

Kurdish Human Rights Project

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# LEGAL REVIEW

Kurdish Human Rights Project

**KHRP**

Established 1992

(2006) 10 KHRP LR





## **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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## Acknowledgements

KHRP would like to thank KHRP Legal Interns Sadaf Sethi, Grace Pelly and Fatima Alkhoe for their invaluable assistance in the compilation of this review.

*The Kurdish Human Rights Project gratefully acknowledges the financial support of:*

The Big Lottery Fund (UK), Irish Aid (Ireland), The Sigrid Rausing Trust (UK), Bar Human Rights Committee for England and Wales (UK), Oak Foundation (USA), Finnish Ministry for Foreign Affairs (Finland), Bishop's Subcommission for Misereor (Germany), UN Voluntary Fund for Victims of Torture (Switzerland), The Bromley Trust (UK), and Sticing Cizera Botan (Netherlands).

The views expressed are those of the contributors and do not necessarily represent those of the KHRP.

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

**Printed in Great Britain**

December 2006

ISSN 1462-6535

Published by the Kurdish Human Rights Project

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## Abbreviations

CAT	United Nations Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
<b>The Convention</b>	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
<b>The Court</b>	The European Court of Human Rights
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	The Democracy Party (Turkey)
HADEP	The People's Democracy Party (Turkey)
ICJ	International Court of Justice
İHD	Human Rights Association, Turkey
NGO	Non-Governmental Organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PKK	Kurdistan Workers' Party
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 2: Right to education
- Article 3: Right to free elections

### **Protocol No 2 to the Convention**

- Article 7: Right of appeal in criminal matters

## Section 1: Legal Developments & News



## **United Nations Human Rights Council holds inaugural session**

The United Nations Human Rights Council, which replaced the Commission on Human Rights, held its inaugural meeting between 19 and 30 June 2006. Unlike the previous Commission, the Human Rights Council included civil society in its sessions and allowed NGOs to participate at the same level as representatives and heads of state. During its first session, the Council adopted eight resolutions, three decisions and two statements by the President, further detail of which can be found on the website.<sup>1</sup>

In particular, the Council addressed the adoption of a treaty to prevent and prohibit enforced disappearances as well as adopting the UN Declaration on the Rights of Indigenous People and held discussions on the Special Procedures on torture and other cruel, inhuman or degrading treatment or punishment. It also passed a decision enabling its Special Procedures to continue with the implementation of their mandates for one year, subject to the completion of a review of these independent thematic and country experts. Further, the Council also called upon all states to ratify the optional Protocol to the UN Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment.

The Council has also held two special sessions since its creation. The first, in July 2006, dealt with the urgent human rights issues of the Occupied Palestinian Territories where the Council adopted a resolution and decided to urgently dispatch the Special Rapporteur to undertake a fact-finding mission on the situation. Its second special session on 11 August 2006 was convened in response to the Israeli-Lebanese conflict where the Council strongly condemned the grave Israeli violations of human rights and breaches of humanitarian laws in Lebanon and dispatched a high-level inquiry commission to the region. The Council opened its third session on 27 November 2006, and concluded on 8 December 2006.

1 Please see the United Nations Office of the High Commissioner for Human Rights website, available at: [www.ohchr.org/english/bodies/hrcouncil](http://www.ohchr.org/english/bodies/hrcouncil)

## **UN General Assembly appoints new Secretary General**

On 13 October 2006, the United Nations General Assembly appointed Foreign Minister Ban Ki-Moon of the Republic of Korea as the United Nation's next Secretary-General to succeed Kofi Annan when he steps down. Mr Ban will commence his position for a term of five years from 1 January 2007.

Addressing the delegates of the General Assembly, Mr Ban promised to carry on Mr Annan's legacy and underlined efforts to reform the UN declaring it necessary. Mr Ban has previously held posts in the UN, serving in the Republic of Korea's mission to the UN and, in 2001, he acted as Chef de Cabinet to the then General Assembly President Han Sueng-soo of the Republic of Korea.

## **Optional Protocol to Torture Convention enters into force**

On 22 June 2006, the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force. The protocol was adopted by the UN General Assembly and opened for ratification in December 2002, entering into force thirty days after receiving its twentieth ratification. It provides for visits to places of detention by international and national monitoring bodies, which will work together and have the right to visit all places where people deprived of their liberty are being held and conduct private interviews with detainees.

Armenia acceded to the Optional Protocol on 14 Sep 2006. The text of the Optional Protocol is attached at Appendix I.

## **Council of Europe releases report on cultural situation of Kurds**

In July 2006, the Council of Europe Committee on Culture, Science and Education released a report on the cultural situation of the Kurds. This encouraged Turkey, as a Council of Europe member state, and also Iran, Iraq and Syria to acknowledge that Kurdish language and culture are part of the heritage of their own country and that they should be preserved, rather than being treated as a threat.

The report noted that the Kurdish people were enjoying a large degree of autonomy in Iraq. In Iran, Kurds have no rights other than cultural: music and

folklore but no education. It therefore identified need for schools teaching the Kurdish language in Iran. In Syria, Kurds have no rights at all and even their music is forbidden. In relation to Turkey, the report revealed that the largely Kurdish region in south east Turkey is the least developed region, for several reasons: isolation, social structure and economic structure.

The report concluded by specifically calling on Turkey to address the 'Kurdish issue' in a comprehensive manner and not only from a security point of view. This included the implementation of the European Charter for Regional and Minority languages with reference to the Kurdish language spoken in Turkey, recognising and supporting Kurdish cultural associations and putting an end to the unreasonably high administrative hurdles faced by Kurds in their cultural activities.

## **Signature and ratification of Council of Europe treaties**

On 19 May 2006, Armenia signed Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.

On 19 May 2006, Azerbaijan ratified Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

## **European Court of Human Rights elects new President**

On 28 November 2006, the European Court of Human Rights elected Jean-Paul Costa as its new President. Mr Costa, who is French, will serve a three-year term beginning on 19 January 2007. He replaces Luzius Wildhaber (Swiss), who has been the Court's President since 1 November 1998. Mr Wildhaber will be 70 on 18 January 2007 and so, according to Article 23(6) of the European Convention, must stand down on that date.

Jean-Paul Costa was born in 1941 and studied in Paris at the Institute of Political Studies, the Law Faculty and the National School of Administration. He has been a Judge of the European Court of Human Rights since 1 November 1998, Section President since 1 May 2000 and Vice-President since 1 November 2001.

## **Development of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**

In June 2006, adopting a resolution by consensus, the Human Rights Council decided to move towards the creation of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. If set up, this Protocol will not create any new obligations but will establish a complementary mechanism to the reporting procedure for addressing and redressing violations of economic, social and cultural rights, enabling victims to bring complaints at the international level.

The issue has been on the agenda since 1990 and has gained momentum through a number of expert meetings, NGO involvement and the work of the Independent Expert of the UN Commission on Human Rights. The Committee on Economic, Social and Cultural Rights first produced a draft Protocol in 1996.

## **OSCE launches information system and hate incidents report**

On 12 October 2006, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) created a tolerance and non-discrimination information system focusing on issues such as hate incidences, xenophobia and religious freedom in the 56 member states of the OSCE. The information system will serve as a collection point for information related to these areas and gives access to reports, action plans, practical initiatives, tools and resources. It is accessible from the OSCE website.

In addition, ODIHR issued a report on hate crimes and violent manifestations of intolerance which shows worrying trends in rises of racist and xenophobic discourse coming from political leaders as well as actions against human rights defenders.

## **OSCE roundtable in Warsaw discusses guidelines on freedom of assembly**

The OSCE/ODIHR hosted a roundtable discussion of the guidelines on legislation regulating and affecting the freedom of assembly in Warsaw on 16 October 2006. The guidelines have been in a working phase for the last two years and are now expected to be ready by early 2007. They will be applicable in any legal

context and serve as a practical toolkit for legislators and practitioners involved in regulating, handling and organising assemblies, and will include examples of good practice from OSCE participating states.

## **Iraqi Parliament swears in new ministers and makes plans for federalism**

The Iraqi Parliament swore-in key ministers on 8 June 2006. Shirwan Al-Waili has been appointed minister of national security, Jawad Al-Bulai the interior minister and Abdel Qader Jassmi Obeidi the defence minister. All three ministers belong to no particular party and are acting independently.

In October 2006, the Iraqi Parliament also approved a law which will allow Iraq to be made into a federation of independent, autonomous regions. The measure allows for different party autonomy and advances the idea of federalism that was envisaged in the Iraqi constitution. It faced resistance from Sunni parties - who fear that Kurdish autonomy as well as Shiite party autonomy will deprive them of status and resources in Iraq – and who therefore threatened a boycott to prevent the bill from being introduced. As a result, the bill now includes a provision that prevents the formation of federal regions for 18 months.

## **Saddam Hussein faces genocide charge in Kurdish case**

The former Iraqi President Saddam Hussein has been charged with genocide in a second trial which commenced on 11 August 2006. The Iraqi Special Tribunal announced fresh charges against Saddam and six others for the displacement of tens of thousands of Iraqi Kurds during the Anfal campaign in 1988. Saddam Hussein's co-accuseds include his cousin Ali Hassan Al-Majid for his role in the poison gas attack on Halabja.

Although the gassing of Halabja, in which 5,000 Kurds died, is considered part of the Anfal campaign, the tribunal spokesman said the Halabja killings would be tried separately due to the different nature of the atrocities.

One Kurdish man testified that he escaped being killed during the 1988 massacre by Iraqi soldiers by pretending he was already dead. Saddam refused to enter a plea on the first day of the trial, denying that he or his government engaged in anti-Kurdish policies or actions.

In his first trial, Saddam has been convicted of crimes against humanity and sentenced to death by hanging over the killing of 148 people in Dujail in 1982.

## **UN Mission in Iraq expresses concern at deteriorating human rights situation in country**

In its latest report, the United Nations Assistance Mission for Iraq (UNAMI) reported that in September and October 2006, 7,054 civilians were violently killed, most of them as a result of gunshot wounds. Terrorist acts and sectarian strife, including revenge killings, fuelled by insurgent, militia and criminal activities were the main source of violence in the country, causing the displacement of individuals and entire communities.

The report also found that freedom of expression continued to be undermined; minorities continued to be adversely and directly affected; the conditions for women continued to deteriorate; the targeting of professionals continued unabated; and that violence was impacting education, by preventing many schools and universities from opening.

The report noted the efforts of the Government, especially the Ministry of Human Rights, for the development of a national system based on human rights and the rule of law citing legislation under discussion by the Council of Representatives with regards to setting up an independent national human rights commission, as foreseen by the Iraqi Constitution.

## **European Commission 2006 Turkey Progress Report confirms slowdown in reform process**

The European Commission released its Turkey Progress Report on 8 November 2006, finding that there had been a slowdown in Turkey's reform process, particularly in relation to Article 301 of the Penal Code and the provisions of the new anti-terror legislation. It also expressed special concern in relation to the situation of internally displaced people.

For the first time, the report made a positive step forward in recognising that the Kurdish minority faces daily discrimination because of their ethnicity. It stated that a comprehensive strategy should be pursued in order to achieve the 'establishment of conditions for the Kurdish population to enjoy full rights and

freedoms’

## **Working Group on Arbitrary Detention visits Turkey**

The UN Working Group on Arbitrary Detention undertook an official visit to Turkey between 9 and 20 October 2006. The delegation visited Ankara, Istanbul, Izmir and Diyarbakır. In each of the cities, the delegation met with judges, prosecutors and police commanders, and visited police prisons and remand detention facilities as well as centres where people are held against their will outside the criminal justice system: mental health institutions and immigration holding facilities.

The Working Group stressed how the entry into force of the new Criminal Code and Criminal Procedure Code in June 2005 had strengthened the safeguards against arbitrary detention in Turkey’s criminal justice system, but voiced serious concerns that these safeguards only existed for criminal justice systems dealing with common offences and did not extend to criminal procedure for terrorism-related crimes.

In particular, the group was disturbed to find that individuals were being held in prisons for several years - in some cases up to as many as thirteen - without being found guilty, while evidence was allegedly being gathered. Further, it raised concerns that for persons suspected of terrorism related offences, police custody can be extended to up to four days with no charges being brought.

Officials told the group that torture had greatly decreased as a practice, with the misconduct of individual police officers being the exception rather than the rule. However, they noted that the ban on statements made in the absence of a lawyer was not being extended retroactively to declarations made to the police before the entry into force of the new law, and called on the Turkish Government for retroactive extension, as part of its obligations under the Convention Against Torture.

The independent experts will write and submit a public report on their findings and recommendations to the Human Rights Council.

## **United Nations Expert on Violence Against Women concludes mission in Turkey**

Following extensive media coverage of suicides of women in Batman, Professor Yakın Ertürk, Special Rapporteur of the United Nations Commission on Human Rights on violence against women, conducted a fact finding mission in Turkey from 22 to 31 May 2006 to investigate the incidents of suicides of women.

Professor Ertürk met with local authorities, civil society representatives and victims or families of victims in Batman, Şanlıurfa and Van. She observed that the majority of women in the provinces she visited live lives that are not their own but are instead determined by a patriarchal normative order that draws its strength from reference to tradition, culture and tribal affiliation.

She noted that, between 2000 and 2005, there were 105 suicides in Batman: 61 victims were women, 44 were men. By the time of her visit, in 2006, there had so far been 7 suicides: 5 women and 2 men, and 53 suicide attempts of which 36 are women and 17 men. She concluded that suicide rates in Batman (calculated per 100,000 individuals) are not particularly high compared with national rates for Turkey, however, far more women than men commit suicide in Batman.

Professor Ertürk found that the causes of suicide can be linked to personal, familial and societal factors. She also found that the patriarchal order and the human rights violations that go along with it – for example, domestic violence – are often key contributing factors. Further, she noted that although Turkey is party to all major international human rights instruments and its domestic legislation provides for the equality and human rights of women, in practice, authorities often lack the willingness to implement these laws and protect these women from violence.

Professor Ertürk concluded that there are reasonable grounds to believe that in some cases women and girls are pushed into suicide or that a so-called honour killing has been disguised as a suicide or an accident. She urged authorities to investigate cases of unnatural death.

## **UN Committee on Rights of Child concludes on Turkey's report**

On 9 June 2006, the UN Committee on the Rights of Child concluded its

observations and provided recommendations on Turkey's initial report regarding the implementation of the provisions of the Optional Protocol to the Convention on the Rights of Child on the sale of children, prostitution and child pornography.

The Committee recommended that Turkey takes all necessary measures to ensure effective monitoring and the presence of an independent complaints mechanism. Such mechanisms should also be easily accessible to children.

The Committee noted that Turkey lacked legal provisions to punish crimes committed through the Internet and urged Turkey to strengthen the legislative framework by the ratification of the Council of Europe Convention on Cybercrime, 2001 and the Convention on Action against Trafficking in Human Beings, 2005.

The Committee further encouraged Turkey to collaborate with NGOs to seek means to expand the services of the helpline of the General Directorate of Social Services and the Child Protection Agency in order to reach out to marginalised communities and rural areas.

## **Council of Europe Human Rights Commissioner visits Turkey**

On 1 November 2006, Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights spent four days in Turkey, discussing human rights issues with senior government leaders, judicial authorities and civil society representatives. In particular, he held discussions with the President of the Constitutional Court, the Acting President of the Court of Cassation, and the Chairperson of the Human Rights Commission in the National Assembly. His agenda also included meetings with religious leaders, legal experts as well as leading human rights NGOs.

## **Syria objects to UN's planned special tribunal for Lebanon**

The United Nations and Lebanon have been in consultation to create a special tribunal to try suspects involved in political killings in Lebanon, in particular the 2005 assassination of former Lebanese prime minister, Rafik al-Hariri who was murdered in a Beirut car-bombing after speaking out against Syrian domination of his country. A continuing UN investigation has implicated senior Syrian and

Lebanese security officials in the killing.

Syria has expressed discontent over the controversial plans as it does not believe the tribunal should be set up until after the UN investigation has been completed. It claims not to have been consulted on the plans for a special tribunal, not to have been given a copy of them and has threatened not to cooperate with it.

## **Journalists in Armenia suffer violence and intimidation**

On 12 September 2006, the OSCE office in Yerevan, Armenia, detailed its concerns about recent incidents of violence and intimidation against local journalists. The OSCE cited reports where journalists, including the Editor-in-Chief of a national newspaper, were threatened, attacked and abused by unknown men outside their homes. The OSCE called upon law-enforcement bodies to undertake prompt measures to ensure the safety of media professionals to promote freedom of expression in the country, and pledged to closely follow developments relating to these cases.

## **Turkey considers repeal of Article 301**

Following on from the criticism voiced by the European Commission in its 2006 Progress Report, the Turkish Government is preparing to make amendments to Article 301 of the Penal Code. Reports indicate that it intends to deal with the ambiguous points of the article, notably replacing the concept of denigrating ‘Turkishness’ with denigrating the ‘Turkish nation’, and through similar changes to narrow down the scope of the law. Turkish Prime Minister Erdoğan has recently met with representatives from leading trade unions and NGOs to consult them on how to change Article 301, who are expected to submit a set of proposals to the Government in order to clarify the law and prevent its misinterpretation. It is hoped that the amending act will be brought before the Turkish Grand National Assembly before the EU summit convenes in mid-December 2006.

Despite the proposed amendments to Article 301, concerns remain regarding other provisions of the Penal Code, including Articles 215, under which a person who praises a ‘crime or criminal’ can be imprisoned for up to 3 years; Article 300, which imposes a sentence of up to 3 years for anyone who tears, burns or ‘denigrates’ the Turkish flag or other sign bearing the white crescent and star on a red background, allowing no capacity for public interest debate or

opinion; Article 318, which creates an offence for journalists to report or debate on military service; and Article 323, which imposes a sentence of between five and ten years on anyone who disseminates or broadcasts information which may 'provoke public concern' or undermine 'national resistance against an enemy'. At present, the Turkish Government has taken no steps to amend these articles.



## Section 2: Articles

**The opinions expressed in the following articles are those of the authors and do not necessarily represent the views of KHRP.**



Sir Nigel Rodley<sup>1</sup> and Matt Pollard<sup>2</sup>

# Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

*This article was originally published in the European Human Rights Law Review, Issue 2, 2006, at pages 115-141. KHRP is grateful to the publishers, Sweet & Maxwell, for their kind permission to reproduce the article.*

*This article examines the obligations imposed on individual states by the UN Convention against Torture to criminalise, prosecute and punish acts of torture under national criminal law. It does this by fully exploring the provisions of the Convention itself and international and national case law.*

## Introduction

At the time of adoption of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”),<sup>3</sup> torture was already prohibited by international law. The purpose of the UNCAT was to reinforce the existing prohibition with specific preventive and remedial measures: in the words of the UN General Assembly, to achieve “a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment”.<sup>4</sup> Perhaps the most fundamental of the specific

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<sup>3</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 UN GAOR Supp. (No.51) at 197, UN Doc. A/39/51 (1984), entered into force June 26, 1987.

