one of several ways to limit the power of government in the United States.²⁵ While the framers did not necessarily set out to institute a federalist system, the framers agreed to a few basic principles: that government power is a potential threat to individual freedom and therefore must be restrained and limited in its exercise; that power divided is power inhibited; and that power inhibited is tyranny prevented.²⁶ The result was a dual federalist system with one central government of enumerated powers and states that retained the reserved

18 L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 *Ariz. J. Int'l & Comp. L.* 93, 95 (1998).

19 *Id.*

20 *Id.* at 99-100.

21 *Id.* at 100.

22 WROTH, *supra* note 4 at 97.

23 *Id.* at 100.

24 *Id.*

25 RICHARD H. LEACH, *AMERICAN FEDERALISM*, 9 (W.W. Norton Company, Inc., 1970).

26 *Id.*

powers. The executive and legislative branches of the state and federal governments could exercise only those enumerated aspects of sovereign power expressly delegated to each of them by the people.²⁷ From this proposition stemmed the clear necessity of an independent judiciary as a third branch of government that would police the actions of the other branches and declare void those that exceeded the powers granted or any limits placed upon them.²⁸

The framers crafted an American idea of sovereignty, based on the thoughts of old world philosophers such as Montesquieu, whereby the power remained with the people.²⁹ The rights of the people expressed in the Constitution and in the 14th Amendment are based on the rights of the individual. The keystone to individual rights is governed by the “non-discrimination” model.³⁰ The members of ethnic groups and national groups are protected against discrimination and prejudice, and they are free to try to maintain whatever part of their ethnic heritage or identity they wish, consistent with the rights of others.³¹ However, their efforts are purely private and it is not the place of public agencies to attach legal identities or disabilities to cultural membership or ethnic identity.³²

By contrast, the tribal nations are traditionally organised horizontally around kinship, clan, and extended family relationships, and had long understood and described political alliances, whether with other tribes or with European colonizing powers, as metaphorical extensions of kinship obligations.³³ In addition, Native American governments recognise the rights of individuals, but decisions are based on consensus, and take into account the good of the group as a whole in addition to the individual. Native Americans are no strangers to federalism, having formed the Iroquois Confederacy or “Great Peace” between A.D. 1000-1500 between the warring factions of the Iroquois tribe including the Onondagas, Mohawks, Oneidas, Senecas, and Cayugas³⁴. The Great Peace was founded on principles of freedom, respect, tolerance, consensus and brotherhood.³⁵ However, this federalist system differed from the federalist system established in the United States in that it necessitated unanimous agreement from all participating tribes. While this horizontal foundation worked in the context of the Iroquois Confederacy, it did not work as well for the American Colonies. Benjamin Franklin drafted the Articles

27 WROTH, *supra* note 4 at 110.

28 WROTH, *supra* note 4 at 110

29 . *Id.*

30 WILL KYMLICKA, *THE RIGHTS OF MINORITY CULTURES*, 9 (Oxford University Press, 1995).

31 *Id.*

32 *Id.*

33 *Id.*

34 SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS*, 17 (University of Oklahoma Press, 1989).

35 *Id.* at 18.

of Confederation on the basis of the Iroquois League.³⁶ However, for the colonists such a diffuse structure was weak, because the powerful states and weak central structure presented problems in relations with Indians as each state pursued its own distinct policies.³⁷

The idea of federalist systems that are either based on group rights or provide for specific group protections did not end with the Iroquois Confederacy. Many federalist systems today provide for substantial considerations of group/ethnic rights. One such example is the affirmative protections for linguistic ethnic minorities in Italy. The Italian Constitution provides for numerous protections for regional linguistic minorities. Article 6 of the Constitution specifically states that the “republic protects linguistic minorities by special laws.”³⁸ The Constitution provided for 20 regions in total, with 5 of them being special or “super” regions with special powers and protections, including Trentino-Alto Adige which contains the German speaking minority of South Tyrol.³⁹ Such affirmative protections at least theoretically not only provide minorities with individual rights, but also provide for a juridical space in which they may exercise cultural expressions.

The American model of federalism, by contrast, operates on the theory of non-discrimination. The theory of non-discrimination, which has also been adopted for religious groups, operates on the idea that the ethnic group is protected from discrimination in general. However, the maintenance and reproduction of these groups should be left to the free choices of the individual in the private sphere, neither helped nor hindered in the private sphere.⁴⁰ This theory works well for the immigrant nature of many people who fled homelands and cultural attachments to come to the United States.⁴¹ This creates an atmosphere of assimilation, resulting in a largely homogeneous population. However, the Native Americans, who were not immigrants but the original inhabitants of North America, are not content with individual rights that do not recognise cultural and group rights.

The Native Americans as minorities are different from other minority groups in the United States. Other minority groups, such as the African Americans, are fully recognised under the United States Constitution and able to use the provisions of the Constitution to protect their rights. In addition, African Americans are able to benefit from rights on a national level. This is because unlike the Native Americans, who are recognised

36 *Id.* at 50.

37 *Id.*

38 ITAL. CONST. art. 6 in [Comparative Law Fall 2004](#)(p. 3.6)

39 Kymlicka, *supra* note 10 at 69.

40 KYMLICKA *supra* note 10 at 50.

41 *Id.*

as separate tribes both among themselves and by the government, African Americans are recognised as an ethnic group in their entirety, not fragmented by region or tribe. Native Americans, by contrast, are recognised as a “domestic, dependent nations” and a sovereign entity theoretically equal to the federal and state governments. Therefore, the Constitutional provisions apply to them differently from other minority groups. In addition, each tribe of Native Americans is treated as an independent “nation” and governed by different treaties or statutes from other tribes. Hence, while some rights for Native American tribes may be advocated for en masse, such as graves repatriation, others must be sought by individual tribes, such as the right of protection for sacred spaces that are specific to each tribe.

Finally, the individual rights basis of the United States federalist system doesn't provide for protection of group and cultural needs. This is particularly illustrated, as I will discuss further, in the Supreme Courts decision in *Lyng v. Northwest Indian Cemetery Protective Association* which held that the building of a road on public lands through a mountain held sacred by the tribe was not a burden of their free exercise rights under the First Amendment.⁴² This is an example of the dichotomy between the American federalist approach of non-discrimination versus the more affirmative granting of rights to minority groups that can be found in Italy. The Iraqi Kurds will be operating in a different federalist system from that found in the United States, however, an analysis of a functioning tribal structure which recognises group rights attempting to operate in a federalist system which recognises individual rights will be relevant to the Kurdish perspective as well. Federalism offers the possibility of working with and protecting the interests of minorities, however it is a culture and language that many minorities have had to learn to speak and understand before they may even begin the process of mastering the system and making it their own.

Native American history and culture

Ancestral Native Americans walked across the Bering Strait between Siberia and Alaska between 15,000 to 40,000 years ago.⁴³ Since that time, they have diversified to form hundreds of different tribes with diverse customs, forms of government, life style and language. Each tribe considered itself separate, distinct, and sovereign, with variations between tribes according to its distinct cultural practices and the needs imposed by its environment.⁴⁴ However, despite differences in structure, traditional tribal governments

42 *Lyng v. Northwest Indian Tribe*, 108 S. Ct. 1319 (1988)

43 BARRY M. PRITZKER, *NATIVE AMERICANS: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND PEOPLES*. Xi (ABC-CLIO, Inc., 1998).

44 O'BRIEN, *supra* note 31 at 14.

shared certain values, ideas of leadership, and styles of decision making.⁴⁵

Tribal governments are traditionally horizontal and diffuse in structure, which is antithetical to the highly structured and hierarchical European governmental systems in which a single monarch held total power and the people had only those rights granted to them by the monarch.⁴⁶ By contrast, traditional tribal societal values were based on the belief that a spiritual force lived within every natural being.⁴⁷ Therefore, the primary goal of religion and politics was to achieve harmony between all elements—the land, plant and animal life, and the human community.⁴⁸ The Navajo or Dine, which means “the people,” believe the act of breathing is a sacred act which unites all beings and phenomena—humans, deer, mountains, stars, and the Holy People.⁴⁹ This connection and responsibility to other people, species and beings means that to destroy any aspect of creating is also to harm oneself.

These spiritual values were reflected in the tribal governments as well. The community and an individual’s responsibility to the community were more important than the individual and his or her rights within society.⁵⁰ As a result, power came from the community and flowed upward to the leaders, and a person’s status and position were based on individual performance and ability.⁵¹ Just as the power could flow up to the leader when the individual was acting responsibly, it could also be withdrawn when they did not. As a result, unanimity and the purest form of direct democracy is highly valued and very much a part of Native American tribal culture.

The individual is also respected in Native American culture, not just the rights of the group. However, the rights of the individual are viewed in a much more integrated way than among western society. While western liberalism posits the individual as the atomistic primary unit, independent of social role and context, Native American cultures generally hold that the individual has moral worth stemming from equality of status and interdependence of individuals within the cosmic order.⁵² Belonging to a specific people implies an intuitive comprehension and a participation in a ritualism that, even if it may include individual and isolated experiences, translates into expressions of, and

45 *Id.*

46 *Id.* at 15.

47 *Id.*

48 *Id.*

49 LAWRENCE E. SULLIVAN, *NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA*, 126 (Continuum International Publishing Group, Inc, 2000).

50 O’BRIEN, *supra* note 31 at 15.

51 *Id.*

52 CLINTON, *supra* note 1 at 330.

continues only in a tribal context.⁵³ The individual exists only in a complex system of relationships which finds its own expression in the image of the spider web, with its perfect equilibrium of reciprocal tensions.⁵⁴ Thus the rights of the individual are important, but are also balanced with, and ideally in harmony with, the rights and needs of the group as a whole.

The roles of men and women are also defined differently in Native American cultures, and vary from tribe to tribe. In particular, many western cultures usually worry about the rights of women in indigenous cultures, viewing many practices as backward and unresponsive to women's rights. The ideal of many tribes, however, is a positive and balanced role of men and women. The Navajo view the relationship between men and women as an intricate balance. Together, Mother Earth and Father Sky embody *complementarity*, the basic relational principle of Navajo philosophy.⁵⁵ In addition, all aspects of "nature" have male and female qualities: there is male rain, which comes down in a deluge, while female rain is a light mist.⁵⁶ Each person has this unity of male and female within him or her, with the left side representing the maleness and physicality, while the right side is the female, emotional side.⁵⁷

The Mescalero Apache also have a strong reverence for the female and natural connections, believing that transformations that occur in nature are associated with the ritual transformations that a young girl experiences in her rite of passage from girlhood to female deity to womanhood.⁵⁸ Other native cultures, such as the Yup'ik Eskimos in Alaska have a more strict segregation of the sexes. Men hunted, while their mothers, wives, and daughters processed their catch.⁵⁹ However, even here the domains of hunting and procreation are ultimately joined, and together are viewed as essential to assuring the reproduction of life.⁶⁰ This emphasis of harmony between the sexes is reflective of the Native Americans spirituality and reverence for harmony and group rights.

Just as there is balance between the sexes, many Native American tribes also have great respect for animal and the land, and the balance between humans and other species and places. For example, the central belief of the Tlingit is that everything has a spirit; not only humans, but animals, plants and features of the natural world such as water,

53 SULLIVAN, *supra* note 46 at 211.

54 *Id.*

55 SULLIVAN, *supra* note 46 at 134.

56 *Id.*

57 *id.*

58 *Id.* at 143.

59 *Id.* at 187.

60 *Id.*

mountains, and glaciers.⁶¹ Since religious thought was linked with ritual action, it was important to speak and even think kindly and respectfully of and to nonhuman forms.⁶² The Yup'ik of Alaska also have a respectful view of animals. They viewed the relationship between humans and animals as collaborative reciprocity by which the animals gave themselves to the hunter in response to the hunter's respectful treatment of them as nonhuman persons.⁶³ The earth, and all its inhabitants, continues to be crucial for the physical and spiritual survival of the Native Americans.⁶⁴

As these examples from various tribes interactions with the sexes, animals, land and tribal organization illustrate, harmony and spirituality infuse almost every aspect of tribal life. Such an emphasis on harmony also reflects a commitment to the well-being and inclusion of the group which is more horizontal in nature from American and European style governing structures which do not insist on direct democracy and harmony between individuals and the group, let alone between humans and animals and the land.

Native Americans and the constitution

The tribes have a peculiar status within United States Federal law, which is both separate from the United States government and the Constitution, as well as a part of it. In order to understand this peculiar relationship, it is important to understand the place tribes have in the Constitution, and the way our courts have interpreted their status vis-à-vis the Constitution and under the various treaties the United States has made with individual Tribes.

Tribes are ultimately subject to federal power, though in a different manner from which state and local governments are subject to federal power. Federal power granted to the central government is enumerated by the Constitution; however, this founding document is largely silent on the status of Indian Tribes. The Constitution mentions Indians three times: twice in Article I dealing with enumeration and commerce and once in the 14th Amendment modifying the enumeration clause.⁶⁵ The enumeration clause was the "three-fifths" clause of the Constitution excluding Indians from taxation and apportioning representation on the basis of slave populations. The 14th Amendment

61 SULLIVAN, *supra* note 46 at 162.

62 *Id.*

63 *Id.* at 182.

64 *Id.* at 212.

65 JEDON E. EMENHISER, *A Peculiar Covenant: American Indian Peoples and the U.S. Constitution*, in AMERICAN INDIANS AND US POLITICS, 4 (John M. Meyer ed., 2002). U.S. CONST. art. I, §2, cl. 3. U.S. CONST. art. I, §8, cl. 3. U.S. CONST. amend. XIV.

has since been modified to count whole persons.

Only the Commerce Clause provision is still operative, stating in Article I, section 8, clause 3: “The Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁶⁶ The Commerce Clause is one of the sources of power cited by the courts for the actions of the federal government with regard to Indian Tribes.⁶⁷ Accordingly, the Commerce Clause is relied on to give the federal government power to regulate not only the buying and selling of goods and services with Indian Tribes, but also the extraction of raw materials and the processing of products prior to distribution and sale on tribal lands.⁶⁸

The Constitution’s differentiation of tribes from states means that the tribes are treated quite differently from state and local governments. Tribal governments are not directly subject to the individual rights set forth in the Constitution, most notably in the Bill of Rights.⁶⁹ This is not to say, however, that the Constitution and Bill of Rights do not apply to Native Americans. The Constitutional as a framework of government powers does apply to Native Americans, and the individual rights guaranteed by the Constitution and the Bill of Rights also apply but only (directly) as limitations on federal or state powers exercised within Indian country, not as limitations on tribal powers.⁷⁰ Although there is no express Constitutional limitation on tribal powers, Congress can limit tribal powers by statute.⁷¹ The Indian Civil Rights Act of 1968 was enacted by Congress to apply most of the provisions of the Bill of Rights to tribes. The rights not included in ICRA are the establishment clause, any right to appointed counsel, the requirement of grand jury indictment, and civil jury trial.⁷² In addition, in an effort to enunciate their own rights and to make their constitutional governments more legitimate with their own people as well as outsiders, many tribes have implemented their own Bill of Rights into their tribal constitutions as well.⁷³

66 U.S. CONST. art. I, §8, cl. 3, quoted in *supra* note 62 at 5.

67 *Id.* at 5. The Commerce Clause was cited as a source of power for actions such as banning the sale of alcohol to Indian peoples from 1802-1903.

68 EMENHISER *supra* note 62 at 5.

69 BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL, 4 (ABC-CLIO, 2003).

70 *Id.*

71 *Id.*

72 CLINTON, *supra* note 1 at 482.

73 *Id.* at 330. While the tribal bills of rights provide protections similar to the federal counterpart, because tribal conceptions of the individual are different from non-Indian views, they sometimes choose to protect a different or additional set of rights. In addition, tribal courts may interpret phrases to fit tribal notions of fairness and individualism. An example of this is Art. VII of the Muckleshoot Constitution which protects civil liberties and rights of the accused, but also guarantees that “All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.”

This special status has led to some confusion as to Indians' citizenship status under the 14th Amendment. The 14th Amendment states that... "[a]ll persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States."⁷⁴ The Supreme Court in *Elk v. Wilkins*, an 1884 decision, ruled that this provision did not give Indian peoples citizenship, since they were not generally considered to be under the jurisdiction of the United States.⁷⁵ As a result, Native Americans as a group living in the United States did not receive the benefits of citizenship until relatively recently. Gradually through treaties and statutes, such as the General Allotment Act of 1887, citizenship was gradually extended to Native peoples.⁷⁶ By 1917 over 2/3 of Native Americans were citizens⁷⁷ however, it wasn't until 1924 and the passage of the Snyder Act that citizenship was ensured for all Native Americans.⁷⁸

The federal right to vote which went along with the citizenship status did not necessarily mean that the states likewise recognised their right to vote in state elections, or that Native Americans were citizens of the states as well. Some states, well aware of treaty rights that exempt tribal lands and their members from most state regulations and taxation, coupled with language in some state constitutions specifying that state governments cannot extend their jurisdiction or taxing authority over Indians or tribes inside Indian Country, erroneously concluded that they had the authority to exclude Indians from the state political process.⁷⁹ As a result, Native Americans didn't get the right to vote in New Mexico until 1962. Other states had similar late dates for recognizing the right of Native Americans to vote.

Aside from powers derived under the Constitution, the federal government derives power over Tribes from the common law. The other main source of federal power over Tribes derives from their status as a "domestic, dependent nation," a phrase first articulated by Chief Justice John Marshall in the 1831 case *Cherokee Nation v. Georgia*.⁸⁰ Marshall recognised a trust relationship between the United States government and tribes that obligated the former to serve as a trustee to protect the latter.⁸¹ Nonetheless, the Court recognised that tribes persist as political entities—nations—with a sovereignty

74 U.S. CONST, 14TH AMEND, quoted in *supra* note 62 at 5.

75 *Elk v. Wilkins*, 112 U.S. 94, 101 (1884) quoted in *supra* note 29 at 5.

76 EMENHISER, *supra* note 62 at 5.

77 Geoff Peterson and Robert Duncan, *American Indian Representation in the 20th and 21st Centuries* in REPRESENTATION OF MINORITY GROUPS IN THE U.S. 119 (Charles E. Menifield ed., Austin & Winfield Publishers 2001).

78 Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 Mont. L. Rev. 269, 273 (Sm. 2004).

79 Peterson and Duncan, *supra* note 74 at 113.

80 *Cherokee Nation v. State of Georgia*, 30 U.S. 1,1 (1831).

81 EMENHISER, *supra* note 62 at 7.

that allows for substantial forms of self government.⁸² These seemingly contradictory statements form the backbone of a complex relationship between the federal government and Indian tribes that often mimics federal relations with states or foreign nations.

Treaty-making represented the earliest forms of forging political ties between the federal government and Indian tribes. As a result, treaties continue to serve as a substantial source of protection for Tribes, and protect much of their territorial sovereignty. This protection has waned however, since the Supreme Court ruled in *Lone Wolf v. Hitchcock* (1903) that Congress has the ultimate plenary power to unilaterally abrogate Indian treaties.⁸³ Treaty making with Indian Tribes ceased in 1871, though extant treaties were given full effect.⁸⁴ The end of treaty-making did signal a diminishment of the legal status occupied by tribes and the relationship with the federal government.⁸⁵ Now, federal action in Indian affairs could proceed by unilateral statutes instead of bilateral treaties.⁸⁶ Since treaties and statutes are coequal under the Constitution, a recent statute may amend or abolish a Treaty dating back to the 1800's.⁸⁷

Treaty rights may be unilaterally abrogated by Congress, and the courts have had a checkerboard history with canons of construction regarding treaty rights. One area that has been successful in the courts is the area of hunting and fishing rights. In the 1999 decision *Minnesota v. Mille Lacs Band of Chippewa Indians* the Supreme Court ruled 5-4 in favour of the Indian Treaty rights pertaining to rights concerning hunting, fishing and gathering rights under an 1837 treaty.⁸⁸ Allowing Tribes continued use of traditional hunting grounds, even those that now exist on private or public lands, is a success for Tribes in the court systems. Such decisions regarding hunting and fishing rights, even off reservation, provide protection for Tribal territorial sovereignty. This may be particularly relevant for the Kurds of Iraq, depending on the final designation of Kirkuk. If the final designation of Kirkuk is outside the Kurdish region, a right to the city based on Native American treaty rights outside their reservations may serve as guidance for

82 N. BRUCE DUTHU, conference, 3/15/05.

83 *Lone Wolf v. Hitchcock*, 23 S. Ct. 216 (1903), quoted in WILDENTHAL, *supra* note 66 at 10. The court in *Lone Wolf* states that Congress exercised plenary power over tribal relations from the beginning. However, the term plenary power had only once, four years earlier, been previously employed by a majority of the United States Supreme Court in *Stephens v. Cherokee Nation*, U.S. 445 (1899). Until the enactment of the Federal Major Crimes Act in 1885, the Indian tribes had near total control over both their members and their territory and almost no federal governing power ever previously existed for either. As a result, the holding of *Lone Wolf* that Congress had plenary power and could unilaterally abrogate treaties, an accepted part of U.S. law for other types of treaties as well, had great impact on the limitation of power of tribes over their own territory and peoples.

84 EMENHISER, *supra* note 62 at 7.

85 DUTHU, *supra* note 44.

86 *Id.*

87 EMENHISER, *supra* note 62 at 7.

88 WILDENTHAL, *supra* note 66 at 11.

preserving rights of access in an area that would otherwise be off limits to the Kurds.

Native Americans and access to Sacred Places under United States Federalism

Indian sacred sites are lands that hold significant spiritual value for an Indian tribe. Among other things, certain mountains, springs, rivers, lakes, caves, and rock formations can be a part of a sacred landscape that is the basis for spiritual belief and practice.⁸⁹ These sites may be discrete geological monuments such as Bear Lodge (also known as Devils Tower) in Wyoming, a sixty-million-year-old rock formation made from the hardened magma of an extinct volcano, or wide swaths of land such as the Indian Pass Sacred Sites, a series of trails running from Los Angeles to Mexico.⁹⁰ During the period from 1861-1887 in American Indian history, tribes were forced onto reservations that in many cases were distant from their home lands and sacred sites. Accordingly, many of the sites tribes consider sacred are not located on reservation lands, but rather, are on public lands, such as Devil's Tower, or on private land.⁹¹ Tribes have repeatedly tried to protect these sacred sites from destruction by raising First Amendment Free Exercise of religion claims. These tribes based their challenges on Free Exercise grounds, claiming that development on lands they considered sacred would unconstitutionally prevent them from observing religious rituals connected to these sites.⁹²

The defining case in this area was the 1988 U.S. Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association* in which tribes contested the Forest Service's plans to permit timber harvesting and road construction in an area of national forest that was traditionally used for religious purposes by members of three American Indian tribes in north-western California.⁹³ In an opinion written by Justice O'Connor, the Supreme Court held that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, (can not) require government to bring forward compelling justification for its otherwise lawful actions."⁹⁴ As a result, unless the Native Americans were prohibited from practicing their religion outright, they could not maintain a First Amendment claim.

89 SUSAN LOBO AND STEVE TALBOT, *NATIVE AMERICAN VOICES*, 267 (Longman, 1998)

90 Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 Yale L.J. 1623, 1624 (2004).

91 *Id.*

92 *Id.* at 1628.

93 *Lyng v. Northwest Indian Tribe*, 108 S. Ct. 1319 (1988).

94 *Id.*

While the Supreme Court has foreclosed protection of sacred sites through first Amendment claims, there is still the possibility of protection of sacred sites via the delegation theory. Native Americans have jurisdiction over civil matters and some criminal matters on reservations over tribal members.⁹⁵ As a result of the checkerboard history with Native Americans in the United States, some non-Indians own fee lands on reservations. In *Buegenig v. Hoopa Valley Tribe*, a non-Indian fee owner sought to harvest timber on her property, which would negatively affect a sacred dance ground for the Hoopa Valley Tribe. The 9th Circuit Court of Appeals in 2001 found that in passing the Hoopa Settlement Act, Congress had authorised the tribe to regulate all matters of a civil nature within the territorial bounds of the reservation. This authorisation, even over fee lands held by non-Indians, was deemed a delegated power.⁹⁶ The 9th Circuit only addressed the delegation theory and did not reach the decision based on a Tribes inherent authority to have jurisdiction on reservation, a decision that makes some Indian Scholars nervous about the future of inherent authority claims. In addition, this delegation theory was over fee lands on what was otherwise reservation land, not off reservation.

Native Americans have not been successful using First Amendment constitutional claims to protect sacred sites that are not directly on their reservations. As stated earlier, there has been some limited success gaining access to hunting and fishing sites that are located off of reservations, usually based on express treaty rights that provide “easement-like” rights of access.⁹⁷ However, by and large, obtaining legal recognition of tribal rights off reservation has been an uphill battle for the Native Americans under the United States Constitution and federalist system. For this reason, it is important that the Kurdish peoples, who have a similar tribal composition and potentially comparable situation to the Native Americans under a new federalist system, make every effort to retain sacred or culturally significant sites within their constitutionally recognised territory. After centuries of abuse and neglect, the Kurds have a second chance at obtaining recognition

95 Criminal law in Indian country is mostly governed by a few federal statutes. The jurisdictional power of some reservations has been altered by Public Law 280 or other reservation specific statutes. The rest of the reservations are governed by the provisions of the General Crimes Act (also known as the Indian Country Crimes Act), 18 U.S.C. §1152, and the Major Crimes Act, 18 U.S.C. §1153, which reserves federal jurisdiction over 15 major crimes. Civil jurisdiction is not as clearly defined by federal statutes, and absent any clearly applicable Congressional pronouncement, basic principles of tribal, federal, and state authority must be applied to determine the existence of jurisdiction within Indian country. CLINTON, *supra* note 1 at 657 and 708.

96 *Buegenig*, 266 F.3d at 1201.

97 The extent of federal pre-emption of state regulation by an Indian treaty turns on the intent of the parties as reflected in the language of the treaty and circumstances under which the treaty was negotiated. Treaty or statutory provisions purporting to reserve such off-reservation rights are subject to the rules requiring liberal construction of Indian treaties in a manner that executes the Indian understanding of the agreement. Therefore, unlike First Amendment claims which do not distinguish between Native American plaintiffs versus other citizens, hunting and fishing rights analyze treaties from the view point of the Native Americans who signed the treaty. CLINTON, *supra* note 1 at 1240-1241.

and peace; strong provisions based on the lessons of Native Americans should be instituted into the permanent Iraqi Constitution to preserve their recognition even after the eyes of the world have shifted from the region.

The Kurds: History and culture

The main concentration of Kurds is in the mountains of the Zagros range where Iran, Iraq and Turkey meet.⁹⁸ The Kurds are descendants of Indo-European tribes who settled among the aboriginal inhabitants of the Zagros Mountains in various epochs, but most probably during the second millennium BC.⁹⁹ Arabs term for places like Kurdistan is *bilad es-siba* 'land of lions,' or regions inhabited by isolated peoples who listen more to their hearts and traditions than to civilization.¹⁰⁰

The Kurds have an ancient culture. This year, 2005, is 2617 by the Kurdish calendar, which dates from the victory of Medes forces against the Assyrian empire at Nineveh, north of Mosul.¹⁰¹ At the time of the Arab conquest in the seventh century AD, "Kurd" was used to denote nomadic people, giving the term a socio-economic rather than ethnic meaning.¹⁰² The region was designated "Kurdistan" in the 12th century and one of its villages, Jarmo, "is the most ancient village in the Middle East. Here, four thousand years before our era, man already cultivated diverse grains... plucked fruits... and raised sheep and goats."¹⁰³

Several factors contribute to the Kurd's isolation: the mountainous terrain that formed a geographic and cultural barrier between them and their neighbours; their ferocity in defending their own territory; and their largely self-sufficient economy, which reduces their dependence on outsiders.¹⁰⁴ The isolation of the villagers in their tribe-oriented and class-conscious society has remained very strong, despite modern influences. The people have developed their own culture and even a unique Kurdish style of dress.¹⁰⁵ The Kurdish ethnic identity is not limited to a single racial origin, but includes Arab,

98 McDOWALL, *supra* note 2 at 6.

99 *Id.* at 7.

100 CHRISTIANE BIRD, *A THOUSAND SIGHS, A THOUSAND REVOLTS: JOURNEYS IN KURDISTAN*, 14 (Ballantine Books, 2004).

101 Edip Yuksel, *Yes, I am a Kurd*, 7 J. Int'l L & Prac. 359, 377 (1998).

102 McDOWALL, *supra* note 34 at 7.

103 Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, the Birthright of all Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 Naval L. Rev. 152, 154 (1998).

104 EDMUND GHAREEB, *THE KURDISH QUESTION IN IRAQ*, 4 (Syracuse University Press, 1981).

105 KNOWLES, *supra* note 101 at 154.

Armenian, Assyrian and Persian (later Turcoman) tribes which became Kurdish by culture and language.¹⁰⁶ As a result of this mix of ancestry, the Kurds do not have a single systematised written or spoken language, but rather remain divided into dialect groups and cannot always communicate freely with other Kurds in their mother tongue, although most share a north-western Iranian linguistic origin.¹⁰⁷ There are also wide-ranging religious beliefs among the Kurds, though most adhere to Sunni Islamic jurisprudence.¹⁰⁸ Consequently, religious belief plays no part in Kurdish distinctiveness.

The definition, then, of a Kurd is difficult because the Kurdish peoples have no set characteristics. In the past, many tribes had their own distinct dress, folktales, music and social customs. Some were known for specific characteristics, such as red hair, broad builds, boorishness, or courage.¹⁰⁹ As a result, the strongest identifier for the Kurds is the region they inhabit, which they refer to as Kurdistan, and their own assertion of Kurdish heritage.

The Kurdish tribal structure, while sharing the kinship ties evident in Native American communities, differs from Native American tribal systems in that they are much more hierarchical in nature. Kurdish loyalties are based on blood ties and territoriality, and extend to organisations of tribal confederations, tribes and sub-tribes.¹¹⁰ Although most tribes formed confederations, effective political power tended to lie more in the hands of *aghas*, as the chiefs were known, controlling either one village or a small group of them.¹¹¹ Tribalism among the Kurds is similar to that among the Arabs except for a marked tie to the land which is not as strong in Arab tribal cultures.¹¹² This is especially true of the mountain tribes where land was traditionally controlled by the tribe and the *gha* was responsible for the equitable allocation of pastoral rights.¹¹³ Two factors make for a particularly strong *gha*: government recognition and noble, semi-religious origins, which give him a position above and outside the internal politics of the tribe, making his position as arbiter of internal disputes immensely strong.¹¹⁴ This emphasis on noble origins adds a hierarchical element to Kurdish society that is not typical in Native American Tribal societies. The Kurds have historically, and to some extent continue to operate in a tribal/hierarchical society defined according to tribe (or class), gender and

106 McDOWALL, *supra* note 2 at 7.

107 *Id.*

108 *Id.* at 8.

109 BIRD, *supra* note 98 at 12.

110 McDOWALL, *supra* note 2 at 9.

111 McDOWALL, *supra* note 2 at 10.

112 *Id.*

113 *Id.*

114 McDOWALL, *supra* note 2 at 9.

age.¹¹⁵

Over the last 30 years or so, the position of the *agha* has been eroded by socio-economic factors, though persecutions by former Iraqi Dictator Saddam Hussein have strengthened many tribal ties.¹¹⁶ Nevertheless, it is extremely important to remember the power of tradition and tribal ties, and that the advance of socio-economic changes has occurred unevenly and is still under way. Perhaps the most important point about tribal attachment to the land is the cultural emphasis the people place on these mountains, an attachment that is reinforced from the cradle:

“The tales of all the raid and feuds and wars in these mountains...deeds of daring, self-sacrifice, greed and treachery form the subject for Kurdish epic songs, which the young warrior hears as he lies awake in his cradle. One cannot fail to be impressed by the thorough indoctrination in the heroics of bloodletting that young Kurds among other mountaineers undergo.”¹¹⁷

The Kurds preserved their history and culture through an unusually rich oral tradition—a treasure trove of folktales, epic poetry, songs and proverbs. Family and tribal histories, community legend and lore were preserved, created, and re-created through the authoritative voices of elders passing along their knowledge to the young.¹¹⁸ This folklore entrenches the history, culture, territorial affinity and epic struggle of the Kurds within each individual.

Kurdish federalism and the importance of land

The Kurdish tribes have inhabited the Zagros Mountains for centuries, with movement of people and power forming an ever shifting wave. Despite the ebb and flow of tribal politics and Kurdish unity, there are certain areas in the Kurdistan region that have significance for all the Kurds. Aside from the political borders of Kurdistan which are known in the region, even if they are not formally recognised or drawn on a map, there is also a mythical view of Kurdistan. Occupancy by the Kurds stretches back into the mists of time, “from time immemorial” to use a resonant phrase, conferring on the Kurdish people a unique association with the land.¹¹⁹ Moreover, the idea of Kurdistan for many Kurds is also characterised by an almost mystical view of “the mountain”, and imaginary

115 McDOWALL, *supra* note 2 at 10.

116 *Id.*

117 McDOWALL, *supra* note 2 at 11.

118 BIRD, *supra* note 98 at 103.

119 DAVID McDOWALL, A MODERN HISTORY OF THE KURDS, 3 (I.B. Tauris, 1996).

as well as real place.¹²⁰ Even though many of the Kurds leave their traditional mountain valleys for the villages or towns, the mountain image loses nothing of its potency, or place in Kurdish identity.¹²¹

Aside from the mystical mountain image, whose exact location or area is not known to non-Kurds, certain cities are also important to Kurdish culture and identity. Kirkuk is the best example, and one of the most contentious cities in Iraq because of the large amount of oil in the area, and because other groups also claim Kirkuk as theirs. Kirkuk is viewed by the Kurds as their capital, the centre of Kurdish history, culture and tradition. However, it is also claimed by the Turkomens, the Arabs and the Assyrians.¹²² These multiple claims have made the city a flashpoint one that United States soldiers in the region readily recognise. “Kirkuk is the key to avoiding civil war in Iraq,” said Lt. Col. Jim Stockmoe, the 1st Infantry’s intelligence officer. “Kirkuk is to Iraq what Kosovo is to the Balkans.”¹²³

Territorial holdings are still contentious in Iraq. Some Kurdish groups appear to call for the redressing of the effects of Saddam’s campaign of Arabization with the return of Kurds and removal of Arabs who were forcibly settled in Iraqi Kurdistan since 1957.¹²⁴ Kirkuk, as well as Mosul, has already suffered some violence between Kurds and Arabs. If not properly managed, Kirkuk could face a threat of large-scale violence between the Turcoman, Kurds, and the Arab majority.¹²⁵ Kirkuk produces a substantial share of Iraq’s oil, and is claimed by both the Kurds and the Turcoman as their historic homeland.¹²⁶ Determining which group has the best claim to the land without bloodshed will be difficult, and even a final decision as to ownership does not ensure an end to the fighting.

Despite these marked differences from the Arabs in Iraq, the majority of Kurds feel that a federal system within Iraq is something they want to pursue. The concept of federalism in the Middle East is extremely recent. Legal education in the Middle East for the past hundred years has been entrenched in the British and French models, which does not have a reference to, or legal tradition of federalism the way that American legal

120 *Id.*

121 *Id.*

122 Jim Krane, Kurds Flooding back into Northern Iraq, Associated Press News Service, September 16, 2004.

123 *Id.*

124 *Establishing a Stable Democratic Structure in Iraq: Some Basic Considerations*, prepared by the Public International Law & Policy Group and The Century Foundation, 9 (May 2003).

125 *Id.* at 24.

126 *Id.* at 24.

education does.¹²⁷ Since the federal horizon does not appear in their textbooks, it is difficult for students, attorneys, judges or legislators to make a jump into the unknown, a jump many Europeans have difficulty making.¹²⁸ With no real experience or familiarity with a federalist system, it is important that the Kurds play a vigilant and active role in safeguarding their position and lands within this new federal system.

Kurds and cultural land under the New Iraqi Constitution

The current constitution of Iraq was approved by a ratification vote on 15 October 2005. The proposed constitution was drafted in 2005 by members of the Interim Iraqi Government to replace the Law of Administration for the state of Iraq for the Transitional Period, which had been put in force by the Coalition Provisional Authority after the Iraq War and occupation of Iraq by the United States and Coalition forces. However, the drafting and adoption of the new Constitution was not without controversy, as sectarian tensions in Iraq figured heavily in the process. The deadline for the conclusion of drafting was extended on four occasions because of the lack of consensus on religious language. In the end, only three of the 15 Sunni members of the drafting committee attended the signing ceremony, and none of them signed it. Sunni leaders were generally urging the electorate to reject the constitution in the 15 October referendum, but were overwhelmingly rejected by the voters.

The Iraqi Constitution provides for many assurances and rights for the Kurdish peoples and region under the proposed federalist system. Firstly, Kurdish is recognised as one of the two official languages, along with Arabic. The right of Iraqis to educate their children in their mother tongue is guaranteed. However, an analysis of the rights promised and the language used makes it clear that the Kurds will need to be active participants in the ensuing political process in order to ensure that their regional competencies and access to cultural territory is guaranteed in the new federal system.

Article 112 addresses the formation of the state. It declares that the federal system is made up of a decentralised capital, regions and governates, and local administrations. Under Article 113, the region of Kurdistan and its existing regional and federal authorities were approbated when the Constitution came into force. On the surface, these provisions seem to adequately address Kurdish concerns; however, there is no absolute guarantee that the region of Kurdistan will remain as it is, and no consideration for cultural affiliations with certain areas of land. Instead, Article 115 provides that governates can organise themselves into a region where either one third of the council members of each

127 Chibli Mallat, *Federalism in the Middle East*, 35 Case W. Res. J. Int'l L. 1, 10 (2003).

128 *Id.*

governate make a request accordingly, or where one-tenth of the voters in each of the governates intending to form a region make such a request.

Section 6 of the Constitution pertains to final and transitional provisions. Under Article 136, the executive Authority undertakes to complete the implementation of the requirements set out in Article 58 of the Transitional Administrative Law, which relates to measures to remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions, including Kirkuk. At first glance, this article is reassuring to the Kurds. The article includes plans to resettle Kirkuk after Saddam's effort at *Arabization*, and basically provides for resettlement of the area by Kurds and assisted removal of Arabs who were forced to relocate to the region. The article contains strong language saying the government *shall* take certain measures to remedy past injustices. However, Article 136 also states that the final designation of Kirkuk territory will be concluded by referendum by 31 December 2007. This unfortunately means that this area, which is so historically and culturally important to the Kurds, may not end up in Kurdish control, depending on the result of the referendum. The wording of this article suggests that the final designation of control over Kirkuk may hinge on the ability of the Kurds to gain enough votes in this referendum.

Article 53(A) of the Transitional Administrative Law still has effect under the new Constitution. This provided that the Kurdistan Regional Government is recognised as the official government of the territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyala and Neneveh. The term "Kurdistan Regional Government" refers to the Kurdistan National Assembly, the Kurdistan Council of Ministers, and the regional judicial authority in the Kurdistan region. In addition, under Article 137, legislation enacted in the region of Kurdistan since 1992 shall remain in force, and government and court decisions and agreements shall be considered valid unless annulled by the competent entity in the region. The Constitution therefore provides a strong assurance for a Kurdish judicial system. These assurances of judicial power which are friendly to Kurdish culture and history are important to ensure court decisions which are fair and do not discriminate against the Kurds.

Article 117 reiterates that the regional authorities shall have the right to exercise executive, legislative and judicial authority in accordance with the constitution. The regional governments are only subject to the federal government under Article 58, legislative powers reserved to the Council of Representatives; Article 70, powers granted to the President of the Republic, and Article 90, the jurisdiction of the Federal Supreme Court. Article 107 also sets out the matters over which the federal government has exclusive authority, including foreign policy, national security policy, fiscal and customs

policy and citizenship and residency issues. This allows a broad range of potential power for the regional governments, which includes cultural freedoms. However, the Kurdish Regional Government must take steps to ensure that issues of national security or citizenship and residency do not encroach on issues surrounding Kurdish identity.

On 30 January 2005, the Kurds won 75 seats in the 275 seat National Assembly, who had the responsibility of drafting the new Constitution. The Shiite Alliance won 140 of the seats, and the Sunnis, who boycotted the election, won 60. As a result, the Kurds and Shiites have two thirds of the vote. With the election of Jalal Talabani, former leader of Patriotic Union of Kurdistan (PUK), the Kurds won a major ally in Government. However, now that the new Constitution has been ratified, further elections are due to be held by 15 December 2005, with a new government sworn in by 31 December 2005. The Kurds need to ensure that this representation continues. The strength of the political parties, the personalities of the leaders and dynamics of the power-sharing agreement between the Shia and the Kurds will all have significant implications not only for the final designation of Kirkuk, but also for the status and rights of Kurds in Iraq as a whole. President Talabani's agreement to abide by Article 58, as set out above, may have been good politics in the face of political wrangling, but it could also be viewed as a concession of a weak political player in the presence of the stronger and larger Shia majority. Thus, a Kurdish president and majority in the current National Assembly do not by themselves guarantee Kurdish possession of Kirkuk, and guaranteed Constitutional rights and protections.

Why a comparison is appropriate

The Native Americans of the United States and the Kurds of Iraq are an appropriate comparison based on the similarity of their tribal cultures and their positioning in a largely western and hierarchical federalist style of government. An understanding of any cultures' internal structure, loyalties, dreams and inspirations are necessary to determine which style of government will function the best given the composition of the people to be governed. This understanding of tribal cultures is largely lacking from the United States territorial style federalism, and the Native Americans as a group have been largely misunderstood and mishandled within this governmental system. The Kurds are similarly situated to the Native Americans, but are only at the beginning of their federalism experience. An analysis of the 250 years of experience the Native Americans have under the United States Constitution may offer insight into ways to better address the needs and desires of the Kurds under the new Iraqi Constitution.

The comparison of Native Americans and the Kurds of Iraq has many areas of disconnect.

The Native Americans have existed under the United States federalist system for centuries, while the Interim Iraqi Constitution is not even a year old. However, the purpose of the comparison is to apply lessons learned from the Native Americans to the Kurds. Second, the Native Americans are also substantially more dissimilar from the dominant culture in America than the Kurds are to the dominant culture in Iraq. Many Native American tribal members have historically, and strive to preserve in the face modern culture, spoken a different language, followed a different religion and have different governing structures and traditions from the primarily Anglo-Saxon hierarchy in charge. The Kurds by contrast share the same religion and tribal structure with the Arabs in Iraq, and many speak the same language as well as cultural dialects. Finally, access to sacred places has spiritual meaning for many Native Americans and is treated as a religious freedom. By contrast, certain lands are not necessarily an issue of spiritual identity for the Kurds, but are culturally and historically significant, and treated as a political issue or a property right.

While there are many differences, the similarities between the Native Americans and the Kurds are also significant. Among these similarities are the tribal structure, the similar cultural struggles to protect sacred places and coping with similar federalist systems, and history of persecution by the dominant cultures. These comparable factors provide many points of comparison and valuable lessons learned by the Native Americans from which the Kurds might benefit.

The tribal structure of the Native Americans and the Kurds is similar in many respects. The Native American tribes are organised horizontally around kinship, clan, and extended family relationships.¹²⁹ Tribal social structures experienced significant reconstruction following sustained contact with Europeans.¹³⁰ Before tribes, various parts of Ancient America were peopled by loosely knit groups whose common identity was created and maintained during the celebration of defining rituals.¹³¹ Over the millennia, the differences between separated communities gradually increased and tribes became more differentiated and susceptible to the interferences of foreign powers.¹³²

The Kurds have similar ties based on kinship, but this social dynamic changes from tribe to tribe. Beyond the loyalty based on blood tie and territoriality lies the organization of tribal confederations, tribes and sub-tribes.¹³³ Unlike the Native Americans who value

129 CLINTON, *supra* note 1 at 1.

130 DUTHU, *supra* note 80.

131 DAVID HURST THOMAS, ET AL., *THE NATIVE AMERICANS: AN ILLUSTRATED HISTORY*, 119 (Betty Ballantine & Ian Ballantine, eds., 2001).

132 THOMAS, ET AL *supra* note 168.

133 MCDOWALL, *supra* note 2 at 9.

individual sovereign autonomy and consensus decision-making,¹³⁴ the *aghas*, or chief, may speak for and bind the tribe as a whole.¹³⁵ The *aghas* ensured the equitable allocation and maintenance of the agricultural terraces, carefully maintained for millennia, and decided where and when the livestock should be taken to graze and winter, and above all, how the water resources were to be shared.¹³⁶ The *aghas* have a large number of close relatives, forming the bedrock of societal solidarity, because until quite recently they tended to be polygamous, while other villagers tended to be monogamous.¹³⁷

Once subject to the whims of the dominant culture, both the Native Americans and the Kurds have faced difficulties in protecting sacred places, a concept which is not easily understood by the dominant culture. In 1979 the U.S. Forest Service approved the development and expansion of the government-owned Snow Bowl ski area on the San Francisco Peaks in the Coconino National Forest of Arizona, despite knowing that the Peaks were sacred to both the Navajo and Hopi tribes.¹³⁸ Likewise, the strength of the Kurd's attachment to the city of Kirkuk was demonstrated in their rejection of the 1970 autonomy agreement offered by the Iraqi government because it did not include Kirkuk in their region. If the Kurds are not given control over Kirkuk, they may not only reject any agreement that is presented to them but also may attempt to secede from the country and take Kirkuk with them.¹³⁹ Accommodation and understanding of both cultures' ties to specific places and sites is important not only for the respect for their rights, but also, as in the case of the Kurds, to avert bloodshed and possible civil war.

Both the Kurds and the Native Americans have faced efforts by the dominant cultures in their respective countries to forcibly assimilate them. In the early 1970's, Saddam Hussein attempted to weaken Kurdish resistance by forcibly relocating many Kurds from the Kurdish heartland in the north, by introducing increasing numbers of Arabs into mixed Kurdish provinces.¹⁴⁰ Likewise, in the 1850's the United States Government began the "reservation period" of policy which forced tribes onto reservations, many of them distant from their actual native lands.¹⁴¹ Such widespread displacements from historical lands and ways of life leave a lasting impact from which both cultures are still recovering.

134 Clinton, *supra* note 1 at 15.

135 McDOWALL, *supra* note 2 at 10.

136 *Id.*

137 *Id.*

138 Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983). Referenced in YABLON, *supra* note 29 at 1627.

139 DAWN BRANCATI, Can Federalism Stabilise Iraq? 19 (The Washington Quarterly, 2004).

140 The Emergence of Saddam Husayn, 1968-79. *U.S. Library of Congress*, access at <http://countrystudies.us/iraq/12/8/2004>.

141 THOMAS, ET AL., *supra* note 168 at 313.

Based on the experience of the Native Americans, there are five main areas which the Kurds needed to pay particular attention to in order to ensure protection of their culturally significant territory and customs: 1.) active participation in the drafting committee responsible for the permanent Iraqi Constitution 2.) specific demarcations of Kurdish territory in the Constitution 3.) clear enumeration of the rights and powers retained by the territories and delegation of powers to the central government 4.) the jurisdiction of courts (federal and territorial) and deference given to regional customs are addressed and 5.) a clear articulation of the duties and obligations of the central government to territories and cultural minorities.

Active Kurdish involvement in the drafting of the constitution was particularly necessary to try and ensure Kurdish control of Kirkuk according to Article 58 of the Interim Iraqi Constitution.¹⁴² Moreover, specific acknowledgement of Kurdish rights under the Constitution is a key factor to interpret subsequent laws and intent by which the separate branches may view Kurdish rights. The Native Americans are only mentioned fleetingly in the U.S. Constitution, most notably in Article I which accords power to Congress, as well as the right to regulate trade under the Commerce power. These imprecise references with no clear designation of rights or acknowledgement of sovereign status have made it possible for the federal government to expand the Commerce power to an almost unlimited reach over tribal issues. In addition, with no express acknowledgement of tribal sovereignty or rights in the Constitution, there are no guaranteed protections for the Native Americans beyond what the judicial branch or Congress feels moved to acknowledge. In making the Kurdish language one of the two official languages of Iraq, and in clearly setting out the rights and liberties of Iraqi people, including complete equality before the law, the Kurds have taken steps to ensure that their existence and inherent rights as a people are recognised. This clear recognition of their status will provide a standard for future amendments and legal interpretations so that the Kurds as a culture and group will not be marginalised in the new federalist system.

Specific designations of territory needed to be made clear in the Constitution. Under the United States Federal system, the Native Americans were not a part of the drafting of the Constitution, and minority rights were not consciously taken into consideration in the designation of territory. It would have been quite possible in the nineteenth century to create states dominated by the Navajo, for example, or by Chicanos, Puerto Ricans, and Native Hawaiians. However, a deliberate decision was made not to use federalism to accommodate the self-government rights of national minorities.¹⁴³ Instead, it was decided that no territory would be accepted as a state unless these national groups

142 IRAQ-INTERIM CONST. Ch. 8, art. 58.

143 Kymlicka, *supra* note 2 at 98.

were outnumbered within that state.¹⁴⁴ Tribes believed their rights were provided for in various treaties made with the federal government. However, in *Lone Wolf v. Hitchcock* the Supreme Court held that Congress may unilaterally abrogate treaties, effectively extinguishing the rights of many tribes to sacred land.¹⁴⁵ This experience suggests that the Kurds should ensure that territorial designations are either specifically designated in clearly demarcated terms in the Constitution or that fair and concrete provisions for determining territorial designations are in place in the Constitution. It is debatable that the Constitution was firm enough in this respect.

A clear understanding of the competencies of the central federal government versus those of the regional governments should be provided for within the constitution. The Native Americans have no formal recognition of their sovereignty under the U.S. Constitution, and instead must rely on an ambiguous Federal-Indian trust relationship brought about through the “domestic, dependent nation” status of Justice Marshall’s early court decisions.¹⁴⁶ In order to ensure they do not face a similar fate, the Kurds needed to ensure that these divisions were clearly demarcated in the permanent Iraqi Constitution. Article 17 provides that regional authorities have the right to exercise executive, legislative and judicial authority, except for those powers stipulated in the exclusive powers of the federal government. This goes some way towards a clear reservation of power to the regions, such as the Tenth Amendment provides for the states. This is an issue the Kurds should seek to clarify to avoid ambiguities in federal versus regional competencies.

It is encouraging that adjudication by Kurdish peoples in Kurdish regions, and recognition of Kurdish judicial organs is a key component of the permanent Iraqi Constitution. The Native Americans have tribal courts, but have only limited jurisdiction. Federal court jurisdiction has much greater impact, mostly negative, on the Indian Tribes. So far under the Iraqi Constitution, the Kurds may have managed to avoid a similar scenario through provisions such as Article 137, which specifically recognises the validity of regional courts and legislation, including Kurdistan. However, federal law is recognised as the superior law if there should be conflict between regional and federal law. In addition, there is no mention in the Constitution of any cultural rights of the Kurds. Such a provision would shape the interpretation of legal principles in the future.

Finally, there should be a patent responsibility of the central government to the minorities groups. The Native Americans have the Federal-Indian trust relationship, stemming from the domestic dependent nation status. This doctrine, however, has been more effective as a shield against potentially negative government action versus a

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Id.

145

Lone Wolf, *supra* note 25.

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Cherokee Nation, 30 U.S at 2.

sword to obtain agency action, or damages for breach of that trust. There are different controlling precedents depending on whether a native group is trying to obtain damages or injunctive relief, or to broaden the trust doctrine to more “intangible factors” than breach of contract claims.¹⁴⁷ In all of these areas, the courts have emphasised the need for not only an affirmative assumption of the trust relationship from Congress, but also a substantive claim which states that Congress intended the form of relief applied for. The Kurds, may not have a need for a federal-Kurd trust relationship, yet their special position as a minority in an Arab state and special cultural rights should be acknowledged and specifically enumerated in the Constitution to avoid enfeebling court decisions like the Native American tribes have experienced.

Conclusion

“In ten years we will be extinct. We are dying. This is hard to talk about, but it needs to be told. What happens to us, happens to you. It has ripple effects throughout the world.”

-- Wilbert Fish, *Blackfeet Tribe*¹⁴⁸

147 Using the trust relationship to ask for damages has the most concrete case law background. This area is controlled by the decisions in *U.S. v. Mitchell*, 445 U.S. 535 (1983) and *Mitchell II*, 463 U.S. 206 (1983). In these cases the Quinault tribe alleged a breach of the trust doctrine for the governments’ mismanagement of timber contracts on the reservation. The courts have read *Mitchell I* and *II* together to interpret a standard for claims arising under the Indian Tucker Act 28 USC §1505. To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *II* are read to instruct 1.) a tribe must identify a substantive source of law that establishes specific fiduciary or other duties 2.) allege that the government has failed faithfully to perform those duties and 3.) the court must then determine whether a relevant source of substantive law “can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of duties the governing laws imposes.” *United States v. Navajo Nation*, 123 S.Ct. 1079, 1090 (2003).

Obtaining injunctive relief through use of the federal trust doctrine has a more limited history in the courts. The most notable case in this area is *Nevada v. US* where a tribe was trying to sue for increased water rights. *Nevada v. U.S.*, 463 U.S. 110 (1983). This case was thrown out on res judicata since the issue had been raised by the tribe in an earlier action. This case was viewed through the lens of water rights however, and the courts interest in finality and certainty in this area. It is not clear whether in other areas where the interest in finality isn’t so great whether a similar result would prevail.

The courts have recognised more tangible contract-like claims, but does not readily address intangible claims. In the *Fort Sill* decision the court stated that “absent specific language of statute the trust relationship did not extend to “intangible factors of tribal well-being, cultural advancement, and maintenance of tribal form and structure.” *Fort Sill Apache Tribe v. U.S.*, 477 F. 2d 1360, 1366 (Ct. Cl. 1973). Again in *Menominee Tribe*, where the tribe sued over the passage of the *Menominee Termination Act*, the U.S. Court of Claims held that there was no statutory basis for the claim. *Menominee Tribe v. U.S.*, 607 F. 2d 1335 (Ct. Cl. 1979). In this area, as with the more contractually based claims it would appear that a specifically worded statute providing for such a claim and a specified relief is necessary in order to prevail in court. The Supreme Court has not answered whether the requirement of statutory or regulatory basis for the assumption of trust obligations prevent federal courts from enforcing the Indian trust doctrine against officials where only equitable or declaratory relief is sought and basis of jurisdiction is not Indian Tucker Act.

148 Talk given by Wilbert Fish, *Montana Blackfeet Tribe* at Vermont Law School, (Dec. 9, 2004).

The fight to preserve sacred places and cultural territory is an ongoing one for the Native Americans and the Kurds. In recent years, the Native Americans have had some limited success in the courts regarding access to traditional hunting and fishing grounds under treaty rights, but have been unsuccessful in establishing a similar acceptance in the courts of a First Amendment claim to sacred sites. The Kurds of Iraq seem to be at the closest point in their history to attaining internationally and nationally recognized legal claim to the territory they have inhabited for thousands of years. This may change depending upon the drafting of the permanent Iraqi Constitution, and on the dynamics of the new Iraqi power-sharing government. However it is important to remember that the struggle of these individual cultures is not limited to their geographic area and the strife and violence that results does not happen in isolation. The struggles of these peoples do have ripple effects throughout the world, and have implications not only for the future freedoms of other indigenous peoples, but ultimately for the legitimate freedoms of all peoples.

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Torture And The Interrogation Of Prisoners: The Protection Of A Vulnerable Person's Basic Human Rights

"A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever ... This conclusion is in perfect accord with (various) International Law treaties ... which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment" ... These prohibitions are "absolute". There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice"

- H.C.5100/94 Public Committee against Torture in Israel and Others v The state of Israel, the General Security Services and Others, (1999) 53(4) PD 817 at paragraph 23 - Supreme Court of Israel.

The world in which we presently live has taken great strides to abolish torture and to protect those whose weaknesses are exacerbated by the arbitrariness of their national state. However, torture and serious ill-treatment remains endemic within many police forces of the world. The detainee, a person who enjoys one of the weakest positions within society with regard to the protection of his physical integrity, finds himself at the mercy of a state who perceives him to be unworthy of benefiting from the core basic human right to enjoy his liberty. We find ourselves living at a time when the European Court of Human Rights can confirm in *Hirst v United Kingdom*¹⁴⁹ that there can be no question that prisoners forfeit their fundamental rights and freedoms, other than the right to liberty, merely because of their status as detainees following conviction, yet in the same week a European Parliament delegation visiting Turkey to check on its

progress in human rights can declare that it found “shocking” reports of murders and mutilations.¹⁵⁰

The contradictions are not surprising. For half a millennium, western legal tradition endeavoured to accommodate the use of torture. Efforts were made to introduce safeguards to make confessions resulting from torture “reliable”. Then there was a slow turning away from its use in the eighteenth century and by the late twentieth-century, western legal tradition was declaring torture to be abhorrent and illegal. Yet, post 9/11, the self-same legal orders have found themselves considering legalising interrogation techniques that sit ill-at-ease with their liberal traditions, or at the least permitting evidence to be admissible in court proceedings, all in the name of acting against terrorism.

The weaknesses and vulnerabilities for prisoners can never be underestimated for they are at the mercy of those detaining them. Such vulnerability is clearly spelt out by the annual report of the Special Rapporteur on Torture presented to the United Nations. The report for March 2005 runs to some 452 pages and details the torture of detained persons in numerous countries, such ill-treatment being evidenced by the following, unfortunate not unusual, example concerning arrests and detentions in Azerbaijan:

“97. Sardar Agaev, the driver of Isa Gambar, leader of the Musavat Party, and Mahir Gambarov, a cousin of Isa Gambar. On the evening of 16th October 2003, they were detained together with four bodyguards outside Isa Gambar’s apartment building by about forty masked men, taken to the Organised Crime Unit (OCU) of the Ministry of Internal Affairs at around 7.30pm, and forced to sign blank statements, as well as a statement saying that they did not need a lawyer. They were taken to the Narimanov District Court, where they were sentenced to fifteen days of administrative detention for insulting a police officer, and returned to the OCU to serve their sentences in basement cells. On their arrival they were stripped naked and separated. Sardar Agaev was taken to a cell, where seven people beat him with fists and rubber truncheons, and kicked him. The beatings lasted for one hour. They threatened him, saying “We have a bottle and we will rape you now.” He was beaten again by four men in the morning, after which he lost consciousness, and water was thrown on him. As a result of the beatings to his kidney, he had blood in his urine. The beatings reportedly stopped following a meeting with a delegate from the International Committee for the Red Cross on 20th October. On 23rd October, he was transferred to Khataye temporary detention centre and released on 25th October, after being ordered to appeal his sentence to the Court of Appeals. On 16th October, Mahir Gambarov was taken to a room where there were about eight

persons waiting, and he was beaten for about an hour. He was held by the men and forced to beg for mercy in front of a portrait of the President. The next day he was hit on chest, slapped in the face, and beaten with rubber truncheons to the legs. He was handcuffed when he raised his hands to protect his face. His shoes and socks were removed and he was beaten on the soles of his feet and threatened with rape. Handcuffed, they would pull his fingers apart. The perpetrators would use a homemade tool with rubber pincers to pinch his fingers and would then plunge his hands into ice-cold water until he could not feel them. His feet were held under the feet of a chair and one of the perpetrators repeatedly sat down upon it. He was reportedly told by the Chief of the OCU (whose name is known to the Special Rapporteur) that in the backroom, "We have an electric chair there, and once you go there, you will speak, you won't be able to stop speaking"

There continues to be widespread abuses of prisoners' rights, especially with regard to their physical integrity. However, the position is not completely bleak, for during the course of the twentieth century there was a slow, but important, recognition by both states and national courts that those subject to arrest and detention continue to enjoy personal rights. Where certain national courts have proven themselves slow to identify such rights, supra-national courts have expressed a willingness to protect the rights of such individuals as well as states, and those who find themselves in detention have found succour in such protection. The weakest of individuals have often found protection from the strongest of international obligations and the attitude to torture of the democratic world has changed. Such advances have been slow and often in the face of opposition from elements of the judiciary. In the ground-breaking judgment of the United States Supreme Court in *Brown v. Mississippi*¹⁵¹ one of the suspects, a black tenant farmer, was seized by a deputy sheriff, accompanied by a number of white men, and hanged by a rope to the limb of a tree for a period of time. He was lowered and then hung again so that he continued to choke. He was brought down a second time and continue to deny his involvement in a murder and so was tied to a tree and whipped. He still denied the crime so was released. Two days later, he was arrested by two deputy sheriffs and again whipped. He was informed that they would continue whipping him until he confessed. The tenant farmer agreed to confess to such a statement as was dictated to him. Similar ill-treatment was meted out to the two fellow-accused. At the trial, the deputy sheriff did not deny the whippings. Despite this, the Trial Court admitted the confessions as evidence and the Supreme Court of Mississippi upheld the ruling. The conviction was overturned by the United States Supreme Court, whose Justices were shocked by the lower courts acceptance that confessions elicited by such brutal means could be deemed admissible. Justice Hughes concluded:

“It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions of these petitioners, and the use of the confession thus obtained as the bases for conviction and sentence was a clear denial of due process.”

As a consequence of this judgment, since 1936, American courts have required that to be admissible all confessions needed to conform to due process and to be “voluntary”. Such elusive concepts were subjected to further consideration and the Supreme Court made a number of findings. These include, *inter alia*, that the police could not strip a detained person of his clothes and keep him naked for some hours,¹⁵² could not threaten to arrest an ailing wife if the detained person failed to co-operate,¹⁵³ could not threaten to cut off financial aid to the detained person’s children and threaten to have them taken away¹⁵⁴ and could not isolate suspects so that friends and family were not able to effect his release or even contact him.¹⁵⁵ The underlying reasons for such judgments are identifiable in the judgment of Justice Frankfurter in *Rochin v California*,¹⁵⁶ in which the prisoner’s stomach was pumped so as to reveal the drugs he had swallowed. Justice Frankfurter ruled that evidence obtained by such means could not be admissible because such means “shock the conscience” and are “constitutionally obnoxious” because they “offend the community’s sense of fair play and decency”.

It can be said that the protection of human rights is a natural consequence of liberal democracies. Dictatorships and one-party states have a different attitude to the treatment of prisoners, many of whom may be members of the political opposition and subjected to repressive measures. For many years, a western European would believe that his right to liberty would be protected in his own country, but suspect harsh realities if arrested overseas. However, the English House of Lords in the *Pinochet*¹⁵⁷ case reminded those heads of state considering subjecting their own nationals to torture that they may be liable for prosecution outside of their own national borders.

An example of liberal democracies protecting basic human rights can be seen in the adoption of the European Convention on Human Rights by the majority of European states. Article 3 of the Convention protects individuals from torture and also from cruel, inhuman and degrading treatment. The Convention has adopted three differing levels of permissible thresholds with regard to such physical ill-treatment. Each threshold

152 *Malinski v New York*, 324 U.S. 401 (1945)

153 *Rogers v Richmond*, 365 U.S. 534 (1961)

154 *Lynumn v Illinois*, 372 U.S. 528 (1963)

155 *Leyra v Denno*, 347 U.S. 556 (1954)

156 *Rochin v Frankfurter*, 342 U.S. 165 (1952)

157 *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet* (No.3) [2000] 1 AC 147

represents a progression in seriousness, with torture deemed to be the most serious and degrading treatment the lowest of the three. Thus, actions move upwards from “degrading”, through “cruel and inhuman” and finally reach a level defined as “torture”. The formality of the approach taken is based upon an attitude which views the seriousness or intensity of the experience as being the primary consideration. The difficulty in such an approach is that a certain action may find itself overlapping different categories and so potentially be subject to different thresholds. This does not aid an authority endeavouring not to torture and further, does not aid a detainee who may perceive ill-treatment to be serious but finds that a court believes it to be of a lesser nature.

An important aspect of Article 3, when compared for instance with the United Nations Convention against Torture, is that Article 3 is not concerned with the motive behind the use of torture, whether it could be justifiable. The act itself is barred and so there is no risk of deviation from such protection due to subjective considerations. Article 3 simply permits no exceptions and derogation from the Article is not permissible, even in times of war or national emergency. Therefore, the Convention permits no justifiable reason or valid excuse as to why torture or inhuman or degrading treatment can occur. Its absolute nature and the breadth of the behaviour covered have made it a model approach.