<sup>4</sup> G.A. res. 39/46, UN Doc. A/RES/39/46 (December 10, 1984), preamble. See also J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention*

measures is the requirement that states parties ensure that torture is prohibited and punished under their domestic criminal law.

International law generally establishes rules regarding the legal responsibility of sovereign *states*, not the legal responsibility of *individuals*. Exceptionally, a body of international law has developed that *directly* imposes international criminal responsibility on individuals.<sup>5</sup> However, arguably the most potent mechanism for overcoming individual impunity for acts of torture is the requirement of international law that at the *national* level each state must criminalise torture and prosecute perpetrators under its domestic laws and in its domestic courts. The aim of this article is to summarise the obligations expressly imposed on the states that are party to the UNCAT to criminalise, prosecute and punish acts of torture under *national* criminal law.

National criminal law systems have a greater overall capacity, more developed procedures, and are generally better-resourced than the international criminal enforcement tribunals created to date. For this reason, individual criminal responsibility established and enforced under national criminal law systems is of fundamental practical importance to the global elimination of impunity for torture. The UNCAT, in requiring states to criminalise all acts of torture in all circumstances, is an important bulwark against impunity. While the requirement that states criminalise torture under national laws was present in earlier or contemporaneous instruments, these are not per se legally binding,<sup>6</sup> or are limited in their field of application by geography<sup>7</sup> or context.<sup>8</sup>

This article considers the following issues:

- scope of the offence;
- appropriate penalty;
- universal jurisdiction;
- extradition and prosecution;
- obligatory arrest of suspects;
- immunities under international law;
- cooperation in criminal law processes;
- fairness to the accused;
- state compliance.

The next section begins this review with an examination of the scope of the offence of torture under the UNCAT.

*against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, 1988), p.1.

<sup>5</sup> N. Rodley, *The Treatment of Prisoners Under International Law* (2nd edn, Oxford, 1999), p.120.

<sup>6</sup> *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 3452 (XXX), annex, 30 UN GAOR Supp. (No.34) at 91, UN Doc. A/10034 (1975) (hereafter, "UN Declaration"), Art.7.

<sup>7</sup> *Inter-American Convention to Prevent and Punish Torture*, O.A.S. Treaty Series No.67, entered into force February 28, 1987, Art.6.

<sup>8</sup> 1949 *Geneva Convention III Relative to the Treatment of Prisoners of War*, 75 UNT.S. 135, entered into force October 21, 1950, Arts 129 and 130; 1949 *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, 75 UNT.S. 287, entered into force October 21, 1950, Arts 146–147.

### Scope of the offence

The keystone of the criminalisation provisions in the UNCAT is Art.4(1), which provides in part as follows:

“4(1). Each State Party shall ensure that all acts of torture are offences under its criminal law.”

This section will consider the scope of the obligation under Art.4, focusing in turn on the definition of torture, complicity and participation in torture, and restrictions on defences to a charge of torture.

### Definition

The definition of “torture” contained in Art.1 UNCAT is of course of critical importance to the obligation under Art.4. This subsection begins by identifying the elements of the definition in Art.1, and then examines how the definition is to be implemented in national legal systems. Next it considers whether torture by intentional omission is covered by the definition, examines the issue of “lawful sanctions”, and finally reviews the connection required between infliction of pain and public authority.

### Article 1 UNCAT

The definition of torture under the UNCAT has been the subject of detailed consideration elsewhere,<sup>9</sup> but it is worth reiterating some key elements. For the purposes of the UNCAT, torture is defined to cover the following conduct:

- (a) any act by which severe pain or suffering, whether physical or mental, is inflicted on a person;
- (b) the pain or suffering must be intentionally inflicted on the person;
- (c) the infliction of pain or suffering must be 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;
- (d) the pain or suffering must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

<sup>9</sup> N. Rodley, “The Definition(s) of Torture in International law” (2002) 55 *Current Legal Problems* 467; Malcolm Evans, “Getting to Grips with Torture” (2002) 51 *I.C.L.Q.* 365; Burgers and Danelius, fn.4 above, pp.114–123; Rodley, fn.5 above, Ch.3; A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (The Hague, 1999), Ch.1; Maxime Tardu, “The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (1987) 56 *Nordic Journal of International Law* 303–321, pp.304–309; Chris Ingelse, *The UN Committee against Torture: An Assessment* (The Hague, 2001), pp.205–240; Organisation Mondiale Contre la Torture, “Interpretation of the Definition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment in the Light of European and International Case Law: The need to preserve legal and jurisprudential evolutions and acquis”, October 30, 2004.

Within the scheme of the Convention, “torture” is distinguished from the more general category of “cruel, inhuman or degrading treatment or punishment”. The criminalisation provisions apply only to “torture” *stricto sensu*. Though the Committee against Torture commented on the absence of national law provisions criminalising *inhuman and degrading punishment* in one case,<sup>10</sup> the Convention is not generally considered to require that states criminalise such treatment except where it amounts to “torture” *per se*. However, neither does the Convention exclude the possibility that general customary international law or other treaties might require criminalisation of at least some forms of ill-treatment not amounting to torture: Art.16(2) of the Convention states that:

“The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.”

In this regard, it is worth noting that the UN Declaration against Torture states that:

“If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well-founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.”<sup>11</sup>

#### Definitions at the national level

Burgers and Danelius, writing shortly after adoption of the Convention, cautioned that Art.1 should be viewed as providing an instructive *description* of torture for the purposes of UNCAT, rather than a legal *definition* that can be directly implemented in national penal law.<sup>12</sup> They also opined that the requirement in Art.4 that torture be criminalised did not necessarily mean that there must be a specific separate offence named “torture” and covering only the conduct described in Art.1 UNCAT.<sup>13</sup> In their view, it would be acceptable to have torture covered by wider categories of offence, such as assault, though all cases falling within the Art.1 definition would have to be appropriately punishable under one or another provision of the national criminal law. As will be seen below, this position has been called into question by subsequent work of the Committee against Torture, the international body charged with interpretation of the UNCAT.

A state that chooses not to legislate a separately-defined offence of torture may unnecessarily complicate the task of meeting its other obligations under the Convention. For instance, giving effect to the special extended jurisdiction under Arts 5 and 7 of the Convention is much simpler in relation to a specifically-defined offence of “torture”.<sup>14</sup> Further, in periodic reporting to the Committee against Torture, states may not be able

<sup>10</sup> Conclusions and Recommendations on Third Report of Ukraine, CAT/C/SR.287, para.28, under C(10).

<sup>11</sup> UN Declaration, fn.6 above, Art.10.

<sup>12</sup> Burgers and Danelius, fn.4 above, p.122.

<sup>13</sup> *ibid.*, p.129.

<sup>14</sup> Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (Geneva, 2002), p.36; Ingelse, fn.9 above, 338.

to produce appropriate statistical data if no separately defined offence exists in the state.<sup>15</sup> For these and other reasons, the earlier views of Burgers and Danelius have been gradually rejected by the Committee against Torture. Over time, the Committee against Torture has increasingly urged states to create a separate classification and definition for the offence of torture which matches that in UNCAT, in recent years elevating this preference to a requirement.<sup>16</sup> Thus, the contemporary interpretation of UNCAT by the Committee against Torture is unequivocal<sup>17</sup>:

- each state must define torture as a separate offence under its penal code, distinct from broader offences such as assault;

<sup>15</sup> See, e.g. Committee against Torture, Concluding Observations and Recommendations on the Report of France, CAT/C/FRA/CO/3/CRP.1, 24 November 2005, para.5.

<sup>16</sup> Ingelse, fn.9 above, pp.218–220, 338–341, sets out a historical overview of the evolution of the Committee's position(s) on the issue. Ingelse comments that the Committee has "quite correctly" essentially ignored the approach originally proposed by Burgers and Danelius.

<sup>17</sup> Ingelse, fn.9 above, pp.222 and 340. The resolve of the Committee on this issue has grown even stronger and more consistent during the time since publication of Ingelse's book: see the Committee's Concluding observations and recommendations on the following periodic reports: Belarus, A/56/44, November 20, 2000, paras 45(b) and 46(a); Georgia, A/56/44, May 7, 2001, para.82(2); Bolivia, A/56/44, May 10, 2001, paras 95(a) and 97(a); Slovakia, A/56/44, May 11, 2001, paras 104(a) and 195(a); Costa Rica, A/56/44, May 17, 2001, paras 135(a) and 136(a); Kazakhstan, A/56/44, May 17, 2001, paras 128(a) and 129(a); Denmark, CAT/C/CR/28/1, May 28, 2002, paras 6(a) and 7(b); Norway, CAT/C/CR/28/3, May 28, 2002, para.6(a); Saudi Arabia, CAT/C/CR/28/5, June 12, 2002, paras 4(a) and 8(a); Russia, CAT/C/CR/28/4, June 6, 2002, paras 6(a) and 8(a); Sweden, CAT/C/CR/28/6, June 6, 2002, paras 5 and 7(a); Uzbekistan, CAT/C/CR/28/7, June 6, 2002, paras 5(g) and 6(a); Israel, A/57/44 paras 47–53, September 25, 2002, at para.7(a); Zambia, A/57/44, September 25, 2002, paras 59–67; Benin, A/57/44 paras 30–35, November 1, 2002, at paras 5(a) and 6(a); Indonesia, A/57/44 paras 36–46, November 1, 2002, at paras 9(a) and 10(a); Venezuela, CAT/C/CR/29/2, December 23, 2002, paras 10(a) and 11(a); Estonia, CAT/C/CR/29/5, December 23, 2002, para.6(a); Egypt, CAT/C/CR/29/4, December 23, 2002, para.6(b); Cambodia, CAT/C/CR/30/2, May 27, 2003, paras 6(c) and 7(a), affirmed CAT/C/CR/31/7, February 5, 2004; Slovenia, CAT/C/CR/30/4, May 27, 2003, paras 5(a) and 6(a); Moldova, CAT/C/CR/30/7, May 27, 2003, para.6(b); Morocco, CAT/C/CR/31/2, February 5, 2004, para.6(a); Yemen, CAT/C/CR/31/4, February 5, 2004, paras 6(a) and 7(a); Lithuania, CAT/C/CR/31/5, February 5, 2004, paras 5(a) and 6(a); Monaco, CAT/C/CR/32/1, May 28, 2004, paras 4(a) and (d), 5(a); Bulgaria, CAT/C/CR/32/6, June 11, 2004, paras 5(a) and 6(a); Switzerland, CAT/C/CO/34/CHE, June 21, 2005, paras 4(a) and 5(a); Finland, CAT/C/CO/34/FIN, June 21, 2005, paras 4(a) and 5(a); Albania, CAT/C/CO/34/ALB, June 21, 2005, paras 7(a) and 8(a); Bahrain, CAT/C/CO/34/BHR, June 21, 2005, paras 5(b) and 6(a); Uganda, CAT/C/CO/34/UGA, June 21, 2005, paras 5(a) and 10(a); Canada, CAT/C/CR/34/CAN, July 7, 2005, para.3(a); Nepal, CAT/C/NPL/CO/1/CRP.3, November 22, 2005, para.5; Sri Lanka, CAT/C/LKA/CO/1/CRP.2, November 23, 2005, para.5; Austria, CAT/C/AUT/CO/3/CRP.1, November 24, 2005, para.6; Bosnia and Herzegovina, CAT/C/BIH/CO/1/CRP.1, November 24, 2005, para.9; Democratic Republic of Congo, CAT/C/DRC/CO/1/CRP.1, November 24, 2005, para.5; Ecuador, CAT/C/ECU/CO/1/CRP.1, November 24, 2005, para.14; France, CAT/FRA/CO/3/CRP.1, November 24, 2005, para.5.

- the definition does not have to reproduce the UNCAT definition verbatim—it can be broader than the UNCAT definition, but it must cover at minimum the same conduct covered by the UNCAT definition;
- on various occasions the Committee expresses the requirement as being that the domestic definition “be in conformity” with or “strictly in keeping with,” the UNCAT definition, and often the Committee simply recommends incorporation of the UNCAT definition.

#### Torture by omission

The reference in Art.1 to “acts” but not “omissions” creates an ambiguity in respect of the scope of behaviour that must be criminalised under Art.4. However, leading commentators agree that at least some omissions, such as intentional failure to provide a prisoner with food or water, fall within the scope of conduct covered by the word “acts” in Art.1, assuming the other elements of intention, purpose and a connection to public office are present.<sup>18</sup> This would certainly be more consistent with the object and purpose of UNCAT, than it would be to exclude torture conducted by means of omission but which is in all other respects identical to torture conducted by positive action. The Committee against Torture does not appear to have commented on this issue.

#### Lawful sanctions

Article 1 also states that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. During the drafting process this clause was originally subject to the proviso that the lawful sanctions must themselves be consistent with the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>19</sup> but as the Minimum Rules were not themselves originally intended to be legally binding, it was considered inappropriate to incorporate them into the binding UNCAT.<sup>20</sup> Considerable controversy therefore remains as to the scope of the “lawful sanctions” exclusion.

For instance, UNCAT does not specify whether the sanction must be “lawful” only under the applicable national law, or whether it must also comply with *international* law, including the prohibition of cruel, inhuman or degrading treatment,<sup>21</sup> and regional treaties such as the European Convention on Human Rights.<sup>22</sup> At the time of adoption, Italy, the Netherlands, the United Kingdom and the United States took the position that “lawful” indeed meant lawful under international law.<sup>23</sup> Other states subsequently

<sup>18</sup> Burgers and Danelius, fn.4 above, p.118; Tardu, fn.9 above, p.304; Boulesbaa, fn.9 above, pp.9–15; Ingelse, fn.9 above, p.208.

<sup>19</sup> Such a condition was included in the parallel provision of the 1975 Declaration against Torture, fn.6 above, and in the Swedish draft convention, UN Doc. E/CN.4/1285, that formed the starting point for the UNCAT drafting process.

<sup>20</sup> Burgers and Danelius, fn.4 above, p.121; Ingelse, fn.9 above, pp.212–213.

<sup>21</sup> Burgers and Danelius, fn.4 above, p.122; Ingelse, fn.9 above, p.214.

<sup>22</sup> Tardu, fn.9 above, pp.307–308.

<sup>23</sup> UN Doc. A/39/499 (1984), paras 11, 13, 19 and 21. See also Ingelse, fn.9 above, p.213.

made similar declarations.<sup>24</sup> Thus, national legislation that precludes criminal liability for lawful sanctions under national law, but which is silent regarding international law, would violate UNCAT. However, some Islamic states interpreted the lawful sanctions clause as allowing certain forms of punishment prescribed by Islamic law (and therefore by their national laws), such as particular corporal punishments.<sup>25</sup>

Ingelse sets out a compelling argument that “lawful sanctions” can only refer to international law, and that international law prohibits corporal punishment.<sup>26</sup> This argument reflects the position earlier taken by the UN Special Rapporteur on Torture in his 1997 report, to which the UN Commission on Human Rights responded by adopting a resolution, without a vote, confirming to governments that “corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture”.<sup>27</sup> The Inter-American Court of Human Rights recently reached the same conclusion based on general customary international law.<sup>28</sup> After considerable ambiguity, the Committee against Torture has adopted a similar position, holding that various forms of corporal punishment violate the Convention.<sup>29</sup> In essence, then, the role of the “lawful sanctions” exclusion must be very restricted: its role may be solely to clarify that “torture” does not include mental anguish resulting from the very fact of incarceration. This specific category of mental suffering can indeed be quite severe, but is a natural and to some degree intended consequence of the use of incarceration as punishment for serious crimes. Without the exception, there would be perhaps some minimal risk that the UNCAT would unintentionally and unrealistically preclude any use of imprisonment as punishment; however, a more tightly-drafted specific exclusion would have achieved this goal without the unfortunate ambiguity engendered by the “lawful sanctions” language.

The “lawful sanctions” exclusion can give rise to other conceptual and technical problems in implementation at the national level. For instance, in reviewing the Fourth Periodic Report of the United Kingdom, the Committee against Torture expressed concern that s.134(5) of the UK Criminal Justice Act provides for a defence for conduct that is permitted under foreign law, even if it would be unlawful under UK law.<sup>30</sup>

<sup>24</sup> e.g. Switzerland. See Ingelse, fn.9 above, p.232.

<sup>25</sup> *ibid.*, pp.213–214.

<sup>26</sup> *ibid.*, pp.214–216.

<sup>27</sup> Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1997/7, paras. 3–11; Commission on Human Rights Resolution 1997/38, April 11, 1997, Report of 53rd Session, ESCOR, 1997, Supplement No.3, Ch.II A, para. 9. See also discussion in Rodley, fn.5 above, Ch.10.

<sup>28</sup> Inter-American Court of Human Rights, *Caesar v Trinidad and Tobago*, Series C No.123, March 11, 2005.

<sup>29</sup> Ingelse, fn.9 above, pp.231–236; CAT/C/SR.294/Add.1, para.23, under E(9) and CAT/C/CR/28/5, June 12, 2002, paras 4(b) and 8(b). However, in its 2004 Concluding Observations on the Report of Yemen, CAT/C/CR/31/4, the Committee expressed concern about “[t]he nature of some criminal sanctions, in particular flogging and amputation of limbs, which *may* be in breach of the Convention” [emphasis added] and in this regard recommended obliquely only that Yemen “take all appropriate measures to ensure that criminal sanctions are in full conformity with the Convention” (paras 6(b) and 7(b)).

<sup>30</sup> Concluding observations and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland—Dependent Territories, CAT/C/CR/33/3, December 10, 2004, paras 4(a)(ii), 5(a).

Apparently the Committee was not persuaded by the Government's several arguments: (a) that such a defence was necessary to provide appropriate protection to surgeons, due to the broadly-worded definition of the offence in UK law which excluded the difficult-to-establish "purposes" requirement in order to facilitate prosecution, and that where the surgeon was operating in a foreign jurisdiction, the defence could only refer to foreign law<sup>31</sup>; (b) that for similar reasons the defence was necessary in order to accommodate the suffering inherent in the fact of imprisonment itself; (c) that an accused would have to prove that the foreign law itself permitted torture and that this was not realistic because "even in the most notorious cases, torture is sanctioned not by law but rather by lawlessness, by abuse of power, and by corruption"<sup>32</sup>; (d) that its courts would never consider any abuse of power as "lawful", no matter what the foreign law stated, and would refer to the UNCAT to help interpret the provision if necessary.<sup>33</sup> The Committee was perhaps too quick to dismiss the Government's argument in favour of avoiding the difficult task of establishing subjective purpose; however, the bottom line is that the Committee will review any exception for "lawful sanctions" with extreme scepticism. This would appear to be one part of the definition of torture under UNCAT that the Committee would rather states *not* reproduce verbatim in their national criminal legislation.