As stated above, torture is prohibited in absolute terms and no derogation is permissible. Therefore, even if a State is suffering extreme crisis, it cannot resort to torture. The initial considerations as to torture by the European Court of Human Rights were marked by judicial conservatism. An early consideration is to be seen in the matter of *Ireland v United Kingdom*¹⁵⁸ where the British army used what was referred to as the “five techniques” when interrogating prisoners suspected of involvement with the Provisional Irish Republican Army (the IRA). The object of such techniques was to elicit information from detained persons, such as confessions detailing their involvement with the IRA and to detail secrets concerning that organisation. Such detainees were subjected to this treatment which consisted of: a) wall-standing: being made to stand by their cell wall, on their toes with their legs and feet apart for a number of hours; b) hooding: having a bag placed over their head throughout most of their period of imprisonment; c) noise: namely being subjected to continuous loud and hissing noises; d) sleep deprivation: being deprived of sleep and e) being deprived of sufficient food and drink to nourish the body. The Court found that such techniques used during interrogation caused:

“at least intense physical and mental suffering to the person subjected thereto ... They accordingly fell into the category of inhuman treatment (and) ... were also degrading since they were such as to arouse in their victims feeling of fear, anguish

*and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance*¹⁵⁹

The majority of the Court held that, although the treatment which the detainees received was of an inhuman and degrading nature, this did not escalate to the intensity required for it to be deemed “torture”. Therefore:

“Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood”

It may be said that such reasoning sits ill with the popular view of torture, namely that it is inflicted upon a person by an authority so as to obtain information. The world legal order moved on in its consideration of torture and Article 1(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 which defines torture as:

“For the purpose of this Convention the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The European Court of Human Rights appears to have accepted that its approach in *Ireland v United Kingdom* may have been too restrictive, particularly as torture is a device that may be used upon detainees. In *Selmouni v France*¹⁶⁰ the European Court relied upon Article 1 of the UN Convention to determine as to whether or not the treatment at issue constituted torture for the purposes of Article 3. The Court held:

“Certain acts which were classified in the past as “inhuman or degrading” as opposed to “torture” could be classified differently in the future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of

159 *Ibid* at para. 167

160 *Selmouni v France* (2000) 29 E.H.R.R. 403

human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”

Defining what constitutes “torture” has proven to be mercurial. In *Denizci v Cyprus*¹⁶¹ the applicants were arrested by Cypriot police officers between 4th and 22nd April 1994. They were ill-treated and were obliged to sign statements saying that they were leaving for the northern part of Cyprus of their own free will. They were then expelled to northern Cyprus, and told that they would be killed if they returned to the south. On 2 June 1994, upon his return to the south, the ninth applicant’s son, İlker Tufansoy, was shot and killed by unknown persons. The European Court held that the ill-treatment and beating of detainees did not amount to torture since it had not been shown to be for the purposes of extracting confessions. This requirement was confirmed in *Aydin v Turkey*¹⁶², though it appears to be narrower than the Torture Convention, in which severe pain or suffering is intentionally inflicted upon a person to elicit information or a confession is only one of the possible acts that could constitute torture.

It therefore follows that serious ill-treatment inflicted upon a detainee by a capricious guard or police officer which was not subjected in order to elicit information would be considered by the European Court to constitute cruel and inhuman treatment and not torture.

Degrading treatment or punishment encompasses treatment or punishment which is designed to humiliate or demean a person in a manner which shows a lack of respect for his dignity. It is characterised by the feelings that arise within the victim, including such emotions as fear, anguish, inferiority and suffering. These emotions come together and operate so as to break an individual’s moral and physical resistance. The European Court’s focus upon the subjective nature of the feelings results in there being a difficulty in establishing a full set of objective criteria which can be applied to all instances.

Torture is absolutely prohibited under all the major international human rights and humanitarian law conventions and the prohibition is deemed to form a part of customary international law. Unfortunately, it is believed that two thirds of states still practice torture.¹⁶³ The impact of 9/11 has shaken the approach in the remaining one third of countries.

161 *Denizci v Cyprus*, Application No. 25316/94, Judgment 23rd May 2001

162 *Aydin v Turkey* (1997) 25 E.H.R.R. 251

163 “Regarding the Torture of Others: Notes on what has been done – and why – to prisoners, by Americans,” Susan Sontag, *New York Times Magazine*, May 23 2004

The assertion that protection for a prisoner's rights is protection for all prisoners and their rights is now subject to debate following the upsurge in terrorist activity in the world. In the war on terrorism, politicians argue that tough measures are necessary so as to protect the security of their citizens. Such tough measures require the ability to interrogate suspected "terrorists" with strength and vigour. Indeed, with regard to those suspects held at Guantanamo Bay and Bagram Air Force base, U.S. officials have referred to the need to soften up prisoners by throwing them into walls,¹⁶⁴ whilst two Afghan nationals died whilst in U.S. custody at Bagram.¹⁶⁵ Public opinion appears to be divided upon the issue. The reality is that distinctions between different prisoners have long existed and many states have applied torture to suspected terrorists during the course of interrogation but, as such actions formed merely a part of ongoing human rights abuses in many of these areas, western jurists gave limited consideration as to whether or not such approaches could be lawful. Indeed, considerations often only arose when states found themselves having to deal with terrorism within its borders. Isolated incidents of terrorism did not shake longstanding commitment to a liberal, democratic approach of defending the notion of equality and fairness between prosecutors and defendants, the police and suspects.

However, a consequence of the upsurge in terrorist attacks upon civilian targets in developed nations has led to a crisis for liberal democracies. A respect for human rights and the existence of rights for detained persons is perceived by such states to be an indicator as to the healthiness of their liberal democracies. Those states willing to use repressive measures against the ordinary citizen are criticised and told to follow the western model with its inbuilt human rights protections. However, following 9/11 in the United States and the London terrorist attacks of July 2005, there has been excitable discussion as to whether or not the war on terror can justify the use of force in interrogations. Journalists have adopted the argument of the bar-room advocate and asked as to whether torture and serious ill-treatment is justified if the "detainee knows where the bomb is and the bomb could kill hundreds of people".

Such argument in the European and American media echoes those which have long prevailed in countries experiencing terrorism. In the dark days of the 1970s, the English police operated within the realms of physical interrogation when dealing with suspected members of the Provisional IRA. It was only in the early 1990s that the English legal system accepted that such ill-treatment had formed a part of a series of significant miscarriages of justice.

There remains a semantic willingness to distinguish "physical" interrogation from torture,

164 "U.S. decries abuse but defends interrogations", Washington Post, 26th December 2003.

165 "Two inmate Deaths at U.S. Base ruled homicides", Los Angeles Times, 6th March 2003

though the result is often the same. It may be said that the European Court of Human Rights damaged its reputation in the *Ireland v United Kingdom* (1978) 2 EHRR 25 case by classifying the interrogation techniques as cruel and inhuman, thereby suggesting that they did not cross the threshold for torture, when to most eyes they were techniques of torture. The failing of the Court in that judgment appears to have been acknowledged in recent years, with the Court being prepared to find incidents of torture where there has not even been any physical contact. This is a significant progress from the *Ireland v United Kingdom* judgment in which sleep deprivation was not considered to be an act of torture.

The failure to acknowledge such techniques as torture in the 1970s underlines one of the difficulties that a lawyer has in identifying torture as a simple definition which can be applied around the world, namely that it is a term which can be applied in a manner which suits the wants of the definer. What may be torture to one person may be warranted questioning to another. Torture may be cried by one state and denied by another, which may cite legal justification or assert that torture requires physical contact, the use of equipment or malignant intent to cause permanent harm. Following the scale of the 9/11 attack, the notion of “torture” was revisited. Sanford Levinson observed¹⁶⁶ that the word “torture” has been broadly defined in certain United Nations conventions whilst elsewhere it is defined more narrowly. However, in all such circumstances, the definitions are concerned not with not how the word is used but how the definer would like it to be used. There is no stable definition. This has meant that there are those who consider the interrogation of terrorist suspect in a physical manner as not constituting torture because of the circumstances surrounding the need for the interrogation.

The debate has received considerable scrutiny in Israel, a country long subject to civilian deaths following terrorist outrages. In the mid-1980s, it became clear that the Israeli General Security Service (GSS) was using physical force when interrogating Palestinians suspected of being involved in terrorism. This led to a commission of inquiry by a former Supreme Court President, Moshe Landau. The Landau Commission concluded that the use of moderate force by the GSS when interrogating suspected terrorists was permissible by virtue of the criminal law defence of necessity.¹⁶⁷ To protect the many potentially at risk necessitated the use of force upon a person being questioned as to future terrorist outrages and so it was clear that the lesser of two evils was the appropriate course of action to take. The Commission founded its conclusion upon the primary goal of such interrogation being to, “*protect the very existence of society and the state against*

166 Sanford Levinson “Precommitment” and “Postcommitment”: The Ban on Torture in the Wake of September 11” *Texas Law Review* 81 (2003) 2013

167 Experts of the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, (1989) *Israel Law Review* 149, at 167 - 176

*terrorist acts directed against citizens, to collect information about terrorists and their modes of organisation and to thwart and prevent preparation or terrorist acts which they are still in a state of incubation.*¹⁶⁸ Therefore, it was impossible to achieve such a goal, *“without the use of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.”*¹⁶⁹

The defence of necessity incorporates moral considerations for the justification stems from a situation where a wrongful action is deemed to be good due to its consequences. At its core is a belief that legitimate interests can be sacrificed, in certain circumstances, so as to protect interests which enjoy a significantly higher value. This is often considered to include the protection of many members of society and morally it is permitted for the many are indeed to be viewed as “innocents”. Necessity has made its way into many legal systems as a defence, though it is limited to circumstances where it would be an appropriate means to avert a danger.

The Landau Commission set out its guidance for GSS interrogators with regard to the interrogation of those suspected of involvement in terrorism.¹⁷⁰ Such guidance was to be reappraised by a Ministerial Committee on an annual basis. Over time, this Ministerial Committee permitted the GSS to employ, amongst others, the following coercive methods of interrogation:

- The placing of the suspect in the “shabach” position in which he was sat on a small, low chair, the seat of which is tilted forward, his hands are tied and his head is covered by an opaque sack before loud music is played;
- Making the suspect adopt the “frog crouch” where is required to stand on the tips of his toes;
- The tightening of hand and leg cuffs;
- The shaking of the suspect’s upper torso;
- Sleep deprivation.

Such an approach was challenged within the Israeli Courts and in 1999 the Israeli

168 Ibid at pg 157

169 Ibid at pg 184

170 Ibid at pg185

Supreme Court held that the coercive methods used by the GSS following the Landau Commission's recommendations were illegal.¹⁷¹ The reasoning of the Court is based upon a strident approach to the asserted powers and duties of the GSS. The Court assessed the power of the GSS to interrogate detained persons and held that it possessed a general power of interrogation similar to that of the "ordinary police force."¹⁷² The fact that the GSS was interrogating suspected terrorists did not give it greater powers. Whilst any form of interrogation will cause discomfort to the suspect, it must be conducted in a fair and reasonable manner. A number of methods used by the GSS were not fair and reasonable because they were used in, "*a manner that applies pressure and causes pain ... they impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner*"¹⁷³ and so could not be included with the general power to interrogate.¹⁷⁴

With regard to the argument that the defence of necessity could be applied to such questioning, the Court observed that the circumstances required that there be explicit legislative authorisation to justify such a use of force. A state could introduce such actions within its laws and so they would be lawful within municipal law. However, to permit such actions, there had to be explicit sanctioning.

The judgment indicates a fundamental weakness in applying necessity to interrogations. Whilst a person may argue necessity when they have killed or seriously harmed someone if they are aware that an act is about to take place, such as the victim shooting indiscriminately into a crowd, it is more difficult to assert that an interrogating officer "knows" that the suspect before him is a terrorist who knows where the "ticking bomb" is hidden. The suspect may only hold partial information, which by its nature would not lead to the "ticking bomb" being found in time. Indeed, the suspect may be an innocent who knows nothing at all.

A more appropriate defence could be that of self-defence, which would only be applied to the person known to have hidden the "ticking bomb". Self-defence justifies the use of force against an unlawful attack and is not limited to defending one's own physical integrity. It differs from necessity in that there is no sacrifice of a potentially innocent person's interest. The defence can only be used where the "victim" is using force, enabling the self-defender to reply with force. Therefore, self-defence initially looks a more attractive proposition to justify the use of force during the course of an interrogation. However, it is important to observe that during the course of the interrogation, the detainee is not

171 H.C.5100/94 Public Committee against Torture in Israel and Others v The state of Israel, the General Security Services and Others, (1999) 53(4) PD 817 at para. 23 - Supreme Court of Israel.

172 *Ibid* para. 32

173 *Ibid* para. 24

174 *Ibid* para. 31

actually using force. He may have primed the “ticking bomb” and be aware as where it is positioned, but what he is actually doing during the course of the interrogation is failing to give the details of his knowledge. His is an act of omission. Can an act of omission be declared to be a use of force? This will depend upon national law, since the difference in approach by states between acts and omissions is significant. As the Israeli Supreme Court detailed, in such circumstances it is for national law to explicitly detail the availability of a defence to the use of force within interrogation and a national state is to be mindful of international legal norms when establishing any potential defence.

The impact of 9/11 has also led to the authorities of western states to tiptoe around the strict laws of their own countries so as to be able to use questionable intelligence obtained by security services with less than blemish-free reputations. This has been referred to as “torture by proxy”. In 2003, the United Kingdom’s Ambassador to Uzbekistan, Craig Murray, made detailed accusations that information was being extracted from Islamic suspects under methods of extreme torture. He originally informed the Foreign Office as to his concerns but became aware that the information was being used by Britain and other western countries which officially disapprove of torture. In an article in the *Daily Telegraph*,¹⁷⁵ Murray remembered a number of Uzbek dissidents attending the Embassy. He recounted that they, “*turned up at my door with broken teeth and burns from torture. Some would spend the night in my home. On one occasion the grandson of a dissident I had met was murdered within hours of my speaking to his grandfather. They left his body on the doorstep. His hands and knees had been smashed with a hammer. It was a warning not to speak to me.*” Murray later stated that he felt that he had unwittingly stumbled upon “torture by proxy” and thought that western countries moved people to regimes and nations where it was known that information would be extracted by torture, and made available to them. This he alleged was a circumvention and violation of any agreement to abide by international treaties against torture.

The problematic nature of such evidence was considered by the English Court of Appeal in *A & Others*¹⁷⁶, an appeal concerning the detention of ten foreign nationals on national security grounds. The Home Secretary asserted that all ten were linked to groups or networks linked to al-Qaeda. Lord Justice Pill, in his judgment, detailed that after the attacks upon the United States on 11 September 2001, the United Kingdom Government formed the view that a public emergency existed due to a situation in which there was a threat to the life of the nation. Legislation was introduced to enable the authorities to arrest and detain suspected terrorists without the need to bring them to trial. The detainees were permitted to seek a review of their detention and the question arose as to whether or not the reviewing court should decline to consider any evidence presented

175 “The envoy silenced after telling undemocratic truths” Robin Gedye, *Daily Telegraph*, 23rd October 2004
176 *A and Others v Secretary of State for the Home Department (No.2)* 1 W.L.R. 414

by the authorities unless it was shown not to have come into existence as a consequence of torture or cruel, inhuman or degrading treatment. Lord Justice Pill concluded that, provided the Secretary of State was acting in good faith, recognition of his responsibility for national security was required when assessing his approach to the material before him. Therefore, notwithstanding the constitutional principle which forbade reliance, in any court of law, by the Secretary of State upon evidence obtained by torture which the state had procured or connived at, where there was no evidence of such procurement nor connivance, and providing that he was acting in good faith any reliance on evidence coming into his hands which had or might have been obtained through torture by agencies of other States over which he had no power did not offend the principle, so the evidence was admissible if it was relevant.

Therefore, in its judgment, the court legitimised the use of information in proceedings acquired as a result of torture, so long as it was committed by non-United Kingdom officials abroad. In doing so, the Court of Appeal choose to draw heavily on the classic notion of “dualism” in order to keep the potential effect of the United Nations Convention on Torture at arm’s length. It recognised that there were international treaty obligations but, and relying upon the dualism approach, such obligations did not have any direct effect in domestic legislation and so had to be transformed into domestic law first, such as through legislation. Only then could the courts apply such obligations. The concern with the judgment was the court’s willingness not to consider as to whether the prohibition on the use of information acquired through torture had acquired the status of customary international law. Such status would lead to it having an immediate impact upon domestic law. The concern must be that the rule of law has been undermined due to the pressures of the “war on terrorism” and that the consequence of such an approach is that the use of evidence obtained under torture is “an affront to the public conscience”. In reality, the obtaining of suitable evidence under torture legitimises the act of torture, even though it is prohibited by customary international law.

History dictates that its lessons are to be learnt and in the present arguments as to “ticking bombs” and terrorism, it is to be remembered that when judicial torture was permitted in Europe, the safeguards that developed over time were found to be flawed. There is no guarantee that the suspect is truly guilty or that the information given by way of torture is wholly reliable. This is so because the test nature of torture is that it is a test of endurance and not a test of truth. Pain may reduce an innocent person to admit to anything, while the pain threshold of the guilty may be such that the pleasure of making no admissions overrides the feelings of pain.

The pinnacle of the argument was expressed by Lord Carlile, a leading lawyer and Liberal Democrat peer appointed by the British government to review its anti-terrorism

legislation. He said with regard to the use of evidence obtained overseas by means of torture that it should be “proportional and not fixed”. However, he added: “I don’t think it is hypocritical to take action which is likely to have the effect of saving possibly dozens or hundreds of lives.”¹⁷⁷ The true question is will such action have the actual effect of saving so many lives? How many times has the wrong person been arrested? In the present day, one would hope that the police possessed such skills of interrogation and investigation that simple physical brutality is not the only means at their disposal.

Recent history highlights that whilst theory suggests that interrogations will be conducted by qualified interrogators, it is clear that many personnel within the detention system are unqualified and appear to be happy to act under orders from people just above them in the order who are also inadequately qualified. As the Abu Ghraib scandal proved, detainees could be abused by civilian personnel who appear to believe that such ill-treatment was condoned by the higher echelons of the military. The observations of the psychologist Stanley Milgram in his series of studies upon “Obedience to Authority” are relevant to this issue as he established the high percentage of “ordinary” persons who would accept requests by a perceived leader to punish someone once they had accepted that their leader would accept responsibility for the action. The protection of an individual prisoner’s rights is the protection of all individual prisoners’ rights and a basic right is the protection of a person’s physical integrity. The justification by Western powers as to the right to torture terrorist suspects, even if on a very limited grounds, will be a green light for many other States to justify their use of torture. In Turkey, Uzbekistan and Burma, to name but three countries with appalling human rights’ records, the term “suspected terrorist” will be a simple catch-all to justify continuing torture and serious ill-treatment of detainees.

In such circumstances, the lessening of protection for a very small group of detained persons on the grounds of “terrorism” could well lead to the lessening of protection for a much larger number of detained persons, who are already in a very vulnerable position. The justification for such lessening of protection does not withstand close scrutiny and appears to be based more upon “political” than “legal” reasoning. It is to be hoped that the international legal protection presently enshrined in customary international law will prove to be a sufficient bulwark against the attempts to legalise torture under a more public relations friendly term.

Sharon Linzey, Professor of Sociology and KHRP intern

Kurdish minority rights and Turkey's Compensation Law for Internally Displaced People

Ostensibly in an effort to combat PKK insurgency during the 1980s and 1990s, state security forces forcibly displaced thousands of rural communities in the Kurdish regions of south-east Turkey. Some 3,500 towns and villages were destroyed during this time. Illegal detention, torture and extra-judicial execution 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 homes¹⁷⁸ 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 5233). This offers 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. This article will examine why this compensation is necessary under principles of international law, explain the link between discrimination against the Kurdish minority and the right to compensation, and address the effectiveness of Law 5233 in meeting the human rights of the Kurds in Turkey.

178

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 southeast, and does not include people who fled violence stemming from the conflict between the government and the PKK, which included evacuations, spontaneous movement, displacement and related rural-to urban movement within the southeast itself. U.S. Committee for Refugees and Immigrants. <http://www.refugees.org/countryreports.aspx?id=1336>.

Compensation as a human right

Compensation for Internally Displaced Persons (IDPs) displaced as a result of conflict is an absolute under international and European human rights mechanisms. Human rights are the articulation of the need for justice, tolerance, mutual respect, and human dignity in all of our activity.¹⁷⁹ To violate the most basic of human rights, such as the right to own property, is to deny individuals their fundamental moral entitlements and to treat them as if they are somehow less than fully human and thereby undeserving of basic respect and dignity.¹⁸⁰ Violations of basic liberties and freedoms are often inflicted upon citizens by their own governments and therefore the international community of nations has placed limits on the unrestrained use of power by a state against its people. These are protected by international law, which has several sources: international conventions, which establish rules expressly recognised by the contesting states; international custom, as evidence of general practice accepted by law; and “the general principles of law recognised by civilised nations”.¹⁸¹

Underlying the laws that prohibit the denials of freedom and liberty is the principle of non-discrimination (Article 14 and Protocol 12 of the ECHR) and the notion that certain basic rights apply universally—in all times and in all places, for all peoples.¹⁸² These are widely known as *jus cogens* or peremptory norms.¹⁸³ According to Article 53 of the Vienna Convention, “a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Although the denial of *jus cogens* norms are often irreparable, international and national courts have required states to pay victims compensation for both material and psychological injury sustained as a direct result of their actions or policies. Compensation not only sanctions the state, but forces the state to acknowledge the violations, in the hope that a society that once tolerated human rights abuses will come to terms with its past, accept responsibility, and make a good faith effort to change its ways.¹⁸⁴

179 Michelle Maiese, “What it Means to Violate Human Rights,” at http://www.beyondintractability.org/m/human_rights_violations.jsp.

180 Id.

181 See Article 38 of the Statute of the International Court of Justice. Online at http://www.icj-cij.org/icjwww/ibasic-documents/ibasictext/ibasicstatute.htm#CHAPTER_II.

182 Don Hubert and Thomas G. Weiss et al., *The Responsibility to Protect: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty*. Canada: international Development Research Centre, (2001), at 144.

183 The Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

184 See Ellen L. Lutz, “After the Elections: Compensating Victims of Human Rights Abuses,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, General Considerations, Neil J. Kritz, (ed.), U.S. Institute of Peace Press, (1995), at 557.

A victim's right to compensation has its legal foundation in customary international law.¹⁸⁵ The obligation to provide compensation for victims of injustice has become part of generally accepted international humanitarian law as well.¹⁸⁶ Article 13 of the ECHR and Article 8 of the Universal Declaration of Human Rights (UDHR) state that everyone has the right to an effective remedy. Article 10 of the American Convention on Human Rights refers to a "right to be compensated in accordance with the law."¹⁸⁷ Such laws stress the importance of publicly recognising the damages caused by injustice and the need to address the denial of victims' rights in a public way.

Compensation and non-discrimination against minorities

The official Turkish stance toward the Kurds since 1923 has been that they are not a minority. The official view is that only non-Muslim communities have 'minority rights' (described as Jews, Armenians and Greeks in the Lausanne Treaty of 1923 and the Turkish Constitution), and that human rights are *individual* matters, not collective. As such, they should be resolved on an individual basis.¹⁸⁸ Notwithstanding Turkey's description of her Kurdish population, international law and human rights conventions grant minorities certain definable and non-derogable rights which have been and are continued to be denied the Kurds.

More than anywhere else, the scale of village destructions and internal displacement of the Kurds in Turkey has most closely resembled the treatment of the Iraqi Kurds during the Anfal campaigns under Saddam Hussein. It is widely held that several thousand villages were destroyed or evacuated by the Turkish military so that, along with the creation of large-scale infrastructure projects such as the construction of dams, between 3 and 4 million Kurds have been forcibly displaced since 1985. Although Turkey has a different standing among the community of nations than did the despotic regime of Saddam Hussein, a quick glance at the recent experience of the Kurdish population in Turkey shows remarkable parallels with events across the border.

The Kurds in Turkey have long been perceived as a threat to territorial integrity and

185 Lutz, *supra* at 553.

186 Theo van Boven, "United Nations Commission on Human Rights: Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, General Considerations, Neil J. Kritz, (ed.), U.S. Institute of Peace Press, (1995), at 508.

187 *Id.*, at 515.

188 See Conny Fredriksson address, "Kurds in Turkey: From Assimilation to Regional Self-rule." The EU, Turkey, and the Kurds International Conference, November 22-23, 2004, European Parliament, Brussels. Available at www.khrp.org

treated with suspicion and outright hostility. Although not specific to Turkey alone, they have suffered severe repression and brutal abuse, being subject to deportation and village destruction programmes orchestrated to dissipate Kurdish territorial dominance in specific areas. The Kurds are generally excluded from legislation devised to protect minorities which is consistent with the fact that they are continually excluded from public life. The European Court of Human Rights has repeatedly found Turkey in violation of the prohibition of torture or ill-treatment, right to a fair trial, right to life and ECHR standards on human rights. As a result, a large proportion of the world's refugee and asylum seeker population originate from Turkey, particularly the Kurdish regions.

Many forms of compensation are open to governments to repair and restore a damaged minority group, but what must take priority to paying monetary compensation or even making reparations or restitution, is that the government truly convey a sense of *regret* to the people it has harmed. Of course, this is difficult to do if a state is not sorry for its past actions. Compensatory mechanisms, such as Law 5233, should be used to demonstrate the change of attitude that a state either has, or intends to adopt in the future, toward its injured people group. Anything less than an 'about-face' in terms of state policy accompanied by compensation will only be temporarily *sufficient*¹⁸⁹, because anything less fails to deal adequately with the problem. Arbitrary deprivation of property, as is the case with the majority of displaced Kurds in Turkey, will be a continuing source of instability, reinforcing a sense of injustice among internally displaced persons.¹⁹⁰ Restitution, as an act of compensation is an essential step in 'making right' a moral 'wrong' committed by the state. However, these steps can only be complete by correcting the state's behaviour for the present and future. This final step serves to signal, both to those within and outside the state, a change in policy with the accompanying respect for rights that was lacking in the first place.¹⁹¹ The following section will examine the extent to which Law 5233 displays this signal.

The Compensation Law: its machinery and effectiveness

Law 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

189 The October 2004 EU progress report on Turkey's compliance with EU Standards concluded that Turkey had sufficiently fulfilled the criteria required to commence negotiations, while recognizing that much work was needed in order to fully comply.

190 Scott Leckie, "New Directions in Housing and Property Restitution," *Returning Home*, (2003) at 39.

191 *Id.*

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 on compulsory purchases.

Although Law 5233 is a welcome step in the right direction, since it purports to offer internally displaced persons a chance to receive compensation for the loss of houses, livestock, farming equipment, farms and possessions, there are a number of potential areas of concern, which are set out below:

1. Law 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.
2. 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.¹⁹² However, the Compensation Law excludes payment for suffering and distress, symptoms commonly felt by internally displaced persons who saw their homes and crops burned down and their livestock destroyed.
3. The constitution of the assessment commissions, with six civil servants and just one outside independent member, invites 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. Future promotions, job security and politics all play a strong role in how commission members make their decisions.
4. Many applicants are automatically excluded from applying to the commissions, either because they have already been compensated, albeit at a comparatively low level; because they are unable or afraid to state the

192

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.

real reason for which they abandoned their home (Law 5233 does not compensate those who migrated for non-security reasons); or because IDPs who were convicted for aiding and abetting the PKK¹⁹³ are excluded from filing applications under Law 5233, forcing them to pay twice for “sheltering members of an armed organisation”;

5. Law 5233 contains no provision for legal aid to assist applicants in preparing their claims, or assessing an amount of compensation proposed by the commissions, expecting poorly educated farmers who cannot afford legal assistance to assemble comprehensive and complex documentation on their own;
6. Applicants had just one year, which expired on 27 July 2005, to apply for remedy under Law 5233, creating enormous pressure on applicants and lawyers, which inevitably led to poorly prepared applications, whilst some potential applicants missed the deadline;
7. The local commissions have only nine months in which to process these claims. 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. Decisions regarding an award of compensation, or indeed lack of, are therefore unlikely to be adequately deliberated;
8. Law 5233 requires that payments of more than 20 billion Turkish Lira require Interior Ministry approval. This will cause delays or obstruct payments, particularly since most claims are likely to exceed that figure;
9. There is no internal appeals procedure within the machinery of the local assessment commissions;
10. 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;
11. Under Law 5233, accepting an award from a compensation commission means giving up all rights to other claims.

193

A large number of people were convicted of aiding and abetting the PKK in the 1990s in trials that were subsequently ruled by the ECHR to be unfair.

Conclusion

As the European Commission considers Turkey for accession to the EU, Turkey should be diligently focusing on honouring the Copenhagen Criteria to respect and protect its minorities, as well as heeding the many precedents set out by the European Court of Human Rights in its judgments against Turkey.

Law No. 5233 is a prime example of how Turkey may appear *sufficiently* to have fulfilled¹⁹⁴ the letter of law when moving to align itself with EU standards, while never fully complying. Although there have been some improvements and changes in the law, e.g. ending the death penalty, the permission for a limited number of broadcasts and education in the Kurdish languages,¹⁹⁵ and eased restrictions on foreign organisations working in the country,¹⁹⁶ the lack of and uneven implementation has given rise yet again to the question of Turkey's commitment to the political criteria, and indeed its commitment to the recompense for those displaced. For many, Law 5233 is yet another example of Turkey's lack of will to commit to any real implementation of the political reforms it has undertaken and the lack of European Commission enforcement of the political criteria as set out in the Copenhagen criteria.

194 See footnote 189.

195 These privileges have already been set aside due to bureaucratic obstacles and lack of practical government support (i.e., enabling legislation, course materials, dialogue and funds).

196 For example, in 2000 Amnesty International was allowed back into Turkey after being banned.

Lucy Claridge, Legal Officer, KHRP

The EU, Turkey and the Kurds: Second International Conference

From 19th to 20th September 2005, a second international conference organised by EU-Turkey Civic Commission (EUTCC) was held at the European Parliament in Brussels. The conference was organised with the support of Kurdish Human Rights Project, Medico International, the Bar Human Rights Committee of England and Wales and Rafto Foundation. The conference was called to evaluate developments in Turkey's accession process since the decision of the European Council to enter into accession negotiation, on 17 December 2004. It brought together MEPs, other politicians, human rights defenders, writers, academics, lawyers and experts on the Kurdish issue to exchange ideas and generate dialogue on the Turkey-EU accession process.

The EUTCC was established in November 2004 as the outcome of the first international conference on 'The EU, Turkey and the Kurds' held in the European Parliament in Brussels on 22-23 November 2004. The aim of the EUTCC is to promote the accession of Turkey as a member of the EU, and to help to guarantee respect for human and minority rights and a peaceful, democratic and long-term solution to the Kurdish situation. To this end, the EUTCC will monitor and conduct regular audits of the European Commission's performance in ensuring Turkey's full compliance with the accession criteria, as defined within the meaning of the accession agreements. It will also make recommendations of measures that could advance and protect human rights; act as a point of contact and exchange information with the institutions of the EU and other governmental and non-governmental organisations; and raise public awareness of issues affecting the EUTCC's work or mandate.

The Conference noted with alarm the escalating military conflict in south-east Turkey and the failure of certain state institutions to adhere to its obligations under the European Convention on Human Rights in accordance with the spirit and terms of its own recent reform packages and commitments given under the Accession process. The indictment of Orhan Pamuk is but one disturbing example. However, the Conference supported the important recent declaration of 12 August 2005 made by the Prime Minister of Turkey concerning the need for further democratic reform. It also welcomes the positive

response of the Kurds to this declaration. The Conference also expressed its concern over the tenor of recent debates concerning Turkey's proposed admission to the EU articulated during the recent referendums. The Conference reiterated its support for the creation of a multi-cultural Europe and called upon leading European politicians to lead the debate in this regard. In particular, the Conference called upon the British Presidency of the EU to ensure that talks with Turkey are opened as planned on 3 October 2005 and to urge Turkey and other member states to help foster a climate of peace so that a democratic platform for dialogue can be established between Turks, Kurds, and other constituent peoples and minorities who are resident in Turkey.

In its final resolution, the conference acknowledged the Turkish government's progress on reform, but expressed concern over lack of implementation in the sphere of human rights since the last conference in November 2004. It called upon both the Turkish government and the EU to ensure that Turkey fully complies with its human rights obligations in relation to torture, the plight of internally displaced people, and protection of women and children. It also urged the Turkish government to ratify the various UN Instruments concerning minorities and to respect the existing cultural and minority rights of all groups. The conference reaffirmed the centrality of the Kurdish question to the establishment of a stable, democratic and peaceful Turkey capable of entering the EU, and called for a peaceful resolution to the conflict, as well as measures by the Turkish Government conducive to a democratic resolution. The full text of the resolution is set out below:

FINAL RESOLUTION

Pursuant to the presentation of Conference papers and interventions made by delegates, this Conference has unanimously resolved to adopt the following declarations concerning the EU-Turkey Accession Process and initiate the following calls for action to be undertaken by the EUTCC and other relevant parties.

The Conference issues the following declarations:

- 1) This Conference reaffirms its conditional support for the EU Turkish Accession Process as declared in the Final Resolution of the First Conference in 2004;
- 2) The Conference declares its further support for the opening of negotiations on 3 October 2005 and calls upon all member state governments to support

this process;

- 3) The Conference acknowledges the Turkish Government's progress on reform, but expresses its concern over lack of implementation and other developments in the sphere of human rights since 17 December 2004. The Conference urges the government to renew the reform process with the commencement of accession negotiations, and to fully implement legislative reforms so far enacted;

Human Rights and Accession

- 4) The Conference supports the undertakings by the EU that reform in the area of fundamental rights, democracy and the rule of law must be strengthened in the course of accession negotiations and welcomes the commitment by the Commission expressed at this Conference to continue to monitor the reform process;
- 5) The Conference maintains the view that Turkey has not yet fulfilled the political elements of the Copenhagen Criteria, and reiterates that its support for the accession process is dependent upon the institutions of the EU robustly enforcing accession standards. There should be no further compromises on membership criteria akin to the EU decision to allow Turkey access to the negotiating table for "sufficiently" fulfilling the Copenhagen Criteria;
- 6) The Conference specifically calls upon both the Turkish Government and the EU to ensure that Turkey fully complies with its human rights obligations in relation to torture, the plight of internally displaced people, and protection of women and children;
- 7) The Conference also calls upon Turkey to ratify the Framework Convention on the Protection of Minorities as well as other UN Instruments concerning minorities and to respect the existing cultural and minority rights of all groups, including the rights of the Assyrian minority in Turkey.

The Centrality of the Kurdish Question

- 8) The Conference asserts that the resolution of the Kurdish conflict is essential to the establishment of a stable, democratic and peaceful Turkey capable of

entering the European Union. True democratic reform can only occur if Turkey undertakes new political reform to its state institutions and banishes adherence to ethnic nationalism which is the root cause of the conflict and Turkey's endemic instability;

- 9) This Conference therefore asserts that the Kurdish people and their representatives should be given a participatory role in the accession process and in any debate over Turkey's democratic constitutional future;
- 10) The Conference acknowledges as a positive step Prime Minister Erdogan's historic 12 August 2005 acknowledgement of the existence of the Kurdish question;
- 11) The Conference welcomes as a positive step the month-long ceasefire called by Kongra-Gel in response to the Prime Minister's recent initiative;
- 12) However, the Conference further asserts that more must and can be done on both sides and calls for the following confidence building measures to be adopted;

Confidence Building Measures

- 13) The Conference hereby calls upon all relevant parties involved in the armed conflict to forthwith stop all hostile military operations in the region and to henceforth pursue non-violent resolutions to the conflict;
- 14) Further, the Conference calls upon all political parties in Turkey to help foster the conditions within Turkey for a democratic platform for dialogue;
- 15) Pursuant to any extension of a ceasefire, the Conference calls upon the European Commission to endeavour to use its good offices to actively develop a democratic platform whereby the constituent elements of Turkey, including the Kurdish people and their representatives, can freely enter into dialogue and debate with the government over possible reform to the Constitution;
- 16) In this respect the Conference recalls the following declaration in the EU-Commission's 1998 report that:

“A civil and non-military solution must be found to the situation in the Southeast Turkey particularly since many of the violations of civil and political rights observed in the country are connected in one way or another with this issue”;

- 17) The Conference further recalls the EU Parliamentary Committee on Foreign Affairs in December 2004 urged:

“all parties involved to put an immediate end to the hostilities in the Southeast of the country” and invited “the Turkish Government to take more active steps to bring reconciliation with those Kurdish forces who have chose to abandon the use of arms”;

- 18) The Conference also calls upon the Turkish Government to fully and unconditionally comply with all international instruments concerning human and minority rights guaranteed by the European Convention of Human Rights, in particular, the rights concerning freedom of expression and association without discrimination, in order to ensure that such a democratic debate can take place;

- 19) In particular, the Conference calls upon the Turkish Government to ensure that all legally constituted Kurdish democratic parties are allowed to engage in peaceful political activity without interference or constant threat of closure, in accordance with Articles 10 and 11 of the European Convention of Human Rights;

- 20) The Conference further calls upon the Turkish Government to fully comply with all judgments of the European Court of Human Rights particularly in relation to those that pertain to the Kurdish conflict. The conference notes the European Commission’s 2004 Report’s particular citation of the ECHR case of Abdullah Öcalan v Turkey in this regard;

- 21) In this respect the Conference calls upon the Turkish Government to begin a public debate about the constitutional recognition of the existence of the Kurdish people within Turkey;

- 22) The Conference also urges all member states of the European Union to individually assist in the creation of a democratic platform for dialogue between Turkey and the Kurds and fully comply with their own obligations under Articles 10 and 11 of the European Convention on Human Rights in

respect of those Kurdish organisations and individuals resident in Europe who are concerned to promote the same;

- 23) The Conference endorses the recommendations of the Council of Europe's representative at this Conference regarding the creation of a Committee for Reconciliation;
- 24) To assist this process, the Conference hereby agrees to set up its own embryonic Committee for National and Cultural Reconciliation under the auspices of the EUTCC consisting of leading European, Turkish and Kurdish politicians and representatives, NGOs, academics, intellectuals and human rights activists; and
- 25) Finally, the Conference mandates the EUTCC, its directors and committees, to engage and campaign on both a political and civic level across Europe in support of Turkey's accession bid to join the European Union on the basis as outlined in this Resolution.

Section 2: Case Summaries and Commentaries

A. Case News – Admissibility decisions and communicated cases

Right to Life

Kanlibaş v. Turkey
(32444/96)

European Court of Human Rights: Admissibility Decision of 28 April 20005

Right to life – Prohibition of torture – Right to a fair trial – Freedom from discrimination – Right to an effective remedy – Articles 2, 3, 6, 13, 14 and 18 of the Convention

Facts

This is a KHRP assisted case. The applicant, Hüseyin Kanlibaş is a Turkish national of Kurdish origin who was born in 1960 and lives in İzmir.

On 12 January 1996, the applicant read a report in the *Milliyet* newspaper stating that Ali Ekber Kanlibaş (the applicant's brother) was one of five PKK militants killed in clashes with the security forces on 9 January 1996 in the rural area of the Kangal township of Sivas, Turkey. On 13 January 1996, the applicant allegedly received a licence signed by the Public Prosecutor authorising him to take the corpse and bury it. When the applicant, together with other five people, started to clean the body, they complain that they found evidence that the corpse had been subjected to torture.

Complaints

The applicant claimed a violation of his right to life under Article 2 of the Convention with regard to Ali Kanlibaş's treatment and his subsequent death.

The applicant also argued that the lack of judicial proceedings necessary to protect the right to life was in breach of Article 2 of the Convention.

Moreover, the applicant claimed a violation of Article 14 taken in conjunction with Article 2 as he argued that only Turkish nationals of Kurdish origin were subject to such treatment, which in turn constituted discrimination.

The applicant further complained that Article 18 taken together with Article 2 had been violated as the goal to be achieved did not constitute a valid restriction to the right to life.

The applicant also claimed that Article 3 had been violated with regard to the torture sustained by the applicant's brother. Moreover, this ill-treatment caused great pain and anguish to the applicant which also constituted a violation of Article 3.

The applicant complained that his brother's right to a fair trial under Article 6 of the Convention had been infringed because his guilt or innocence had not been established prior to his death. The applicant further complained that there had been a violation of Article 6 because of the failure to investigate his brother's cause of death.

Finally, the applicant argued that Article 13 had been breached as he was denied the right to an effective remedy.

Held

With regard to the alleged violations of Articles 2 and 3, taken together with Articles 13, 14 and 18, the Court held that Article 35 of the Convention made it clear that it may only deal with a matter after all domestic remedies had been exhausted, which was not the case here.

The Court concluded that the complaints under Articles 14 and 18 could only be declared admissible if an admissible complaint existed under Articles 2 and 3, which was not the case here. Therefore, the arguments under Articles 14 and 18 could be taken no further.

The applicant's complaint under Article 13, in combination with Articles 2 and 3, was held to be inadmissible for the same reason.

However, the Court found that the Turkish authorities may have failed to conduct an effective investigation into the applicant's brother's death, which could constitute a violation of Articles 2 and 3. The application was therefore admissible to this extent.

The Court found no violation under Article 6(1) because the case against the applicant's brother had been abandoned, and therefore this part of the complaint was declared

inadmissible. The Court did not address the alleged violation as a result of the failure to investigate the cause of the applicant's brother's death, but only procedural aspects of Articles 2 and 3 were declared admissible.

Osmanoğlu v. Turkey

(48804/99)

European Court of Human Rights: Communicated on 25 April 2005

Right to life – Prohibition of torture– Respect for private and family life – Right to an effective remedy – Prohibition of discrimination - Articles 2, 3, 5, 8, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Muhyettin Osmanoğlu, is a Turkish national who was born in 1942 and lives in Diyarbakır. He is the father of Atilla Osmanoğlu, who has disappeared since 25 March 1996.

According to the applicant, on 25 March 1996, he arrived at his store in Diyarbakır city and saw two men escorting his son. They were armed and carried walkie-talkies. He asked them who they were and was told that they were police officers working for the Security Directorate, who wanted to talk to his son about a canteen contract. They said his son would be back in half an hour. When his son did not return on the evening of the 25 March 1996, the applicant feared his son had been taken into custody. He then applied to the Diyarbakır Governor's Office and to the Diyarbakır State Security Chief Prosecutor. The applicant has not seen his son since.

Communicated under Articles 2, 3, 5, 8, 13 and 14 of the Convention.

Prohibition of torture

Karaoğlu v. Turkey

(60161/00)

European Court of Human Rights: Admissibility Decision of 10 May 2005

Right to life – Ill-treatment – Right to fair trial - Freedom of expression – Freedom of association – Freedom from discrimination – Articles 2, 3, 6, 10, 11 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Fikret Karaoğlan, is a Turkish national of Kurdish origin, who was born in 1971 and lives in Belgium.

The applicant was a student at the University of Ege, Turkey. He also worked briefly as a journalist in a newspaper and a television station. The applicant was searched by the police following instructions of the Izmir chief public prosecutor regarding his alleged involvement in the throwing of a Molotov cocktail on behalf of an illegal organisation at a branch of Halk Bank in 1995. The applicant claimed that he was handed over to a police officer by the Anti-Terror branch. He claimed that during his arrest he was dragged by force and subjected to beatings, although these claims were contradicted by a medical report of the Dağkapı health centre which stated that there were no signs of ill-treatment.

On 22 March 1998, the applicant was brought before the public prosecutor at the Diyarbakır State Security Court where he denied the charges brought against him and claimed that his statement during custody was obtained under duress. On 4 May 1998, the Public Prosecutor at the Izmir State Security Court filed a bill of indictment accusing the applicant of membership of the PKK. On 7 November 1998, the applicant submitted a written defence to the Izmir State Security Court alleging that throughout his life he had tried to stay away from political activity. On 15 December 1998, the Izmir Security Court convicted the applicant as charged and sentenced him to twelve years and six months imprisonment. Although the applicant appealed the decision on 30 December 1998, the Court of Cassation upheld the judgment on 1 July 1999. According to the medical reports prepared on 19 May 2000, the applicant was suffering from post traumatic stress syndrome as well as somatic injuries and symptoms. However, the doctors refused to give statements to the court since they feared they might face persecution.

Complaints

The applicant complained under Article 3 of the Convention that he was subjected to ill-treatment during his arrest and while he was held in police custody.

The applicant contended under Article 5(1) (c) that his detention in police custody was not attributable to any of the exhaustive purposes listed in the Article and hence was unlawful.

The applicant also claimed that he did not receive a fair trial by an independent and impartial tribunal, violating Article 6 of the Convention.

Moreover, the applicant submitted that his right to freedom of expression and freedom

of peaceful assembly under Articles 10 and 11 of the Convention had been breached.

The applicant also complained under Article 13, in conjunction with Article 3, that he lacked an effective remedy due to the absence of an independent authority with which he could lodge a complaint about his ill-treatment.

The applicant also claimed under Article 14 that he was discriminated against as a result of his Kurdish origin.

Held

The Court found that the applicant's complaint under Article 3 regarding the alleged ill-treatment to which he was subjected during detention was unsubstantiated. Consequently this part of the submission was inadmissible.

With regard to the applicant's complaint under Article 5, the Court noted that the applicant was released from police custody on 22 March 1998, whereas the application was introduced to the Court on 23 December 1999, and therefore found introduced out of time.

The applicant's complaint regarding his right to a fair hearing under Article 6 was declared admissible.

As far as the applicant's complaints under Article 10 and 11 were concerned, the Court held in accordance with Article 35(1) of the Convention that it may only deal with a matter after all domestic remedies have been exhausted, which was not the case here. As a result this part of the submission was not admissible.

The Court found that the applicant did not have an arguable claim concerning a potential violation of his rights under Article 3, which would have required a remedy within the meaning of Article 13. Consequently that part of the submission was also inadmissible.

The Court also held that there was no evidence that the applicant had been discriminated against within the meaning of Article 14. This part of the submission was therefore deemed to be inadmissible.

Right to Liberty and Security

Amiryan v. Armenia

(31553/03)

European Court of Human Rights: Communicated in June 2005

Right to liberty and security – Fair trial - Freedom of expression - Freedom of assembly and freedom of association – Right to an effective remedy – Freedom from discrimination - Articles 5, 6, 10, 11, 13, 14 and Article 3 of Protocol No. 1

Facts

This is a KHRP assisted case. The applicant, Sargis Grigor Amiryan is an Armenian national who was born in 1948 and lives in Ashtarak, Armenia.

The applicant is a member of “Yerkrapah Voluntary Union”, an NGO of Karabakh war veterans. In February and March 2003, the applicant acted as an authorised election assistant during the Armenian presidential election. In the aftermath of the first and second rounds of the election, a series of protests were organised in Yerevan by the opposition parties.

On 22 February 2003, two police officers came to the applicant’s apartment and informed him that he was to be taken to the police station, where he was subsequently questioned about his participation in previous demonstrations. The applicant was subsequently brought before a judge and confirmed his name, whereupon the judge stated, “Fifteen days of administrative detention. Get out.”

Whilst in detention, the applicant was not allowed to reply to his wife’s letter nor was his lawyer allowed to visit him despite several attempts. On 28 February 2003, after being advised to do so in the detention facility, the applicant wrote a plea of mercy in which he was told to express his genuine remorse for his past actions, which the authorities would use to negotiate an early release. On 4 March 2003, the applicant was released but was requested by the bailiff to pay an administrative fine of 1,000 Armenian drams.

Communicated under Articles 5, 6, 10, 11, 13, 14 and Article 3 of Protocol No. 1.

Sapeyan v. Armenia

(35738/03)

European Court of Human Rights: Communicated in June 2005

Right to liberty and security – Fair trial - Freedom of expression - Freedom of assembly and freedom of association – Right to an effective remedy – Freedom from discrimination - Articles 5, 6, 10, 11, 13, 14 of the Convention and Article 3 of Protocol No. 1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Zhora Sapeyan is an Armenian national who was born in 1954 and lives in Ashnak, Armenia.

The applicant is the chairman of a regional branch of the “Republic” Party. In the aftermath of the first and second rounds of the presidential election of March 2003, a series of protests were organised in Yerevan by the opposition parties.

On 26 February 2003, when another demonstration was supposed to take place in Yerevan, the applicant and two other members of his party drove from Ashnak village to Yerevan. On the road to Yerevan, the car was stopped by individuals in civilian clothes who introduced themselves as officers of the Aragtsotn Regional (District) Police Department. The applicant and his companions were taken to the Police Department, where they were held for several hours without any explanation. The applicant was then transferred to the Central District Police of Yerevan and was asked a number of questions regarding his intended participation in the demonstration of 26 February 2003.

The applicant was subsequently taken to the Kentron and Nork-Marash Districts Court of Yerevan where he was escorted into a judge’s office and was asked a few questions regarding his intention to attend the demonstration as well his previous attendance at another demonstration on 20 February 2003. The applicant was sentenced to ten days administrative detention. This decision was stated to be not subject to appeal. The applicant’s lawyer eventually lodged an appeal to the Criminal Court of Appeal and the applicant’s sentence was reduced to a penalty of 1,000 Armenian drams. The applicant was then released. On 14 May 2003, the applicant participated in a demonstration in Yerevan. On 21 May he was again taken to a police station and transported to the court. He was asked to wait in the car and was then given a judgment of the Yerevan Nork-Marash Court of First Instance subjected him to an administrative fee of 1,000 Armenian drams.

Communicated under Articles 5, 6, 10, 11, 13, 14 and Article 3 of Protocol No. 1.

Gasparyan v. Armenia

(35944/03)

European Court of Human Rights: Communicated in September 2005

Arbitrary detention – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of assembly and association – Right to free elections – Articles 5, 6, 11, 13 and 14 of the Convention, and Article 3 of Protocol No. 1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Maksim Gasparyan, is an Armenian national who was born in 1948 and lives in Yerevan, Armenia.

On 19 February 2003, a presidential election took place in Armenia. The applicant acted as an authorised election agent for the main opposition candidate. The applicant was assigned a polling station for the Shengavit District where his duties included preventing irregularities or violations of election procedure.

According to the applicant, on 26 February 2003 he was taken to the Shengavit District Police where the police officers drafted a protocol of administrative offence indicating that the applicant participated in an unauthorised demonstration. The applicant made a written statement that he had not participated in the demonstration. The applicant was later brought before the Kentron and Nork-Marash Districts Court of Yerevan where the examination of his case lasted two minutes. The applicant was found guilty of minor hooliganism and was taken to a detention centre.

On 1 March 2003, whilst in detention, the applicant was asked to sign a sample application expressing remorse. The applicant signed the document in order to secure his release. In June 2003, the applicant discovered from a bailiff who visited him that a decision by the Chairman of the Criminal Court of Appeal on 1 March 2003 had ordered his release in exchange for a fine of AMD 2000.

Communicated under Articles 5, 6, 11, 13 and 14 of the Convention and Article 3 of Protocol No.1 to the Convention.

Kirakosyan v. Armenia

(31237/03)

European Court of Human Rights: Communicated in September 2005

Arbitrary detention – Inhuman degrading treatment – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of assembly and association – Right to free elections – Articles 3, 5, 6, 10, 11, 13, and 14 of the Convention and Article 3 of Protocol No.1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Lavrent Kirakosyan, is an Armenian national who was born in 1960 and lives in the village of Karakert, Armenia. The applicant is Chair of the Baghramyan District branch office of the National Democratic Union political party.

On 21 March 2003, during the course of the Armenian presidential election, the applicant participated in a demonstration in Yerevan. According to the applicant, at 8am on 22 March 2003, two police officers visited the applicant at his home and took him to the Baghramyan District Police Station. The applicant was then taken to Armavir Regional Court where after only a few minutes the Judge sentenced the applicant to ten days immediate administrative detention for a public disorder offence. The applicant was then taken to Armavir Regional Detention Facility and was detained with seven other people in a dirty, poorly lit cell measuring 8.75 square metres.

On 25 March 2003, following a letter to the Armavir Regional Authority, the applicant and three other detainees were transferred to another cell which was in similar condition. The applicant was allowed only limited use of toilet facilities and was offered no food or water during his detention. On return to his village many of the applicant's cattle had died or been lost and his wife had suffered medical complications having given birth whilst he was in detention.

Communicated under Articles 3, 5, 6, 10, 11, 13 and 14 of the Convention and Article 3 Protocol No.1 to the Convention.

Karapetyan v. Armenia
(22387/05)

European Court of Human Rights: Communicated in September 2005

Arbitrary detention – Inhuman degrading treatment – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of assembly and association – Articles 3, 5, 6, 13, and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Zavan Karapetyan, is an Armenian national who was born in 1945 and lives in the village of Karakert, Armenia.

On 21 March 2003, during the course of the Armenian presidential election, demonstrations took place in Yerevan. On that day the applicant travelled to Yerevan to visit his son in hospital. The applicant did not participate in the demonstration, but arranged to return to his village at 5pm with two co-villagers who did participate.

At 8am on 22 March 2003, two police officers visited the applicant at his home and took him to the Baghramyan District Police Station where he signed documents he was unable to read, believing that it would lead to his release. The applicant was then taken to Armavir Regional Court where, after only a few minutes, the Judge sentenced the applicant to ten days immediate administrative detention for a public disorder offence. The applicant was then taken to Armavir Regional Detention Facility where he was placed in a small cell with eight other people. The cell had insufficient light and air and no food was provided during the applicant's detention. The applicant suffered psychologically and his health deteriorated as he suffers from cardiovascular problems. The applicant was not allowed to buy medicine during his detention.

Communicated under Articles 3, 5, 6, 13 and 14 of the Convention

Mkhitaryan v. Armenia

(22390/05)

European Court of Human Rights: Communicated in September 2005

Arbitrary detention – Inhuman degrading treatment – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of assembly and association – Articles 3, 5, 6, 8, 10, 11, 13, and 14 of the Convention, and Article 3 Protocol No.1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Arman Mkhitaryan, is an Armenian national who was born in 1965 and lives in the village of Karakert, Armenia.

On 21 March 2003, during the course of the Armenian presidential election, the applicant participated in a demonstration in Yerevan. According to the applicant, at 7am on 22 March 2003 two police officers visited him at his home and took him to the Baghramyan District Police Station. The applicant was then taken to Armavir Regional Court where

after only a few minutes the Judge sentenced him to ten days administrative detention for a public disorder offence. According to the applicant the proceedings lasted only a few minutes and he was denied legal representation.

The applicant was then taken to Armavir Regional Detention Facility where he was placed in a cell with nine other people measuring only 7.5 square metres. The water provided was undrinkable, whilst food was provided only once a day and was of poor quality. The applicant was denied contact with his family. During his detention the applicant suffered a swelling on his face which still recurs. After his release the applicant was diagnosed with a chronic infection and tuberculosis of the left lung on 23 September 2003 and in May 2004 respectively.

Communicated under Articles 3, 5, 6, 8, 10, 11, 13 and 14 of the Convention, and Article 3 Protocol No.1 to the Convention.

Ashot Davtyan v. Armenia

(22382/05)

European Court of Human Rights: Communicated in September 2005

Arbitrary detention – Prohibition of inhuman or degrading treatment – Right to liberty and security – Right to a fair trial – Freedom of expression – Freedom of assembly and association – Right to free elections – Articles 3, 5, 6, 10, 11, 13 and 14 of the Convention and Article 3 of Protocol No. 1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Ashot Davtyan, is an Armenian national who was born in 1977 and lives in Yerevan.

The applicant assisted one of the opposition parties, the National Democratic Union, in organising a series of demonstrations during the Armenian presidential elections. On 21 March 2003, the applicant participated in a demonstration in Yerevan.

According to the applicant, between 8am and 9am on 22 March 2003, a police officer from the Erebuni District Police Station came to the applicant's house and told him he was to be taken to the police station because of a dispute with his neighbour. At the police station the applicant was questioned about the demonstration in Yerevan. When the applicant said he could not afford a lawyer, no alternative was offered him. The applicant was then taken to the Erebuni and Nubarashen Districts Court of Yerevan, where he was

sentenced to five days administrative detention for a public disorder offence.

The applicant was taken to a detention facility where he was placed in a cell with two other people measuring 8.75 square metres, with only one bed. The cell was dirty, poorly lit and poorly ventilated, and was infested with pests and insects. Family members were prevented from bringing the applicant food or cigarettes. Upon his release the applicant was asked to pay for the food, electricity and the bed used.

Communicated under Articles 3, 5, 6, 10, 11, 13 and 14 of the Convention, and Article 3 of Protocol No. 1 of the Convention.

Right to a private and family life

Xenides-Arestis v. Turkey

(46347/99)

European Court of Human Rights: Admissibility decision of 14 March 2005

Right to a private and family life – Protection of property – Prohibition of discrimination – Articles 8 and 14 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

The applicant, Mrs Myra Xenides-Areastis, is a Cypriot national of Greek-Cypriot origin, who was born in 1945 and lives in Nicosia.

The applicant claims to own half a share of a plot of land in Famagusta (Northern Cyprus). One of the houses on the land she maintains was her home where she lived with her husband and children.

The applicant maintains that, in August 1974, she was forced to leave her home and possessions and has been denied access and enjoyment of them ever since.

On 30 June 2003 the Parliament of the Turkish Republic of Northern Cyprus (TRNC) enacted Law no. 49/2003 under which a “commission” was set up to deal with compensation claims for properties located in the TRNC.

On 24 April 2004 the UN plan for the reunification of Cyprus was rejected in the Greek-Cypriot referendum and consequently did not enter into force.

Complaints

The applicant complained that she continues to be denied access to her home, violating Article 8 of the Convention.

The applicant complained that that she is also denied peaceful enjoyment of her possessions, violating Article 1 of Protocol No.1 to the Convention.

The applicant complained that these denials of access result from her being Greek Orthodox and of Greek-Cypriot origin, and is therefore discriminatory, violating Article 14 of the Convention.

Held

The Court declared all complaints admissible, rejecting the government's objections regarding the victim status of the applicant and the non-exhaustion of domestic remedies. The Court considered certificates produced by the applicant sufficient evidence of ownership. The Court did not consider that the commission established under Law 49/2003 to be an adequate and effective remedy for the purposes of Article 35 of the Convention, since mere compensation could not adequately redress the negation of the applicant's rights. The Court also accepted concerns over the impartiality of the compensation commission submitted by the Cypriot government, which intervened as a third party. The Court did not consider it necessary at that stage to address the arguments advanced by the parties as to the ultimate legality of the TRNC, which the Turkish government submitted was a valid legal entity, evidenced by the negotiating status afforded it by the UN.

This decision is important in the light of Turkey's recent Law on Compensation for Damage Arising from Terror and Combating Terror, under which compensation commissions have been established to provide damages to Internally Displaced Persons (IDPs) displaced as a result of the conflict in south-east Turkey. The decision indicates that, if the compensation commissions do not afford IDPs an adequate remedy, affected persons may then be able to apply to the ECtHR for more appropriate compensation.

Kalanyos v. Romania

(57884/00)

European Court of Human Rights: Admissibility decision of 19 May 2005

Destruction of Roma settlement – Prohibition of inhuman and degrading treatment – Right to a family life – Right to an effective remedy – Freedom from discrimination – Articles 3, 6, 8, 13

and 14 of the Convention

Facts

The applicants are Romanian nationals of Roma origin. The first, Sandor Kalanyos, was born in 1941; the second, Tamas Kalanyos, in 1942 and the third, Istvan Rozsa, in 1972. They live in the hamlet of Plăieșii de Sus, in the district of Plăieșii de Jos, Harghita County.

On 6 June 1991, a fight started in Plăieșii de Sus between four Roma and a night-watchman. The first applicant was one of the four Roma involved. Shortly afterwards, he was arrested and in the subsequent criminal proceedings, he was sentenced to three years imprisonment.

On 8 June 1991, a notice was displayed on the outer limit of the Roma settlement informing the inhabitants that on 9 June 1991 their houses would be set on fire. The Roma informed the police and village officials who, rather than intervening, told the Roma to leave their homes for their own safety.

On 9 June 1991 the Roma villagers, including the second applicant, fled seeking refuge in a nearby stable. An organised group of non-Roma villagers cut off the electricity and phone lines to the settlement and set fire to all twenty-seven Roma houses, including those of the applicants.

At the time of these events, the first applicant was still in pre-trial detention. The third applicant and his wife were living with an uncle, whom they were looking after following his assault in a revenge attack. During the events, the third applicant fled to the neighbouring town of Sfântu Gheorghe, in Covasna County, where his parents lived.

During the following year, the Roma villagers were forced to live in nearby stables in dreadful conditions, without heating or running water. The applicants only managed to survive with the help of their friends and family.

On 9 September 1991, the mayor of Plăieșii de Jos purchased a dismantled wooden stable in order to provide the Roma with materials and the authorities gave them permission to collect wood from the local forest. The first and second applicants submitted that they received no assistance for the reconstruction of their homes, whilst the third applicant claimed he had received only one consignment of wood.

Following the destruction of the Roma settlement, the Harghita County Police Department started an investigation. Both the mayor's office and the police stated that,

given the large number of people involved in the events, it had not been possible to identify the culprits. On 27 June 1996 the Prosecutor's Office of the Harghita County Court closed the investigation on the ground that the prosecution of the offences was barred by a statutory time limitation.

On 14 July 1998 the applicant's lawyer filed a complaint with the Prosecutor's Office at the Supreme Court of Justice, which was passed to the Prosecutor's Office at the Tîrgu-Mureş Court of Appeal. In a decision of 9 October 1998, the Prosecutor's Office rejected the complaint. It found that the offences had been committed, "as a result of serious acts of provocation by the victims." On 21 January 1999 the Prosecutor's Office at the Supreme Court of Justice upheld the decision.

Complaint

The applicants complained that after the destruction of their homes they had had to live in very poor, cramped conditions, violating Article 3 of the Convention.

The applicants complained that the authorities' failure to carry out an adequate criminal investigation, culminating in formal charges and the conviction of those responsible, had deprived them of the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal in the determination of their civil rights, violating Article 6(1) of the Convention.

The applicants further complained that, since ratification of the Convention, there had been a continuing breach of their rights to respect for their homes and private and family lives as the authorities had neither conducted a thorough and comprehensive investigation nor provided any redress, violating Article 8 of the Convention.

The applicants claimed that the public prosecutor, who under Romanian law has the final say in criminal investigation, was neither impartial nor independent and that they had been denied an effective remedy, violating Article 13 of the Convention.

The applicants further complained that the violations they had suffered were predominantly due to their Roma ethnicity, and were discriminatory, violating Article 14 of the Convention, taken in conjunction with Articles 3, 6(1) and 8 of the Convention.

Held

the government claimed that the state bore no responsibility for the destruction of the applicants' houses, and that they had been rebuilt with the help of the authorities, submitting that this assistance fulfilled the government's positive obligations under Articles 3 and 8. The government argued that the living conditions offered by the new

houses were better than they had been before the events and therefore did not fall within the scope of Article 3 of the Convention. They added that there was no obligation under the Convention to provide homes or to carry out an investigation into alleged violations that had occurred before the Convention was ratified. The government submitted that a criminal investigation had been effective and had thus met the requirements of Article 13 of the Convention, adding that the effectiveness of the remedy does not depend on the certainty of a favourable outcome.

The applicants considered that the investigation was not effective given that the prosecutors had not charged anyone, preferring to wait until the statute of limitations had excluded any criminal liability. They submitted that the lack of an effective remedy should be considered in the context of widespread violence and discrimination against Roma in Romania as well as of the continued lack of an adequate response from the authorities.

Regarding the alleged discrimination, the government submitted that the applicants had not proved this allegation “beyond reasonable doubt”. The applicants argued that despite compelling evidence, authorities had made no effort to investigate allegations of discrimination. They also submitted that the Court had demonstrated a willingness to relax the “reasonable doubt” requirement where the respondent state had failed to cooperate in providing evidence; therefore, they considered that the evidence was sufficient to shift the burden of proof.

The Court considered that the complaint formulated by the applicants raised serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court unanimously declared the complaints admissible, without prejudging the merits of the case.

Freedom of Religion

Kimlya, Sultanov and the Church of Scientology v. Russia

(76836/01, 32782/03)

European Court of Human Rights: Admissibility decision of 9 June 2005

Registration of church – Freedom of religion – Freedom of expression – Freedom of assembly – Freedom from discrimination – Articles 6, 9, 10, 11 and 14 of the Convention

Facts

The first applicant, Mr Yevgeniy Nikolayevich Kimlya, is a Russian national, who was born in 1977 and lives in Surgut in the Khanty-Mansi Autonomous Region of the Russian Federation. He is the president of the Church of Scientology of Surgut City. The second applicant, Mr Aidar Rustemovich Sultanov, is a Russian national who was born in 1965 and lives in Nizhnekamsk in the Tatarstan Republic of the Russian Federation. He is a co-founder and member of the third applicant, the Church of Scientology of Nizhnekamsk .

On 15 August 2000, the first applicant applied to the Justice Department of the Khanty-Mansi Region for registration of the Church of Scientology of Surgut as a legal entity. On 14 September, the Justice Department refused on the basis that he had not produced a document proving the existence of the group for no less than 15 years; as required by federal law.

On 17 October, the first applicant appealed to the Khanty-Mansai Town Court which dismissed his complaint. There followed a series of appeals and remittal of proceedings between the Khanty-Mansai Regional Court and the Khanty-Mansai Town Court, the last on 18 January 2005, when the Khanty-Mansai Regional Court dismissed the appeal referred again to the 'fifteen year rule'.

On 23 December 2001, the applicant church applied to the state Registration Chamber of the Tatarstan Republic for registration. The applicant was refused registration on the basis that an expert examination had yet to be conducted. Following this refusal, the second applicant lodged a series of appeals, and eventually the Supreme Court of the Tatarstan Republic ruled in his favour on 18 April 2002.

On 1 July 2002, the power to award registration was transferred to the Main Department of the Ministry of Justice of the Tatarstan Republic, which refused to enforce the judgment of 18 April 2002. A further series of appeals ended in an order for a remittal for new examination by the Supreme Court on 27 November 2002.

On 25 February 2003, following an expert examination and a further refusal by the justice department, the Nizhnekamsk Town Court dismissed the second applicant's appeal on the basis of the 'fifteen year rule'. The applicant's appeal was rejected.

In October 2004 the power to award registration was transferred to the Federal Registration Service, which rejected the second applicant's registration for the same reason.

Complaints

The second and third applicants complained that the final quashing of the appeal on 28 May 2002 violated Article 6(1) of the Convention.

The applicants complained that the refusal by the authorities to grant the applicants' churches legal status denied them substantial rights and an autonomous existence and therefore violated their right to freedom of religion, freedom of assembly and freedom of expression, violating Articles 9, 10 and 11 of the Convention. They also argued that the 'fifteen year rule' was discriminatory as it did not apply to other types of organisations, and therefore violated Article 14 of the Convention in conjunction with Articles 9, 10 and 11.