#### Official authority

The formulation of the definition of torture under UNCAT makes it clear that not only public officials who directly participate in torture, but also those who turn a blind eye to acts of torture carried out by unofficial groups such as paramilitary organisations, must be made criminally responsible.<sup>34</sup> However, in the application of the definition in a national criminal law context, there may be practical difficulties in providing or assessing evidence of acquiescence in particular cases. There is also overlap between this aspect of the definition, and the express requirement in Art.4(2) that "complicity or participation" in acts of torture also be criminalised under national law. This will be considered in greater detail below.

#### *Complicity or participation*

Article 4(1) UNCAT provides as follows:

"4(1). Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."

<sup>31</sup> Fourth Periodic Report of the United Kingdom, CAT/C/67/Add.2, May 27, 2004, paras 36-42 and Written Responses to oral questions, supplied by the UK delegation during the session, pp. 9-11, available from [www.ohchr.org](http://www.ohchr.org).

<sup>32</sup> UK Written Responses, *ibid.*, p.11.

<sup>33</sup> *ibid.*, p.10.

<sup>34</sup> Rodley, fn.5 above, pp.100-101.

Officials who order or instruct others to carry out torture must therefore be made criminally responsible by national law.<sup>35</sup> Doctors who are involved in torture must also be brought under national criminal law provisions.<sup>36</sup> Some members of the Committee against Torture have “taken the position” that Art.4 requires the criminalisation of attempted torture as well.<sup>37</sup>

While it is clear that wilful blindness or acquiescence on the part of state officials, as included in the Art.1 definition of torture, gives rise to *state* responsibility under international law, the Convention text itself does not expressly link the Art.1 wording “instigation”, “consent” or “acquiescence” with the Art.4 wording “complicity or participation”. Consequently it is not obvious on the face of the Convention whether every individual public official sufficiently involved under Art.1 so as to make the state responsible would in all cases also become *individually* criminally responsible. Burgers and Danelius are of the view that all such “instigation, consent or acquiescence” should be deemed to be covered by the term “complicity or participation” in Art.4.<sup>38</sup> This view finds support in the recent finding by the Committee against Torture that Azerbaijan’s domestic criminalisation of torture “did not fully comply with Article 1 of the Convention” because it failed to “provide for criminal liability of officials who have given tacit consent to torture”.<sup>39</sup>

It was agreed within the working group that drafted the Convention that “complicity or participation” includes acts relating to cover-up or concealment of incidents of torture.<sup>40</sup> The discussion arose from a question whether the English phrase “complicity or participation” embraced the concept of “*encubrimiento*” (roughly: “concealment”) under Spanish law. It was agreed that “*encubrimiento*” would be added to the Spanish text of the treaty, to further clarify that such conduct was included in the English phrase “complicity or participation”.<sup>41</sup> Though “*encubrimiento*” does not in fact appear in the final Spanish text of the Treaty, there is no indication that its omission was intended to remove acts of concealment from the scope of the conduct that must be criminalised under Art.4(1). Accordingly, states are obliged to criminalise, at the very least, *positive* acts taken with the intention of concealing an act of torture or leaving it unpunished; it may also be that certain intentional *omissions* intended to conceal torture may also be covered by “complicity or participation”.<sup>42</sup>

<sup>35</sup> Ingelse, fn.9 above, p.340. Burgers and Danelius, fn.4 above, p.130. CAT/C/SR.93, para.42; CAT/C/SR.247, para.16.

<sup>36</sup> Ingelse, fn.9 above, p.340, referring to CAT/C/SR.77, para.28 and CAT/C/SR.105, para.5.

<sup>37</sup> Ingelse, fn.9 above, p.340.

<sup>38</sup> Burgers and Danelius, fn.4 above, p.130.

<sup>39</sup> Conclusions and Recommendations on Azerbaijan, CAT/C/CR/30/1, May 14, 2003, para.5(b).

<sup>40</sup> Tardu, fn.9 above, p.312. See also Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (University of Essex Human Rights Centre, Colchester, 2003), p.78.

<sup>41</sup> Burgers and Danelius, fn.4 above, p.57.

<sup>42</sup> There seems little reason not to adopt a reading of Art.4 similar to that discussed above in relation to Art.1.

### Defences

This subsection considers the availability of defences of consent, exceptional circumstances, superior orders, and statutory time-limits, in relation to the obligation to criminalise torture under the UNCAT.

### Consent

Under the UNCAT, states can allow for a defence of consent to treatment involving intentional infliction of pain or suffering. Treatment that has the freely given consent of the person to whom it is applied, consensual medical treatment being the most obvious example, will not fall within the definition of torture under the UNCAT in most instances given the “purposes” requirement of the UNCAT.<sup>43</sup> Indeed, for the most part, *non*-consensual medical treatment will also fall outside the purposes requirement of the definition of torture under UNCAT, or alternately may be considered to involve “presumed consent” where the treatment is intended to directly benefit the recipient.<sup>44</sup> It is unclear whether it would be enough, in the case of presumed consent, for the accused to show that the treatment was subjectively intended (i.e. actually intended in the mind of the particular accused) for the benefit of the recipient, or whether it would be necessary to further prove that such treatment was also objectively (in the mind of a hypothetical reasonably well-informed person in the place of the accused) for the benefit of the individual.

The further rationale proposed by Burgers and Danelius, that medical treatment does not involve pain or suffering “intentionally” inflicted within the meaning of the UNCAT definition, as it is merely a “side effect”,<sup>45</sup> is a rather more dangerous doctrinal explanation. Similar reasoning has been used outside the medical context to imply that pain or suffering caused as a side effect of certain interrogation techniques may fall outside the definition of torture if the infliction of pain was not the “precise objective” of the interrogator.<sup>46</sup> In criminal law, “intent” is conceptually distinct from “purpose”

<sup>43</sup> Burgers and Danelius, fn.4 above, p.119.

<sup>44</sup> See Rodley, fn.5 above, pp.79–84.

<sup>45</sup> Burgers and Danelius, fn.4 above, p.119.

<sup>46</sup> See memoranda reproduced in K. Greenberg and J. Dratel, eds, *The Torture Papers: The Road to Abu Ghraib* (Cambridge, 2005), especially: memorandum by J.S. Bybee, Assistant Attorney-General of the United States, “Memorandum for Alberto R. Gonzales, Counsel to the President”, August 1, 2002 (Greenberg and Dratel, p.172, at pp.174–175); memorandum by J.C. Yoo, Deputy Assistant Attorney-General, to Counsel to the President, August 1, 2002 (Greenberg and Dratel, p.218, at p.219); and “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations”, April 4, 2003 (Greenberg and Dratel, p.286, at p.292). The 2002 Bybee memorandum was withdrawn and replaced in 2004: Daniel Levin, Acting Assistant Attorney General, “Memorandum for James B. Comey, Deputy Attorney General”, December 30, 2004, available from <http://news.findlaw.com>. The 2004 Replacement Memorandum expressly stated that “it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture”. It added that “specific intent must be distinguished from motive”, that torture cannot therefore be used for a “good reason”, and that “a defendant’s motive (to

or “motivation” for good reason. For instance, most legal systems, for the purposes of offences of assault, regard reasonably foreseeable damage as being “intentional” whether or not the purpose of the activity was the damage itself. So long as the accused intended to strike the victim, the question of purpose or motivation does not affect the basic responsibility of the accused for the assault (though it may aggravate the penalty or elevate the offence). There would seem to be little reason to construe the concept of “intention” more narrowly in the context of the prohibition and prevention of torture, especially given that the definition already requires a “severity” to the pain and suffering, and specific purposes beyond the immediate treatment.

It is important to recognise also that a defence of consent, improperly drafted or applied, could violate the criminalisation requirements under UNCAT if it were a bad faith manoeuvre to avoid the prohibition. Further, such treatment, particularly non-consensual medical treatment, can be applied in an abusive or improper manner, and the fact that it might not constitute “torture” so as to require criminalisation does not mean that it might not still constitute “other cruel, inhuman or degrading treatment” that is likewise prohibited by the UNCAT and in respect of which the state must therefore take preventive or remedial steps.<sup>47</sup>

#### Exceptional circumstances

Appeals to the “greater good”, including concepts such as national security, anti-terrorism measures, or other public safety objectives, cannot be the basis for defences to charges of torture under UNCAT.<sup>48</sup> Article 2 UNCAT provides in part as follows:

“2(2). No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

This is important because when conduct amounting to torture is exposed, states sometimes attempt to minimise the conduct by characterising it as an unusual measure “necessary” to deal with serious threats to public safety or national security. Further, many national criminal law systems incorporate general defences of necessity, or defence of self and others.<sup>49</sup>

Article 2(2) UNCAT unequivocally requires the state to eliminate any defence of exceptional circumstances or necessity in respect of torture, and makes it clear that the

protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute”.

<sup>47</sup> See Art.16 UNCAT.

<sup>48</sup> Burgers and Danelius, fn.4 above, p.119. Rodley, fn.5 above, pp.79–84.

<sup>49</sup> See, e.g. CAT, *Summary record of the 297th meeting: Israel*, CAT/C/SR.297/Add.1, September 4, 1997; Eyal Benvenisti, “The Role of National Courts in Preventing Torture of Suspected Terrorists” (1997) 8 E.J.I.L. 596–612. Benvenisti argues in support of allowing a defence of “defence of self and others” from attack in order to permit flexibility in the use of physical or mental duress in interrogation where an individual is suspected of planning attacks against civilians. Benvenisti advocates reliance on retrospective judicial evaluation to police whether the suspicions were correct. It is submitted that Benvenisti’s argument is entirely inconsistent with UNCAT.

offence must apply in all circumstances, no matter how grave the threat the information sought through the torture might be intended to prevent.<sup>50</sup> The Committee has also objected to provisions allowing the defence of self-defence in reply to a charge of torture, as inconsistent with Art.2(2).<sup>51</sup> It may not be enough that the criminal law of a state is silent as regards a defence of necessity in relation to torture; in one case the Committee held that the state had to enact a "legal provision clearly prohibiting the invocation of a state of necessity as a justification of torture".<sup>52</sup>

In its review of the Fourth Periodic Report of the United Kingdom, the Committee against Torture expressed concern that s.134(4) of the UK Criminal Justice Act provides for a defence of "lawful authority, justification or excuse" to a charge of official intentional infliction of severe pain or suffering.<sup>53</sup> As was noted earlier under "lawful sanctions" with respect to a related provision, the Committee was not persuaded by the Government's explanation.

The Convention also does not permit amnesties and immunities, even where granted to resolve armed conflicts (international or non-international) or transitions from dictatorial to democratic governments, to provide a defence to torture.<sup>54</sup> The Committee against Torture has emphasised that national laws enacting such amnesties or immunities are inconsistent with state obligations under the UNCAT.<sup>55</sup> The former Chairman of the Committee, Peter Burns, has written that general amnesties "by their very nature" violate a state party's obligations under the UNCAT.<sup>56</sup> Amnesties granted by truth and reconciliation processes that do not assign guilt, though they may involve some elements of investigation or redress, similarly fail to meet the requirements of criminal punishment imposed by the UNCAT.<sup>57</sup> Indeed, even amnesties granted on condition of admission of guilt may not meet the requirements of the UNCAT, given that its provisions very specifically contemplate prosecutorial and criminal processes.<sup>58</sup> Where, however, such a truth and reconciliation process has the power to order prosecution in any given case, but decides not to in a particular case, in Burns' opinion this may satisfy the "competent authorities" requirement of the UNCAT.<sup>59</sup>

<sup>50</sup> Boulesbaa, fn.9 above, pp.76–83.

<sup>51</sup> Benin, A/57/44, paras.30–35, November 1, 2002, at paras 5(f) and 6(c).

<sup>52</sup> Belgium, CAT/C/CR/30/6, May 27, 2003, paras 5(b) and 7(b). A more ambiguous recommendation was included in an earlier report on Israel, A/57/44, paras.47–53, September 25, 2002, at para.7(i).

<sup>53</sup> Concluding observations and recommendations, fn.30 above, paras 4(a)(ii), 5(a).

<sup>54</sup> Ingelse, fn.9 above, pp.342–344.

<sup>55</sup> CAT/C/SR.247, para.20; CAT/C/SR.131/Add.2, para.21; CAT/C/SR.146/Add.2, para.2; CAT/C/SR.161, para.2; CAT/C/SR.167, para.31 under 5; CAT/C/SR.170, para.2 under 22; CAT/C/SR.242/Add.1, para.2 under C(7) and E(15). Cameroon, CAT/C/CR/31/6, February 5, 2004, at paras 5(h) and 9(f); Chile, CAT/C/CR/32/5, June 14, 2004, paras 6(b) and 7(b); Argentina, CAT/C/CR/33/1, December 10, 2004, paras 3, 7(a).

<sup>56</sup> P. Burns and S. McBurney, "Impunity and the United Nations Convention against Torture: A Shadow Play without an Ending" in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Punishment of Transnational Human Rights Litigation* (Hart Publishing, Oxford, 2001) pp.275–288, at p.286.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*, p.287.

<sup>59</sup> *ibid.*

## Superior orders

Article 2(3) states as follows:

“An order from a superior officer or a public authority may not be invoked as a justification of torture.”

This makes it clear that no defence of “superior orders” is permitted in respect of criminal charges of torture. Thus, the practice of certain states in providing complete amnesties or immunities for officials or military personnel under “due obedience” laws, clearly violates Art.5(3).<sup>60</sup> Historically, the Committee against Torture has not always put this point forcefully, though Ingelse suggests that this may be due in some cases to carelessness.<sup>61</sup> It has recently been more proactive in this regard.<sup>62</sup>

The working group that drafted the Convention specifically rejected a proposal to add the qualification that superior orders could “be considered a ground for mitigation of punishment, if justice so requires”.<sup>63</sup> However, Burgers and Danelius state that an appeal to superior orders as an extenuating fact allowing a milder penalty “cannot be excluded”, though if the penalty was so lenient that it did not take into account the serious nature of the offence it would be contrary to the spirit of the Convention.<sup>64</sup> The International Law Commission, reporting to the General Assembly on the issue, implied that superior orders could in fact be considered in mitigation of sentence.<sup>65</sup> Boulesbaa also argues in favour of this conclusion, relying in part on “general principles of international law”, in particular the fact that the Charters of the Nuremberg and Tokyo tribunals permitted consideration of superior orders in mitigation of sentence.<sup>66</sup> Even if national law can permit mitigation of sentence based on superior orders, the mitigation cannot be without limits: if too great a reduction in penalty were permitted by the national law it would likely contravene the obligation in Art.4(2) of the Convention with respect to “appropriate penalties”, dealt with in the next section of this article.

## Time-limits, statutes of limitation or prescription

The Committee against Torture, amongst others, has taken the view that states must repeal, or make non-applicable to prosecutions for torture, statutes of limitation and

<sup>60</sup> Boulesbaa, fn.9 above, pp.86–87.

<sup>61</sup> Ingelse, fn.9 above, pp.266–271.

<sup>62</sup> Benin, A/57/44, paras.30–35, November 1, 2002, at paras 5(f) and 6(c); Belgium, CAT/C/CR/30/6, May 27, 2003, paras 5(a) and 7(a); Monaco, CAT/C/CR/32/1, May 28, 2004, paras 4(b) and 5(b); Morocco, CAT/C/CR/31/2, February 5, 2004, paras 5(a) and 6(b); Colombia, CAT/C/CR/31/1, February 4, 2004, paras 3(a) and (b); Chile, CAT/C/CR/32/5, June 14, 2004, paras 6(i), 7(d).

<sup>63</sup> Burgers and Danelius, fn.4 above, p.73. Boulesbaa, fn.9 above, pp.83–84.

<sup>64</sup> Burgers and Danelius, fn.4 above, p.124.

<sup>65</sup> Boulesbaa, fn.9 above, pp.84–85.

<sup>66</sup> *ibid.*

other time-limits in national law after which criminal prosecutions may not be taken.<sup>67</sup> At the very least, any such period must recognise the special seriousness and characteristics of the crime of torture, and therefore rank amongst the longest provided for by national law, i.e. equal or greater to those that apply to the most serious crimes.

## Penalty

Article 4(2) UNCAT provides as follows:

“4(2). Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

Burgers and Danelius observe that it was not possible to arrive at any particular penalty in the UNCAT negotiations, for instance a minimum period of imprisonment.<sup>68</sup> They further comment that given variations between national practices, the severity of a penalty must be assessed in relation to the severity of sanctions generally applied in the state: “what is considered severe in a country which generally applies mild punishments may well be considered mild in a country where criminal sanctions are normally harsh”.<sup>69</sup> In their view, it is reasonable to require simply that the punishment for torture be close to the penalties applied to the most serious offences within the given national system.<sup>70</sup> However, this is arguably an unnecessarily flexible position; there is no reason why the Convention cannot be read as mandating at least a universally applicable *minimum* penalty, without necessarily imposing absolute uniformity of sentencing ranges in all states.

Indeed, the Committee against Torture has on numerous occasions ruled that sentences of a short duration, from several days to two or three years, were insufficient.<sup>71</sup> Though UNCAT has never prescribed a minimum appropriate sentence, nor recommended any particular sentencing range, Ingelse derives from a review of numerous UNCAT decisions that the Committee generally considers a sentencing range of six to twenty years’ imprisonment to be suitable.<sup>72</sup>

The Essex Human Rights Centre, in *Combating Torture: A Manual for Judges and Prosecutors*, suggests that where national legislation does not incorporate a separate

<sup>67</sup> Turkey, CAT/C/CR/30/5, May 27, 2003, para.7(c); Slovenia, CAT/C/CR/30/4, May 27, 2003, paras 5(b) and 6(b); *Prosecutor v Furundzija* (International Criminal Tribunal for the Former Yugoslavia), December 10, 1998, paras 155 and 157. See also the UN Commission on Human Rights Resolution 2005/35, “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”, para.6.

<sup>68</sup> Burgers and Danelius, fn.4 above, p.129.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> Ingelse, fn.9 above, p.341, referring to CAT/C/SR.40, para.25; CAT/C/SR.95, para.54; CAT/C/SR.61, para.25; CAT/C/SR.215, paras 32 and 36 under D; CAT/C/SR.37, para.27; CAT/C/SR.95, para.54; CAT/C/SR.10, para.23; CAT/C/SR.51, para.31; CAT/C/SR.78, paras 4 and 40; CAT/C/SR.141, para.66; A/48/44, para.345; CAT/C/SR.50, paras 32 and 39.