Held

The Court declared the complaint regarding the quashing of the second applicant's final appeal inadmissible, as the decision occurred outside the six month time limit. The Court considered the quashing to be an instantaneous act rather than one creating an ongoing situation and accordingly rejected the complaint under Article 35(1) and (4) of the Convention.

The Court declared that the complaint over the refusal of registration was not manifestly ill-founded within the meaning of Article 35(3) of the Convention, and declared it admissible without prejudging the merits.

B. Substantive

Right to life

Akdeniz and Others v. Turkey
(25165/94)

European Court of Human Rights: Judgment of 31 May 2005

Life – Inhuman Treatment or Punishment - Effective Remedy - Discrimination – Right to liberty and security – Fair Trial – Articles 2, 3, 5, 6, 13, 14 and 41 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mrs Mevlüde Akdeniz, a Turkish citizen of Kurdish origin, was born in 1955 and lives in Diyarbakir. The facts were in dispute between the parties.

On 20 February 1994, approximately 200 soldiers from the Kulp District Gendarme Headquarters came to the applicant's Sesveren hamlet of Karaorman village, located within the administrative jurisdiction of the town of Kulp, and forced the villagers out of their house. One of the soldiers read out the names of six males living in the village, including İrfan Akdeniz, Halit Akdeniz, Faik Akdeniz, and the applicant's son Mehdi Akdeniz. The soldiers then beat up these six people, including the applicant's son, who was subjected to the worst treatment. The six were subsequently taken away, out of sight of the villagers. After two hours, the soldiers walked with them to another hamlet, about 1.5 kilometres away, where they eventually drove away. The applicant never saw her son again. Eye-witnesses who were held with the applicant's son claimed that he had been held at the Kulp District Gendarme Headquarters where he had been detained and tortured for five days.

The applicant subsequently made various attempts to obtain information about the whereabouts of her son, but was unsuccessful. These included oral and written applications to the Chief Public Prosecutor at the Diyarbakir State Security Court.

Complaints

The applicant submitted that her son was arrested and detained by members of the Turkish security forces and is now presumed dead, in violation of Article 2 of the Convention.

The applicant also claimed that her son had been subjected to torture, in breach of Article 3. In addition, she alleged that she had suffered distress and anguish as a result of her inability to find out what had happened to her son and the way she was treated in response to her inquiries. This, she submitted, was also in breach of Article 3 of the Convention.

The applicant further claimed that her son's disappearance constituted a breach of Article 5 of the Convention.

Moreover, she submitted that her son had not received a fair trial, which in turn violated Article 6 of the Convention.

The applicant also claimed that she had no effective remedy in respect of her claims,

which was in breach of Article 13 of the Convention.

The applicant complained that she and her son had been discriminated against in breach of Article 14 by reason of their Kurdish origin.

Held

The Court held that there had been a violation of Article 2 in respect of the applicant's son's presumed death and the failure of the Turkish authorities to conduct an effective investigation.

It also found a violation of Article 3 of the Convention in relation to the applicant's son's treatment while in detention and the applicant's distress with regard to the lack of diligence on the part of the Turkish authorities in addressing the applicant's inquiries. While the Court found that Article 5 and Article 13 of the Convention had been breached, it found it unnecessary to examine the complaint under Article 6 and 14 of the Convention.

Turkey was ordered to pay the applicant EUR 16,500 for pecuniary damage, EUR 20,000 for non-pecuniary damages to be held for the heirs of her deceased son and EUR 13,500 in her personal capacity.

Commentary

The Court stated that Article 2 and the protection of the right to life was one of the most fundamental principles protected by the Convention and that the circumstances in which deprivation of the right to life may be justified must therefore be strictly construed. The Court placed particular emphasis on the vulnerability of detained persons, and the fact that authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused.

The Court added that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Taking into account the fact that no information had come to light concerning the whereabouts of the applicant's son for more than 11 years, the Court held that he must be presumed dead following an unacknowledged detention by the security forces. The responsibility of the respondent state for his death was therefore engaged. As the authorities had not provided any explanation as to what occurred, the Court found that liability for his death was attributable to the respondent government.

With regard to Article 3 of the Convention, substantial eyewitness evidence by other detainees who were also ill-treated established that the applicant's son had received the most severe beating at the time of his arrest. The Court had no reason to doubt the accuracy of these statements, especially given that neither the authenticity nor the accuracy of these statements had been challenged by the government. It concluded, therefore, that the applicant's son had been subjected to ill-treatment, which, at the very least, reached the threshold set out in Article 3.

With regards to the suffering of the applicant, the Court stressed that whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will hinge on the existence of certain factors which renders the applicant's suffering distinct from the emotional distress inevitably caused by the loss of a close relative. In these particular circumstances, the applicant had suffered and continued to suffer great distress as a result of her son's disappearance and her inability to find out what had happened to him, in violation of Article 3.

As far as Article 5 was concerned, the Court had already found that the applicant's son had been apprehended and taken away from his village by security forces and that he was last seen in the hands of those forces at a military detention facility. His detention there was not logged in the relevant custody records and there existed no official trace of his subsequent whereabouts or fate. The Court held that these facts in themselves must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement and escape accountability. Furthermore, the Court declared that the absence of holding data must be seen as incompatible with the very purpose of Article 5 of the Convention.

Ateş v. Turkey

(30949/96)

European Court of Human Rights: Judgment of 31 May 2005

Right to life – lack of effective investigation – prohibition of torture – Right to liberty and security

Facts

This is a KHRP assisted case. Yasin Ateş, the applicant, was born in 1931 and is a Turkish citizen of Kurdish origin. He lived in the town of Kulp at the time of the events giving rise to the present application. The facts were disputed between the parties.

In 1995, the applicant's son, Kadri Ateş, lived in Diyarbakır where he worked for Zahit Trade, a business which sold foodstuffs wholesale. On 13 June 1995, Kadri Ateş, together with his colleague Burhan Afşin, his father-in-law Vehbi Demir, his paternal uncle Kemal Ateş and a man called Memduh Çetin, left Diyarbakır to go to Kulp to sell foodstuffs using a small lorry owned by Zahit Trade. One kilometre before the Lice-Kulp fork, the vehicle slowed to a halt as a result of a police minibus blocking the road. They were subsequently surrounded by four police officers who then proceeded to carry out identity checks on all the occupants. Memduh Çetin and Burhan Afşin were finally ordered out of the lorry and taken to the police checkpoint at the entrance to the Lice district. Kemal Ateş, once he arrived at the police point, sought an explanation for his detention but was stopped by police. Four plain-clothed police officers carrying pistols got out of the car. After asking several questions to Kadri Ateş and Vehbi Demir, they told both men that they were to be taken back to Diyarbakır to the Financial Branch of the Police, as there was a problem concerning some cheques. Vehbi Demir and Memduh Çetin informed the police that they had simply boarded the lorry as passengers and that they had nothing to do with any cheques. They were however ordered to drive back to Diyarbakır. Once they arrived at the destination, both Kadri Ateş and Vehbi Demir identified themselves and were ordered to go to one of the cars. They were blindfolded and pushed into a car and were threatened by one of the officers. The car stopped at the Riot Police Directorate. Kadri Ateş was ordered to strip and Vehbi Demir, who was also a victim of the same treatment, heard his screams and cries. The applicant never saw his son again.

On 20 June 1995, the applicant applied to Diyarbakır Court to obtain information concerning the detention of his son. He was however told that his son was not in custody. The applicant was subsequently informed that Kadri Ateş had died as a result of a clash between security forces and the PKK. The applicant died on 19 May 2001 and the applicant's daughter, Bidayet Ateş, continued the application.

Complaints

The applicant complained that his son had been unlawfully killed while detained by agents of the state, violating Article 2 of the Convention.

The applicant complained that the state had failed to carry out an adequate and effective investigation into his son's death, violating the procedural obligations of Article 2 of the Convention.

The applicant complained that there was no effective system to ensure the safety of a person in detention, violating Article 2 of the Convention.

The applicant complained that his son had been tortured whilst in custody, violating Article 3 of the Convention, and claimed the state's failure to carry out any form of adequate and effective investigation into the allegations of torture violated Article 3 of the Convention.

The applicant complained that he had suffered anguish and distress in the face of the authorities' complacency amounting to a violation of Article 3 of the Convention.

The applicant complained that his son had been unlawfully detained violating of Article 5 of the Convention.

The applicant complained that the response of the authorities to the complaints and petitions about the detention, torture and killing of his son was utterly inadequate, violating Article 13 of the Convention.

Finally the applicant complained that the rights of his son under Article 2 and 13 were violated on the grounds of his Kurdish origin, violating Article 14 of the Convention.

Held

The Court held that the government had failed to account for the killing of Kadri Ateş, and therefore had breached Article 2 of the Convention. Given that the applicant's son was under arrest and, according to the government, killed in an area where a planned operation had taken place the onus was on the government to explain the killing, which they had failed to do.

The Court held that the domestic authorities had failed to carry out an adequate and effective investigation into the killing of the applicant's son, violating Article 2 of the Convention under its procedural limb.

The Court did not find it necessary in the circumstances of the case to reach any separate finding on the wider issue of effective safeguards of those in custody.

The Court held that there was no evidence to support the allegation that the applicant's son had suffered torture or ill-treatment, and therefore there had been no violation of Article 3 in this respect.

Regarding the complaint that the failings in the *post mortem* examination prevented any concrete evidence of ill-treatment coming to light, the Court held that this would be considered under Article 13 of the Convention.

The Court held that there was no basis for finding a violation of Article 3 regarding the applicant's own suffering.

The Court held that the applicant's son had been held in contravention of numerous safeguards afforded, and had been in violation of Article 5(1) of the Convention. The Court identified a number of shortcomings in this respect, and particularly noted that his detention was neither properly recorded in the custody records as required, nor was his detention amenable to independent judicial scrutiny.

The Court referred to its findings under the procedural limb of Article 2 and held that the applicant was denied an effective remedy in respect of the death of his son, in breach of Article 13 of the Convention.

The Court did not consider that it is necessary also to consider the applicants complaints in conjunction with Article 14 of the Convention.

Turkey was ordered to pay the applicant's successor EUR 60,000 in respect of pecuniary damage and EUR 20,000 to be held for the widow of Kadri Ateş as well as EUR 3,500 to be held for the beneficiaries of the applicant's estate in respect of non-pecuniary damage.

Commentary

The Court reiterated that Article 2 together with Article 3 enshrines one of the basic values of the democratic societies making up the Council of Europe.

Bringing a case against a member State for violations of Article 2 and 3 presents particular difficulties for applicants and the Court has developed several ways of mitigating these difficulties through its jurisprudence.

Whilst establishing a substantial violation of the right to life would normally require the applicant to prove the state's culpability 'beyond reasonable doubt', the burden of proof has been reversed where for example the victim was known to be in State custody, putting the onus on the government to provide a satisfactory explanation. This principle also applies in other areas where the victim was within the exclusive control of the authorities (see *Akkum and Others v. Turkey*, 21894/93, 2005). In *Ateş v. Turkey*, because the applicant's son was under State control, the burden of proof was reversed and the failure of the government to provide a satisfactory explanation led to a finding of a substantial breach of Article 2.

Whilst Article 2 in its original construction would seem to be applicable merely to actual state killing, the Court has extended its scope well beyond such limited circumstances.

Taken in conjunction with Article 1, which obliges state to secure the rights of those within their jurisdiction, the Court has put member States under procedural obligations to conduct an adequate and effective investigation (see *McCann and Others v. the United Kingdom*, 18984/91, 1995). The Article 13 right to an effective remedy also extends member State's liability in such circumstances, under which the obligations are wider than those imposed by Article 2.

Whilst the Court in *Ateş v. Turkey* again declined to consider the Article 14 complaint of discrimination, Judge Mularoni gave a partly dissenting opinion. She considered that given the quantity of Article 14 complaints lodged by Turkish citizens of Kurdish origin it was necessary to consider this question and to avoid doing so suggests that discrimination is not an important issue.

Aydın v. Turkey (25660/94)

European Court of Human Rights: Judgment of 24 May 2005

Right to Life – National authorities' failure to conduct an effective investigation – Prohibition of torture – Right to an effective remedy – Prohibition of discrimination – Articles 2, 3, 11, 13 and 14 of the Convention

Facts

The applicant Ms Süheyla Aydın, a Turkish national of Kurdish origin, was born in 1966 and lives in Switzerland where she has been granted political asylum. The facts of the case were disputed between the parties.

The applicant is the wife of Necati Aydın, whose body was found on 9 April 1994 in a location outside Diyarbakır. The applicant was working as an anaesthetics nurse and her husband was an environmental technician. Necati was also the president of the Health Workers' Trade Union (*Tüm Sağlık-Sen*). The applicant and her husband had previously been harassed by security forces due to their links with the trade union.

On 18 March 1994 the couple and their relatives were arrested while at their relatives' house. Once at the police station, the couple was separated. The applicant was then taken to a room where her husband was standing naked and shaking. The police then ordered the applicant - who was six months pregnant at the time - to strip naked and threatened her husband that they would harm her if he did not answer their questions. She also heard her husband's screams while being tortured. During her detention,

she was not given the right of access to a lawyer, prosecutor, or judge. The applicant's husband and another man, Mehmet Ay, were subsequently released by the Prosecutor of the Diyarbakır State Security Court. However, the two men were never seen again. Necati's family asked the Prosecutor about his whereabouts, and were told that both men had been released and they had not been re-arrested. On the evening of 9 April 2005, villagers working in a field in the Silvan district near the Pamalki river, discovered three bodies, and the families identified the bodies of Necati Aydın and Mehmet Ay that evening. They had been shot dead.

Complaints

The applicant alleged that her husband had been killed by agents of the state, in violation of Article 2 of the Convention.

The applicant further complained that the investigation into the disappearance and the subsequent killing of her husband had been so flawed that the authorities had failed to comply with the fundamental requirements of Articles 2 and 13.

The applicant alleged Article 3 of the Convention had been breached since she had been blindfolded whilst in detention, which put her in a vulnerable position.

The applicant also submitted that her husband had been killed as a result of his trade union activities, infringing his freedom of association, in violation of Article 11 of the Convention.

The applicant also argued that because of his Kurdish origin, her husband was guaranteed the right to life to a lesser extent than non-Kurdish people, in violation of Article 14 of the Convention.

Held

The Court held that given the government's failure to identify and summon the accompanying police officers or produce a release document, it had not proven that Necati Aydın was released from state custody. Consequently the government's responsibility to account for Necati Aydın's death was engaged. Given the absence of any explanation, the Court found a violation of Article 2 of the Convention.

The Court held that the investigation was not adequate and effective and violated the procedural obligations implied by Article 2. The Court was highly critical of the investigation, particularly the lack of a proper autopsy or investigation of the scene of death at the early stages. The Court was also highly critical of the presumptuous attribution of responsibility for the death to the PKK which led to the Public Prosecutor's

referral to the state Security Court.

The Court held that given the lack of evidence to support the applicant's allegations of mistreatment, it could not find a violation of Article 3 of the Convention in respect of her treatment.

The Court held that Necati Aydın was subjected to ill-treatment at the hands of the state, that at least amounting to inhuman and degrading treatment, violating Article 3 of the Convention.

The Court considered the complaint under Article 11 of the Convention arose out of the same facts as the Article 2 complaint and declined to examine the matter separately.

The Court referred to the failures in the investigation found under Article 2 and held that these amounted to a violation of Article 13 of the Convention.

The Court held it unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2 and 13.

Turkey was ordered to pay the applicant the sum of EUR 30,000 in pecuniary damages. The respondent state was ordered to pay EUR 21,000 in respect of non-pecuniary damages, to be held for the heirs of the deceased husband, and EUR 3,500 in her personal capacity.

Commentary

Article 2 and 3 enshrine the most fundamental principles of the Convention. By developing these principles in conjunction with Article 1 and Article 13, the Court has put member states under strict obligations to prevent violations from occurring and to act accordingly when they do.

In this case, the Court discussed whether the treatment of Necati Aydın amounted to a violation of Article 3. The case law of the Court has been neither clear nor consistent in establishing what amounts to torture, and what amounts to inhuman or degrading treatment, and indeed whether there exists a distinction between degrading and inhuman treatment. The reason for the inconsistency is perhaps that the differentiation holds little legal relevance, since all violations of Article 3 hold equal legal significance. However, the importance of the distinction, as pointed out in this judgment, is evidenced by the existence of different categories in the Convention itself, and is significant in the greater moral stigma that torture holds.

The Court considered that, in addition to the question of severity, there is also a 'purposive' element to the definition, and referred to the inclusion of 'intentional' in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This appears from the judgment to differentiate torture from inhuman and degrading treatment and the Court declined to find an incident of torture because of insufficient evidence that he was beaten to extract information or punish him. In some previous cases the 'purposive' element has been used to distinguish inhuman treatment from degrading treatment.

Çelikbilek v. Turkey
(27693/95)

European Court of Human Rights: Judgment of 31 May 2005

Right to life – National authorities' failure to conduct an effective investigation – Inhuman treatment – Unfair trial – Prohibition of discrimination – Articles 2, 3, 6, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. Abdurrahman Çelikbilek, the applicant, a Turkish citizen of Kurdish origin, was born in 1951 and lives in Diyarbakır. The facts surrounding the death of the applicant's brother, Abdulkadir Çelikbilek, were disputed by the parties.

On 9 June 1994, Abdulkadir Çelikbilek made a statement to the Prosecutor at the Diyarbakır State Security Court about a certain Ms Amber Yılmaz's death and her husband's involvement with the Kurdistan Workers' Party (PKK). A week later, he was arrested by two plain-clothes police officers while he was leaving a café. Two witnesses of the incident subsequently informed the applicant that his brother had been taken away by the police forces.

About a week later, on 21 December 1994, three police officers came to the applicant's home and informed him that his brother had been wounded and admitted to hospital. When the applicant was taken to the police car, he was told that his brother's body had been found outside the Mardinkapı cemetery in Diyarbakır. The police took the applicant to the cemetery, where they searched him and confiscated his petition addressed to the Prosecutor at the Diyarbakır Court. The applicant saw evidence of torture all over the applicant's brother's body. The applicant was convinced that his brother had confessed whilst being tortured that his son had just joined the PKK, as the police later came to the applicant's house to question him on the issue. Moreover, in June 1996, the applicant

was himself abducted by state agents while walking in the street in Diyarbakır and was threatened regarding his alleged links to the PKK.

Complaints

The applicant alleged that his brother had been killed by agents of the state, in violation of Article 2 of the Convention.

The applicant complained that the authorities' failure to carry out an adequate and effective investigation into the killing of his brother violated the procedural obligations of Article 2 of the Convention.

The applicant complained that the indifference displayed by the authorities caused him grief and torment amounting to inhuman treatment under Article 3 of the Convention.

The applicant complained that, as a result of the inadequate criminal investigation he could not bring civil proceedings against the perpetrators, violating his right of access to a court under Article 6, and his right to an effective remedy under Article 13.

The applicant complained that, because of their Kurdish origin, he and his deceased brother had been subjected to discrimination in breach of Article 14, in conjunction with Articles 2, 3 and 6 of the Convention.

Held

The Court held that the government provided no explanation for the death of Abdulkadir Çelikkbilek, and therefore was in violation of Article 2 of the Convention.

The Court held that there were very serious shortcomings in the investigation into Abdulkadir Çelikkbilek's death and concluded that the domestic authorities had failed to carry out an adequate or effective investigation, violating Article 2 of the Convention in its procedural limb.

The Court held that there was no special basis for finding a violation of Article 3 of the Convention with respect to the applicant.

The Court considered the applicant's complaint under Articles 6 and 13, exclusively under Article 13 and held that the applicant has been denied an effective remedy in respect of the death of his brother. He had thereby been denied access to other available remedies including a claim for compensation, consequently, there was a violation of Article 13 of the Convention.

The Court did not find it necessary to determine whether there had been a violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 6 of the Convention.

The Turkish State was required to pay EUR 60,000 in respect of pecuniary damages and EUR 20,000 in respect of non-pecuniary damages, to be held by the applicant for the widow and children of Abdullakadir Çelikkilek, as well as EUR 3,500 in his personal capacity.

Commentary

The Court again stressed that Article 2 ranks as one of the most fundamental provisions of the Convention, to which no derogation would be permitted, and that, together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe.

The applicant complained that, as a relative of the primary victim, he had suffered a violation of Article 3 in his own right. It is difficult for families of human rights victims to establish an Article 3 violation. Under the Court's case law, it is required that the suffering of the applicant goes beyond a dimension and character distinct from the emotional distress inevitably caused, and that there are 'special factors' which justify such a finding. Relevant elements include the proximity of the family tie, the involvement of the family member in the attempts to obtain information, and the way in which the authorities responded to those enquiries. The Court has emphasised that the essence of establishing such a violation concerns the authorities' reactions and attitudes to the situation rather than the particular facts and circumstances of the death or disappearance.

Whilst the Court held that there was no such 'special basis' for finding such a violation, Judge Costa gave a partly dissenting opinion on this point. He said he found difficulty in agreeing with the Court's rejection of the applicant's complaint under Article 3 of the Convention. Although he stated that under the circumstances, he would not go as far as to find a violation, he described the Court's jurisprudence on this matter as harsh and open to change.

Kişmir v. Turkey (27306/95)

European Court of Human Rights: Judgment of 31 may 2005

Right to life – Failure to conduct an effective investigation – Degrading treatment – Right to an effective remedy – Article 2, 3 and 13 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mrs Hayriye Kışmır, a Turkish national of Kurdish origin, was born in 1948 and lives in Diyarbakır. The facts of the case were disputed by the parties.

On 6 October 1994, seven police officers from the Diyarbakır Police Headquarters came to the applicant's house and questioned her about her son Aydın's whereabouts and presumed connections with the Kurdistan Workers' Party (PKK). They subsequently took the applicant's two other sons, İrfan and Turan, to the Police Headquarters and questioned them about Aydın. On the morning of 6 October 1994, Aydın was violently arrested outside his relative Barış' house, and is said to have been beaten up. He was subsequently taken to the police station with Barış and the latter's brother Yılmaz. Both Barış and Yılmaz claimed that they heard Aydın screaming while being tortured, which the Turkish authorities denied.

İrfan and Yılmaz were subsequently released and told the applicant about her son's condition. The applicant went to seek help at the Diyarbakır branch of the Human Rights Association. In the meantime, the applicant had already submitted a petition to the Prosecutor at the Diyarbakır State Security Court.

On 12 October 1994, the applicant was told to pick up Aydın's body at the morgue. She was further told that Aydın had thrown himself out of the window on the seventh floor, which the applicant argued was an attempt by the police to cover up the true circumstances of her son's death. Aydın's body had purple bruising around the right eye and outside right arm and wounding on the top of the head and over the right eyebrow. There was widespread bleeding under the skin of the back.

Complaints

The applicant alleged that her son had been killed by agents of the state, in violation of Article 2 of the Convention.

The applicant complained that the respondent government was under a positive obligation to protect the life of her son, and had failed to do so, violating Article 2 of the Convention.

The applicant complained that the investigation into the death of her son had not been effective, and violated the procedural limb of Article 2 of the Convention.

The applicant alleged that her son was subjected to treatment which amounted to torture, violating Article 3 of the Convention.

The applicant complained that, as a result of the inadequate criminal investigation she could not bring civil proceedings against the perpetrators, violating her right of access to a court under Article 6, and her right to an effective remedy under Article 13 of the Convention.

The applicant complained that the rights of her son to non-discrimination (Article 14), taken in conjunction with Articles 2 and 13, were violated on the grounds of his Kurdish origin.

Held

The Court held that the government have failed to account for the death of Aydın Kışmir while he was in the custody of police officers, and therefore there had been a direct violation of Article 2 of the Convention.

Regarding the applicant's complaint over the obligation to protect Aydın Kışmir's life, the Court held that it was not necessary to reach any separate finding on this matter.

The Court held that the investigation into Aydın Kışmir's death was inadequate, violating Article 2 of the Convention under its procedural limb. The Court was especially critical of the serious and unnecessary delays in the investigation, the fact that the police officers involved appeared never to have been questioned, and the lack of involvement of and communication with the applicant.

The Court held that since no information was submitted by the government to fully explain injuries on Aydın's body, there had been a violation of Article 3 of the Convention.

The Court held that it was unnecessary to deal with the complaint as regards civil proceedings under Article 6 and dealt with the matter exclusively under Article 13. Referring to its findings under the procedural limb of Article 2 the Court reiterated that no effective criminal investigation can be considered to have been conducted. The Court held, therefore, that the applicant had been denied access to domestic remedies, including a claim for compensation, in breach of Article 13 of the Convention.

The Court did not consider it necessary to deal with applicant's complaint under Article 14 in conjunction with Article 2 and 13 of the Convention, referring to its findings under the latter Articles.

The Turkish State was ordered to pay EUR 30,000 in respect of non-pecuniary damage, to be held by the applicant for the beneficiaries of the estate of Aydın Kışmir and EUR 3,500 in respect of the applicant's personal non-pecuniary damage.

Commentary

The Court reiterated that Article 2 together with Article 3 enshrines one of the basic values of the democratic societies making up the Council of Europe.

Whilst establishing a substantive violation of Article 2 would normally require the applicant to prove the state's culpability 'beyond reasonable doubt', the burden of proof can be reversed where for example the victim was known to be in State custody. In this case, **the applicant's son was in custody, and therefore the burden of proof was reversed.** The failure of the government to provide a satisfactory explanation led to a finding of a substantial breach of Article 2.

A similar approach has been taken by the Court to the alleged Article 3 violations. The Court cited *Selmouni v. France* (25803/94, 1999,) and reiterated that the burden to provide a plausible explanation for the injuries found on an individual, who was taken into police custody in good health, falls to the government.

Whilst the majority in this case declined to consider the Article 14 complaint of discrimination, Judge Mularoni gave a partly dissenting opinion. She considered that given the quantity of Article 14 complaints lodged by Turkish citizens of Kurdish origin it was necessary to consider this question and to avoid doing so suggests that discrimination is not an important issue.

Koku v. Turkey

(27305/95)

European Court of Human Rights: Judgment of 31 May 2005

Disappearance & killing – National authorities' failure to conduct an effective investigation – Prohibition of torture – Right to liberty and security – Right to an effective remedy – Prohibition of discrimination – Articles 2, 3, 5, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Mustafa Koku is a Turkish national of Kurdish origin, who was born in 1963 and now lives in the United Kingdom. The facts of the case were disputed by the parties.

Hüseyin Koku was the founder and Chair of the pro-Kurdish People's Democracy Party (HADEP). At around the beginning of April 1994, Hüseyin Koku was arrested, taken into custody and placed into detention on remand for allegedly helping and abetting the

Kurdistan Workers' Party (PKK). During his detention, Hüseyin was allegedly tortured intensively. He was subsequently released and acquitted due to lack of evidence against him.

Following his release, Hüseyin is said to have been harassed and threatened by plain-clothes police officers about his political activities. On 20 October 1994, Hüseyin was abducted by police officers while walking along in Elbistan with his wife Fatma. The latter went to several police stations in Elbistan shortly afterwards but was told that her husband was not detained there. On 5 November 1994, a telephone call was made to Hüseyin's house and his thirteen-year-old daughter was made to listen to the voice of her father screaming while being tortured. Fatma Koku launched a complaint to the Public Prosecutor; however no steps were taken to investigate the matter. On 27 April 1995, Fatma was finally informed that her husband had died. The Koku family had not been informed about any investigation being undertaken into Hüseyin's disappearance and murder.

Complaints

The applicant complained that his brother had been intentionally killed by agents of the state in circumstances and none of the exhaustive list of purposes set out in Article 2(2) of the Convention applied.

The applicant complained that the authorities had omitted to take reasonable steps to safeguard his brother's life, violating Article 2 of the Convention.

The applicant complained that the state failed to carry out an adequate and effective investigation the disappearance and subsequent murder of his brother, violating the procedural limb of Article 2 of the Convention.

The applicant complained that the abduction and disappearance of his brother, coupled with the state's failure to carry out an adequate investigation undermined Article 3 of the Convention.

The applicant complained that Hüseyin Koku was tortured whilst in the custody of the security forces following his detention in October 1994, violating Article 3 of the Convention.

The applicant complained that he had suffered anguish and distress in the face of the authorities' complacency over his brother's disappearance, violating Article 3 of the Convention.

The applicant complained that his brother had been detained unlawfully in violation of Article 5 of the Convention.

The applicant complained that the response of the authorities to his family's complaints and petitions were inadequate and the necessary remedies either did not exist or were, in practice, useless, violating Article 13 of the Convention.

The applicant further complained that his brother's abduction and murder was a direct result of his activities on behalf of HADEP and, more widely, the Kurdish minority in Turkey, violating Article 14 of the Convention.

Held

The Court did not consider that there was enough evidence to establish who was directly responsible for Hüseyin Koku's death. However the Court considered that there were serious defects in the criminal law in the south-east region at the relevant time, which removed the protection which Hüseyin Koku should have received by law. The authorities had failed to take the reasonable measures available to them to prevent a real and immediate risk to Hüseyin Koku's life from materialising, violating of Article 2 of the Convention.

The Court held that the authorities had failed to carry out an adequate and effective investigation, violating the procedural limb of Article 2 of the Convention. In particular the Court criticised the authorities for not establishing a time of death, not chasing possible witnesses and perpetrators, and not properly involving the next of kin.

Regarding the complaints of torture by the applicant, the Court addressed the first complaint under Article 13 of the Convention. Regarding the allegation that Hüseyin Koku was tortured whilst in custody, the Court referred to its findings under Article 2 and held that the state's involvement had not been proven.

The Court held that there were no special features existing which would justify a finding of a violation of Article 3 of the Convention in relation to the applicant himself. Whilst the applicant took many steps to promote his brother's case, he was in the United Kingdom at the time of his abduction, and did not bear the brunt of the task of making inquiries with the authorities in Turkey.

The Court held that given that it had not established that State agents were responsible for abducting the applicant's brother, there had been no violation of Article 5 of the Convention.

The Court held that the applicant was denied an effective remedy in respect of the abduction and the subsequent death of his brother, violating Article 13 of the Convention.

The Court did not consider it is necessary to examine separately the applicant's complaints under Article 14 of the Convention.

The Turkish State was ordered to pay EUR 60,000 in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage to the widow and six children of Hüseyin Koku.

Commentary

Whilst the Court did not hold the government directly responsible for the disappearance and subsequent death of the applicant's brother, the applicant was able to rely on the test developed by the Court in *Osman v. the United Kingdom*, 23452/94 1998, whereby in certain circumstances the authorities are placed under a positive obligation to take measures to protect an individual whose life is at risk.

Whilst not every claimed risk to an individual's life requires preventative measures to be taken, which would create an impossible or disproportionate burden on the authorities, where the authorities knew or ought to have known at the time of the existence of a real and immediate risk and failed to take measures, they are liable under Article 2 of the Convention. The Court considered that, given Hüseyin Koku was the chairman of HADEP's Elbistan branch, he belonged to a category of persons running a particular risk of falling victim to disappearance or murder. The Court referred to dozens of incidents where politicians working for HADEP had been kidnapped, injured and killed around the relevant time and referred to previous cases which had been considered by the Court.

The Court also examined the question of whether there were effective criminal-law provisions in place to deter the commission of offences. Whilst the Court considered that there was a framework of law in place with the aim of protecting life and courts apply this law, it followed previous judgments in considering the implementation of the criminal law in the south-east region during the relevant period as falling outside of the mandatory protection of Article 2 (see for example *Akkoç v. Turkey*, 22947/93 and 22948/93, 2000),

The majority of the judges declined to consider the Article 14 complaint of discrimination, Judge Mularoni gave a partly dissenting opinion. She considered that given the quantity of Article 14 complaints lodged by Turkish citizens of Kurdish origin it was necessary

to consider this question and to avoid doing so suggests that discrimination is not an important issue.

Taniş and Others v. Turkey

(65899/01)

European Court of Human Rights: Judgment of 2 August 2005

Disappearance - Right to life - Lack of effective investigation – Effective remedy – Articles 2, 3, 5 and 13 of the Convention

Facts

The applicants Yakup Taniş, Mehmet Ata Deniz, Şuayyip Taniş and Selma Güngen (Taniş) were born in 1978, 1969 and 1955 respectively and live in Şırnak. They are relatives of Serdar Taniş and Ebubekir Deniz, respectively president and secretary of the *Demokratik Halk Partisi* (the People's Democratic Party or DEHAP).

On 25 January 2001, both men received a telephone call from the Silopi police station requesting their presence at the police station as soon as possible. They attended, and were never seen again. Taniş and Deniz's relatives claimed that they received repeated threats from police authorities both before and after the disappearance about their connection with DEHAP. Some of the applicants subsequently gave depositions to the Silopi Prosecutor and provided various pieces of evidence.

Complaints

The applicants contended that the state was responsible for both men's disappearance and therefore Article 2 of the Convention had been breached.

The applicants also claimed a violation of Article 2 in relation to the lack of investigation into the circumstances surrounding the men's disappearance.

The applicants complained that they were greatly distressed and anxious as a result of the way the Turkish authorities had treated them throughout the investigation, which constituted a breach of Article 3 of the Convention.

The applicants stated that there had been a violation of Article 5 as a result of the manner in which the two men had been detained by the police and their subsequent disappearance.

In addition, the applicants claimed that they were deprived of an effective remedy in violation of Article 13 of the Convention.

Held

The Court held the state responsible for the disappearance of both men, in violation of Article 2 of the Convention. In reaching this finding, the Court relied on the context in which the disappearances had occurred, the fact that there were still no indications as to either men's whereabouts nor any indication regarding whether or not they were alive four years after their disappearance, and the failure of the Turkish authorities to provide a valid explanation as to what had happened.

The Court also held that the authorities had failed to carry out an adequate and effective investigation, violating the procedural limb of Article 2 of the Convention. The Court noted that there was a general reticence on the part of the Turkish authorities to investigate the allegations against the police officers involved and also a complete acceptance of their statements once they had been taken.

In relation to the families' great distress following the Turkish authorities' reaction and lack of care in investigating the circumstances into the disappearance, the Court found a violation of Article 3 of the Convention.

In addition, the Court found a violation of Article 5, based on the lack of credible explanations and negligence displayed in the investigations by the Turkish authorities.

In the light of the authorities' failure to protect the lives of the applicants' relatives, the Court held that the applicants had been denied their right to an effective remedy under Article 13 of the Convention.

Finally, the Court found a violation of Article 38 in failing to provide all necessary information to the Court.

Turkey was ordered to pay EUR 40,000 to Selma Güngen and EUR 50,000 to both Divan Arsu and Zehra Deniz for pecuniary damages. Turkey was also required to pay EUR 20,000 for non-pecuniary damages to every applicant.

Commentary

The Court emphasised that Articles 2 and 3 form the most fundamental principles within democratic societies who are part of the Council of Europe. Where a detainee has disappeared in the absence of a plausible explanation from the member State, in

order to determine whether or not they can be presumed to have died, the Court must look at all the circumstances, including the existence of circumstantial evidence. In this case, the greater the lapse of time since the person was detained, the more likely it is that he has died. Further, the lack of effective investigation into their disappearance cast further doubt on the government's version of events. Therefore the state's responsibility was engaged.

In respect of Article 38, the Court stated that it was vital, for the effective functioning of the right to individual petition under Article 34, that member States provide all necessary facilities to permit a serious and effective examination of the complaints (*Tanrıkulu v Turkey*, 23763/94). The Court found that the government's failure to meet the Court's demands for essential evidence, including the investigation file, and the failure to have taken statements from the head of the Gendarmerie at that time, nor the person who telephoned Serdar Tanış on 25 January 2001 and whose name had not been provided, breached Article 38 of the Convention.

Toğcu v. Turkey
(27601/95)

European Court of Human Rights: Judgment of 31 May 2005

Right to life – Disappearance – Failure to conduct an effective investigation – Prohibition of torture – Right to liberty and security – Right to an effective remedy – Prohibition of discrimination – Articles 2, 3, 5, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Hüseyin Toğcu, a Turkish citizen of Kurdish origin, was born in 1944, and lives in the town of Silvan within the administrative jurisdiction of Diyarbakır, in south-east Turkey.

The applicant is the father of Ender Toğcu, who had been taken into custody by the security forces in the City of Diyarbakır on 29 November 1994.

On 29 November 1994, Ender Toğcu, left his brother Ali to visit the latter's wife in hospital, where she was giving birth. Ender never arrived at the hospital and has not been seen since. On the same day, police officers came to the applicant's house and enquired about Ender's whereabouts in relation to his presumed links with the Kurdistan Workers' Party (PKK), which the applicant denied. The police subsequently went to Ali's house and conducted a search but did not find anything.

The following day, Ali was apprehended by the police and taken to the Security Directorate, where he was detained, interrogated and tortured for several hours. He claimed to have heard his brother Ender screaming while being tortured in the room next to him. Upon his release, Ali made several inquiries to the Turkish authorities – including the Prosecutor - about his brother. These however remained unanswered. The applicant was heard by the Prosecutor for the first time on 19 July 1996 but the latter declined to prosecute anyone. Although the investigation was reopened in October 1999, statements made by Ender's relative seemed to have been distorted by the Turkish authorities, although they denied such claims.

Complaints

The applicant alleged that his son had been abducted and detained by security forces and is now presumed to be dead, violating of Article 2 of the Convention.

The applicant complained that the government had failed to comply with its obligations under Article 2 of the Convention to take positive steps to protect his son's right to life.

The applicant complained that the state had failed to carry out an adequate and effective investigation into the disappearance of his son, violating Article 2 of the Convention.

The applicant complained that the abduction and disappearance of his son, coupled with the state's failure to carry out a proper investigation, also violated Article 3 of the Convention.

The applicant complained that his son had been unlawfully detained, violating Article 5 of the Convention.

The applicant complained that that despite the steps he and his family had taken, the response of the various authorities had been inadequate. The necessary remedies either did not exist or they were, in practice, useless, violating Article 13 of the Convention.

The applicant complained that his son had also suffered discrimination on the grounds of race, and that there was sufficient evidence to disclose an administrative practice of violations of Article 14 against Kurds in south-east Turkey.

The applicant complained that the restrictions on the rights and freedoms afforded under the Convention in particular in relation to Article 5 were applied for purposes not permitted under the Convention, violating Article 18 of the Convention.

Held

The Court held that there had been a violation of Article 2 of the Convention in respect of the Turkish authorities' failure to conduct an effective and prompt investigation into the circumstances of the applicant's son's disappearance.

The Court held that there were no violations of Article 2 in respect of the disappearance itself and the Turkish government's alleged failure to protect the right to life of the applicant's son. The Court felt unable to make an evidential finding as to who might be responsible for the disappearance of Ender Toğcu.

The Court held that there had been no violation of Article 3 of the Convention, reiterating that it had been unable to determine who was responsible for Ender's death. Moreover, with regard to the applicant's claim that he had himself suffered great anguish and distress which in turn constituted a violation of Article 3, the Court felt unable to find the special factors which render the applicant's suffering distinct from the emotional distress inevitably caused by the loss of a close relative.

As the Court was unable to determine what and who caused the death of the applicant's son, it could not find any violations of Article 5.

The Court held that the applicant was denied an effective remedy in respect of the disappearance of his son, and was thereby denied access to any other available remedies at his disposal, including a claim for compensation in breach of Article 13.

The Court did not consider it is necessary to examine separately the applicant's complaints under Article 14 of the Convention.

Turkey was ordered to pay EUR 10,000 in respect of non-pecuniary damage to the applicant, to be held by him for the widow and children of his son, and EUR 3,500 to the applicant in respect of non-pecuniary damage,.

Commentary

In cases where the body of the victim has never been found, the procedural obligations of Article 2 are invaluable in bringing a successful claim. Under Article 2 some form of effective investigation is necessary when individuals have been killed. This obligation is not confined to cases where it is apparent that the killing was caused by an agent of the state. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of Article 2. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible, in terms of the approach taken rather than the results

achieved, and there is also a requirement of promptness. These obligations, which have developed in the Court's jurisprudence, apply in cases where a person has disappeared in life-threatening circumstances similar to this case.

In assessing whether Ender Toğcu's disappearance was indeed life-threatening, the Court considered previous cases involving disappearances in 1994, and held that a general context pertained in that year where the disappearance of a person suspected by the authorities of PKK involvement could be considered as life-threatening.

Whilst the majority declined to consider the Article 14 complaint of discrimination, Judge Mularoni gave a partly dissenting opinion. She considered that given the quantity of Article 14 complaints lodged by Turkish citizens of Kurdish origin it was necessary to consider this question, and to avoid doing so suggests that discrimination is not an important issue.

Dündar v. Turkey
(26972/95)

European Court of Human Rights: judgment of 20 September 2005

Lack of effective investigation – Right to life – Prohibition of torture – Lack of effective remedy – Articles 2, 3, 6, 13 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Zübeyir Dündar, is a Turkish citizen of Kurdish origin, who was born in 1940 and lives in the town of Cizre, in south-east Turkey. He is the father of Mesut Dündar, whose strangled body was found near Sulak village on 6 September 1992. The facts of the case are disputed by the parties.

According to the applicant, in July 1992, police officers from Cizre Police Headquarters raided the applicant's home and told the applicant that they were taking his son, Mesut Dündar, to Elazığ Psychiatric Hospital. The applicant's son was mentally ill having suffered from meningitis in his childhood. The applicant's son was taken into police custody at Cizre Police Headquarters but subsequently escaped.

On 6 September 1992, Mesut Dündar's strangled body was discovered. According to a report published in *Özgür Gündem* newspaper on 19 November 1992, four women saw four armed persons, one thought to be a police officer, strangle Mesut Dündar.

On September 1994, the applicant lodged a petition with the Cizre Prosecutor to determine the progress of the investigation into his son's death and was told that the case was closed. Later, the applicant discovered that the investigation was ongoing.

the government argued that the events taking place following Mesut Dündar's escape from custody were unknown and that the applicant's allegation that his son was killed by agents of the state had no basis. It also argued that all necessary steps had been taken by the authorities following Mesut Dündar's death, which had been the subject of an ongoing investigation by the Cizre Gendarmerie in correspondence with the Cizre Prosecutor.

Complaints

The applicant complained that his son had been killed by agents of the state, violating Article 2 of the Convention.

The applicant complained that the failures in the investigation into his son's death violated the procedural obligations of Article 2 of the Convention.

The applicant also complained that he had suffered anguish and distress following the killing of his son on account of his inability to discover the circumstances in which his son had been killed, amounting to a violation of Article 3 of the Convention.

The applicant claimed that the failures in the investigation meant that the perpetrators had not been identified and that as a result he had been denied a civil action, violating Article 6(1) of the Convention.

The applicant complained that the failures in the investigation meant he was not afforded an effective remedy, violating Article 13 of the Convention.

The applicant further argued that the treatment of his son was because of his Kurdish origin, and that he had been discriminated against, violating Article 14 of the Convention.

Held

The Court held that there was not enough substantive evidence to demonstrate that the agents of the state were responsible for the applicant's son's death and therefore there had been no direct violation of Article 2 of the Convention.

The Court held that the investigation was not adequate and effective and found a breach of the procedural obligations implied by Article 2. The Court was highly critical of the

investigation, particularly the lack of an autopsy and proper investigation of the scene of death or investigation of possible witnesses.

The Court found that, given that the state had not been proven responsible for Mesut Dündar's death, there was also no violation of Article 3 in that respect.

Regarding the suffering of the applicant as a result of the failure to investigate the death, the Court did not consider that there were 'special factors' to justify finding a violation of Article 3 of the Convention.

The Court held that it was not necessary to deal separately with the alleged violation of Article 6 of the Convention, dealing with the matter wholly under Article 13.

The Court considered that the inadequacies of the criminal investigation denied the applicant an effective remedy, in violation of Article 13 of the Convention.

The Court held by six votes to one that it was unnecessary to examine the applicant's complaint separately under Article 14 of the Convention.

The Court awarded the applicant the sum of EUR 10,000 for non-pecuniary damage, to be held by him on behalf of the beneficiaries of his son's estate, and EUR 3,500 to the applicant himself, considering the violation of Article 13.

Commentary

In its treatment of the procedural obligation of Article 2, the Court reiterated that this duty, taken in conjunction with a member State's obligation to secure rights under Article 1, applies not only to cases of state killings. In previous judgments which have concerned the death of persons in custody, the Court often places the burden of proof concerning the cause of death on the respondent state rather than on the applicant. In this case, the applicant was not afforded such a generous standard of proof. The Court considered that given that two months had passed between the detention of the applicant's son by authorities and his death, the onus was on the applicant to provide evidence of guilt rather than the Respondent government to provide a plausible explanation.

Judge Mularoni gave a partly dissenting opinion. Whilst the majority considered it unnecessary to consider the complaint of discrimination separately, Judge Mularoni said she felt uncomfortable not considering a potential violation of Article 14 given the number of applications lodged by Turkish citizens of Kurdish origin, and particularly following the *Nachova and Others v. Bulgaria* cases (nos. 43577/98 and 43579/98), where the Court found such a violation.

Nesibe Haran v. Turkey

(28299/95)

Disappearance of terrorist suspect – Right to life – Freedom from torture – Right to liberty and security – Right to an effective remedy – Freedom from discrimination – Articles 2, 3, 5, 13, 14, 18 and 34 of the Convention

European Court of Human Rights: Judgment of 6 October 2005

Facts

This is a KHRP assisted case. The applicant, Ms Nesibe Haran, is a Turkish national who was born in 1971 and lives in Diyarbakır. She is the wife of İhsan Haran, who disappeared on 24 December 1994. The facts surrounding his disappearance were disputed between the parties.

On 24 December 1994, the applicant's husband did not return home from work. According to the applicant, on 27 December 1994, Mr Fahri Hazar told her that on the morning of 24 December 1994 he had seen her husband being taken away by policemen. On 30 December, Mr Fahri Hazar was arrested and taken into custody.

The applicant submitted that she had tried to file a petition with the public prosecutor's office but was prevented from doing so by policemen and continued to try for a month without success. According to the applicant, she visited several prisons in search of her husband and at the Diyarbakır E-type prison she met a man who told her that he had seen her husband in custody.

On 1 February 1995 İhsan Haran's brothers were held in custody. They later claimed that they were threatened that they would be killed like their brother.

Complaints

The applicant alleged that agents of the state were responsible for her husband's disappearance, violating Article 2 of the Convention.

The applicant further complained that the domestic law did not afford adequate protection for the right to life, violating Article 2.

The applicant complained that the inadequacy of the investigation into her husband's death violated the procedural obligations of Article 2 of the Convention.

The applicant complained that her anguish at the inability to discover what has happened

to her husband amounted to inhuman and degrading treatment, violating Article 3 of the Convention.

The applicant complained that her husband had been unlawfully detained in breach of Article 5 of the Convention.

The applicant complained that there was no independent authority to bring her complaint to, violating the right to an effective remedy under Article 13 of the Convention.

The applicant complained in conjunction with Articles 2, 3 and 5 that there was an administrative practice of ethnic discrimination, violating Article 14 of the Convention.

The applicant complained that restrictions on her and her husband's rights had been applied for purposes not permitted under the Convention, violating Article 18 of the Convention.

The applicant's legal representatives complained that they had been prevented from contacting the applicant, violating the right to unhindered and effective individual application to the Court under Article 34.

Held

The Court considered that the evidence advanced by the applicant was based upon hearsay evidence and was not convinced of the credibility of statements made by İhsan Haran's brothers. The Court held that there was insufficient evidence to satisfy the standard of proof of "beyond reasonable doubt", and that there had been no substantive violation of Article 2 of the Convention.

Regarding the procedural obligation under Article 2, the Court reiterated that the state is under an obligation to conduct an adequate and effective investigation in response to possible violations of the right to life, and that there is also a requirement of promptness and reasonable expectation. The Court stated that although there was no proof that İhsan Haran had been killed, this obligation extends to disappearances in life-threatening circumstances. The Court noted critically that the investigation only commenced following communication of the application by the European Commission of Human Rights to the government. The Court commented on the reluctance of the applicant to become involved in an investigation which it considered would have affected the adequacy of the investigation, but stated nevertheless that this fact does not absolve the national authorities from their duty. The Court held that there had been striking omissions in the investigation amounting to a breach of Article 2 of the Convention,

noting in particular that the national authorities had failed to question İhsan Haran's brothers, despite them being in State custody. The Court declined to reach any finding on the applicant's complaint of the inadequacy of the domestic law with regard to Article 2.

The Court held that since the applicant neither witnessed the alleged events leading to her husband's disappearance nor became actively involved in the investigation, her suffering was not of a dimension or character that could amount to a violation of Article 3 of the Convention.

The Court referred to its evidential findings under the Article 2 complaint and held that there had therefore been no breach of Article 5 of the Convention.

The Court referred to its findings on the procedural aspect of Article 2 and considered no separate issues arising under Article 13.

The Court considered that the complaint under Article 14 was unsubstantiated by the applicant and therefore held that there had been no violation.

The Court considered that the complaint under Article 18 was unsubstantiated and accordingly held that there had been no violation.

Regarding the interference with the applicant's right of individual application, the Court held that the complaint had not been raised early enough to allow observations and therefore held it unnecessary to examine the matter.

The Court awarded the applicant EUR 10,000 in non-pecuniary damages.

Commentary

In applying Article 2 in conjunction with Article 1, the jurisprudence of the Court has developed an obligation on authorities to carry out an official investigation into possible violations of an individual's right to life (see *McCann and Others v. the United Kingdom*, 18984/91, 1995). This obligation extends to disappearances in life threatening circumstances, notwithstanding a lack of conclusive evidence of a substantive violation of the right to life (*Tanrıkulu v. Turkey* 23763/94, 1999). This is useful to applicants in disappearance cases as the requirement of 'beyond reasonable doubt' is by the nature of such complaints, often difficult to meet. In such cases, where even the death of the alleged victim cannot be conclusively established, the Court can infer that a victim has been killed by the length of their disappearance and by the context of the time and place of the disappearance. In the present case, the Court referred to previous judgments

which concerned the situation in south-east Turkey in the relevant year, effectively using its body of case-law as contextual evidence.

The Court has declined to definitively state the specific requirements as to the standard as of an investigation, and in the present case the Court reiterated that the minimum threshold varies depending upon the circumstances of each case and the practical realities of the investigation work (citing *Velikova v. Bulgaria*, 41488/98, 2000, and *Ülkü Ekinc v. Turkey*, 27602/95, 2002). The Court did that state the obligation does not go as far as requiring that the perpetrators be successfully located and prosecuted.

Establishing a violation of Article 3 for relatives of human rights victims requires the applicant to establish that their suffering went beyond the inevitable suffering caused in such circumstances. In deciding whether this is the case, the Court's jurisprudence has been more concerned with the response of the authorities to events and enquires made, rather than the events themselves. In this case, the applicant's lack of involvement in enquiries led the Court to find that her suffering did not exceed a dimension and character beyond what is inevitable.

Prohibition of torture

Dizman v. Turkey

(27309/95)

European Court of Human Rights: Judgment of 20 September 2005

Ill-treatment by police officers – Prohibition of torture – Lack of effective remedy – Government cooperation in Convention proceedings – Articles 3, 5, 13, 14 and 38(1) of the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Ahmet Dizman, is a Turkish national who was born in 1969 and lives in the town of Seyhan, within the administrative jurisdiction of the province of Adana. The facts surrounding the events of 5 October 1994 were disputed by the parties.

On 4 October 1994, the applicant attended the funeral of two members of the HADEP (*Halkın Demokrasi Partisi* – People's Democracy Party), a pro-Kurdish political party. According to the applicant, at about 11 am on 5 October 1994, he was taken from the Erzurumlular Café in the Mutlu neighbourhood in Adana by two armed men who later

identified themselves as policemen. He was put in a car with two more police officers, both armed with automatic weapons. The applicant was driven to a deserted field by the policemen and punched, kicked and beaten with the butts of their guns. The applicant was questioned over the political activities of a number of local people and threatened with being killed if he did not cooperate and provide information. The applicant was taken to hospital later that day by his family where it was established that his jaw had been broken.

On 7 October 1994, the applicant requested that the Adana Prosecutor's office initiate criminal proceedings against the officers. He asked to be sent to the Adana Forensic Medicine Directorate, who later reported that the applicant's jaw had been broken.

The applicant's case was referred to the Adana Administrative Council which on 24 November 1994 found that there was insufficient evidence to open an investigation.

On 31 May 1996, the Administrative Council's decision was quashed by the Council of State which found evidence of ill-treatment and held that the four policemen should be tried before the Adana Criminal Court of First Instance.

The subsequent hearing was postponed several times pending statements by the policemen, all four of whom made statements denying the allegations. On 29 December 1997, a final hearing took place and the defendants were acquitted for lack of evidence.

the government argued that the ill-treatment alleged by the applicant had not occurred, and that there was no evidence to substantiate the allegations. the government commented that the medical evidence had been obtained two days after the alleged ill-treatment.

Complaints

The applicant complained that there had been a violation of Article 2 of the Convention on account of death threats he received from the policemen.

The applicant complained that the beating he had suffered amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

The applicant complained that he had been unlawfully detained by the police officers, violating of Article 5 of the Convention.

The applicant complained that the subsequent failures in the investigation and the criminal proceedings meant he had been denied an effective domestic remedy, violating

of Article 13 of the Convention.

The applicant further complained that his treatment was because of his Kurdish origin, and that he had been discriminated against contrary to Article 14 of the Convention.

Held

The Court did not consider that the facts could amount to a breach of the applicant's right to life and held that there had been no violation of Article 2 of the Convention.

The Court held that the treatment of the applicant by the policemen amounted to inhuman and degrading treatment, violating of Article 3 of the Convention.

The Court held that it was unnecessary to examine the applicant's complaint separately under Article 5 of the Convention.

The Court held that the applicant had an 'arguable complaint' which the authorities have an obligation to properly investigate. As such, the applicant was denied a domestic remedy in respect of an adequate investigation and any possible award of compensation, violating Article 13 of the Convention.

The Court held by six votes to one that it was unnecessary to examine the applicant's complaint separately under Article 14 of the Convention.

The Court awarded the applicant the sum of EUR 5,000 in respect of pecuniary damage and EUR 15,000 in respect of non-pecuniary damage

Commentary

The Court reiterated the importance of respondent states' cooperation in providing documents and information and referred to a number of failures by the government in this respect. The Court referred to the obligation of respondent states under Article 38(1) of the Convention stating that such a failure constituted a violation of the government's obligation to 'furnish all necessary facilities.' The Court can and did draw inferences from such a failure on a government's part about the well-foundedness of the applicant's allegation.

The Court's jurisprudence on Article 3 violations has treated inhuman and degrading treatment as a relative term considered in all the circumstances of each case. Relevant factors in establishing a breach can include the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and health of the victim.

The Court has placed stringent obligations on member States to investigate allegations of torture and inhuman or degrading treatment. Article 13 taken in conjunction with Article 3 gives rise to an obligation on member states to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and where appropriate the payment of compensation. The remedy must be effective both in practice and in law, and particularly must not be hindered by acts or omissions of the authorities.

Judge Mularoni gave a partly dissenting opinion. Whilst the majority considered it unnecessary to consider the complaint of discrimination separately, Judge Mularoni said he felt uncomfortable not considering a potential violation Article 14 given the number of applications lodged by Turkish citizens of Kurdish origin, and particularly following the *Nachova and Others v. Bulgaria* cases (nos. 43577/98 and 43579/98), where the Court found such a violation.

Ostrovar v. Moldova

(35207/03)

European Court of Human Rights: Judgment of 13 September 2005

Arbitrary detention – Inhuman and degrading treatment – Right to a private and family life – Right to an effective remedy – Articles 3, 8 and 13 of the Convention

The Facts

The applicant Mr Vitalie Ostrovar was born in 1974 and lives in Chişinău. He is the former senior assistant to the prosecutor of the Centru District of Chişinău.

On 24 July 2002, the applicant was arrested by the Moldovan Secret Services on charges of bribe-taking. Later the charges were modified to corruption. On 15 August 2002, the applicant was remanded for a period of thirty days, which was extended several times until 15 November, when the Court of Appeal ordered his release pending trial. On 4 April 2003, the applicant was convicted by the Court of Appeal and sentenced to ten years imprisonment.

The applicant's complaints regarding the conditions of detention relate to two periods of detention served in Remand Centre No. 3 of the Ministry of Justice between 18 October 2002 and 15 November 2002, and between 4 April 2003 and 13 December 2003.

The applicant claimed to have been detained in a cell measuring 25 square metres,

together with at times more than twenty people. There were no mattresses or bed covers and not enough beds. After lodging his application with the Court, he was transferred to a smaller cell of 15 square metres, where he alleges conditions were even worse. The lack of alternative smoking facilities meant the inmates had to smoke inside the cells, causing the applicant to suffer asthma attacks usually two or three times a day. Medication was not provided by the prison and the applicant had to rely on the supply of medication from his family. The cell's window was closed by shutters, preventing the entry of fresh air and sunlight and there was no ventilation system. The cell was infected with bed bugs, lice and ants. The cell was very cold during the winter and very hot during the summer. The toilet was situated at 1.5 metres from the dining table and was permanently open. There was no library and no appropriate facilities for recreation and exercise. The food served to the inmates was of a very bad quality. The inmates were exposed to infectious diseases like tuberculosis, skin and respiratory infections.

The applicant alleged that during his detention, his correspondences was interfered with and he was denied contact with his wife and family. The applicant complained to the Prosecutor General and after numerous unsuccessful proceedings the applicant's complaint was dismissed by the Chişinău Court of Appeal on 28 June 2004.

Complaints

The applicant complained that the conditions of his detention in the Remand Centre No. 3 amounted to inhuman and degrading treatment, violating Article 3 of the Convention.

The applicant complained that the interception of his correspondence by prison authorities and the denial of contact with his wife and daughter violated his right to respect for family life under Article 8 of the Convention.

The applicant complained that in respect of the above he was denied access to an effective remedy, violating Article 13 of the Convention.

Held

The Court held that the conditions of the applicant's detention went beyond the minimum threshold of severity, violating of Article 3 of the Convention.

The Court held that the domestic legislation concerning interception of the applicant's correspondence (Article 18 of the Law on Pre-Trial Detention) was not formulated with sufficient clarity. The interference was therefore not 'in accordance with the law' and violated Article 8 of the Convention.

The Court held that the domestic legislation concerning a prisoner's contact with family

and other persons (Article 19 of the Law on Pre-Trial Detention) was not formulated with sufficient clarity. The interference was therefore not ‘in accordance with the law’ and violated Article 8 of the Convention.

The Court held that given that the government provided no evidence of a domestic remedy regarding the applicant’s conditions of detention, there had been a violation of Article 13 of the Convention.

The Court held that given the existence of the Law on Pre-Trial Detention, the applicant could not be considered as having been denied an effective remedy regarding Article 8.

The Court ordered the respondent state to pay the applicant EUR 3,000 in respect of non-pecuniary damage.

Commentary

The Court referred to previous judgments on the conditions of detention, reiterating that the member States must ensure that a person’s conditions of detention are compatible with respect for his human dignity. To this end, the state must ensure that the detainee is not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. As in *Kehayov v. Bulgaria*, 41035/98, 2005, the Court considered the evidence of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The reports of 1998 and 2001 and referred specifically to the CPT’s guideline of minimum cell space per prisoner of 4 square metres, condemning the cramped conditions in the detention facility.

Regarding the alleged violation of Article 13 in conjunction with Article 8, the Court reiterated that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, which would be impose on member states a requirement to incorporate the Convention (see *Appleby and Others v. the United Kingdom*, 44306/98, 2003). The implication of this approach is that the challenges to the quality of domestic law contained in Article 8 cannot be indirectly applied to domestic remedies.

Right to liberty and security

Tanrikulu and Others v. Turkey

(29918/96, 29919/96, 30169/96)

European Court of Human Rights: Judgment of 6 October 2005

Unlawful detention – Right to Liberty and security – Article 5 of the Convention

The Facts

This is a KHRP assisted case. The applicants are Mr Sinan Tanrıku, Mr Servet Ayhan and Mr Firat Anlı, they are Turkish nationals who were born in 1966, 1973 and 1971 respectively and live in Diyarbakır.

The first and third applicants are lawyers. The first and the second applicants were members of the Human Rights Association and the third applicant was the president of the HADEP (*Halkın Demokrasi Partisi* – People’s Democracy Party) in Diyarbakır provincial headquarters at the time of the events.

On 27 February 1995, police officers, authorised by the Diyarbakır Governor’s Office and with a search warrant from the Diyarbakır State Security Court, conducted a search of the HADEP headquarters and the Human Rights Association branch in Diyarbakır. The applicants were arrested and handed over to the gendarmes.

A report drafted by the gendarmerie on 28 February 1998 reported discovering various PKK related items at the HADEP headquarters.

On 22 March 1995 the public prosecutor filed an indictment against the applicants accusing them of making propaganda for the PKK and requesting that they be convicted of membership of an illegal organisation. On 1 May 1995 the applicants were released pending trial.

On 8 April 1997 the state Security Court acquitted the applicants of all charges. On 16 April 1997, this decision was upheld by the Court of Cassation.

On 26 November 1997, the first applicant successfully claimed compensation from the Diyarbakır Assize Court for the period spent in detention.

Complaints

The applicants submitted that under Articles 58 and 59 of the Advocacy Law, criminal investigations of lawyers and political party administrators must be carried out by the public prosecutor. Therefore the applicants complained that the procedure was not ‘prescribed by law’ violating of Article 5(1) of the Convention.

The applicants complained that the length they were held in custody without being brought before a judge violated Article 5(3) of the Convention.

Held

Concerning the argument advanced by the applicants regarding the Article 5(1) breach, the Court considered that the charges brought against the applicants did not concern their professional activities and therefore fell outside the ambit of Articles 58 and 59 of the Advocacy Law. Therefore, there had been no breach of Article 5(1) of the Convention.

The Court held that the applicants' detention for ten days before being brought before a judge clearly exceeded the Court's jurisprudence on the requirement of promptness and thus violated Article 5(3) of the Convention.

The Court ordered the respondent state to pay Mr Tanrikulu and Mr Anlı EUR 1,000 each for pecuniary damage, and all the applicants EUR 5,000 in non-pecuniary damages.

Commentary

In considering the legality of detention, the Court reiterated that Article 5(3) requires a 'reasonable suspicion', and neither the establishment of guilt of the applicant nor proof of the case against them. The Court added that the authorities do not need to be in possession of sufficient evidence to bring charges. In this case, therefore, the later finding that there was insufficient evidence against the applicants was not considered relevant to the legality of their initial detention. In other words the Court was satisfied that the authorities' action in response to information sufficiently satisfied the requirement of reasonable suspicion.

In considering the length of the applicant's detention the Court recalled *Brogan and Others v. the United Kingdom*, 11209/84, 11234/84, 11266/84, 11386/85, 1988, where it held that detention in police custody lasting four days and six hours without judicial control fell outside the strict constraints of Article 5(3), notwithstanding that the purpose was to protect the community from terrorism. The Court accepted that the investigation of terrorist offences present special problems, but reiterated that the investigating authorities did not have *carte blanche* to arrest suspects whenever they assert that terrorism is involved, free from effective control by the domestic courts and ultimately the Court itself. The Court referred to the cases of *Aksoy* and *Demir*, both of which concerned detention for alleged involvement in terrorism, and considered that the government had not adduced any reasons to depart from its findings in those cases. The Court particularly stressed the importance of judicial intervention in the detention of suspects, and was not convinced that the circumstances of the conflict in south-east Turkey can negate such a requirement.

I.I. v. Bulgaria

(44082/98)

European Court of Human Rights: Judgment of 9 June 2005

Conditions in detention – Prohibition of inhuman and degrading treatment – Right to liberty and security – Articles 3 and 5 of the Convention

Facts

The applicant, Mr I.I., is a Bulgarian national, born in 1962 and lives in Shounmen.

On 31 January 1998, the applicant allegedly took part in two violent incidents in his home town of Shounmen. Later that evening, the applicant went to the Regional Police Department in Shounmen for questioning, at which point to applicant submitted that he had been deprived of his liberty.

The following day, or the day after that, the applicant was transferred to Shoumen Regional Investigation Service where he was kept in an underground cell which, according to the applicant, was occupied by three to four detainees and measured only six square metres. The lighting was constantly on and not sufficient to read. The detainees slept on a concrete platform covered with wooden planks and blankets. The applicant was only allowed to leave the cell for five minutes two or three times a day to wash and use the toilet. Outside these times the applicant had to use a bucket in the cell to relieve himself. Detainees were allowed to bathe once a week for ten minutes.

On 1 February 1998, criminal proceedings were bought against the applicant. On 2 February 1998, an investigator ordered the applicant's preliminary detention for a period of 24 hours. On 3 February 1998, a prosecutor extended the applicant's detention for a further three days.

On 5 February 1998, the applicant was bought before an investigator and charged with instigating others to commit unlawful deprivation of liberty, and also extortion through threats of murder accompanied by light bodily harm. The investigator ordered the applicant's pre-trial detention. During the course of the applicant's detention, his psoriasis worsened and his skin got covered with massive eczema. It seems that the applicant was not permitted to keep the medication in his cell and therefore his use was limited. As a result the applicant alleges that he developed psoriatic arthritis.

On 4 March 1998, the Shoumen Regional Court heard an appeal lodged by the applicant. The court rejected the appeal holding that it could not consider the merit of the charges

and that the only relevant arguments concerned the applicant's health, which whilst advanced by the applicant's counsel had not been proved.

On 17 March 1998, the applicant was granted an examination by a dermatologist who found that the applicant's skin condition had worsened as a result of bad sanitary conditions.

On 30 April 1998, the Shoumen Regional Prosecutor's Office ordered the applicant's release on bail, reasoning that his health had worsened during custody.