<sup>72</sup> Ingelse, fn.9 above, p.342.

offence of torture, or the facts of an incident of torture do not meet a national definition of torture that is narrower than that under the UNCAT, judges and prosecutors should invoke the next most serious category of crime covering the facts so as to ensure a sentence that is appropriate for the seriousness of torture.<sup>73</sup>

### Universal jurisdiction

From the beginning, early drafts of the Convention included articles requiring states to exercise jurisdiction over certain acts of torture occurring outside their territorial boundaries (i.e. on board ships or aircraft registered to the state, and where the perpetrator or victim was a national of the state).<sup>74</sup> For proponents such as Sweden, this extra-territorial or “universal” jurisdiction was of key importance as it reduced the ability of torturers to escape being held individually responsible by fleeing to foreign states, i.e. there should be “no safe haven for torturers”.<sup>75</sup> The concept mirrored in many respects provisions already in place under treaties concerning aircraft hijacking, protection of diplomats, and hostage-taking.<sup>76</sup> However, other states were reluctant to include such a provision because they believed it would cause problems within their domestic legal systems, for instance where the state’s domestic criminal law normally was subject to a strict principle of territoriality.<sup>77</sup> Gradually, much of this opposition abated, and the final form of the treaty incorporates broad jurisdiction provisions.<sup>78</sup>

Article 5(1)(a) UNCAT requires states to ensure that their domestic criminal law recognises jurisdiction over offences of torture “when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State”, i.e. a broad form of the regular “territorial” jurisdiction generally covered by national criminal law systems. However, subsequent provisions of the Convention go further:

- Article 5(1)(b) requires states also to exercise criminal jurisdiction when the alleged offender is a national of that state, no matter where in the world the torture occurred. Burgers and Danelius argue that this should be read as applying also to circumstances where the alleged offender acquired such nationality *after* the alleged acts of torture took place.<sup>79</sup>
- Article 5(1)(c) adds the situation where the victim is a national of that state, though to this it adds the qualification “if that State considers it appropriate”.

<sup>73</sup> Foley, fn.40 above, p.83.

<sup>74</sup> Burgers and Danelius, fn.4 above, pp.57 *et seq.*

<sup>75</sup> *ibid.*, p.58.

<sup>76</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, 860 U.N.T.S. 105, entered into force October 14, 1971, Art.4; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 974 U.N.T.S. 178, entered into force January 26, 1973, Art.5; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*, 1035 U.N.T.S. 167, 13 I.L.M. 41, entered into force February 20, 1977, Art.3; *International Convention against the Taking of Hostages*, 1316 U.N.T.S. 205, entered into force June 3, 1983, Art.5.

<sup>77</sup> Burgers and Danelius, fn.4 above, pp.58, 72–73, 78–80, 85, 92, 94–95.

<sup>78</sup> *ibid.*, pp.78–80, 85, 92, 94–95.

<sup>79</sup> *ibid.*, p.132.

As criminal jurisdiction over extra-territorial offences against state nationals was not in all cases accepted, Art.5(1)(c) was not made mandatory.<sup>80</sup>

It is important to recognise that the jurisdiction to be established under Art.5(1) must be applicable whether or not the perpetrator of the torture is presently on the territory of the state party in question. That is, if jurisdiction is established on a ground listed in Art.5(1), it can provide the foundation for a request for extradition of the accused torturer from another state.

However, Art.5(2) goes even further, requiring each state party to establish criminal jurisdiction over all other offences of torture (i.e. outside its territory, by nationals of other states against nationals of other states), except where the alleged offender is extradited to a state having jurisdiction under Art.5(1), i.e. the state where the torture occurred, or the torturer's own state, or the state of the victims. Though there was some discussion during the drafting as to whether an unsuccessful request for extradition should be a pre-condition to such jurisdiction, in their final form Arts 5(2) and 7(1) do not impose any such requirement: a state must establish jurisdiction over offences of torture committed abroad, where the offender is subsequently present on their territory, regardless of whether any other state actually requests extradition.<sup>81</sup>

In 2005, pursuant to its domestic criminal law implementing UNCAT, the United Kingdom successfully prosecuted an Afghani national, Faryadi Sarwar Zardad, for torture he inflicted in Afghanistan on other Afghani nationals.<sup>82</sup> The United Kingdom believes this to be the first time in the world that a foreign national had been tried on charges relating to foreign torture of victims who are also foreign nationals.<sup>83</sup>

Ingelse notes that, given that Art.5(2) refers to extradition to "any of the States mentioned in paragraph 1 of this Article", there may be arguments that states are technically only required to establish jurisdiction under Art.5(2) where at least one of the states having jurisdiction on the basis of territory, nationality of the perpetrator, or nationality of the victim, is also a party to the UNCAT.<sup>84</sup> He concludes that the possibility that Art.5(2) could be read so restrictively was not intended or foreseen by

<sup>80</sup> *ibid.*, p.132. Ingelse, fn.9 above, p.320. This possibly implies misgivings in respect of the passive personality principle as a basis for jurisdiction, in light of predictable national sympathies for a victim of a foreign perpetrator and the possible implications for the impartial administration of justice.

<sup>81</sup> Burgers and Danelius, fn.4 above, pp.133,137.

<sup>82</sup> Guardian Online, July 19, 2005, "Afghan Warlord jailed in UK", [www.guardian.co.uk](http://www.guardian.co.uk). The July 2005 UK conviction was followed in October 2005 by two criminal convictions by a Dutch court, again involving Afghani nationals complicit in torture in Afghanistan: District Court of The Hague (Rechtsbank's Gravenhage): Cases against Heshamuddin Hesam and Habibulla Jalalzoy (October 14, 2005), 09/751004-04, 09/751005-04, 09/75006-05.

<sup>83</sup> *ibid.* and UK "Opening Address", speaking notes distributed on the occasion of the periodic review by the Committee against Torture during its December 2004 Session, para.27, available from [www.ohchr.org](http://www.ohchr.org). In an earlier case, a Sudanese doctor was charged in 1997 in Scotland concerning torture allegedly committed in Sudan. However, in 1999 Scottish prosecution authorities decided to discontinue the prosecution for unknown reasons: Scottish Parliament Information Centre, Research Note 01/83, "The International Criminal Court and the Concept of Universal Jurisdiction" (September 10, 2001), p.6.

<sup>84</sup> Ingelse, fn.9 above, pp.321-323.

the drafters, and that such an interpretation would “fall far short” of the object and purpose of the Convention.<sup>85</sup> Ingelse himself declines to take a position on whether a state that established jurisdiction only vis-à-vis other state parties would in fact violate the Convention.<sup>86</sup> However, it is submitted that his argument against this strained restrictive reading is of greater force than he admits, and that a state party is indeed obliged by Art.5(2) to establish jurisdiction over any act of torture where the offender is not extradited to the state in whose territory the torture was perpetrated, the offender’s state or the victim’s state, regardless of whether that state is a party to the Convention.

States sometimes argue that because the UNCAT refers in some articles as applying to “any area under its [the State’s] jurisdiction”,<sup>87</sup> obligations under the UNCAT do not apply to foreign territories which are under the effective control of the state but over which the state disavows legal jurisdiction.<sup>88</sup> The Committee against Torture has firmly rejected this argument, holding that the territorial application of the UNCAT “includes all areas under the *de facto* effective control of the State party’s authorities”.<sup>89</sup> This implies that the duty of the state to take accused persons into custody, investigate allegations, and to prosecute or extradite the person applies also in areas outside its normal territory but under its effective control (see below).<sup>90</sup> However, even on its own terms, it bears emphasising that even if a more restricted notion of international law “jurisdiction” were to be accepted so as to relieve states from any international legal obligation to prevent, investigate and arrest torturers outside their ordinary state territory, the *domestic law* criminal jurisdiction to be established under Art.5(1)(b) and (2) clearly must be made to apply to acts committed anywhere in the world.

## Extradition and prosecution

### *The choice: extradite or prosecute*

Under Art.7(1) UNCAT, a state which finds that it has a person accused of torture present on territory under its jurisdiction is faced with a mandatory choice: it may extradite the individual to the state(s) where the torture occurred, or of which the individual or the alleged victims are nationals, but if it cannot or does not extradite him, it must “submit the case to its competent authorities for the purpose of prosecution”. This is the principle of *aut dedere aut judicare* (extradite or prosecute), which is intertwined

<sup>85</sup> *ibid.*, pp.322–323.

<sup>86</sup> *ibid.*, p.323. Clearly, whatever the answer to this question, it is entirely consistent with the Convention for a state to legislate broad universal jurisdiction for itself: Art.5(3) states that the Convention “does not exclude any criminal jurisdiction exercised in accordance with internal law”. However, see comments to the contrary in the individual opinion of President Guillaume in the ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Merits, February 14, 2002, General List No.121.

<sup>87</sup> Arts 2(1), 5(1)(a), 5(2), 7(1).

<sup>88</sup> See Concluding observations and recommendations, fn.30 above, para.4(b). See also Boulesbaa, fn.9 above, pp.74–76.

<sup>89</sup> Concluding observations and recommendations, fn.30 above, para.4(b).

<sup>90</sup> *ibid.*, para.5(j).

with the provisions for universal jurisdiction described above.<sup>91</sup> Article 8 UNCAT itself expressly provides a legal basis for extradition.<sup>92</sup>

As was noted earlier, a state is obliged under Art.5(2) to establish jurisdiction over any accused torturer found on its territory that it does not extradite, and this is not dependent on actually receiving an extradition request. Similarly, under Art.7(1), the obligation to submit the case for possible prosecution applies whether the failure to extradite is due to the rejection of a request actually received or due to no request having been made.<sup>93</sup> The mere presence of the torturer on the state territory gives rise to the obligation to exercise universal jurisdiction, which can only be satisfied by either prosecution or extradition.<sup>94</sup> How long may a state that is reluctant to prosecute wait to see if another state requests extradition, before it is itself required to submit the case to its competent authorities? The answer is not clear: there must be some discretion on the part of the state, but an unreasonable delay will bring it into violation of Art.7(1).<sup>95</sup> Any more precise answer can likely only be determined on a case-by-case basis.

#### *Factors affecting the obligation to prosecute*

A state will not necessarily violate Art.7 in every situation where an individual accused of torture present in its territory is not ultimately prosecuted.<sup>96</sup> The article does not require that all accusations automatically lead to initiation of a prosecution. Each state is bound to “submit the case to its competent authorities for the purposes of prosecution”, but Art.7(2) specifies that the prosecutorial authorities are to make their decision whether to prosecute “in the same manner as in the case of any ordinary offence of a serious nature under the law of that State”. Further, Art.7(2) provides that the standards of evidence required for prosecution and conviction in a torture case under universal jurisdiction cannot be less stringent than those required in torture cases under regular jurisdiction. Thus, notwithstanding the difficulties in obtaining and presenting evidence that will almost always arise where the offence is prosecuted in a state other than the state where the torture took place,<sup>97</sup> the fair trial rights of the accused are guaranteed.

This also underscores that the duty of the state under UNCAT is not to ensure the prosecution of every *allegation* of torture. Many states’ prosecutors may only commence prosecutions in cases where there is a reasonable prospect of conviction. The standard of proof generally required for criminal offences—beyond reasonable doubt, *intime conviction*—is equally to be applied in a prosecution for torture. A state is not bound to initiate a prosecution where it is clear that the evidence cannot meet the applicable

<sup>91</sup> Burgers and Danelius, fn.4 above, pp.63–64,

<sup>92</sup> *ibid.*, pp.138–140.

<sup>93</sup> *ibid.*, p.137.

<sup>94</sup> Burns and McBurney, fn.56 above, p.282.

<sup>95</sup> *ibid.*, p.282; Ingelse, fn.9 above, p.328.

<sup>96</sup> Ingelse, fn.9 above, p.329.

<sup>97</sup> Tardu, fn.9 above, p.314. Ingelse, fn.9 above, 329.

standard<sup>98</sup>; however, it may be that the state has other obligations, not involving criminal law processes, in respect of such a case.<sup>99</sup>

Further, notwithstanding that a case might not *ultimately* be determined to be suitable for prosecution, where there is any substantial allegation, the state must actually have its competent authorities evaluate the case, and the discretion of those authorities not to prosecute must be exercised consistently with the state's obligations under the Convention as a whole, i.e. prosecution must proceed unless it is relatively obvious that the evidence cannot support it.<sup>1</sup>

#### *Multiple states with jurisdiction*

Several states may have criminal law jurisdiction over a particular torturer, or even a particular act of torture, as the result of implementing the requirements of the UNCAT.<sup>2</sup> There is never an *obligation* on a state to extradite an accused torturer under the UNCAT, so long as the state is ready and able to prosecute appropriate cases itself.<sup>3</sup> Consequently, if the matter is not determined by general extradition treaties, the state receiving the request can freely choose, or determine based on its domestic legal system, among the requesting states. Presumably the state best-positioned to rally the evidence needed to prosecute the case would be the preferred choice in most cases.

#### *Non-refoulement*

The prohibition of torture and other forms of ill-treatment includes a specific rule against transferring an individual to the custody or territory of another state if he or she would face a real risk of torture or other prohibited ill-treatment there.<sup>4</sup> This rule, often referred to as the rule of *non-refoulement*, is partially codified in Art.3 UNCAT. It

<sup>98</sup> Burgers and Danelius, fn.4 above, p.138. However, see Foley, fn.40 above, p.77, suggesting that "the public interest served in ensuring that those in positions of authority do not abuse it . . . may justify bringing a prosecution even in cases where there is a greater likelihood of acquittal than would usually be the case".

<sup>99</sup> e.g. Art.13: "Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given"; Art.14 re: "enforceable right to fair and adequate compensation".

<sup>1</sup> Ingelse, fn.9 above, p.348.

<sup>2</sup> Indeed, under customary international law, *all* states can probably now assert criminal law jurisdiction over *all* acts of torture, no matter where they occur in the world, whether or not they are a party to UNCAT: see Rodley, fn.5 above, p.130. However, in relation to states parties to the UNCAT, clear authority is more easily established through reliance on the treaty than through the arduous and risky challenge of proving customary international law. Further, states are expressly *compelled* by CAT to establish certain forms of extra-territorial criminal jurisdiction for torture, whereas it remains unclear whether customary law *requires* the assertion of extra-territorial jurisdiction.

<sup>3</sup> Burgers and Danelius, fn.4 above, p.139.

<sup>4</sup> See, e.g. UN Human Rights Committee, *General Comment No.20 concerning prohibition of torture and cruel treatment or punishment (Art.7)*, HRI/GEN/1/Rev7, March 10, 1992, para.9; European Court of Human Rights, *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 and *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413.

should be mentioned that notwithstanding that UNCAT seeks to facilitate extradition of accused torturers, the rule of *non-refoulement* applies to persons accused of torture just as forcefully as it does in respect of persons accused of other crimes or no crime at all.<sup>5</sup> In such circumstances the state having custody of the accused must prosecute him if at all possible.

### Obligatory arrest and investigation

Where a state party finds that a person alleged to have committed an offence is in territory under its jurisdiction, Art.6 UNCAT requires the state to examine the information available to it and, where the circumstances warrant, to take the person into custody or take other legal measures to ensure his presence for the time necessary to enable any criminal or extradition proceedings to be instituted. Whether such detention is warranted will depend on factors including in part the state's domestic rules concerning evidence.<sup>6</sup> Under Art.6(2) the state must also immediately make a preliminary inquiry into the facts and inform the states where the torture is alleged to have taken place, and those of which the alleged offender and victims were nationals, of the situation. Both the detention and the investigation must take place whether or not any request for extradition has been received by the state.<sup>7</sup>

### Immunities under international law

International law generally grants certain senior state officials, particularly those who exercise diplomatic functions on behalf of the state, immunity from criminal law processes in other states.

In 1998, while the Committee on Torture was in the course of considering the Third Periodic Report of the United Kingdom, British courts were considering whether they could assert jurisdiction over the former Head of State of Chile, General Pinochet, for purposes of extradition on charges of torture. The Committee against Torture stated unequivocally its view that Art.5(2) UNCAT conferred universal jurisdiction over all torturers present in state territory "whether former heads of State or not".<sup>8</sup> The British House of Lords subsequently reached effectively the same conclusion.<sup>9</sup>

However, in a 2002 decision, *Congo v Belgium*, the International Court of Justice considered the immunity of certain *sitting* high officials of a state.<sup>10</sup> Belgium had issued

<sup>5</sup> Tardu, fn.9 above, p.313. Ingelse, fn.9 above, pp.351–352. CAT/C/SR.14, para.29; CAT/C/SR/16, paras 13 and 48; CAT/C/SR.17, para.25; CAT/C/SR.26, para.51; CAT/C/SR.32, paras 15 and 19, CAT/C/SR.107, para.33; CAT/C/SR.122, para.23.

<sup>6</sup> Burgers and Danelius, fn.4 above, p.134.

<sup>7</sup> Ingelse, fn.9 above, p.351, citing CAT/C/SR.78, para.41; CAT/C/SR.158, para.68; CAT/C/SR.247, para.17.

<sup>8</sup> Summary record of the first part of the 354th meeting, CAT/C/SR354, November 18, 1998, para.39.

<sup>9</sup> *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* [2000] 1 A.C.147, HL.

<sup>10</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, fn.86 above.

an arrest warrant to the Congolese Minister of Foreign Affairs, on charges of war crimes and crimes against humanity. Congo challenged the warrant before the International Court. Belgium defended the warrant by arguing that no immunity would apply to the Minister during any private visits to Belgium.

The Court specifically upheld the immunity of an incumbent minister of foreign affairs, no matter how serious the crime of which he or she is accused.<sup>11</sup> While the Court went out of the way to state that it was deciding only in respect of an incumbent minister of foreign affairs,<sup>12</sup> by implication the same immunity would likely be accorded the incumbent head of state, and possibly even the head of government.<sup>13</sup> So long as the minister of foreign affairs, and possibly the head of government or head of state, retains his or her office, then, the courts of another state are prohibited by international law from exercising any authority over him or her, even if the official is on a private visit at the time.<sup>14</sup>

Further, the Court held that these immunities are in no way affected by the fact that “various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition”; the immunities remain intact even when courts exercise jurisdiction over serious crimes under such treaties.<sup>15</sup> This formulation clearly can be read as including the UNCAT. However, the immunities under discussion by the court all relate solely to *incumbent* officials: the Court concluded that the complete immunity is lost as soon as the individual ceases to hold the position that qualified them for the immunity.<sup>16</sup>

Though the International Court of Justice did not expressly distinguish between them in its judgment, there are in fact two types of immunity under international law, “personal immunity” and “functional” immunity.<sup>17</sup> Only Heads of State, diplomatic agents, and possibly Heads of Government, enjoy “personal” or “diplomatic” immunity; *all* state officials enjoy “functional” immunity.<sup>18</sup> Both during and after any state official is in office, he or she enjoys complete immunity from the court processes of other states in respect of “ordinary” crimes, where the crime is part of an “official” act on behalf of the state: this is “functional” immunity. “Personal” or “diplomatic” immunity, on the other hand, for the few officials who enjoy it, applies to any act undertaken while in office, whether the act in question was part of their “official” duties or something they

<sup>11</sup> *ibid.*, para.51.