On 19 April 1999, criminal proceedings against the applicant were discontinued and the charges dropped.

Complaints

The applicant complained that the condition of his detention amounted to inhuman or degrading treatment, violating Article 3 of the Convention.

The applicant complained that prior to the order on 2 February 1998, his detention had been without legal basis, violating Article 5(1)(c) of the Convention.

The applicant complained that his arrest ordered by the investigator and confirmed by the prosecutor violated Article 5(3) of the Convention, as neither official could be considered an officer of the law for the purposes of that provision.

The applicant complained that he had not been allowed to properly challenge the legality of his detention, contrary to Article 5(4) of the Convention.

Held

The Court gave regard to the cumulative effects of the stringent regime imposed on the applicant, the material conditions and the effect on the applicant's health, and considered that the conditions of the applicant's detention amounted to a violation of Article 3 of the Convention. The Court acknowledged the financial difficulties involved in detention conditions, but also considered that many of the problems in the present case could be resolved without considerable cost. The Court was particularly critical of the sanitary conditions and the withholding of the applicant's medication.

The Court rejected the government's submission that the applicant's detention between 31 January 1998 and 2 February was voluntary and identified the issue as one of proper conformity with domestic law. The Court considered that in given that no order for 'preliminary detention' had yet been ordered during this time, the detention was not

prescribed by law and therefore violated Article 5(1) (c) of the Convention.

The Court held that the Bulgarian law concerning pre-trial detention in force at the relevant time violated Article 5(3) of the Convention as it was based upon the order of investigators and prosecutors who cannot be considered independent and impartial.

The Court held that Article 5(4) requires the domestic court to consider the reasonableness of the suspicion grounding the arrest and the legitimacy of its purpose, as well as procedural requirements. The Shoumen Regional Court's refusal to consider the merits of the case against the applicant was in breach Article (5)(4) of the Convention.

The Court awarded the applicant EUR 4,000 for non-pecuniary damage.

Commentary

Whilst the Court held that detention pending trial cannot itself violate Article 3, it reiterated that member States must ensure that detention is compatible with a person's human dignity and that a detainee's suffering does not go beyond that which is inevitable in such circumstances. In assessing whether an applicant's treatment goes beyond the 'minimum threshold', the Court has declined to set an objective standard; rather it has relied on relative assessments based on the circumstances of each case, (see *van der Ven v. the Netherlands*, 50901/99; *Poltoratskiy v. Ukraine*, 38812/97, 2003).

This case is one of a number of detention cases where the Court has considered reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment CPT.

A factor of particular importance in this case was the applicant's state of health. In this respect the Court cited *Assenov and Others v. Bulgaria*, 24760/94, 1998, which concerned police brutality and was also relevant as it concerned the same detention facility as in the instant case. The applicant in *Assenov* had also made allegations concerning the conditions of his detention, alleging that he was held in an overcrowded cell with very limited light and fresh air, and that he was let out of his cell only twice a day, to go to the toilet. In that case however the allegations were not substantiated to the Court's satisfaction.

The Court's ruling regarding the pre-trial detention proceedings in Bulgaria, followed a series of successful challenges to the domestic law as it stood at the material time; (see *Assenov and Others v. Bulgaria*, cited above; *Shishkov v. Bulgaria*, 38822/97, 1997; *Nikolova v. Bulgaria*, 40896/98, 2004).

Gurepka v. Ukraine

(61406/00)

European Court of Human Rights: Judgment of 6 September 2005

Arbitrary detention – Prohibition of inhuman and degrading treatment – Right to liberty and security – Right to a fair trial – Right to an effective remedy – Freedom from discrimination – Right to appeal in criminal matters – Articles 3, 5, 6, 13, and 14 of the Convention and Article 2 of Protocol No. 7 to the Convention.

The Facts

The applicant, Mr Nikolay Vasilyevich Gurepka was born in 1956 and lives in the city of Simferopol, the Autonomous Republic of Crimea, Ukraine.

In April and October 1998, the applicant failed to attend court during civil proceedings. On 18 May 1998 he was fined and on 1 December 1998 the court imposed seven days administrative detention.

On 2 December 1998, the Prosecutors' Office of the Autonomous Republic of Crimea (POARC) (also the applicant's employer) lodged an extraordinary appeal with the Highest Court of the Autonomous Republic of Crimea (HCARC) and the applicant was released. On 3 December the appeal was rejected. From 25 to 31 December 1998, the applicant served the remainder of his detention. The applicant appealed against the prior decisions but with no success.

On October 2001, the applicant was diagnosed with Hepatitis C which he believed he could have contracted whilst in detention.

On 6 June 2000 the Simferopolskiy District Court ruled against the applicant in defamation proceedings. On 20 September 2000 the applicant's cassation appeal was rejected as having been submitted late. The applicant appealed and on 2 February 2001 the decision was quashed in part and the fine reduced. On 6 December the Supreme Court of the Ukraine rejected the applicant's request for leave to appeal under new cassation procedure.

Complaints

The applicant complained that his detention damaged his health and his reputation causing him moral and physical suffering, violating Article 3 of the Convention.

The applicant complained under Article 5(1) that his detention was unlawful.

The applicant complained under Article 6(1) that the fine and administrative detention imposed were arbitrary, violating his right to a fair trial. He also alleged that the defamation proceedings against him in 2000 violated Article 6.

The applicant complained that he had no effective remedy to challenge his administrative detention, violating Article 13 of the Convention.

The applicant complained under Article 14 that he had been subject to discrimination.

Held

The Court was not satisfied that the applicant had provided any evidence of a causal link between his illness and the conditions of his detention and held the application under Article 3 of the Convention to be manifestly ill-founded.

The Court reiterated that ‘unlawful’ for the purposes of Article 5(1) refers to the legality of procedure rather than the nature of the offence. Given that the deprivation of liberty was technically legal under domestic law, the Court held the application to be manifestly ill-founded.

The Court found no evidence to substantiate the alleged violations of Article 6 of the Convention.

The Court also held the applicant’s complaint over the defamation proceedings manifestly ill-founded, noting that Article 35 (1) & (4) required the application to be lodged within six months of the alleged violation, which had passed.

Further, the Court held the applicant’s unsubstantiated complaint under Article 14 to be manifestly ill-founded.

Finally, with regards to the applicant’s complaint under Article 13, the Court reiterated that the right to an effective remedy does not guarantee a right to appeal. However, the Court therefore did find that there had been a violation of Article 2 of Protocol No.7 to the Convention.

The Court awarded the applicant EUR 1,000 for non-pecuniary damage.

Commentary

In relation to Article 6, the Court held the complaint regarding the imposition of the fine manifestly ill-founded, since the applicant had not provided any evidence to substantiate compliance with timing formalities. Regarding the fairness of proceedings which led to

the applicant's detention, the Court reiterated that its role was not a court of appeal and could not reassess evidence in the manner of domestic courts, citing *Vidal v. Belgium*, 12351/86, 1992 and *Edwards v. United Kingdom*, 13071/87, 1992.

Although the Court did not find a violation of Article 13, it did conclude that there had been a violation of Article 2 of Protocol 7, which guarantees the right to appeal in criminal matters. The Court considered that given the severity of the punishment, the detention could be considered criminal in nature and therefore admissible under that article. The Court held that, given that the right to appeal rests upon the discretion of the Prosecutor's Office, it could not be considered an effective remedy.

Right to a Fair Trial

Hatip Çaplık v. Turkey (57019/00)

European Court of Human Rights: Judgment of 15 July 2005

Right to a fair trial – Fairness of the proceedings – Independence and impartiality of a tribunal comprising one military judge – Prohibition of discrimination – Articles 6 and 14 of the Convention

Facts

This is a KHRP assisted case. The applicant, Hatip Çaplık, was born in 1961 and lives in Adana. On 14 October 1997, the applicant was convicted of aiding the Kurdistan Worker's Party (PKK) and sentenced for three years and nine months imprisonment by the Adana State Security Court. The applicant sought to challenge the decision on the basis that he had not received a fair trial under Article 6 of the Convention.

On 17 November 1994, the applicant was arrested on suspicion of sending threatening letters on behalf of the PKK to F.A. and I.A. Samples of the applicant's handwriting were taken and sent to the laboratory for examination. Expert evidence suggested that there were some similarities between the applicant's handwriting and the handwriting on the letter. The following day, the applicant denied all allegations against him and pleaded not guilty before the judge of the Adana Magistrate's Court. In particular, he denied allegations that he had any links with the PKK.

After the Konya Security Court held twenty-six hearings on the matter, the case was

transferred to the Adana State Security Court on 16 May 1997. The court, composed of three judges including a military judge, found the applicant guilty of aiding an armed band and sentenced him to three years and nine months imprisonment pursuant to Article 169 of the Criminal Code. The applicant was further debarred from public service for three years. The court found it established that the applicant had sent a threatening letter on behalf of the PKK to F.A. and I.A., who were to give statements against the PKK in another criminal case. The court, relying on expert reports, concluded that the letter had been written by the applicant. Following a hearing held on 30 June 1999, the Court of Cassation dismissed the applicant's appeal.

Complaints

The applicant submitted that his right to a fair trial under Article 6(1) of the Convention had been impaired due to the presence of a military judge during the proceedings.

Furthermore, the applicant claimed under Article 6(1) & (2) that he had been denied a fair hearing before domestic courts, as he had been convicted solely on the basis of expert reports, which were not supported by any oral or other documentary evidence.

The applicant also complained that the length of the proceedings were incompatible with the "reasonable time" requirement, as established by Article 6(1) of the Convention.

The applicant finally alleged that, due to his Kurdish origin, he had been subjected to discrimination in breach of Article 14 in conjunction with Article 6 of the Convention.

Held

While the Court held that Article 6 had been violated, it could not find any breaches of Article 14.

The Court held that a finding of a violation of Article 6 was sufficient compensation.

Commentary

Concerning the applicant's claim that the independence and impartiality of the Adana State Security Court had been impaired due to the presence of a military judge during the proceedings, the Court held, unanimously, that there had been a violation of Article 6(1) of the Convention. Consequently, the Court did not find it necessary to examine the applicant's complaints under Article 6(1) and (2) in relation to the fairness of the proceedings.

Nonetheless, the Court rejected the applicant's complaint that the total duration of the proceedings of four years and seven months constituted a violation of the reasonable

time requirement under Article 6(1).

The Court also rejected the applicant's claim that he had been subjected to discrimination in breach of Article 14 of the Convention as a consequence of his Kurdish origins. The Court said it had investigated the complaint, but rejected it as manifestly ill-founded.

Finally, the Court could not find, as argued on behalf of the Turkish government, that the applicant's complaint in respect of the independence and impartiality of the Adana State Security Court must be rejected for non-exhaustion of domestic remedies under Article 35 of the Convention as there was no clear indication that the Court should depart from its previous authorities (see in particular *Ahmet Sadik v. Greece*, 18877/91, 1996).

With regard to the Article 6(1) violation, the Court felt that the applicant's fears about being tried by a bench which included a member of the Military Legal Service were objectively justified.

Öcalan v Turkey

(46221/99)

The European Court of Human Rights: Grand Chamber judgment of 12 May 2005

Unfair trial- Death penalty- Detention- Articles 2, 3, 5, 6, 7, 8, 9, 10, 13, 14 and 34 of the Convention.

Facts

The applicant is the former leader of the Kurdistan Workers Party (PKK) who is currently detained in İmralı Prison. Before he was arrested by the Turkish authorities, the applicant had fled Turkey and had sought asylum in several countries. On 9 October 1998, he arrived in Greece after being banished from Syria, where he had been living for many years. The applicant had been forced to flee Turkey; the Greek authorities refused to grant him asylum but helped him to travel to Moscow. The Russian authorities accepted his request for asylum although they never put it into force. Consequently, the applicant flew to Italy on 12 November 1998. The Italian authorities also refused to grant asylum to the applicant. Finally, on 2 February 1999, the applicant arrived to Kenya with the help of the Greek authorities. The Kenyan Ministry of Foreign Affairs expressed his disagreement concerning the presence of the applicant in Kenya and required his rapid departure from the Greek Ambassador. Therefore, the Greek officials prepared for the applicant to leave Kenya for the Netherlands. Nevertheless, on 15 February 1999, the Kenyan authorities went to the Greek Embassy and handed the applicant over to the

Turkish authorities, despite the opposition of the Greek Ambassador.

On 16 February 1999, the applicant was put in custody on the island of İmralı in Turkey. The applicant was questioned by members of security forces and did not see any judge before 23 February 1999. He was also prevented from seeing his lawyers until 25 February 1999. The first conversation with his lawyers took place in the presence of a judge and members of the security forces, whilst the other ones were recorded by the authorities. The applicant was tried before the Ankara State Security Court. During the proceedings, a new law was adopted and consequently the military judge of the Court was replaced by a civil judge. On 29 June 1999, the Court sentenced the applicant to death for his leadership of the PKK which undermined the integrity of the country. On 25 November 1999, the Court of Cassation upheld the judgment of the first instance court. The applicant then lodged a complaint with the European Court of human Rights. On 3 October 2002, the applicant's death sentence was commuted to life imprisonment by the Ankara State Security Court in compliance with a new law. On 12 March 2003, a Chamber of the Court held that a number of the rights of the applicant provided by the Convention had been violated by Turkey.

Complaints:

The applicant claimed a number of violations of Article 5. He first complained under Article 5(4) that he had been denied his right to contest the lawfulness of his detention before a judge as he could not see his lawyers and had no access to the documents concerning his arrest during his detention. He also alleged a violation of Article 5(1) as his detention was unlawful. Finally, he claimed that he had not been brought promptly before a judge in breach of Article 5(3).

The applicant raised a number of violations of Article 6. He alleged that he had not been tried by an independent and impartial tribunal, as a military judge was appointed in breach in breach of the Convention. He also claimed that the difficulties he had encountered communicating with his lawyers and the denial of access to his case file infringed the Convention.

Further, the applicant claimed a violation of Articles 2, 3 and 14. He claimed that the imposition of the death penalty breached the right to life and constituted inhuman treatment. He finally alleged that he had been sentenced to death because of his PKK leadership and consequently the sentence was discriminatory.

Relying on Article 3, the applicant maintained that the conditions of his detention were inhuman and degrading as he was the sole inmate in the prison and therefore he suffered from social isolation.

The applicant also complained under Article 34 that he had faced difficulties in exercising his rights of individual petition in breach of the Convention.

Finally, the applicant claimed a violation of Articles 7, 8, 9, 10, 13, 14, and 18 taken together or individually with Articles 2, 3, 5 and 6.

Held

The Grand Chamber upheld the Chamber judgment of 12 March 2003.

The Court held that there had been a violation of Article 5(4) as the applicant had been denied an effective remedy to contest the lawfulness of his detention by not being granted an opportunity to consult a lawyer. The Court found no violation of Article 5(1) and considered the circumstances of the arrest and the detention as lawful. The Court ruled a violation of Article 5(3) as the applicant had not been presented to a judge until he had spent seven days in detention.

The Court found a violation of the right to a fair trial under Article 6 regarding the composition of the tribunal. The Court held that, even though the military judge had been removed from the tribunal before the verdict, this measure was not enough to consider the tribunal independent and impartial as a tribunal is required to be independent and impartial during all the proceedings. The Court also found a violation of Article 6 regarding the applicant's lack of access to a lawyer while in police custody, the fact that the consultations between the applicant and his lawyers had been monitored by a third party and finally regarding the restrictions concerning the applicant's access to his lawyers and to his case file.

The Court took note of a general abolitionist trend of the death penalty between the member states but refused to conclude whether the imposition of the death penalty was against the provision of Article 2. Nevertheless, the Court held that imposing the death penalty on the applicant after an unfair trial did not respect the provision of Article 2(1) which requires that the death penalty be pronounced by a court and consequently became an inhuman and degrading treatment in breach of Article 3.

The Court found no violation of Article 3 regarding the applicant's conditions of detention in prison. The Court considered that the applicant was not kept in solitary confinement as he could communicate with the outside world by letter and could see a doctor, his family and his lawyers.

When considering the alleged violation of Article 34, the Court reiterated that the failure to comply with an interim measure of the Court will be treated as such a violation

(*Mamatkulov and Askarov*, 46827/99 and 46951/99, 2005). In this case however the Court considered that whilst the government's failure was regrettable, it did not under the special circumstances inhibit the applicant's right of petitions.

The Court considered that the applicant's complaints under Articles 7, 8, 9, 10, 13, 14, and 18 taken either individually or with Articles 2, 3, 5 and 6, were based upon the same factual evidence as the other complaints, and therefore warranted no further examination.

Commentary

This decision is of huge significance for several reasons. First, it confirms the Court's earlier judgment dated 18 March 2003 that capital punishment has now come to be regarded as "an unacceptable form of punishment" which "can no longer be seen as having any legitimate place in a democratic society".

In addition, the Grand Chamber took the exceptional step of proposing specific measures available to the Turkish Government to enable it to implement fully the terms of the judgment: the applicant should be given a retrial without delay if requested. The Council of Europe's Committee of Ministers will monitor any failure to implement the Court's decision. Turkey's approach to upholding this ruling will be seen by many as a litmus test of its commitment to the universal applicability of basic human rights and fundamental freedoms for all, irrespective of ethnic or political status; a commitment that is critical to Turkey's aspirations of EU accession.

Mamatkulov and Askarov v. Turkey

(46827/99, 46951/99)

European Court of Human Rights: Grand Chamber Judgment of 4 February 2005

Extradition proceedings – Right to life – Prohibition of torture – Right to a fair trial – Right of individual petition – Articles 2, 3, 6 and 34 of the Convention

The Facts

The applicants are Mr Rustam Sultanovich Mamatkulov and Mr Zainiddin Abdurasulovich Askarov. They are Uzbek nationals who were born in 1959 and 1971 and are currently in custody in the Republic of Uzbekistan.

On 3 and 5 March 1999 respectively, the applicants were arrested by Turkish police under an international arrest warrant, suspected of homicide, causing injury to others by the

explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan. The Republic of Uzbekistan requested the applicant's extradition under a bilateral treaty with Turkey.

On 11 March 1999, extradition proceedings took place before the Criminal Court. Both applicants argued that they were not in Uzbekistan at the material time and that their prosecution was political in nature. Both submitted that political dissidents are subjected to torture in Uzbekistan.

On 15 March 1999, the first applicant appealed to the Bakırköy Assize Court against the extradition. On 18 March 1999 the second applicant appealed to the Istanbul Assize Court. Both appeals were dismissed.

The applicant's representatives took their case to the European Court of Human Rights. On 18 March 1999 the President of the relevant Chamber decided to indicate to the Turkish Government ("the government"), not to extradite the applicants prior to the meeting of the competent Chamber. The interim measure was issued on the basis of Rule 39 of the Rules of Court and was extended on 23 March 1999.

On 27 March 1999, the applicants were handed over to the Uzbek authorities. The Supreme Court of Uzbekistan found the applicants guilty and they were sentenced to 20 and 11 years respectively. Since their return to Uzbekistan, the applicant's legal representatives have been unable to contact them.

In its judgment of 6 February 2003, the Chamber held unanimously that there had been no violation of Article 3, that Article 6 was not applicable to the extradition proceedings in Turkey and that no separate issue arose concerning the applicants' complaint under Article 6 of the Convention. Finally, it held by six votes to one that there had been a violation of Article 34 of the Convention.

On 21 May 2003, the Grand Chamber accepted a request for referral by the government.

Complaints

The applicants complained that their extradition to Uzbekistan risked the imposition of the death penalty, violating their right to life under Article 2 of the Convention.

The applicants complained that their extradition to Uzbekistan risked them being subject to torture, violating Article 3 of the Convention.

The applicants complained that they were not afforded a fair hearing in Turkey and that the extradition proceeding in Turkey violated Article 6(1) of the Convention.

The applicants complained that they would not be afforded a fair trial before the criminal court in Uzbekistan and therefore their extradition violated Article 6(1) of the Convention.

The applicants' legal representatives complained that their extradition contrary to the Court's indication under Rule 39 (interim measures) prevented their effective presentation of their application to the Court, violating their right to individual petition under Article 34 of the Convention.

Held

The Court held by fourteen votes to three that there had been no violation of Article 3 of the Convention.

The Court held unanimously that no separate examination of the complaint under Article 2 of the Convention was necessary.

The Court held unanimously that Article 6(1) did not apply to the extradition proceedings in Turkey. In considering the application of Article 6(1) to extradition proceedings, the Court reiterated that that the 'entry, stay and deportation of aliens' does not raise issues under Article 6 referring to the Chamber judgment on this matter and *Maaouia v. France*, 39652/98, 2000.

The Court held by thirteen votes to four that there had been no violation of Article 6(1) as regards the criminal proceedings in Uzbekistan. The Court heard contextual evidence from Amnesty International on human rights abuses in Uzbekistan, but did not consider that the evidence was enough to demonstrate the requisite 'risk of a flagrant denial of justice' in the case of the applicants.

The Court held by fourteen votes to three that in failing to comply with the interim measure ordered by the Court, Turkey had failed to comply with its obligations under Article 34 of the Convention.

The Court awarded the applicant the sum of EUR 3,000 in respect of non-pecuniary damages.

Commentary

Rule 39 extends the Court's system of protection under the Convention. the government

submitted that it had no legal obligation to comply with the indication, whilst the Commission of Jurists, which intervened as a third party, submitted that such interim measures are binding in international law. In reaching its decision the Court considered developments concerning the effectiveness of remedies by the International Court of Justice, the Inter-American Court of Human Rights, Human rights Committee and the Committee against Torture of the United Nations.

This is the first case in which the Court has examined the application of Article 6 to extradition proceedings. The Court relied upon one authority and two admissibility decisions. Implicit in the ruling is that there is no distinction between extradition and immigration for the purposes of Article 6.

The extra-territorial application of Article 6 is enacted if there is a 'risk of flagrant denial of justice'. The test applied by the Court should be compared with the similar extra-territorial application of Article 3, for which the relevant standard is a 'real risk'; (see *Soering v. United Kingdom*, 14038/88, 1989). It is not clear why there is a distinction between the two Articles, but it would appear that Article 6 carries without it a heavier burden of proof.

Right to a private and family life

Moldovan and Others v. Romania (No.2)

(41138/98 and 64320/01)

European Court of Human Rights: Judgment of 12 July 2005

Racist attacks on Roma people – Right of access to court – Right to proceedings within reasonable time – Freedom from discrimination – Articles 6, 8 and 14 of the Convention

Facts

The first applicant, Iulius Moldovan, was born in 1959; the second applicant, Melenuța Moldovan, was born in 1963; the third applicant, Maria Moldovan, was born in 1940; the date of birth of the fourth and fifth applicants, Otilia Rostaș and Petru (Gruia) Lăcătuș, is unknown; the sixth applicant, Maria Florea Zoltan, was born in 1964; and the seventh applicant, Petru (Dîgăla) Lăcătuș was born in 1962. The applicants are Romanian nationals of Roma origin. They used to live in the village of Hădăreni, in the Mureș district, and are agricultural workers. After the events described below, some applicants returned to live in Hădăreni, while others, who are homeless, live in various parts of the

country. Mr Iulius Moldovan is currently living in Spain and Mrs Maria Floarea Zoltan lives in the United Kingdom.

On the evening of 20 September 1993, there was a confrontation in a bar in the centre of Hădăreni between three Romas, Rapa Lupian Lăcătuş, Aurel Pardalian Lăcătuş, (who were brothers) Mircea Zoltan, and a non-Roma, Cheţan Gligor. The argument became physical and ended with the death of Cheţan Crăciun, who had come to the aid of his father. The three Roma then fled the scene, seeking refuge in a neighbour's house.

Soon afterwards, an angry mob of villagers arrived at the house where the three Roma were hiding and demanded that they come out. Among the crowd were members of the local police force in Hădăreni. When the brothers refused to come out, the crowd set fire to the house. The brothers tried to flee but were caught by the mob who beat and kicked them with vineyard stakes and clubs. They later died of their injuries, whilst Mircea Zoltan died in the fire.

Later that evening, the villagers burned the Roma homes and property. The riots continued until the following day. In all, thirteen Roma houses belonging to the applicants were destroyed, as well as much of the applicant's personal property. Some of the applicants were intimidated and attacked on returning to the village. Petru Lacatus alleged that his pregnant wife was beaten, causing brain damage to their unborn child.

In the aftermath of the above incidents, the Roma residents of Hădăreni lodged a complaint with the Public Prosecutor's Office identifying individuals including some police officers.

The case was sent to the Târgu-Mureş Military Prosecutors' Office which has jurisdiction in crimes committed by police. According to the military prosecutor, the evidence indicated that Chief of Police Moga and Sergeant Şuşcă had incited violence and were directly involved in arson. Lieutenant Colonel Palade was thought to have organised a small meeting with non-Roma villagers after the incident, advising them "not to tell anyone what the police had done if they wanted the incident to be forgotten and not have any consequences for themselves."

On 10 January 1995, the case was referred it to the Bucharest Territorial Military Prosecutors' Office and on 22 August 1995, the military prosecutor at the Bucharest Military Court decided not to open a criminal investigation, stating that the involvement of the three men had not been confirmed. In September 1995, the Head of the Bucharest Territorial Military Prosecutors' Office upheld the decision, refusing to open an investigation, and all charges against the police officers were dropped. An appeal lodged

by the injured parties was dismissed by the Military Prosecutors' Office of the Supreme Court of Justice.

Criminal proceedings were issued against twelve civilians concerning the events of 20 September 1993, and on 17 July 1998 the Târgu-Mureş County Court delivered its judgment. The court convicted five civilians of extremely serious murder and twelve civilians, including the former five, of destroying property, outraging public decency and disturbing public order. The court pronounced prison sentences ranging from one to seven years, and noted that those given terms of less than five years had half the sentence pardoned. The court established that the villagers had declared that, on the night in question, the village was to be "purged of the Gypsies". In its judgment the court made discriminatory remarks about the Roma community, which it considered had 'marginalised itself, shown aggressive behaviour and deliberately denied and violated the legal norms acknowledged by society.'

Subsequent appeals to the Târgu-Mureş Court of Appeal and the Supreme Court of Justice on 15 January 1999 and 22 November 1999 saw reductions in the charges and sentences, and two acquittals. Furthermore, by a decree of 7 June 2000, the President of Romania issued individual pardons to two of the remaining three convicts, whereupon they were released.

On 14 March 2000 the Supreme Court of Justice rejected the applicant's appeal to open a criminal investigation into the police officers involved in light of the trial evidence.

The Romanian Government subsequently allocated funds for the reconstruction of the damaged or destroyed houses. Eight of the houses were rebuilt but were uninhabitable, whilst three had not been built at all. The applicants submitted that following the events of September 1993, they had been forced to live in hen-houses, pigsties, windowless cellars, or in extremely cold and deplorable conditions. These conditions had lasted for several years and, in some cases, continued to the present day. As a result, the applicants and their families fell ill.

On 12 January 2001 the Mureş Regional Court delivered its judgment in the civil case. The court awarded pecuniary damages in respect of the partial or total destruction of the houses of six Roma, including those of the third and fifth applicants, but rejected the other applicants' request for pecuniary damages in respect of the rebuilt houses. The Court refused all applicants damages in respect of belongings and furniture, on the ground that they had not submitted documents to confirm the value of their assets and were not registered as taxpayers capable of acquiring such valuable assets. The applicants received no non-pecuniary damage until an appeal to the Târgu-Mureş Court of Appeal

gave judgment on 24 February 2004. The applicants were awarded damages ranging from ROL 15,000,000 to ROL 100,000,000 although no award was made in respect of Petru (Gruia) Lăcătuș. The applicants filed an appeal which was rejected by the Court of Cassation, on 25 February 2005.

Complaints

The applicants complained that after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in very poor, cramped conditions, in violation of Articles 3 and 8 of the Convention.

The applicants complained that the failure of the authorities to carry out an adequate criminal investigation, culminating in formal charges and the conviction of all individuals responsible, had denied them a civil action before the court, violating Article 6 of the Convention.

The applicants complained that the length of the criminal proceedings were unreasonable, and had denied them a civil action before the court, violating Article 6 of the Convention.

The applicants submitted that, on account of their ethnicity, they were victims of discrimination by judicial bodies and officials, contrary to Article 14 of the Convention.

Held

The Court held that the events of 20 September 1993 could not be directly examined by the Court, as they occurred prior to Romania's ratification of the Convention. However, the Court considered that, given the involvement of police officers, the state's responsibility was engaged by the continuing nature of the alleged breach. The Court therefore turned to the question of whether the government took adequate steps to put a stop to the said breach. The Court noted, amongst other things, the failure to bring criminal action against the police, the refusal of the domestic courts to provide compensation, and the discriminatory remarks made by the Târgu-Mureș County Court, all of which it held amounted to a serious violation of Article 8 of the Convention.

Noting that discrimination can itself amount to a violation of Article 3, the Court also referred to the living conditions suffered by the applicants and held that the two factors combined amounted to a violation of Article 3 of the Convention.

The Court held that whilst the failure of the authorities to bring a criminal action against certainly prevented a civil remedy, it considered that the civil remedy brought against

the civilians involved precluded any further remedy afforded under Article 6(1) of the Convention.

The Court considered the length of the proceedings, taking its starting point as the ratification of the Convention in Romania on 20 June 1994. The Court dismissed the government's submission that the delay had been due to the complexity of the case, blaming the various procedural errors committed by the domestic court, and held that the length of proceedings failed to satisfy the time requirement, violating Article 6(1) of the Convention.

Having established a violation of Articles 6 and 8, and having in part referred to discriminatory treatment in respect of those violations, the Court held that there had been a violation of Article 14 of the Convention in conjunction with Articles 6 and 8.

The Court ordered the respondent to pay the applicants the following sums in respect of pecuniary damage and non-pecuniary damage: EUR 60,000 to Iulius Moldovan; EUR 13,000 to Melenuța Moldovan; EUR 11,000 to Maria Moldovan; EUR 15,000 to Otilia Rostaș; EUR 17,000 to Petru (Gruia) Lacatus; EUR 95,000 to Maria Floarea Zoltan and EUR 27,000 to Petru (Dîgăla) Lacatus.

Commentary

Moldovan and Others v. Romania (No.2) was linked with *Moldovan and Others v. Romania (No.1)* 41138/98 and 64320/01, 2005, which was struck off the list following a friendly settlement reached with eighteen of the original applicants. The judgment came just days after the Grand Chamber gave judgment in *Nachova v Bulgaria* 43577/98 and 43579/98, 2005 (also reported in this Legal Review), and it appears that these cases represent a positive move in the Court's treatment of racial discrimination. Article 14 cannot be raised independently as its wording refers to the other Articles of the Convention. The Court has often declined to consider Article 14 if it is satisfied that the complaint has been remedied by its treatment of the other Articles.

Freedom of expression

Öztürk v. Turkey

(29365/95)

European Court of Human Rights: Judgment of 4 October 2005

Conviction for publication of books – No punishment without law – Freedom of expression – Protection of property – Articles 7 and 10 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

This is a KHRP assisted case. The applicant, Mr Ünsal Öztürk, is a Turkish national who was born in 1957 and lives in Ankara.

The applicant is the owner of “*Yurt Books and Publishing*”, a small independent firm that has published numerous books in Turkey. The applicant was subjected to several criminal prosecutions for having published certain books between 1991 and 1994 which were held by various State Security Courts to constitute propaganda against the ‘indivisible unity of the state’. Most of the books were confiscated. In all, the applicant served a total of one year, five months and twenty days in prison and paid the equivalent of EUR 5,121 in fines.

Complaints

The applicant complained that Article 8(2) of the Prevention of Terrorism Act (under which in most cases the applicant was convicted) envisaged the publishing of periodicals whilst he was convicted for publishing books. This was unforeseeable, violating Article 7(1) of the Convention.

The applicant complained that his freedom of expression had been unjustifiably interfered with, violating Article 10 of the Convention.

The applicant complained that the confiscation of the books amounted to a violation of his right to peaceful enjoyment of property under Article 1 of Protocol No.1 to the Convention.

Held

Noting that the government had made no submissions regarding Article 7, the Court followed a series of similar judgments (*Başkaya and Okçuoğlu v. Turkey* for example) and held that there had been a violation of Article 7 of the Convention.

The Court held that the interference with the applicant’s freedom of expression was not ‘prescribed by law’ and therefore violated Article 10. The Court did not consider it necessary to consider the other requirements of Article 10(2).

The Court held that it was unnecessary to consider the issue of Article 1 of Protocol No.1 to the Convention separately, as it considered the confiscations a consequence of

the Article 10 violation.

The Court awarded the applicant EUR 14,500 in respect of pecuniary damage and EUR 3,000 for non-pecuniary damage.