<sup>12</sup> *ibid.*

<sup>13</sup> A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003), p.266; H. Fox, *The Law of State Immunity* (Oxford University Press, Oxford, 2002), pp.422–423. *Congo v Belgium*, *ibid.*, para.51.

<sup>14</sup> Cassese, *ibid.*, p.271.

<sup>15</sup> *Congo v Belgium*, fn.86 above, para.59.

<sup>16</sup> *ibid.*, para.61. The Court there stated too that personal immunity also does not apply before the courts of the official’s own state, or where the state in question waives the immunity, or before certain international criminal tribunals.

<sup>17</sup> See A. Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case” (2002) 13 E.J.I.L. 853–875.

<sup>18</sup> *ibid.*, p.862.

did in their “private” capacity, and only lasts as long as the individual occupies the protected office.<sup>19</sup>

In *Congo v Belgium*, the Court ruled that after a Minister of Foreign Affairs leaves his position he becomes criminally responsible for anything he did in his “private” capacity, but (the Court implied) he remains immune for any acts he has done in an “official” capacity while serving as a representative.<sup>20</sup> The Court therefore seemed to blend “functional” immunity with “personal” immunity; however, the Court did not explain whether any continuing (and presumably therefore “functional”) immunity for “official” acts also applied to *international* crimes committed while in office. In the *Pinochet* case, the British House of Lords had held that continuing functional immunity did not apply to torture under the UNCAT.<sup>21</sup> There is a great weight of additional authority in support of the conclusion that international crimes, especially torture, constitute a general exception to “functional” immunity.<sup>22</sup>

Following the *Congo v Belgium* judgment, then, the position of the International Court of Justice would seem to be that, while they are in office, a state cannot arrest or prosecute the head of state, head of government, or minister of foreign affairs, and perhaps certain other diplomatic agents, for any crime, including torture under the UNCAT. This can be explained by the “personal” or “diplomatic” immunity they enjoy at that time. Other state officials enjoy no immunity in respect of acts of torture while they are in office, and so are liable to arrest and prosecution by other states under the UNCAT at any time. This is because they do not enjoy personal immunity and their functional immunity does not apply to serious international crimes. In respect of torture (though apparently not in respect of ordinary crimes) all individuals are subject to jurisdiction and prosecution under the UNCAT after they leave office, no matter how high the office, since any personal or diplomatic immunity is lost and serious international crimes are not covered by the continuing functional immunity.<sup>23</sup>

The Court recognised several other circumstances where a prosecution could take place notwithstanding that the accused was otherwise entitled to immunity. First, it said, the accused’s own country could try him under its national laws, since the international

<sup>19</sup> *ibid.*, pp.862–864.

<sup>20</sup> *Congo v Belgium*, fn.86 above, para.61. See Marina Spinedi, “State Responsibility v Individual Responsibility for International Crimes: Tertium Non Datur?” (2002) 13 E.J.I.L. 895–899.

<sup>21</sup> *Pinochet*, fn.9 above, at [52] (Lord Browne-Wilkinson).

<sup>22</sup> *Eichmann*, Israel, Supreme Court, judgment May 29, 1962, 36 I.L.R. 277–342; *Barbie*, France, Cour de Cassation, October 6, 1983, 78 I.L.R. 26–31; *Yamashita* 327 U.S. 1; *Karadžić*, ICTY, Trial Chamber I, May 16, 1995 (IT-95–5–D and IT-95–18), para.24; *Furundžija*, ICTY Trial Chamber II, June 5, 1998 (IT-95–17/1–T) para.140; *Slobodan Milošević (decision on preliminary motions)*, ICTY Trial Chamber III, November 8, 2001 (IT-99–37–PT), para.28. See also the detailed analysis in Cassese, fn.13 above, pp.267–271; Cassese, fn.17 above, pp.864–866, 870–874; Steffen Wirth, “Immunity for Core Crimes? The ICJ’s Judgment in the Congo v Belgium Case” (2002) 13 E.J.I.L. 877–893; and Spinedi, fn.20 above.

<sup>23</sup> To the extent that para.61 of the *Congo v Belgium* judgment could be read as inconsistent with this position, significant authority exists to suggest that the judgment is simply incorrect: Cassese, fn.17 above, pp.866–874; Wirth, fn.22 above. See also N. Rodley, “Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective” (2000) 69 *Nordic Journal of International Law* 11–26.

immunity would not apply in his own state.<sup>24</sup> Though in practice it is difficult to imagine realistic political circumstances in which such a prosecution would take place, it is worth noting that initiating prosecution of one's own national, regardless of rank, for acts of torture perpetrated in the state's own territory, is not merely an option under international law, it is an obligation. The Court also noted that a state could waive the immunity in respect of a particular individual.<sup>25</sup> Again, it is difficult to imagine realistic circumstances in which a state would waive immunity for an incumbent minister of foreign affairs, head of government or head of state. Finally, the Court noted that certain international criminal courts may have jurisdiction to try incumbent state officials notwithstanding any immunity that might otherwise obtain in international law.<sup>26</sup>

Some leading commentators, even after the *Congo v Belgium* judgment, would go further, arguing that the provisions of the UNCAT should be interpreted as implicitly overriding all immunities, apparently even for incumbent Heads of State, Heads of Government, and Ministers of Foreign Affairs.<sup>27</sup> Such an approach would clearly be consistent with the absolute abhorrence with which international law views and prohibits torture and would recognise that torture inherently involves abuse of official powers, such that a *failure* to override normal international immunities only reinforces the fundamental problem of widespread impunity for torture. On the other hand, one cannot dismiss as entirely unreasonable the reluctance of the International Court of Justice to abandon entirely measures fundamental to facilitating resolution of international disputes through diplomatic means rather than armed conflict.

In 2002, France issued a warrant to the President of the Congo, and a summons to one of its Generals, in relation to criminal proceedings against the Congolese Minister of the Interior (and others including the President and military officials), for crimes against humanity and torture.<sup>28</sup> The Congo again challenged this warrant before the International Court of Justice.<sup>29</sup> In hearings regarding the Congo's request for provisional measures to suspend the warrant and investigation, representatives of France stated that "France in no way denies that President Sassou Nguesso enjoys, as a foreign Head of State, immunities from jurisdiction, both civil and criminal".<sup>30</sup> The request for provisional measures was denied, though entirely without prejudice to the ultimate disposition of the case on its merits.<sup>31</sup> At the time of writing, the

<sup>24</sup> *Congo v Belgium*, fn.86 above, para. 61.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> Cassese, fn.13 above, pp.272–273. See also Burns and McBurney, fn.56 above, pp.285–286, though they do not distinguish between the situations of incumbent and former officials, and their piece was written prior to the *Congo v Belgium* judgment.

<sup>28</sup> ICJ, Press Release 2002/37, "The Republic of the Congo seizes the International Court of Justice of a dispute with France," December 9, 2002.

<sup>29</sup> *ibid.*

<sup>30</sup> ICJ, Press Release 2003/20, "The Court rejects the request for the indication of a provisional measure submitted by the Republic of the Congo", June 17, 2003.

<sup>31</sup> *ibid.* See also the Case Summary: *Case concerning certain criminal proceedings in France (Republic of the Congo v France)*, Case Summary 2003/01, Order of June 17, 2003.

International Court procedure was continuing, though no hearing on the merits has yet been scheduled.<sup>32</sup>

### Co-operation in criminal law processes

Article 9 UNCAT states in part as follows:

“9(1). States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Art.4, including the supply of all evidence at their disposal necessary for the proceedings.”

The co-operation contemplated by Art.9 may be critical in situations where the prosecution is to take place in a state other than the state where the events took place. However, the provision also underlines a practical difficulty with universal jurisdiction: if the foreign state is conducting the prosecution because the state where the torture took place is unable or unwilling, it is unlikely that that same unable or unwilling state will be able or inclined to supply the necessary evidence in any event.

### Fairness in the proceedings

The UNCAT provides in Art.7(3) that a person accused of torture “shall be guaranteed fair treatment at all stages of the proceedings” regarding the offence. The provision implicitly incorporates a range of specific protections provided under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,<sup>33</sup> including for example the following<sup>34</sup>:

- The state cannot subject the individual to arbitrary arrest or detention.
- The individual must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him.
- The state must promptly bring the person before a judge or judicial officer, and the person has the right to trial within a reasonable time or to release.
- The person is entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- The person is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- The person has the right to be presumed innocent until proved guilty according to law.

<sup>32</sup> The ultimate deadline for filing arguments was recently extended to August 2007: see ICJ, Press Release 2005/17, “Certain Criminal Proceedings in France (Republic of the Congo v France) Further extension of time-limits for the filing of a Reply and a Rejoinder”, July 13, 2005.

<sup>33</sup> Burgers and Danelius, fn.4 above, p.138; Ingelse, fn.9 above, p.328.

<sup>34</sup> From the International Covenant on Civil and Political Rights, Arts 9, 10, 14 and 15. For more detail see D. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (The Hague, 2001).

- The person is entitled to the following guarantees, as a minimum:
  - to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - to be tried without undue delay;
  - to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;
  - to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - not to be compelled to testify against himself or to confess guilt.
- The person shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law.
- The person shall not be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.<sup>35</sup>

### State compliance

In 2001, Amnesty International published a study on universal jurisdiction that includes an assessment of state practice in relation to the enactment and implementation of legislation to establish universal jurisdiction over torture as required by the UNCAT.<sup>36</sup> The study concluded that, as of September 1, 2001, at least 80 of the 126 states then party to the UNCAT could exercise universal jurisdiction over cases of torture not amounting to war crimes or crimes against humanity.<sup>37</sup> However, not all of these 80

<sup>35</sup> A torturer facing trial in one country for torture committed in another country might have been previously acquitted by a tribunal in the country where the torture occurred, but through a “mock trial” process tainted by its association with a government that tolerates torture. In such circumstances, the “mock trial” procedure, lacking bona fides even if taken in formal accordance with national law and procedure, likely would not qualify as an actual prosecution or trial under the terms of the UNCAT so as to prevent the subsequent prosecution or trial in another state: see Ingelse, fn.9 above, p.332.

<sup>36</sup> Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI Index IOR 53/013/2001 (London, September 2001), Ch.10 “Torture: State practice at the national level”.

<sup>37</sup> *ibid.*, p.1. Presumably a greater number would be able to apply universal jurisdiction over war crimes and crimes against humanity, pursuant to the Geneva Conventions or domestic implementing legislation.

states had enabled themselves to exercise jurisdiction over all conduct amounting to torture as defined by the UNCAT, the most common defect being inadequate definitions in national law.<sup>38</sup>

The study identified five models through which national constitutions and legislation could enable courts to exercise universal jurisdiction over torture: express provisions, analogous crimes, crimes defined in treaties, customary international law, and direct incorporation. The models were not mutually exclusive: the courts of any given state could receive jurisdiction through a combination of models. The study provided a brief overview of the situation in each state party to UNCAT.

A variety of states enacted express provisions specifically to implement UNCAT or the prohibition of torture under customary law<sup>39</sup>; this is generally the best method to ensure full compliance with the requirement to criminalise torture, though problems may still arise.<sup>40</sup> Other states exercise universal jurisdiction over ordinary crimes under national law, such as assault, rape, murder, or manslaughter, that are analogous to the crime of torture as defined in UNCAT<sup>41</sup>; however, this method of compliance with UNCAT in many instances failed actually to criminalise all the conduct covered by UNCAT, or permitted unacceptable defences such as superior orders.

Other states have legislation that allows their courts to exercise universal jurisdiction over all crimes defined in treaties to which the state is a party<sup>42</sup>; however, problems can still arise where, for instance, no sentencing range has been enacted in domestic law for a given offence and the treaty does not specify particular penalties, as is the case with the UNCAT. In a smaller number of cases, the state may have laws enabling universal jurisdiction over all crimes under customary international law<sup>43</sup>; this can be highly problematic in practice, given the arduous methodology required to prove customary international law, especially to the degree of precision required for criminal prosecution, and difficulties where no sentencing range is specified. Finally, some states' constitutions provide that international law, whether under treaty or custom, is directly

<sup>38</sup> *ibid.*

<sup>39</sup> e.g. (as of September 1, 2001), Australia, Brazil, Cameroon, Canada, China, Colombia, Finland, France, Iceland, Malta, Netherlands, Portugal, UK, US and Uruguay. Estonia, Azerbaijan and Chile each subsequently introduced an offence of torture into its domestic law: Estonia CAT/C/CR/29/5, December 23, 2002; Azerbaijan, CAT/C/CR/30/1, May 14, 2003; Chile, CAT/C/CR/32/5, June 14, 2004.

<sup>40</sup> See the description, above, of the dispute between the UK and the Committee against Torture regarding their implementation of the "lawful sanctions" exception. The Committee also identified certain inadequacies in respect of the definitions introduced by Estonia (*ibid.*, para.5(b)), Azerbaijan (*ibid.*, para.5(b)), and Chile (*ibid.*, paras 6(c), 7(a)).

<sup>41</sup> e.g. (as of September 1, 2001), Austria, Azerbaijan, Colombia, Croatia, Czech Republic, Democratic Republic of the Congo, El Salvador, Italy, Jordan, Kyrgyzstan, Liechtenstein, Macedonia (Former Yugoslav Republic of), Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Turkey, Ukraine, and Uzbekistan.

<sup>42</sup> e.g. (as of September 1, 2001), Argentina, Armenia, Austria, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Ethiopia, Germany, Greece, Guatemala, Honduras, Hungary, Iran, Italy, Mexico, Panama, Paraguay, Peru, Spain, and Switzerland.

<sup>43</sup> e.g. (as of September 1, 2001), Belgium, Ecuador, El Salvador, Ethiopia, and Georgia.

effective in domestic law with precedence over normal national legislation<sup>44</sup>; again, ambiguity arising from the lack of a domestic definition of the crime or penalty may make actual prosecution of torture by such states unlikely.<sup>45</sup>

### **Conclusion**

This article has reviewed a variety of aspects of the requirement under the UNCAT that states criminalise torture. Together, these measures form a global web of criminal laws, extradition measures, and investigative and prosecutorial obligations. It is a powerful framework for fighting the impunity that has allowed torture to persist long after its formal prohibition by the community of nations. However, the means of enforcing the obligations of states under the UNCAT are essentially limited to moral and political suasion through the public reports of the Committee against Torture. Consequently, if the important set of tools for the elimination of torture provided by the UNCAT is to have meaningful effect, a few forward-looking states with political courage must take the initiative to *use* them. Twenty years after the adoption of the UNCAT, perhaps for the first time anywhere, a trial and conviction under the universal jurisdiction provided by Art.5(2) has taken place in the United Kingdom.<sup>46</sup> One hopes that, 20 years from today, this moment will be seen as the opening of a new phase in the progressive realisation of the elimination of torture through national criminal enforcement, an achievement that may well not have been possible without the criminalisation provisions of the UNCAT.

<sup>44</sup> Amnesty International suggested that Egypt and Hungary might have such jurisdiction.

<sup>45</sup> See Ingelse, fn.9 above, pp.259–261.

<sup>46</sup> See fns 82 and 83 above.



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# Bringing Complaints under the Special Procedures System: a Strategic Approach to the UN Human Rights Machinery

## Abstract

*This article reviews the UN Special Procedures mechanism as one of the possible mechanisms available under the United Nations human rights machinery. It illustrates what the system consists of, in particular 'who' are 'Special Procedures', their background and core activities. Particular attention is given to the complaints mechanism also known as 'communications' as one of the core activities. The operational side of the 'communications' system is described and the main weaknesses and strengths are reviewed. It is argued that despite the weaknesses, its main strengths - namely protection, monitoring and advocacy - can prove the communications system to be a worthwhile and valuable tool for victims of human rights abuses and the wider human rights community. Communications sent concerning allegations of human rights violations of Kurdish people are used as a case study, concretely illustrating their positive contribution to human rights in the areas of protection, monitoring and advocacy.*

## Introduction

The United Nations human rights machinery consists of two broad clusters. The first one comprises mechanisms set up under international human rights treaties and comprising organs such as the Human Rights Committee, which monitors States' compliance with their obligations under the Convention on Civil and Political Rights.<sup>2</sup> The other cluster comprises machinery whose creation is

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2 Other Committees established under specific Conventions are: the Committee on Economic, Social and Cultural rights (CESCR) that monitors the implementation of the International

directly mandated by the UN Charter, such as the General Assembly, the Economic and Social Council (ECOSOC) and the late Commission on Human Rights or mechanisms which have been authorised by one of these bodies, such as Special Procedures.

In spite of their name evoking some kind of 'disembodied' mechanism, the Special Procedures consist of a number of individual independent experts who bear different titles such as special rapporteurs (SRs), special representatives, independent experts (IE) or working groups (WG) and who, until recently, were appointed<sup>3</sup> by the United Nations Commission on Human Rights - which has now been replaced by the Human Rights Council<sup>4</sup> under the General Assembly resolution 60/251 of 15 March 2006.

## Background

The Special Procedures have evolved somewhat randomly way over the last three decades. The first thematic special procedure to be established by the Commission was the Working Group on Disappearances, which was set up in 1980 and composed of a group of five independent experts mandated to 'examine questions relevant to enforced or involuntary disappearances of persons'<sup>5</sup>. In fact, the establishment of the WG was an attempt to respond to the massive 'disappearances' taking place in Argentina during the 70s under the military junta, while avoiding a country specific approach that would have

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Convention on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against women that monitors the implementation of the Convention on the Elimination of Discrimination against women (CEDAW), the Committee on the Elimination of Racial Discrimination that monitors the implementation of the Convention on the Elimination of Racial Discrimination (CERD); the Committee Against Torture (CAT) that monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee on the Rights of the Child (CRC) that monitors the implementation of the Convention on the Rights of the Child and the latest Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) set up under the Convention that monitors the implementation of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

- 3 On the appointment of mandate-holders see Manual of the United Nations Special Procedures, June 2006, p.4 available at [http://www.ohchr.org/english/bodies/chr/special/docs/Manual\\_English.pdf](http://www.ohchr.org/english/bodies/chr/special/docs/Manual_English.pdf) (29 November 2006)
- 4 At its first session, the Council decided to extend exceptionally for one year, subject to the review it will undertake within one year after the holding of its first session, the mandates and mandate-holders of all the Commission's Special Procedures, Human Rights Council Decision 2006/102.
- 5 Commission on Human Rights Resolution 1980/20

been highly controversial<sup>6</sup>. At the time, singling out any one country was indeed avoided. It was not foreseen that the WG was to lay down the basis for what can be considered one of the most innovative, responsive and flexible human rights mechanism<sup>7</sup>.

Since then, the number of mandates created by the Commission on Human Rights to monitor and report on thematic or geographic human rights concerns has grown considerably. By November 2006, the number of Special Procedures had increased to 28 thematic mandates<sup>8</sup> and 13 country-specific mandates<sup>9</sup>.

### Special Procedures' Activities

Today the principal functions of special procedures are recognised to be:

- **analyse** the relevant thematic issue or country situation on behalf of the international community;
- **advise** on the measures which should be taken by the Government(s) concerned and other relevant actors;
- **alert** United Nations organs and agencies and the international community in general to the need to address specific situations and issues. In this regard they have a role in providing “early warning” and encouraging preventive measures;
- **advocate** on behalf of the victims of violations through measures such as requesting urgent action by relevant States and calling upon Governments to respond to specific allegations of human rights violations and provide redress;
- **activate** and mobilise the international and national communities to address particular human rights issues and to encourage

6 H. Steiner and P. Alston, *Human Rights in Context*, OUP 2000, p. 641

7 Amnesty International, ‘United Nations Special Procedures: Building on a cornerstone of human rights protection’, October 2005, AI Index: IOR 40/017/2005, p.5

8 For a list of thematic Special Procedures see <http://www.ohchr.org/english/bodies/chr/special/themes.htm> (29 November 2006)

9 For a list of country specific Special Procedures see <http://www.ohchr.org/english/bodies/chr/special/countries.htm> (29 November 2006)

cooperation among Governments, civil society and inter-governmental organizations.<sup>10</sup>

In so doing, the work of the Special Procedures is usually organised around a four-pillar structure<sup>11</sup> comprising: a) thematic analyses production; b) complaints/communications system<sup>12</sup>; c) country visits; and d) press statements. However, these different pillars should not be seen in isolation but rather as structurally interrelated and mutually supporting elements of Special Procedures operational structure.

### *Thematic analyses*

Mandate-holders submit a report on their activities on a regular basis to the relevant United Nations bodies, in particular to the Human Rights Council (HRC) and the General Assembly (GA). The experts may choose or be requested by the relevant body (GA or HRC), to focus on a topic of particular relevance to their mandate either as part of their annual report or as a separate additional report.<sup>13</sup>

The following are just some examples of thematic studies:

- The 2006 report<sup>14</sup> of the Special Rapporteur on Violence against Women focuses on the ‘due diligence standard’;
- The Working Group on Arbitrary Detention normally devotes a section of its annual report to specific topics and in 2006<sup>15</sup> the report focused on ‘secret prisons and over incarceration’;

10 Manual of the United Nations Special Procedures, June 2006, p.4

11 Although each Special Procedures may retain some specificities see for example the WG on Arbitrary Detention and the WG on Enforced and Involuntary Disappearances, there are greater commonalities than differences in their general responsibilities and methods of work, see above ft.9

12 The terms complaints and communications will be used interchangeably.

13 All the reports are available under the Annual Report section of each of the individual mandate web-page

14 Report of the Special Rapporteur on Violence against Women, its causes and consequences, E/CN.4/2006/61

15 Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7

- In his 2006 report the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions devoted a section to the principle of ‘transparency’;<sup>16</sup>
- In 2006 the Special Rapporteur on Adequate Housing devoted a separate report on ‘women and adequate housing’.<sup>17</sup>

### *Complaints*

Complaints will be considered extensively later in this article. However, by way of introduction, the complaints procedure - also referred to as communications - provides a mechanism whereby mandate-holders can receive information from different sources and can act on credible information by sending a communication to the relevant Government(s) in relation to any actual or anticipated human rights violations which fall within the scope of their mandate.<sup>18</sup>

### *Country visits*

Country visits<sup>19</sup> are a crucial element for a meaningful country engagement because of the variety of direct interlocutors that mandate-holders can meet, ranging from Government officials, judicial and legislative representatives, rights-holders, national human rights institutions, NGOs and civil society representatives, media and international organisations present in a given country. Furthermore, country visits represent an effective way of directly observing and gathering first-hand information. Country visits are also an opportunity for NGOs, civil society organizations and associations to establish links with Special Procedures, to convey their concerns and make themselves known as potential reliable sources of information for communications.

Special rapporteurs can make requests to visit a particular country but ultimately

16 Report of the Special Rapporteur on extra-judicial, summary or arbitrary executions, E/CN.4/2006/53

17 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, E/CN.4/2006/118

18 Manual of the United Nations Special Procedures, para. 28

19 A list of country visits undertaken, forthcoming and requested can be found on the OHCHR's web-site: <http://www.ohchr.org/english/bodies/chr/special/countryvisitsa-e.htm> (29 November 2006)

these can only take place once the State has officially accepted and invited the special rapporteur to visit. Countries may also extend a 'standing invitation'<sup>20</sup> whereby a State gives a 'blanket prior agreement'<sup>21</sup> announcing that it will always accept requests to visit from all thematic Special Procedures.

A number of factors may affect the choice of a mandate-holder for a visit request: a particular recent development at the national level,<sup>22</sup> extensive media coverage of a particular issue falling within the scope of a mandate,<sup>23</sup> considerations of geographical balance, requests from NGOs, Governments of international organisations, or the number and consistency of communications sent over the recent years by one or more mandate-holders to a particular country, highlighting a pattern of alleged human rights violations or institutional aspects conducive to violations.

Regardless of the reasons for choosing a specific country, the purpose of country visits is to assess the actual human rights situation, including an examination of the relevant institutional, legal, judicial, and administrative aspects and to make recommendations in relation to issues that arise under the relevant mandate.

Reports on country visits are submitted and presented to the Human Rights Council and are publicly available.

### ***Press statements***

Special Procedures may issue press releases whenever deemed necessary on specific situations of grave concern falling within the scope of one or more of the mandates. They can also decide to issue a press statement or hold a press conference, either individually or jointly with other mandate-holders, in relation

20 A list of states that have extended a standing invitation to thematic procedures can be found on the OHCHR's web-site: <http://www.ohchr.org/english/bodies/chr/special/invitations.htm> (29 November 2006)

21 Nigel Rodley, United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human rights. Complementarity or Competition?, in (2003) *Human Rights Quarterly*, 25

22 The Special Rapporteur on the independence of judges and lawyers was prompted to request a visit to Ecuador following reports on threats to the principle of judicial independence after the replacement of 27 out of 31 Supreme Court justices in December 2004 and carried out a second visit to follow-up on the previous one.

23 This was the case for the Special Rapporteur on violence against women visit to Turkey, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/ECC79067F93A9485C125717F004AAFDD?op=ndocument> (29 November 2006)

to communications raising particularly grave allegations to which a Government has repeatedly failed to provide a substantive response.<sup>24</sup>

### *Special focus: complaints under the Special Procedures mechanism*

The focus of this article is on the complaints mechanism also known and referred to as ‘communications’: one of the Special Procedures’ core protection functions. Under the communications system, some Special Procedures are mandated to seek clarification and prompt the concerned Government to end or take preventative and investigatory action in relation to credible and reliable allegations of human rights violations. When they receive credible information that a human rights violation that comes within the scope of their mandate, is either at risk of occurring, or has occurred, some special rapporteurs may decide<sup>25</sup> to intervene directly with Governments. Although most communications concern individuals or groups, Special Procedures may also intervene in relation to negative institutional development considered to be conducive to human rights abuses. In 2005, Special Procedures sent 1,049 communications of which 53% were sent jointly by more than one mandate-holder to 137 States, addressing 2,545 individual cases.<sup>26</sup>

A communication takes the form of an ‘urgent appeal’ when the alleged violation(s) is imminent or still occurring, or that of a ‘letter of allegation’ when the violation(s) has already occurred. The communication is transmitted through the Office of the High Commissioner for Human Rights (OHCHR), which supports Special Procedures, to the Government concerned. The immediate aim of communications is to: protect the alleged victim(s) from the imminent, ongoing or further violation(s); seek clarification regarding the allegations and open and engage in a constructive dialogue with the concerned Government. That is why communications in general and in urgent appeals in particular ‘serve urgent humanitarian purposes’<sup>27</sup> and ‘do not imply any kind of value judgment on the

24 See as an example the press releases concerning the detention facilities at Guantanamo Bay which can be found on the Special Procedures web-site <http://www.ohchr.org/english/bodies/chr/special/press2006.htm> (29 November 2006)

25 The decision to intervene will depend on various criteria established by the different rapporteurs, these are usually explained in the questionnaires and can be found on their individual web-pages.

26 Special Procedures Bulletin, January-April 2006 available at <http://www.ohchr.org/english/bodies/chr/special/BulletinJan-Apr2006.pdf> (29 November 2006)

27 Theo van Boven, Special Rapporteur on the question of torture, Annual report E/CN.4/2003/68, pg.4

part of the special procedure concerned and are thus not per se accusatory' and 'are not intended as a substitute for judicial or other proceedings at the national level'.<sup>28</sup>

The sources of information concerning allegations can be the alleged victims, non-governmental organisations (NGOs), national human rights institutions, international organisations (e.g. UN country teams or OHCHR Field offices) and/or intergovernmental organisations. The special rapporteurs have developed common criteria to test the credibility of information alleging human rights violations, which usually refer to the reliability of the source; the internal consistency of the information received and the precision of the factual details included in the information. Of course, the allegations themselves have to fall within the scope of one or more mandates: if it falls within several then a joint communication is sent.

Although some mandate holders have developed their own requirements as to the content of a complaint<sup>29</sup>, the source<sup>30</sup> will usually be asked to provide<sup>31</sup> the following minimum information:

- The person(s) or organization(s) submitting the communication;
- The full name of the alleged victim(s), their age, sex, and place of residence or origin;
- As many details as possible (name, age, sex, place of residence or origin) in cases involving a group or community;
- Date and place of incident (approximate, if exact date is not known);
- A detailed description of the circumstances of the incident in which the alleged violation occurred;

28 Manual of the United Nations Special Procedures, para.50

29 See Questionnaires available at <http://www.ohchr.org/english/bodies/chr/special/questionnaires.htm> (29 November 2006)

30 Sources should be aware and make the alleged victim aware of the fact that his/her name would be reflected in the reports presented to the HRC, although exceptions may be made in relation to children and other victims of violence in relation to whom publication would be problematic.

31 On where to send correspondence concerning a complaint, see *Working with OHCHR: A handbook for NGOs*, chapter 5 available at <http://www.ohchr.org/english/about/ngohandbook/ngohandbook5.pdf> (29 November 2006)

- Identification of the alleged perpetrator(s), name(s) if known and/or title/function, and suspected motive;
- Specifying, where relevant, if steps have been taken at the national level (e.g. have police been contacted, are other national authorities involved, the position - if any - of the Government);
- Specifying, where relevant, if steps have been taken at the international level (e.g. if the complaint is being considered under other international mechanisms).<sup>32</sup>

Once the communication (whether an urgent appeal or letter of allegation) is sent, the Government should take the necessary steps to bring the violation to an end, provide information clarifying the allegations, and take steps to protect the victim where necessary. Depending on the answer received from the Government or whether additional information is received from the source, mandate-holders can decide to send a follow-up communication requesting a further explanation or, where there has been no reply, they can send a communication urging the concerned Government to provide the information. Whilst sources of information are kept confidential, observations to Government replies, Government replies and the communications are made public in the reports which used to be presented at the annual sessions of the Human Rights Commission and which it is presumed<sup>33</sup> will continue to be presented at the Human Rights Council sessions.

### **Strengths and Limits of The Special Procedures Complaints System**

To some extent, the limits of Special Procedures communications are in fact also their strength.

Of course, a limit such as enforcement is not just exclusive to Special Procedures but is shared to different degrees by most of the UN human rights machinery. However, if enforcement is understood to comprise some sort of 'moral compulsion',<sup>34</sup> then it could be argued that in the case of Special Procedures this

32 Special Procedures of the Commission on Human rights, 'Urgent appeals and letters of allegation on human rights violations' available at <http://www.ohchr.org/english/bodies/chr/special/complaints.htm> (29 November 2006)

33 Subject to the review of Special Procedures the Council intends to carry out in conformity with General Assembly resolution 60/251

34 H. Steiner and P. Alston, *Human Rights in Context*, OUP 2000, p. 593

is achieved and revealed through some of the 'positive' human rights stories<sup>35</sup> in which victims have been protected and Governments have taken action to halt, redress and/or prosecute those responsible for human rights violations. Furthermore, such cases - and generally Government responsiveness to communications - are a way of establishing a non-confrontational constructive dialogue contributing to the entrenchment and fostering of a State's human rights culture.

Another 'weakness' is the fact that Special Procedures are not a judicial process and Governments are under no obligation to reply or to take action on the matter. However, on the other hand, this means that mandate holders can act rapidly and bring the matter to the attention of the concerned Government at the earliest possible point and without having to wait for national remedies to be exhausted or, if the case is pending before another international mechanism, for the latter to reach a decision. Often cases which are being reviewed under one of the UN committees are at the same time a subject of Special Procedures communications, especially in cases of harassment and death threats which continue to be received by the complainant while the case is being considered by a Committee.

A marked strength in terms of protection is the fact that communications can be sent regardless of a State's ratification of international instruments. This allows Special Procedures to intervene in matters that cannot be brought to the attention of treaty bodies. The corresponding weakness is that, of course, the alleged human rights violations have to fall within the scope of an existing mandate, which is not always the case.

An unequivocal strength lies in the fact that communications can bring to Governments' further attention appeals already promoted by NGOs, national and international networks, adding an extra official layer of international pressure and contributing to a sort of 'snowball effect', whereby international pressure becomes of such significance that the Government cannot but take the necessary steps to protect human rights. Yet, on the flipside of the coin, in countries where - owing to different reasons including a repressive system - civil society is not organised or active or is unaware of such a mechanism, little or no information is received by mandate-holders, which inevitably limits their action in terms of protection and establishing a dialogue with that specific Government.

35 For examples of 'positive' human rights stories see 'Facts & Figures 2004' and 'Facts and Figures 2005' available at <http://www.ohchr.org/english/bodies/chr/special/complaints.htm> (29 November 2006)

Despite not having an obligation<sup>36</sup> to reply to communications, the average rate of Governments' replies to communications is 50%<sup>37</sup> with Governments of some countries being much more responsive than others (with an average of 80-90% replies). Further, the level of responsiveness may vary according to the thematic areas touched by communications: some Governments are more inclined to reply to some special rapporteurs rather than others. There is also a certain discrepancy as to the quality of replies.<sup>38</sup>

However, even when there are no replies, communications are still documented and reported in UN official reports which, in turn, can be used as an advocacy and lobbying tool for policy change. Communications and thematic analyses of communications remain a monitoring tool identifying human rights trends and patterns and are a way of keeping the spotlight on contentious issues and tracking a country's 'human rights record'. Furthermore, a comprehensive 'human rights record' can be tracked and enhanced thanks to the establishment in 2004 of the Quick Response Desk database. In fact, it is now possible to produce consolidated analyses of all the communications sent by each special procedure -which highlights the potential of Special Procedures as a whole and not just in their individual capacity - to a region, on a specific group of individuals (children, women, a minority group) or to a specific country, making it possible to monitor a country's human rights trends and patterns throughout the years. This type of analysis is already being used as an internal information tool feeding into country engagement activities of the OHCHR<sup>39</sup>. This could become even more relevant if the new Human Rights Council were to avail itself of the Special Procedures communication system for the Universal Peer Review<sup>40</sup> which it has

36 There is no legal obligation for Governments to reply. However CHR resolution 2004/76 urging States to cooperate on the matter by 'responding without undue delay to requests for information' does create a legitimate expectation about Governments cooperation.

37 Data kindly provided by OHCHR Quick Response Desk. See also statistics in reports on communications, in particular Special Rapporteur on Independence of judges and lawyers E/CN.4/2006/52/Add.1, pg.6, Special Rapporteur on violence against women, its causes and consequences E/CN.4/2006/61/Add.1 , the Special Rapporteur on extra-judicial, summary and arbitrary executions E/CN.4/2006/53, pg.7

38 Some Rapporteurs have recently started to classify Government replies, the Special Rapporteur on extra-judicial, summary and arbitrary executions has classified replies according to five categories: a) largely satisfactory response; b) cooperative but incomplete response; c) allegations rejected but without adequate substantiation; d) receipt acknowledged; e) no response. Report E/CN.4/2006/53

39 Office of the United Nations High Commissioner for Human Rights, Annual Report 2005, p.42. Available at <http://www.ohchr.org/english/about/docs/annualreport2005.pdf> (29 November 2006)

40 On 23 June 2006, at their 13<sup>th</sup> Annual Meeting Special Procedures mandate-holders issued a press statement calling upon the Council to recognize the essential role of the Special Procedures in strengthening human rights protection; by making their work of central to the system of

been mandated to carry out by the GA resolution 60/251.

The follow-up procedure<sup>41</sup> to communications seems to be the special procedure mechanism's 'Achilles' heel'. Arguably, it is a significant weakness but not a fatal one. In the first place, it should be borne in mind that follow-up would have no reason to exist if Governments did reply in a reasonable time and satisfactory manner. In an admittedly imperfect world, this is not the case for a number of reasons, which are not always attributable to Governments ill will but to other factors, such as lack of personnel trained in dealing with UN human rights mechanisms. Thus, follow-up means that a mixed strategy, which is partly already in place, needs to be systematised and consolidated. A range of initiatives have been taken in this respect. These include improving the structure and content of communications in order to facilitate Governments going through the essential points of communications and providing relevant information, the creation of the Quick Response Desk database which facilitates tracking communications without any Government replies, and the compilation of 'good' news stories. Further, internal discussions have been initiated on methods of work and enhancing the role of sources in providing further information.

Ultimately there is always the issue of lack of adequate financial resources to sustain the work of Special Procedures. 'Heavy' and 'middle weight' mandates, which have a turn-out of over 400 and 200 communications per year respectively and yet are managed by just 1.5 members of OHCHR staff, cannot be reasonably expected to carry out effective follow-up on top of their routine workload.

In conclusion, the benefit of the Special Procedures communications procedure is its strategic capacity, since it can be used by victims, or by organisations applying on behalf of victims, as an emergency/humanitarian protection system. This will be particularly applicable when other avenues are not available, are too laborious or are time consuming given the urgency of the matter, even though they do not provide for a judicial remedy. In the course of action, although Governments have no duty to reply, communications are a way of establishing a dialogue – whether effective or not - but nonetheless a dialogue with the concerned Government. At the very least, they become an official UN human rights monitoring tool, documenting and analysing trends and patterns thematically or by state at the same time.