Commentary

The right to freedom of expression enshrined in Article 10 of the Convention is often called a 'limited right'. This is because there are a number of legitimate aims in pursuit of which a member state may interfere with a person's right. However, the interference cannot be justified unless it is 'prescribed by law' and 'necessary in a democratic society'. In this case, the Court's analysis under Article 10 was closely related to its findings under Article 7. In order for an interference to be 'prescribed by law', the law must be formulated in a way in which the applicant could have anticipated being in breach, which is similar to the requirement of predictability under Article 7. In finding in favour of the applicant the Court referred to the previous judgments of *Başkaya and Okçuoğlu v. Turkey* 23536/94 and 24408/94, 1999; and *E.K. v. Turkey*, 28496/95, 2002, where on similar facts the Court had held that such an interference was not 'prescribed by law'. The Court considered that the government had not submitted any facts to justify a departure from those precedents.

Grinberg v. Russia

(23472/03)

European Court of Human Rights: Judgment of 21 July 2005

Defamation action by politician against journalist – Freedom of expression – Article 10 of the Convention

Facts

The applicant, Mr Isaak Pavlovich Grinberg is a Russian national, who was born in 1937 and lives in Ulyanovsk.

On 6 September 2002, the *Guberniya* newspaper published a piece written and signed by the applicant concerning a fellow journalist who had been sentenced to one year correctional labour. The applicant criticised what he saw as a war on the independent press by the Governor of the Ulyanovsk Region, Mr Shamanov. The applicant recalled Mr Shamanov's alleged support for the killing of an 18-year-old Chechen girl. The applicant ended the piece referring to Mr Shamanov with the phrase 'No shame and no scruples!'

On 14 November 2002, following a civil defamation action against the applicant, the Leninskiy District Court of Ulyanovsk ruled in Mr Shamanov's favour, holding that the assertion that Mr Shamanov had no shame and no scruples was damaging to his honour and dignity.

On 24 December 2002 the Ulyanovsk Regional Court upheld the judgment. On 22 August 2003 the Supreme Court of the Russian Federation dismissed a further application.

Complaints

The applicant complained that the defamation action brought against him unjustifiably interfered with his freedom of expression, violating Article 10 of the Convention.

Held

The Court held that the interference with the applicant's freedom of expression was not 'necessary in a democratic society' and therefore violated Article 10 of the Convention. The Court noted that Russian domestic law failed to differentiate between fact and value judgments, the former being provable and the latter not. This being the case, having to prove the truth of a value judgment put an impossible burden on the applicant before the domestic courts.

Commentary

Whilst most of the rights enshrined in the Convention require some balancing of relevant factors, this is particularly true of Article 10. In *Grinberg v. Russia* the decision involved the balancing of a politician's right to defence of his reputation, with the public interest issues associated with the freedom of the press. The Court described what it considered to be the role of the press in a democratic society and how it should relate to the political realm. The Court considered the press as having not only the right to freedom of expression, but also a duty to impart information and ideas on matters of public interest. In its judgment of Court reiterated that the freedom afforded to the press should be broad and allow for a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria (no. 1)*, 15974/90, 1995). Whilst freedom of expression is subject to the limitations in Article 10(2), the Court reiterated that there is little scope for restriction of political speech or debate, adding that a politician acting in public matters must be prepared for increased scrutiny and criticism.

Prohibition of discrimination

Nachova and Others v. Bulgaria

(43577/98 and 43579/98)

European Court of Human Rights: Judgment of 6 July

Right to life – Prohibition of discrimination – State’s failure to conduct a proper investigation – Act of racial violence – Right to an effective remedy – Articles 2, 13 and 14 of the Convention

Facts

The four applicants are Bulgarian nationals of Roma origin; Ms Anelia Kunchova Nachova, born in 1995, Ms Aksiniya Hristova, born in 1978 - both live in Dobrolevo (Bulgaria) - Ms Todorka Petrova Rangelova, born in 1955 and Mr Rangel Petkov Rangelov, born in 1954 – both live in Lom (Bulgaria). They were all relatives of Mr Angelov and Mr Petkov, who were 21-years-old at the time of the incident and both conscripts in the Construction Force.

The case concerns the killing on 19 July 1996 of Mr Angelov and Mr Petkov by a member of the military police who was attempting to arrest them. On 15 July 1996, both men fled from a construction site outside the prison where they had been brought for work and travelled to the home of Mr Angelov’s grandmother, Ms Tonkova, in the village of Lesura. Their absence was reported the following day and their names put on the military police’s wanted list. A warrant for their arrest was received on 16 July 1996 by the Vratsa Military-Police Unit. The Vratsa Military-Police went to the village in order to arrest both fugitives. “In accordance with the rules” all officers were told by their superior to carry their handguns and automatic rifles and wear bullet-proof vests. Once outside the premises in question, both fugitives were quickly identified. They were shot by Major G. while trying to escape.

A criminal investigation was opened on 19 July 1997. On 7 January 1997, the families of both victims were given access to the investigation file. Their request that three more witnesses be heard was granted.

On 8 April 1997, following the investigator’s final report, the Pleven Military Prosecutor accepted the investigator’s recommendation and closed the preliminary investigation into the deaths. He concluded that Major G. had proceeded in accordance with Bulgarian law. The Prosecutor noted, *inter alia*, that both men originated from “minority families”, an expression mainly used to designate people from the Roma minority. All appeals

from the victims' relatives were dismissed.

Complaints

The applicants complained that Mr Angelov and Mr Petkov had been killed in violation of Article 2 of the Convention. It was alleged that they had died as a result of the failure of domestic law and practice to regulate in a "Convention compatible manner" the use of firearms by State agents. The applicants also complained that the Bulgarian authorities had failed to conduct an effective investigation into the deaths.

In addition, the applicants alleged that a separate issue arose under Article 13 of the Convention (right to an effective remedy).

Moreover, the applicants claimed that the prejudice and hostile attitudes from Army officials towards persons of Roma origin constituted a violation of Article 14 of the Convention.

Held

The Court held, unanimously, that there had been a violation of Article 2 of the Convention in respect of the deaths of Mr Angelov and Mr Petkov. The Court also held that there had been a violation of Article 2 of the Convention in so far that the Bulgarian authorities failed to conduct an effective investigation into the deaths of both fugitives.

The Court also held, unanimously, that no separate issue arose under Article 13.

Furthermore, the Court held by eleven votes to six that there had been no violation of Article 14 of the Convention taken together with Article 2 in respect of the allegation that the events leading to the deaths constituted an act of racial violence. However, the Court did unanimously hold that there had been a violation of Article 14 of the Convention taken in conjunction with Article 2 of the Convention in that the authorities failed to investigate possible racist motives possible behind the events that led to the deaths of Mr Angelov and Mr Petkov.

Finally, the Court held, unanimously, that Bulgaria had to pay, jointly to Ms Nachova and Ms Hristova, EUR 25,000 in respect of pecuniary and non-pecuniary damage, and jointly to Ms Rangelova and Mr Rangelov EUR 22,000 in respect of pecuniary and non-pecuniary damage. The applicants were also to receive EUR 11,000 in respect of costs and expenses.

The Court awarded Ms Nachova and Ms Hristova EUR 25,000 jointly for pecuniary and non-pecuniary damages and Ms Rangelova and Mr Rangelov EUR 22,000 jointly.

Commentary

With regard to Article 2(2) (b) of the Convention, the Court held that military officials can only put one's life at risk in circumstances of absolute necessity, which was clearly not the case here. Furthermore, Article 2 implies that there is a primary duty upon States to ensure that adequate rules and safeguards exist to establish the circumstances in which law-enforcement officials may resort to firearms. In that respect, Bulgarian legislation was clearly defective. Moreover, the Court found that the use of force was disproportionate to the aim to be achieved. Similarly, no effective investigations had been conducted, which also infringed Article 2.

Although there was evidence of some racist statements made by Major G., this constituted an insufficient basis for concluding that the respondent state was liable for racist killing. No positive steps were however taken to investigate whether discrimination had taken place, which violated Article 14 of the Convention.

This decision is of major importance to the Kurds' rights to non-discrimination under the ECHR. It provides a clear indication that the Court is now willing to consider whether or not violations of Article 14 have occurred, rather than dismissing such complaints out of hand and without considering them. This development in the Court's jurisprudence was echoed in the dissenting opinions of Judge Mularoni in *Ateş v Turkey*, *Kismir v Turkey*, *Koku v Turkey*, *Toğcu v Turkey* and *Dündar v Turkey* reported earlier in this Legal Review.

Enjoyment of property

Aslangiray and Others v. Turkey

(48262/99)

European Court of Human Rights: Judgment of 31 May 2005

Expropriation of land for dam construction – Protection of property – Right to fair trial – Freedom from discrimination – Articles 6 and 14 of the Convention and Article 1 of Protocol No.1 to the Convention

Facts

The applicants, Mr Ali Aslangiray, Mrs Fatma Özbilge and Mrs Gülsüm Özbilge are Turkish nationals. On 19 July 1993, the applicants brought separate actions before the Baskil Civil Court of First Instance against the National Water Board. They alleged that their plots of land had been illegally seized by the administration for dam construction

without any payment and requested compensation. Proceedings in the domestic court between the applicants and the National Water Board lasted several years. On 17 March 1998, the applicants were awarded compensation in a judgment of the Court of Cassation. On 11 November 1998, the administration paid the applicants the amounts due together with interest.

Complaints

The applicants complained that the additional compensation had fallen in value, since the default interest payable had not kept pace with the very high rate of inflation in Turkey, violating the right to possessions under Article 1 Protocol No.1 to the Convention.

The applicants complained that the length of the court proceedings were unreasonable violating Article 6(1) of the Convention.

The applicants complained under Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, that State debts were not subjected to enforcement procedures like ordinary debts.

Held

The Court declared the complaints admissible and held that as a result of that delay and the length of the proceedings, the applicants had to bear an individual and excessive burden that upset the fair balance between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions, violating Article 1 of Protocol No.1 to the Convention. The Court held that it was unnecessary to review the applicants' complaints under Article 6 and 14 of the Convention.

Commentary

The issues in this case were similar to previous cases (*Aka v. Turkey*, 19639/92, 1998; *Akkuş*, 19263/92, 1997) and the Court referred to its findings in those cases.

Section 3: Appendices

Appendix 1. European Court of Human Rights – Judgments against Turkey in 2004 dealing exclusively with issues already examined by the Court

- 49 cases concerned the lack of independence and impartiality of State Security Courts dealing with offences under counter-terrorism legislation
- 20 cases (including gone friendly settlement) concerned both the lack of independence and impartiality of State Security Courts and convictions for dissemination of separatist propaganda and/or incitement to hatred and hostility; a violation of Article 10 alone was found in a further judgment.
- one case concerned the lack of independence and partiality of a martial law court (cf. the leading judgment of *Şahiner v. Turkey*, judgment of 25 September 2001), as well as the length of the criminal proceedings
- 35 cases concerned delays in payment of compensation for expropriations (cf. the leading judgment of *Akkus v. Turkey*, judgment of 9 July 1997)
- seven cases concerned the failure to bring detainees promptly before a judge
- five cases (including one friendly settlement) concerned the destruction of possessions and homes by the security forces

Appendix 2. European Court of Human Rights – Evolution of cases against Turkey

	2002	2003	2004
Applications lodged (provisional statistics for 2004)	3879	2944	3491
Applications allocated to a decision making body	3866	3558	3679
Applications declared inadmissible or struck off	1639	1632	1817
Applications referred to Government	377	357	740
Applications declared admissible	102	142	172
Judgments (Chamber and Grand Chamber)	55	76	156
Judgments (final-after referral to Grand Chamber)	1	1	2
Judgments (friendly settlement)	45	44	10
Judgments (striking out)	4	1	3
Judgments (just satisfaction)	-	-	-
Judgments (preliminary objections)	-	1	-
Judgments (interpretation)	-	-	-
Judgments (revision)	-	-	-

Appendix 3: European Court of Human Rights – Composition of the Court – List of Judges (In order of precedence)

- Mr Luzius WILDHABER, President (Swiss)
- Mr Christos ROZAKIS, Vice-President (Greek)
- Mr Jean-Paul COSTA, Vice-President (French)
- Sir Nicolas BRATZA, Section President (British)
- Mr Boštjan ZUPANČIČ, Section President (Slovenian)
- Mr Giovanni BONELLO (Maltese)
- Mr Lucius CAFLISCH (Swiss)*
- Mr Loukis LOUCAIDES (Cypriot)
- Mr Ireneu CABRAL BARRETO (Portuguese)
- Mr Riza TÜRMEŒ (Turkish)
- Mrs Françoise TULKENS (Belgian)
- Mr Corneliu BÎRSAN (Romanian)
- Mr Peer LORENZEN (Danish)
- Mr Karel JUNGWIERT (Czech)
- Mr Volodymyr BUTKEVYCH
(Ukrainian)
- Mr Josep CASADEVALL (Andorran)
- Mrs Nina VAJIĆ (Croatian)

Mr John HEDIGAN (Irish)

Mr Matti PELLONPÄÄ (Finnish)

Mrs Margarita TSATSA-NIKOLOVSKA (citizen of “The former Yugoslav Republic of Macedonia”)

Mr András BAKA (Hungarian)

Mr Rait MARUSTE (Estonian)

Mr Kristaq TRAJA (Albanian)

Mrs Snejana BOTOUCHAROVA (Bulgarian)

Mr Mindia UGREKHELIDZE (Georgian)

Mr Anatoly KOVLER (Russian)

Mr Vladimiro ZAGREBELSKY (Italian)

Mrs Antonella MULARONI (San Marinense)

Mrs Elisabeth STEINER (Austrian)

Mr Stanislav PAVLOVSKI (Moldovan)

Mr Lech GARLICKI (Polish)

Mr Javier BORREGO BORREGO
(Spanish)

Mrs Elisabet FURA-SANDSTRÖM (Swedish)

Mrs Alvina GYULUMYAN (Armenian)

Mr Khanlar HAJIYEV (Azerbaijani)

Mrs Ljiljana MIJOVIĆ (citizen of Bosnia and Herzegovina)

Mr Dean SPIELMANN (Luxemburger)

Mrs Renate JAEGER (German)

Mr Egbert MYJER (Dutch)

Mr Sverre Erik JEBENS (Norwegian)

Mr David Thór BJÖRGVINSSON (Icelandic)

Mrs Danutė JOČIENĖ (Lithuanian)

Mr Ján ŠIKUTA (Slovakian)

Mr Dragoljub POPOVIĆ (citizen of Serbia and Montenegro)

Mrs Ineta ZIEMELE, Registrar
(Latvian)

Mr Erik FRIBERGH, Deputy Registrar
(Swedish)

*Elected as the judge in respect of Liechtenstein

Appendix 4. Concluding observations of the Human Rights Committee on Syria's implementation of the International Covenant on Civil and Political Rights

1. The Committee considered the third periodic report of the Syrian Arab Republic (CCPR/C/SYR/2004/3) at its 2291st and 2292nd meetings (CCPR/C/SR.2291 and 2292), held on 18 July 2005, and adopted the following concluding observations at its 2308th meeting (CCPR/C/SR.2308), held on 28 July 2005.

A. Introduction

2. The Committee welcomes the timely submission of the third periodic report by the Syrian Arab Republic, which contains detailed information on Syrian legislation in the area of civil and political rights. The Committee encourages the state party to increase its efforts to include in its reports more detailed information, including statistical data, on the implementation of the Covenant in practice.

B. Positive aspects

3. The Committee welcomes the accession by the state party to other international human rights instruments in the reporting period, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the two Optional Protocols to the Convention on the Rights of the Child.

C. Principal subjects of concern and recommendations

4. The Committee notes with concern that the recommendations it has addressed to the Syrian Arab Republic in 2001 have not been fully taken into consideration and regrets that most subjects of concern remain. The Committee regrets that the information provided was not sufficiently precise.

The state party should examine all recommendations addressed to it by the Committee and take all necessary steps to ensure that national legislation and its implementation ensure the effective enjoyment of all Covenant rights in the state party.

5. While welcoming the establishment of the National Committee for International Humanitarian Law, the Committee notes that it is not fully independent. Noting the delegation's statement about current plans to establish an independent national human rights institution, the Committee wishes to stress the complementary role of such an institution with respect to governmental institutions and non-governmental organizations dealing with human rights (article 2 of the Covenant).

The state party is encouraged to establish a national human rights institution that complies with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) (General Assembly resolution 48/134).

6. The Committee notes with concern that the state of emergency declared some 40 years ago is still in force and provides for many derogations in law or practice from the rights guaranteed under articles 9, 14, 19 and 22, among others, of the Covenant, without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict. The Committee has further noted that the state party has not fulfilled its obligation to notify other States parties of the derogations it has made and of the reasons for these derogations, as required by article 4 (3) of the Covenant. In this regard, the Committee has noted the statement of the delegation that the Baath Party Congress in June 2005 had resolved that emergency provisions would be limited to activities which threaten State security. The Committee, however, remains concerned at the absence of any indication that the resolution has become law (art. 4).

The state party, guided by the Committee's general comment No. 29 (2001) on derogations during a state of emergency (article 4 of the Covenant), should ensure firstly that the measures it has taken, in law and practice, to derogate from Covenant rights are strictly required by the exigencies of the situation; secondly, that the rights provided for in article 4 (2) of the Covenant are made non-derogable in law and practice; and thirdly, that States parties are duly informed, as required by article 4 (3) of the Covenant, of the provisions from

which it has derogated and the reasons therefore, and of the termination of any particular derogation.

7. The Committee remains concerned that the nature and number of the offences carrying the death penalty in the state party are not consistent with the requirement of the Covenant that this form of punishment must be limited to the most serious crimes. The Committee is deeply concerned at the de facto reinstatement of death sentences and executions in 2002. The Committee has noted the written replies given by the delegation and notes the insufficient information relating to the number of persons whose death sentences have been commuted, and the number of persons awaiting execution (art. 6).

The state party should limit the cases in which the death penalty can be imposed, in line with the Committee's previous recommendation that the state party should bring its legislation into conformity with article 6 (2) of the Covenant, which provides that a sentence of death may be imposed only for the most serious crimes, and should give precise information to explain the particular reasons for the death sentences imposed and executed.

8. The Committee welcomes the information provided by the delegation on the agreement of 5 May 2005 between the Prime Minister of Lebanon and the President of Syria to establish a committee that would meet periodically to further investigate the facts concerning disappearances of Syrian and Lebanese nationals in the two countries. The Committee remains concerned, however, that sufficient information was not provided about concrete steps taken to establish such a committee in Syria, as well as about its envisaged composition and measures to ensure its independence (arts. 2, 6, 7, 9).

The state party should give a particularized account of Lebanese nationals and Syrian nationals, as well as other persons, who were taken into custody or transferred into custody in Syria and who have not heretofore been accounted for. The state party should also take immediate steps to establish an independent and credible commission of inquiry into all disappearances, in line with the recommendations the Committee made in 2001.

9. While noting the information provided by the state party on measures taken against some law enforcement personnel for acts of ill-treatment of prisoners, the Committee remains deeply concerned at continuing reports of torture and cruel, inhuman or degrading treatment or punishment. The Committee is also concerned that these practices are facilitated by resort to prolonged

incommunicado detention, especially in cases of concern to the Supreme State Security Court, and by the security or intelligence services. (arts. 2, 7, 9 and 10).

The state party should take firm measures to stop the use of incommunicado detention and eradicate all forms of torture and cruel, inhuman or degrading treatment or punishment by law enforcement officials, and ensure prompt, thorough, and impartial investigations by an independent mechanism into all allegations of torture and ill-treatment, prosecute and punish perpetrators, and provide effective remedies and rehabilitation to the victims.

10. The Committee notes the statement by the delegation regarding the establishment of a committee to revise legislation governing the Supreme State Security Court. The Committee reiterates its previous concern that the procedures of this court are incompatible with article 14 of the Covenant (art. 14).

The state party should take urgent measures to ensure that all rights and guarantees provided under article 14 of the Covenant are respected in the composition, functions and procedures of the Supreme State Security Court and in particular that accused persons are granted the right to appeal against decisions of the Court.

11. The Committee takes note of the information provided by the delegation whereby Syria does not recognize the right to conscientious objection to military service, but that it permits some of those who do not wish to perform such service to pay a certain sum in order not to do so (art. 18).

The state party should respect the right to conscientious objection to military service and establish, if it so wishes, an alternative civil service of a non-punitive nature.

12. The Committee is concerned at the obstacles imposed on the registration and free operation of non-governmental human rights organizations in the state party and the intimidation, harassment and arrest of human rights defenders. It also continues to be deeply concerned about the continuing detention of several human rights defenders and the refusal to register certain human rights organizations (arts. 9, 14, 19, 21 and 22).

The state party should immediately release all persons detained because

of their activities in the field of human rights and end all harassment and intimidation of human rights defenders. Furthermore, the state party should take urgent steps to amend all legislation that restricts the activities of these organizations, in particular state of emergency legislation which must not be used as an excuse to suppress activities aimed at the promotion and protection of human rights. The state party should ensure that its law and practice allow these organizations to operate freely.

13. The Committee is concerned at the extensive limitations on the right to freedom of opinion and expression in practice, which go beyond the limitations permissible under article 19 (3). Furthermore, the Committee is concerned at allegations that the government has blocked access to some Internet sites used by human rights defenders or political activists (art. 19).

The state party should revise its legislation to ensure that any limitations on the right to freedom of opinion and expression are in strict compliance with article 19 of the Covenant.

14. While welcoming the statement by the delegation that the Publications Act of 2001 is in the process of being appropriately revised, the Committee is concerned at its nature and application. The Committee has also noted in this regard the information provided by the delegation that a new law for audio-visual media is being prepared (art. 19).

The state party should ensure that all legislation governing audio-visual and print media and the licensing regime are in full compliance with the requirements of article 19, and that any limitations on the content of publications and media broadcasts fall within the strict limits permissible under article 19 (3).

15. The Committee regrets that no statistical information was provided on the exercise in practice of the right to freedom of assembly. While noting the view held by the delegation that protests such as the peaceful demonstration on 25 June 2003 outside UNICEF headquarters in Damascus had not obtained the required permit, the Committee is concerned that the laws and regulations and their application prevent the exercise of the right to peaceful assembly (art. 21).

The state party should take all necessary measures to guarantee the exercise in practice of the right to peaceful assembly and should provide statistical information on the number of and grounds for denials of applications, the

number of cases where denials have been appealed, the number of rejected appeals and on what grounds.

16. The Committee reiterates its previous concern that, despite article 25 of the Constitution, discrimination against women continues to exist in law and practice in matters related to marriage, divorce and inheritance, and that the Penal Code contains provisions discriminating against women, including providing lesser penalties for crimes committed by men in the name of honour. It notes the statement by the delegation that a commission is currently considering amendments to the personal status laws and that the provisions of the Penal Code with regard to honour crimes are currently being revised (arts. 3, 6 and 26).

The state party should review its laws in order to ensure equality between men and women in matters of personal status, and to eliminate any discrimination against women in the Penal Code.

17. While noting the statement by the delegation that a national strategy for women has been initiated, the Committee notes that the participation of women in public life remains low (art. 3).

The state party should take appropriate steps towards achieving balanced representation of women in public life.

18. The Committee notes the information provided by the state party and the delegation's statement as to the absence of any discrimination on grounds of race, colour, descent, or national or ethnic origin in the state party. However, the Committee remains concerned at discrimination against Kurds and that the practical enjoyment by the Kurdish population of their Covenant rights is not fully guaranteed (arts. 26 and 27).

The state party should ensure that all members of the Kurdish minority enjoy effective protection against discrimination and are able to enjoy their own culture and use their own language, in accordance with article 27 of the Covenant.

19. The Committee has noted the information provided by the state party with regard to the stateless Kurds. The Committee remains concerned at the situation of the large number of Kurds treated as aliens or unregistered persons and the discrimination experienced by them. The Committee reminds the state party

that the Covenant is applicable to all individuals subject to its jurisdiction (arts. 2 (1), 24, 26 and 27).

The state party should take urgent steps to remedy the situation of statelessness of Kurds in Syria and to protect and promote the rights of non-citizen Kurds. The Committee further urges the state party to allow Kurdish children born in Syria to acquire Syrian nationality.

D. Dissemination of information about the Covenant

20. The state party should publish and widely disseminate its third periodic report by the Committee and the present concluding observations thereon to the general public as well as the judicial, legislative and administrative authorities, and it should circulate the fourth periodic report among the non-governmental organizations operating in the country.
21. The Committee suggests that the state party seek technical assistance from OHCHR and other United Nations entities or agencies dealing with human rights.
22. In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the state party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 6, 8, 9 and 12 above. The Committee requests the state party to include in its next periodic report information concerning the remainder of its recommendations, to be presented by 1 August 2009.

Appendix 5: KHRP Publications

CODE	TITLE	PUBLISHER	PRICE/ISBN
REPORTS			
2005			
05/A	The Cultural and Environmental Impact of Large Dams in Southeast Turkey: Fact-Finding Mission Report	KHRP	ISBN 1900175851 £10 or download online www.khrp.org [Not available in print]
05/B	Trial Observation - Relatives of human rights defenders at risk: the extra-judicial killing of Siyar Perinçek	KHRP	ISBN 1 900175819 £10 or download online www.khrp.org
05/C	'Thirteen Bullets': Extra-judicial killings in southeast Turkey – Fact-finding mission report	KHRP	ISBN 1 900175 827 £10 or download online www.khrp.org
05/D	Enforcing the Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora	KHRP	ISBN 1 900175 83 5 £10 or download online www.khrp.org
05/E	Pumping Poverty: Britain's Department for International Development and the Oil Industry	PLATFORM (endorsed by KHRP)	£10 or download online www.khrp.org
05/F	Freedom of expression at risk: writers on trial in Turkey - Trial observation report	KHRP	£10 or download online www.khrp.org
05/G	KHRP Legal Review 7 (2005)	KHRP	ISBN 1748-0639 £8 or download online www.khrp.org
05/H	Development in Syria – A Gender and Minority Perspective	KHRP	ISBN 1 900175886 £10 or download online www.khrp.org
05/I	Human Rights Violations Against Kurds in Turkey: Report Presented to the Organisation for Security and Cooperation in Europe (OSCE)	KHRP	download online www.khrp.org
05/J	International Conference on Turkey, the Kurds and the EU: European Parliament, Brussels, 22-23 November 2004 – Conference Papers	KHRP	£10 or download online www.khrp.org

05/K	Recognition of linguistic rights? The impact of pro-EU reforms in Turkey : Fact Finding Mission	KHRP	£10 or download online www.khrp.org
05/L	The Status of Internally Displaced Kurds in Turkey and Compensation Rights: Fact Finding Mission Report	KHRP	£10 or download online www.khrp.org
05/M	Dissenting Voices: Freedom of Expression and Association in Turkey – Fact Finding Mission Report	KHRP	£10 or download online www.khrp.org
05/	Freedom of Expression and Association in Turkey	KHRP	ISBN 1900175940 £10 or download online www.khrp.org
05/	KHRP Legal Review 2005 (8)	KHRP	ISBN 17480639 £8 or download online www.khrp.org
05/	Dissenting Voices: Freedom of Expression and Association in Turkey-Fact Finding Mission Report	KHRP	ISBN 1900175908 £10 or download online www.khrp.org
2004			
	KHRP Legal Review 6	KHRP	ISBN 1 900175 72 X £8 available www.khrp.org
	Report on the Trial of Huseyin Cangir – Trial Observation Report	KHRP	ISBN 1 900175 76 2 £5 Available www.khrp.org
	Turkey's Implementation of Pro-EU Reforms – Fact-finding mission report	KHRP	ISBN 1 900175 73 8 £5.00 Available www.khrp.org
	Linguistic and Cultural Rights of Kurds under International Law (Turkish language)	KHRP	download online www.khrp.org
	Report on the Trial of Ferhat Kaya – Trial Observation Report	KHRP	£10 or download online www.khrp.org
	Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora - English, Sorani, Kurmanci, Arabic, Turkish, French (Second edition)	KHRP	£10 or download online www.khrp.org
	Turkey – The Situation of Kurdish Children	KHRP	ISBN 1 900175 77 0 £5.00 Available www.khrp.org
	Turkey – The Situation of Kurdish Children (Turkish language)	KHRP	£10 or download online www.khrp.org
	The Kurds in Iraq - The Past, Present and Future (Turkish language)	KHRP	£10 or download online www.khrp.org

	The Kurds: Culture and Language Rights	KHRP	ISBN 1 900175 74 6 £8.00
	Taking Human Rights Complaints to UN Mechanisms (Turkish language)	KHRP	Available www.khrp.org
	Kurdish Cultural and Language Rights (Turkish language)	KHRP	Available www.khrp.org
	KHRP Legal Review 5	KHRP	ISBN 1 90017572 X
	Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora	KHRP/ KWP	ISBN 1 900175 71 1 <i>Available www.khrp.org</i>
04/L	Baku-Tbilisi-Ceyhan Oil Pipeline: Human rights, Social and Environmental Impacts Turkey Section Final Report of Fourth Fact-Finding Mission – Ardahan and Imranli Regions 10-27 September 2004	KHRP	£10 or download online www.khrp.org
	Taking Human Rights Complaints to UN Mechanisms – A Manual (Russian language)	KHRP/ BHRC/ Platform	<i>Only available in Armenia and Azerbaijan or www.khrp.org</i>
	Torture in Turkey – the Ongoing Practice of Torture and Ill-treatment	KHRP	ISBN 1 900175 70 3 £8.00
2003			
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03/Q	The Kurds in Iraq; the past, present and future	KHRP	ISBN 1900175673 £8.00
03/P	KHRP Legal Review 4 (November 2003)	KHRP	ISBN 1900175681 £8.00
03/O	After the War: Report of the KHRP Fact-Finding Mission to Iraqi Kurdistan	KHRP	ISBN 1900175665 £5.00
03/K	Internally Displaced Persons: the Kurds in Turkey	KHRP, Göç-Der, IHD Diyarbakir	£8.00
03/J	Some Common Concerns: Imagining BP’s Azerbaijan-Georgia-Turkey Pipelines System – Azeri language	KHRP, PLATFORM, the Corner House, Friends of the Earth International, Campagna per la Riforma della Banca Mondiale and CEE Bankwatch	<i>Only available in Azerbaijan</i>

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03/I	Turkey's non-implementation of European Court judgments: the Trials of Fikret Baskaya	KHRP, BHRC	ISBN 1 900175 630 £5.00
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03/F	Taking cases to the European Court of Human Rights – A Manual - Armenian language	KHRP	<i>Available in Armenia only</i>
03/E	Meaningful Consultation and the Ilisu Dam: the Trial of Human Rights Defenders	KHRP, Corner House, BHRC	ISBN 1 900175 606 £5.00
03/D	KHRP Legal Review 3	KHRP, June 2003	ISBN 1 900175 58 4 £8.00
03/C	Second International Fact-Finding Mission Baku-Tbilisi-Ceyhan Pipeline – Turkey Section March 16th-24th 2003	KHRP, Campagna per la Riforma della Banca Mondiale, Platform, the Cornerhouse	<i>Available online</i>
03/B	“This is the Only Valley Where We Live”: the Impact of the Munzur Dams	KHRP/ the Cornerhouse	ISBN 1900 175 569
03/A	The State and Sexual Violence – Turkish Court silences Female Advocate – Trial Observation Report	KHRP/ BHRC January 2003	ISBN 1900 175 56 8
2002			
02/S	The Kurdish Human Rights Project Legal Review 2	KHRP December 2002	£8.00 ISBN 1 900175 55X

02/R	Ülke İçinde Göç Ettirilen İnsanlar: Kürt Göçü (A Turkish Translation of KHRP's June 2002 Report, "Internally Displaced Persons: The Kurds in Turkey")	KHRP/Goç-Der/Senfoni/IHD	ISBN 9759286181 <i>Available only in Turkey.</i>
02/Q	Dicle-Fırat ve Su Sorunu: Türkiye'de Baraj Yapımı Suriye ve Irak'taki Etkileri (A Turkish Translation of KHRP's August 2002 Report, "Downstream Impacts of Turkish Dam Construction on Syria and Iraq")	KHRP/Senfoni	ISBN 9759286159 <i>Available only in Turkey.</i>
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OO/G	Adil bir yargılamanın güvenceleri - Karen Reid Avrupa İnsan Hakları Sözleşmesi Rehberi, Üçüncü Kitap.	KHRP and Scala/October 2000	ISBN 9757132934 <i>Available only in Turkey.</i>
OO/F	Kişinin Özgürlük ve Güvenlik Hakları by Karen Reid (Avrupa İnsan Hakları Sözleşmesi Rehberi, İkinci Kitap)	KHRP and Avesta/July 2000	ISBN 9757112798 <i>Available only in Turkey.</i>
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98/B	State before Freedom - Media Repression in Turkey	Article 19/ Contemporary Journalists Association of Turkey/KHRP/ July 1999	£5.00 ISBN 1870798791
98/A	Freedom of Thought, Conscience, Religion and Expression. A publication of an English/Turkish handbook of an excerpt from 'Law and Practice of the European Convention on Human Rights and the European Social Charter' Article 9 and 10 of the European Convention	KHRP/May 1998	<i>Available only in Turkey.</i>

1997			
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