Universal Periodic Review. Statement available at <http://www.ohchr.org/english/bodies/chr/special/statementCC-HRC.pdf> (29 November 2006)

41 Manual of the United Nations Special Procedures , p.19

## Case Study: Communications on Alleged Human Rights Violations of Kurdish People

The following section puts the communications mechanism in context by assessing Special Procedures communications sent to OHCHR regarding alleged human rights violations towards Kurdish people.

Over the past years, different Special Procedures have sent joint or individual communications concerning human rights violations against Kurdish people. The mandates who have sent communications are mainly: the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions, the Special Rapporteur on Torture, the Special Representative of the Secretary General (SRSG) on Human Rights Defenders, the Special Rapporteur on Violence against Women, the Special Rapporteur on Freedom of Expression and the Working Group on Arbitrary Detention. Most of the communications have been sent to the Turkish Government, although there are a few cases that have been the subject of communications sent to the Islamic Republic of Iran and Syria.

Communications have been sent in relation to allegations of **'harassment and death threats'** received by a woman whose case was being heard at the European Court on Human Rights, and in relation to the case of two Kurdish women arrested on suspicion of being 'members of the PKK/KONGRA-GEL terrorist organisation' and **'tortured while in custody'** at the Anti-Terror Branch of Hakkâri (Turkey) police headquarters. The Government denied the torture allegations and replied that 'The Hakkâri Public Prosecutor's Office initiated an investigation based on complaints of the two persons of ill-treatment; however, it concluded with a decision not to prosecute for lack of credible and substantiating evidence'.<sup>42</sup>

Communications have covered a case<sup>43</sup> concerning **'lack of due diligence'** by local authorities in their duty to prevent the **'honour killing'** of a 22-year-old Kurdish woman. The Government replied giving a full account of the facts and action taken by the relevant authorities and specifying that the girl never sought 'either police or gendarmerie protection'. In his observations to the reply, the Special Rapporteur noted 'that even if the victim did not make a formal request for police protection, the act of reporting a death threat, and the subsequent events, would

42 Special Rapporteur on violence against women, its causes and consequences, Communications report E/CN.4/2006/61/Add.1, page 37

43 Special Rapporteur on extra-judicial, summary and arbitrary executions, Communications report E/CN.4/2005/7/Add.1, para.734

seem to impose an obligation of due diligence upon the Government. It is not evident from the information provided that such an obligation was satisfied.<sup>44</sup>

The Special Rapporteur on summary executions also took action on the case of a father and son who were reportedly **shot dead by police officers**<sup>45</sup> in front of their house. The case has been widely reported on and has generated international indignation and condemnation<sup>46</sup>. The Government replied giving an account of the facts of the incident, the evidence and the investigations. The Special Rapporteur found the reply cooperative but incomplete which, according to the Special Rapporteur's classification of Governments' responses, denotes a reply that provides some clarification of the allegations but contains limited factual substantiation or fails to address some issues. In another case, a communication<sup>47</sup> was sent in relation to the '**unintentional killing**' of a man in the context of a **security operation** in the Adana region. The Government replied that 'According to the intelligence gathered by Turkish law enforcement agencies' two militants of the PKK/KONGRA-GEL were expected to carry out a bombing and armed attacks. The Government further stated that according to the investigation carried out, the victim 'was killed in an exchange of fire with the police who tried to stop him and his accomplice while they were on their motorcycle.'<sup>48</sup> A complaint was filed at the Public Prosecutor's Office and trial was pending. Communications have also been sent jointly by the Special Rapporteur on Summary Executions, Special Rapporteur on Freedom of Expression and the Special Rapporteur on the Independence of Judges and Lawyers concerning the arrest of members of the legal pro-Kurdish Democratic party HADEP<sup>49</sup> detained and taken to the Anti-Terror Branch of the Diyarbakir Police Headquarters.

In her 'Compilation of developments in the area of human rights defenders'<sup>50</sup> the Special Representative of the Secretary General on Human Rights Defenders expressed her concern in relation to the fact that 'the alleged perpetrators of violations against human rights defenders have been the authorities, either

44 Ibid. E/CN.4/2005/7/Add.1, para.734 para.737

45 Special Rapporteur on extra-judicial, summary and arbitrary executions, Communications report, E/CN.4/2006/Add.1, pg.252

46 A number of press releases by human rights organizations such as Amnesty International, Human Rights Watch, the Kurdish Human Rights Project have been released.

47 E/CN.4/2005/7/Add.1

48 Ibid.

49 Special Rapporteur on extra-judicial, summary and arbitrary executions, Communications report, E/CN.4/2003/Add.1

50 Special Representative of the Secretary General on human rights defenders, **Compilation of developments in the area of human rights defenders**, E/CN.4/2006/95/Add.5

in the form of the State authorities, the police, the courts or members of the security forces or gendarmerie.’ She based this on communications sent to Turkey since the establishment of her mandate. She also expressed concern about the Government’s persisting views that many human rights defenders were ‘enemies of the State’. The Special Representative noted that ‘a large number of her communications deal with **prosecution of defenders and legal action against organisers of demonstrations or against NGOs** working on human rights issues. Defenders have been charged in particular as a result of promoting the rights of the Kurdish population, issuing ‘unauthorised press statements’, alleged misconduct against lawyers, ‘inciting hatred and enmity amongst peoples’, aiding terrorist organisations and ‘professional misconduct.’<sup>51</sup>

Over the past few years, the Special Rapporteur on torture has documented and reported on a number of allegations of **torture suffered at the hands of security police** by members of the pro-Kurdish People’s Democratic Party (HADEP). In response to four consecutive communications<sup>52</sup> concerning the **death in custody** of a member of HADEP and the prosecution of the accused, the Government said that ‘The final hearing of the case against 16 police officers was held on 9 May 2005. The Kocaeli Heavy Penal Court No. 2 acquitted nine of the officers due to lack of evidence linking them to the crime. Seven of the police officers were sentenced to periods of between 8 months to one year. The ruling can be appealed to a higher court.’

In 2005 joint communications were sent to Iran concerning: the alleged **summary execution**<sup>53</sup> of a Kurdish man by security forces; the **non-respect of international norms and standards for the imposition of capital punishment** on four Kurdish men<sup>54</sup>; and the case of an Iranian citizen of Kurdish origin, allegedly **held incommunicado, tortured and sentenced to death**<sup>55</sup> on the basis of a confession extracted under torture. In all cases no Government reply was received.

In 2002, the Special Rapporteur on Violence against Women - jointly with the Special Rapporteur on Torture and Special Rapporteur on Extra-judicial, Summary

51 Ibid., para. 1658

52 Special Rapporteur on the question of torture, Communications report E/CN.4/2006/6/Add.1 pg.321, E/CN.4/2002/76/Add.1, para. 1615, E/CN.4/2003/68/Add.1, para. 1853, and E/CN.4/2005/62/Add.1, para. 1804

53 Special Rapporteur on extra-judicial, summary and arbitrary executions, Communications report, E/CN.4/2006//Add.1

54 Ibid.

55 Ibid.

or Arbitrary Executions - sent a communication<sup>56</sup> to Sweden concerning a case of **repatriation to a country where a risk of torture** and ill-treatment existed<sup>57</sup>. In this particular case, a Kurdish woman who was refused asylum by Sweden faced imminent repatriation to Iran while her case was pending before the European Court of Human Rights. The Swedish Government responded by stating that the minister could not interfere with individual decisions by independent immigration authorities for constitutional reasons, but passed the letter to the Aliens Appeals Board. Ultimately, the Aliens Appeal Board decided to put on hold the plan to deport the woman until the Board had made its decision on her appeal. This case not only protected the rights of women but in addition, it is likely that the communication also contributed to the decision, reported by the Government in its reply, to set up a Committee to propose amendments to the Aliens Act to make it possible to grant refugee status to persons with a well-founded fear of persecution because of gender or sexual orientation.

The Special Rapporteur on Summary Execution has sent communications to Syria concerning the **deaths** of 40 persons of Kurdish origin due to the **excessive use of force** by law enforcement officials and has found the Government reply cooperative but incomplete.<sup>58</sup>

The Working Group on Arbitrary Detention<sup>59</sup> has adopted Opinion N.7/2005<sup>60</sup> in which it considered the case of a member of the Kurdish minority in Syria sentenced to five years' imprisonment by the Supreme State Security Court for taking photographs of a peaceful Kurdish demonstration and posting them on the Internet. The Government replied that he had been arrested for committing an offence which is punishable by law, i.e. being a member of a proscribed Kurdish party called 'Yakiti'; for disseminating inflammatory propaganda; and for publishing articles, under a pseudonym, in an unauthorised magazine. He was further accused of 'printing 1,000 copies of a calendar showing a map of

56 Special Rapporteur on violence against women, Communications report, E/CN.4/2003/75/Add.2, para.204

57 This case has been documented in D. Singer, International human rights mechanisms and women asylum seekers, Asylum Aid, November 2005 available at <http://www.asylumaid.org.uk/New%20RWRP/RWRP%20Publications/IntHRmechanismsandwomenasylumseekers2005.pdf> (29 November 2006)

58 For more information on the communication see Special Rapporteur on extra-judicial, summary and arbitrary executions, Communications report, E/CN.4/2006//Add.1, p. 231

59 Although the WG shares most of the methods of work of Special Procedures it has a slightly different communications system. For more information see <http://www.ohchr.org/english/issues/detention/complaints.htm> (29 November 2006)

60 Working group on arbitrary detention, Report on opinions adopted, E/CN.4/2006/7/Add.1, pg30

what purports to be Kurdistan, with the intention of distributing it among Kurdish students at Damascus University. They claimed he sought to stir up racial tensions, undermine national unity and malign the State, participating in demonstrations which had not been authorised by the competent authorities. In this respect, the Working Group found that he had been wrongfully imprisoned for having peacefully exercised his freedom of expression and assembly in Syria in connection with the demands of the Kurdish minority to which he belonged, and therefore **found the detention to be arbitrary** and in contravention of Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 18 and 19 of the International Covenant on Civil and Political Rights.

The above-mentioned cases provide clear examples of the strengths and limits of the Special Procedures mechanisms. Such communications may not always receive a satisfying Government reply, but they do discharge their protection function, they often establish a dialogue with concerned Governments –which can go beyond protection, as in the case of Sweden – and, where these fail, they still carry out a documenting function and become an official UN human rights monitoring tool keeping the spotlight on controversial issues. Different stakeholders can use this and other Special Procedures activities, such as country visits, in a variety of ways and for different purposes, including information sharing, lobbying and advocacy. In its latest progress report on Turkey's membership of the EU, the European Commission highlights judgments of the European Court of Human Rights, reviews human rights issues and mentions the problems identified and recommendations made by the Special Rapporteur on violence against women<sup>61</sup> after her fact-finding mission<sup>62</sup> to Turkey.

## Conclusion

The present article explained the Special Procedures communication system and what can be reasonably expected from an admittedly imperfect mechanism. If the system is properly understood then its limits can also be seen as its strengths. The case study on communications sent regarding allegations of human rights violations of Kurdish individuals has been used to illustrate in practical terms the likely outcomes of such interventions. Even though communications do

61 Commission of the European Union, Enlargement Strategy and Progress Reports 2006, Progress report on Turkey available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/tr\\_sec\\_1390\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/tr_sec_1390_en.pdf) (29 November 2006)

62 For a list of Special Procedures visits to Turkey see <http://www.ohchr.org/english/bodies/chr/special/countryvisitsn-z.htm> (29 November 2006)

not provide for a judicial remedy, they can be used by victims or organisations applying on their behalf as an emergency/humanitarian protection system, especially when other avenues are too laborious and/or time consuming given the urgency of the matter. Although Governments have no duty to reply, communications are a way of establishing a dialogue. At the very least, they represent an official UN human rights monitoring tool, documenting and analysing trends and patterns thematically or with respect to states. It is felt that, at a time when Special Procedures are being scrutinised in order to ‘rationalise’ the system, these basic considerations should be kept very present in decision-makers’ minds.

Tom Obokata\*

# A Human Rights Framework to Address Trafficking of Human Beings

*This article was originally published in the Netherlands Quarterly of Human Rights, Vol 24/3, 379-404, 2006. KHRP is grateful to the publishers, Intersentia (www.intersentia.be), for their kind -permission to reproduce the article.*

## Abstract

*This article attempts to establish a human rights framework to promote better understanding of trafficking and to articulate obligations which can be imposed upon States. It begins by exploring the definition of trafficking of human beings adopted under the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) attached to the United Nations Convention against Transnational Organised Crime. It then highlights the advantages of using a human rights framework to the practice. The article continues with identification of human rights obligations imposed upon States to: 1) prohibit trafficking; 2) punish traffickers; 3) protect victims; and 4) address the causes and consequences of the act. Finally, the interaction among different branches of international law and its implication on the obligations imposed upon States will be examined. The main conclusion reached is that a human rights framework may be utilised to assist global action against the phenomenon, and several recommendations in this regard are presented.*

## 1. INTRODUCTION

Trafficking of human beings is a widespread practice in the modern world. It has been estimated that approximately 800,000 people are trafficked all around the world each year.<sup>1</sup> Virtually all States are affected by the practice,<sup>2</sup> and traffickers are believed to

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<sup>1</sup> US Department of State, *Trafficking in Persons Report 2005*, US Department of State, Washington DC, at p. 6. It should be stressed that the clandestine nature of trafficking makes it difficult to obtain accurate statistics.

<sup>2</sup> Ryf, K.C., 'The First Modern Anti-Slavery Law: The Trafficking Victim Protection Act 2000', *Case Western Reserve Journal of International Law*, Vol. 34, 2002, p. 45, at p. 47.

make between USD 7 to 10 billion annually from trafficking business.<sup>3</sup> The transnational nature of the practice and its link with organised crime prompted the international community to take urgent action, and a major step was taken in December 2000 with the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) attached to the United Nations Convention Against Transnational Organised Crime (Organised Crime Convention).<sup>4</sup>

It is widely accepted by different actors, such as scholars, governments, NGOs and international organisations, that trafficking is not only a criminal justice issue, but also a human rights issue, because the act is regarded as a serious threat to the promotion and protection of human rights.<sup>5</sup> This suggests that a human rights framework may have a role to play in assisting global action against the practice. The Office of the United Nations High Commissioner for Human Rights adopted the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.<sup>6</sup> However, these Principles and Guidelines are not legally binding and do not fully articulate human rights obligations. As a result, a human rights discourse in relation to trafficking remains without much substance.

The purpose of this article, then, is to establish a human rights framework in order to promote better understanding of the practice and to articulate obligations which can be imposed upon States to prevent and suppress the practice. The article begins with an analysis of the definition of trafficking under the Trafficking Protocol. The key elements of the definition are identified in comparison with the definition of smuggling of human beings. It then illustrates some advantages of adopting a human rights framework, such as its ability to promote a victim-centred and holistic approach to the practice.

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<sup>3</sup> UNICEF UK, *End Child Exploitation: Stop Traffic!*, UNICEF UK, London, 2003, at p. 11.

<sup>4</sup> UN Doc. A/RES/55/25 (2001), Annexes I and II. For the drafting process of these instruments, see, Gallagher, A., 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly*, Vol. 23, No. 4, 2001, p. 975.

<sup>5</sup> See for instance, *Reports of the Secretary General on Trafficking in Women and Girls*, UN Docs E/CN.A/2002/80 and E/CN.A/2003/74; *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organisation for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons*, UN Doc. A/AC.254/27; Global Alliance Against Trafficking in Women (GAATW), *Human Rights and Trafficking in Persons: A Handbook*, GAATW, Bangkok, 2001; Inglis, S.C., 'Expanding International and National Protections against Trafficking for Forced Labour Using a Human Rights Framework', *Buffalo Human Rights Law Review*, Vol. 7, 2001, p. 55; Obokata, T., 'Human Trafficking, Human Rights, and the Nationality, Immigration and Asylum Act 2002', *European Human Rights Law Review*, Vol. 4, 2003, p. 410; and Murray, J., 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of the United Nations Civilian Police in Trafficking of Women in Post-Conflict Bosnia and Herzegovina', *Columbia Human Rights Law Review*, Vol. 34, 2003, p. 475.

<sup>6</sup> UN Doc. E/2002/68/Add.1.

It continues with an analysis of human rights obligations. It firstly analyses the obligations imposed upon non-State actors such as organised criminal groups. Although they do not bear legal obligations under international human rights law, it will be shown that the applicable human rights norms and principles can be enforced indirectly at the national level through civil and criminal proceedings against traffickers. At the international level, trafficking of human beings can be regarded as a crime against humanity, and therefore traffickers may be brought before the International Criminal Court (ICC). The article then proceeds to examine obligations imposed upon States. The development of international human rights law reveals that States have certain obligations with regard to trafficking committed by non-State actors, and consequently can be held legally accountable. This article examines four key obligations applicable to all States regardless of their status as States of origin, transit and destination. These are the obligations to: 1) prohibit trafficking and related acts; 2) investigate, prosecute and punish traffickers; 3) protect victims of trafficking; and 4) to address the causes and consequences of the practice.

Finally, the article examines the interaction among different branches of international law, including international human rights law, international criminal law and an emerging branch known as transnational criminal law and its implications for the obligations imposed upon States in relation to trafficking. The main conclusion reached is that a human rights framework can be used to reinforce global action against trafficking, and some recommendations are presented in this regard.

## 2. DEFINITION OF TRAFFICKING

There were five key international instruments in relation to trafficking prior to the entry into force of the Trafficking Protocol.<sup>7</sup> However, it was the Trafficking Protocol which adopted a definition of the practice for the first time under international law. The drafting of this Protocol was set in motion when the United Nations General Assembly adopted a resolution establishing an Ad Hoc Committee to develop instruments on organised crime, including trafficking, in 1999.<sup>8</sup> Not only States, but

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<sup>7</sup> International Agreement for the Suppression of the White Slave Traffic 1904, 24 *United Kingdom Treaty Series* 1; International Convention for the Suppression of the White Slave Traffic 1910, 20 *United Kingdom Treaty Series* 269; International Convention for the Suppression of the Traffic in Women and Children 1921, 9 *League of Nations Treaty Series* 15; International Convention for the Suppression of the Traffic in Women of Full Age 1933, 150 *League of Nations Treaty Series* 431; and Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949, 96 *United Nations Treaty Series* 271.

<sup>8</sup> UN Doc. A/RES/53/111 (Transnational Organised Crime). For the political and legal developments leading to the adoption of the Organised Crime Convention, see Vlassis, D., *The United Nations Convention Against Transnational Organized Crime and its Three Protocols: Development and Outlook* (unpublished manuscript).

also other actors such as NGOs played an important part in developing these instruments.<sup>9</sup> After a series of sessions, the Committee finalised the Organised Crime Convention and Trafficking and Smuggling Protocols, which were subsequently adopted in Palermo, Italy in December 2000. Article 3 of the Trafficking Protocol provides that:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.<sup>10</sup>

This definition is not to be confused with that of ‘smuggling’ of human beings. Although these two terms have been used interchangeably in the past, there is a consensus that they are different practices. According to Article 3 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), also attached to the Organised Criminal Convention, smuggling means:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident.<sup>11</sup>

The following elements of trafficking can be identified in comparing these definitions. First, trafficking is carried out with the use of coercion and/or deception, whereas smuggling is not, indicating that the latter can be a voluntary act on the part of those smuggled. Second, trafficking entails subsequent exploitation of people, while the services of smugglers end when people reach their destination. Third, trafficking can take place both within and across national frontiers, although international movement is required for smuggling. Fourth, entry into a State can be both legal and illegal in the case of trafficking, and smuggling is characterised by illegal entry. In looking at these definitions, it can be argued that trafficking of human beings is more likely to be regarded as a human rights issue, particularly because of the use of coercion and subsequent exploitation inherent in the practice. This suggests that a human rights framework may also be required to address it.

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<sup>9</sup> Potts, L.G., ‘Global Trafficking in Human Beings: Assessing Success of the United Nations Protocol to Prevent Trafficking in Persons’, *George Washington International Law Review*, Vol. 35, 2003, p. 227, at pp. 238 and 239.

<sup>10</sup> Trafficking Protocol, *op.cit.* (note 4).

<sup>11</sup> *Ibidem*, Annex III.

### 3. A HUMAN RIGHTS FRAMEWORK

What is a human rights framework to address trafficking of human beings? A simple answer would be that it is a framework of action for those concerned. To begin with, a human rights framework allows one to explore and identify relevant human rights issues in relation to trafficking of human being. For instance, the major causes of trafficking, such as poverty, discrimination based on gender, race and other distinctions, and humanitarian crises all raise human rights concerns.<sup>12</sup> In relation to the process of trafficking, the use of coercive measures such as abduction is a common method of recruitment for traffickers.<sup>13</sup> Trafficked people are also placed under inhuman or degrading conditions during their journey. Many are forced to travel in overcrowded trucks and shipping containers for long periods of time.<sup>14</sup> Because of these conditions, many people suffer from exhaustion, dehydration and malnutrition.<sup>15</sup> Further, once they reach their destination, many of those trafficked are exploited by transnational corporations, farmers, restaurant owners and others, and are forced to work long hours with minimal pay in order to clear the debts imposed by traffickers,<sup>16</sup> raising the issues of slavery and forced labour. Other pertinent human rights issues include frequent physical and mental abuse, restriction on freedom of movement, racism and xenophobia, and malpractice on the part of law enforcement agencies.<sup>17</sup> These and other relevant human rights issues can be uncovered through a human rights framework.

Once relevant human rights issues are identified, a human rights framework can be used to establish a plan of action to be taken by States. This is done through the articulation of obligations established under international human rights law. These obligations include, but are not limited to, prohibition of trafficking, punishment of traffickers, and protection of victims.<sup>18</sup> By examining the problem of trafficking through the lens of a human rights framework, pressure can be brought upon States to

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<sup>12</sup> Obokata, T., 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law', *International Journal of Refugee Law*, Vol. 17, No. 2, 2005, p. 394, at pp. 399 and 400. Although this article focuses upon smuggling, the causes are also applicable to trafficking.

<sup>13</sup> *Report of the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography*, UN Doc. E/CN.4/1999/7, paras 57, 75, 76, 85 and 86.

<sup>14</sup> *Written Statement Submitted by Human Rights Advocates International*, UN Doc. E/CN.4/2002/NGO/45, paras 12 and 13.

<sup>15</sup> *Report of the Special Rapporteur on Migrants: Mission to the Border between Mexico and the United States of America*, UN Doc. E/CN.4/2003/85/Add.3, para. 4.

<sup>16</sup> *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN Doc. E/CN.4/2000/68, para. 66; and *Report of the Special Rapporteur on Migrants Workers*, UN Doc. E/CN.4/2001/84, para. 54.

<sup>17</sup> Obokata, *loc.cit.* (note 12), at pp. 401 and 402.

<sup>18</sup> See section 4.2. for detail.

take action. Such an approach may also encourage other pertinent actors, such as NGOs and international organisations, to work closely with States to address the human rights issues inherent in the practice.

There are two main advantages in applying a human rights framework to trafficking. First, it promotes better understanding of the problems experienced by those trafficked. Those trafficked may be seen as victims of human rights abuses<sup>19</sup> rather than criminals who violate national immigration laws and regulations, and therefore a victim-centred approach may be promoted. Victimisation may lead to deprivation of victims' sense of self-control and autonomy, and they can also feel isolated from their family, society and the world around them.<sup>20</sup> The victim-centred approach could rectify this situation and empower victims by restoring their dignity and self-worth.<sup>21</sup> Second, a human rights framework can be used to address wider issues. As noted above, there is a wide variety of issues related to trafficking of human beings, including the causes and consequences, which must be dealt with to effectively prevent and suppress the phenomenon. A human rights framework allows us to understand these issues in depth and to seek not only legal, but also political, economic and social solutions accordingly. In other words, it has the potential to promote a holistic approach, and therefore strengthen global action against the phenomenon.

#### 4. A FRAMEWORK OF ACTION: HUMAN RIGHTS OBLIGATIONS IN RELATION TO TRAFFICKING OF HUMAN BEINGS

##### 4.1. OBLIGATIONS OF NON-STATE ACTORS

Trafficking of human beings is carried out, for the most part, by non-State actors such as organised criminal groups. A starting point is, therefore, to examine the extent to which international human rights law can be enforced against them. It should be noted from the outset that there is a growing trend for recognising the legal obligations of these non-State actors and for holding them accountable under international human

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<sup>19</sup> *Smuggling and Trafficking in Persons and the Protection of Their Human Rights: Note by the Secretary-General*, UN Doc. E/CN.4/Sub.2/2001/26, para. 22; Obokata, T., "'Trafficking' and 'Smuggling' of Human Beings in Europe: Protection of Individual Rights or States' Interests?", *Web Journal of Current Legal Issues*, No. 5, 2001, at <http://webjcli.nc.ncl.ac.uk> (accessed 23 June 2006); and Hartsough, T., 'Asylum for Trafficked Women: Escape Strategies Beyond the T Visa', *Hastings Women's Law Journal*, Vol. 13, 2002, p. 77, at p. 95.

<sup>20</sup> Roht-Arriaza, N., 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches', in: Roht-Arriaza, N. (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, at p. 19.

<sup>21</sup> *Idem*. See below for measures which can be taken in this regard.

rights law. This comes from the idea that non-State actors are also holders of duties to promote and protect human rights.<sup>22</sup> Such a view, however, must be treated with caution. In order to maintain that international human rights law imposes direct obligations upon non-State actors, it must be shown that international human rights law is directly enforceable against them. In other words, a horizontal application of international human rights law at the international level must be established.

In examining the current status of international human rights law, it becomes apparent that a horizontal application is not possible. As a result, non-State actors do not possess legal obligations, and therefore cannot be held directly accountable.<sup>23</sup> The Human Rights Committee, an organ charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR),<sup>24</sup> makes this clear by stating that ‘obligations are directed to States and do not, as such, have direct horizontal effect as a matter of international law’.<sup>25</sup> The same position is also supported by jurisprudence in which claims against non-State actors have been deemed inadmissible.<sup>26</sup> This means that obligations imposed upon non-State actors at the international level are moral, rather than legal, in character.

This does not mean, however, that international human rights law is irrelevant in efforts to combat trafficking of human beings. Human rights norms and principles may be applied indirectly through national courts and tribunals, and the

<sup>22</sup> On this topic, see Paust, J.J., ‘The Other Side of Rights: Private Duties under Human Rights Law’, *Harvard Human Rights Journal*, Vol. 5, 1992, p. 51; Clapham, A., *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993; Jochnick, C., ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’, *Human Rights Quarterly*, Vol. 21, No. 1, 1999, p. 56; Ramasastry, A., ‘Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations’, *Berkeley Journal of International Law*, Vol. 20, 2002, p. 91; Megret, F. and Hoffmann, F., ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, *Human Rights Quarterly*, Vol. 25, No. 2, 2003, p. 281; and *Reports of the Special Rapporteur on Human Rights and Human Responsibilities*, UN Docs E/CN.4/2002/107 and E.CN.4/2003/105.

<sup>23</sup> Rodley, N., ‘Can Armed Opposition Groups Violate Human Rights?’, in: Mahoney, K.E. and Mahoney, P. (eds), *Human Rights in the Twenty-First Century: A Global Challenge*, Martinus Nijhoff Publishers, Dordrecht, 1993, at pp. 297-318; Schabas, W., ‘Punishment of Non-State Actors in Non-International Armed Conflict’, *Fordham International Law Journal*, Vol. 26, 2003, p. 907, at p. 908.

<sup>24</sup> 1966, 999 *United Nations Treaty Series* 171.

<sup>25</sup> General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 8.

<sup>26</sup> *F.G.G. vs the Netherlands*, Communication No. 209/1986, UN Doc. CCPR/C29/D/209/1986, in which the Human Rights Committee held that communications directed against non-States actors were inadmissible. In *G.R.B. vs Sweden*, Communication No. 83/1997, UN Doc. CAT/C/20/D/83/1997, the Committee against Torture stated that allegations of a risk of torture at the hands of Sendero Luminoso, a non-State entity controlling significant portions of Peru, fell outside the scope of Article 3 of the Convention (para. 6.5).

horizontal application of human rights law is possible at this level.<sup>27</sup> This can be achieved in two ways. The first is to bring criminal proceedings against perpetrators. In the context of trafficking, many States have already enacted specific laws and regulations to prohibit the act.<sup>28</sup> The second is to initiate civil actions against traffickers. A classic example of a civil proceeding is *Filartiga vs Pena-Irala*<sup>29</sup> from the United States, in which the Court of Appeals applied the *Alien Tort Claims Act*<sup>30</sup> to adjudicate in a case involving deliberate torture inflicted upon a plaintiff. Various States have enacted similar legislation to allow victims of human rights abuses to initiate civil actions.<sup>31</sup>

At the international level, the principle of individual responsibility under international criminal law is applicable to trafficking of human beings as a way to enforce human rights norms and principles indirectly. Violations of international criminal law and human rights law are inter-linked,<sup>32</sup> and the principle of individual criminal responsibility for committing crimes under international law has long been established.<sup>33</sup> This was reaffirmed in the Rome Statute of the ICC.<sup>34</sup> Among different

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<sup>27</sup> On this topic, see Klein, D.F., 'A Theory for the Application of Customary International Law of Human Rights by Domestic Courts', *Yale Journal of International Law*, Vol. 13, 1988, p. 332; Koh, H.H., 'Is International Law Really State Law?', *Harvard Law Review*, Vol. 111, 1998, p. 1824; Dickson, B., 'The Horizontal Application of Human Rights Law', in: Hegarty, A. and Leonard, S. (eds), *Human Rights: An Agenda for the 21st Century*, Cavendish, London, 1999; Paust, J.J., 'Customary International Law and Human Rights Treaties Are Laws of the United States', *Michigan Journal of International Law*, Vol. 20, 1999, p. 301; and Cooper, J., 'Horizontality: The Application of Human Rights Standards in Private Disputes', in: English, R. and Havers, P. (eds), *An Introduction to Human Rights and the Common Law*, Hart, Oxford, 2000.

<sup>28</sup> US Department of State, *op.cit.* (note 1).

<sup>29</sup> 630 F.2d 876 (1980) (2d Cir., 30 June).

<sup>30</sup> 28 U.S.C., para. 1350. For a discussion of the Alien Tort Statute, see, Lu, J., 'Jurisdiction over Non-State Activities under the Alien Tort Claims Act', *Columbia Journal of Transnational Law*, Vol. 35, 1997, p. 531.

<sup>31</sup> In the case of the United States, see further, the *Torture Victim Protection Act*, 28 U.S.C., para. 1350; and the *Victims of Trafficking and Violence Protection Act*, Pub. L. 106-386, 114 Stat. 1464. Similar legislation also exists in Belgium and the Netherlands. Pearson, E., *Human Traffic, Human Rights: Redefining Victim Protection*, Anti-Slavery International, London, 2002, at pp. 81, 100 and 101.

<sup>32</sup> Cassese, A., *International Criminal Law*, Oxford University Press, Oxford, 2003, at p. 64. See also Meron, T., *Human Rights and Humanitarian Norms as Customary International Law*, Clarendon Press, Oxford, 1989; Sunga, L.S., *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff Publishers, Dordrecht, 1992; Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, Dordrecht, 1992; Meron, T., 'International Criminalization of Internal Atrocities', *American Journal of International Law*, Vol. 89, 1995, p. 554; and Ratner, S.R. and Abrams, J.S., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed., Oxford University Press, Oxford, 2001.

<sup>33</sup> See for instance, Articles 227-230 of the Treaty of Versailles 1919, Article 6 of the Charter of International Military Tribunal 1945, Article 6 of the Charter of the International Military Tribunal for the Far East 1946, Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity) 1945; Article 4 of the Convention on the Prevention and Suppression of the Crime of Genocide 1948; Article 3 of the International Convention on the

categories of crimes established, trafficking of human beings may be designated as a crime against humanity.<sup>35</sup> This means, among others, that cases involving trafficking may be brought before the ICC. Even if this is politically or technically impossible to do, trafficking of human beings as a crime against humanity serves as a basis for the establishment of universal jurisdiction by States.<sup>36</sup> This would not only send a message to traffickers that they cannot avoid the reach of the law, but also put more pressure on States to establish criminal jurisdiction, prosecute and punish traffickers. Thus, there are ways in which human rights norms and principles can be enforced against traffickers.

## 4.2. OBLIGATIONS OF STATES

All of this, then, leads to an examination of the obligations imposed upon States in relation to human rights abuses committed by traffickers, so as to establish a framework of action. The development of international human rights law reveals that States can be held accountable even when they do not directly violate human rights, and it will be shown that this is applicable to the trafficking of human beings. This article examines the following four obligations which are imposed upon all States: obligations to 1) prohibit trafficking and related acts; 2) investigate, prosecute and punish traffickers; 3) protect victims of trafficking; and 4) address the causes and consequences of trafficking.<sup>37</sup> It will be demonstrated that these obligations are established under international human rights law.

### 4.2.1. *Obligation to Prohibit Trafficking of Human Beings and Related Acts*

Prohibition of trafficking of human beings through national legislation is one obligation imposed upon States under international human rights law. While the exact wording varies, some of the existing human rights instruments explicitly require States

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Suppression and Punishment of the Crime of Apartheid 1973; Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia 1993; and Article 6 of the Statute of the International Criminal Tribunal for Rwanda 1994. Van den Wyngaert, C. (ed.), *International Criminal Law: A Collection of International and European Instruments*, 2nd ed., Kluwer Law International, The Hague, 2000.

<sup>34</sup> Article 25, UN Doc. A/CONF.183/9 (1998). For commentaries on the Rome Statute in general, see, Cassese, A., Gaeta, P. and Jones, J. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002; and Lee, R.S., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2000.

<sup>35</sup> Obokata, T., 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System', *International & Comparative Law Quarterly*, Vol. 54, 2005, p. 445.

<sup>36</sup> *Ibidem*, at p. 455.

<sup>37</sup> A shorter version of an analysis of human rights obligations imposed upon States appears in Obokata, *loc.cit.* (note 5).

to prohibit the act. They include the 1949 Convention,<sup>38</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>39</sup> the Convention on the Rights of the Child (CRC),<sup>40</sup> and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography.<sup>41</sup> Regionally, the Charter of Fundamental Rights of the European Union,<sup>42</sup> Council of Europe Convention on Action against Trafficking in Human Beings,<sup>43</sup> the American Convention on Human Rights (ACHR),<sup>44</sup> the Inter-American Convention on International Traffic in Minors,<sup>45</sup> and the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution<sup>46</sup> are also pertinent.

Other related acts are also prohibited under international human rights law. As noted earlier, many of those trafficked are coerced into the process by traffickers, and may experience acts amounting to torture, and/or inhuman or degrading treatment. States are also under a clear obligation to prohibit these acts.<sup>47</sup> It is now settled that the prohibition of torture is part of customary international law<sup>48</sup> and *jus cogens*.<sup>49</sup> Moreover, the prohibition of slavery and forced labour is a clear obligation

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<sup>38</sup> *Op.cit.* (note 7), Articles 1-4.

<sup>39</sup> Article 6, 1979, 1249 *United Nations Treaty Series* 13.

<sup>40</sup> Article 35, UN Doc. A/RES/44/25, 20 November 1989.

<sup>41</sup> Articles 1-3, UN Doc. A/RES/54/263, 25 May 2000.

<sup>42</sup> Article 5(3), OJ C 364/1, 18 December 2000.

<sup>43</sup> 2005, ETS, No. 197, 2005.

<sup>44</sup> Article 6, 1969, 1144 *United Nations Treaty Series* 123.

<sup>45</sup> Article 7, 1994, available at: [www.oas.org/juridico/english/Treaties/b-57.html](http://www.oas.org/juridico/english/Treaties/b-57.html) (accessed 23 June 2006).

<sup>46</sup> 2000, SAARC (South Asian Association for Regional Cooperation) consists of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

<sup>47</sup> Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, UN Doc. A/RES/39/46, 10 December 1984. Other instruments include Article 5 of the Universal Declaration on Human Rights (UDHR) 1948, GA Res. 217A(III); Article 7 of ICCPR; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 5, 1950; Article 5(2) of ACHR; Article 5 of African Charter of Human and Peoples' Rights (African Charter) 1986, OAU Doc. CAB/LEG/67/Rev.5; Inter-American Convention to Prevent and Punish Torture 1985, OASTS No. 67; and European Convention for the Prevention of Torture and Inhuman, Degrading Treatment or Punishment 1986, ETS No. 126, 1986.

<sup>48</sup> See, for example, *Filartiga vs Pena-Irala*, *op.cit.* (note 29); *Prosecutor vs Delalic*, Case IT-96-21-T, Trial Judgment, 11 November 1998, para. 459; and General Comment No. 24 (Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or Optional Protocols) (1994) of the Human Rights Committee, para. 8, *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.5 (hereinafter *Compilation of General Comments*).

<sup>49</sup> *Prosecutor vs Furundzija*, Case IT-95-17/1, Trial Judgment, 10 December 1998, para. 153; and General Comment No. 24, *ibidem*, para. 10. Article 53 of the Vienna Convention on the Law of Treaties 1969, 1155 *United Nations Treaty Series* 33, provides that *jus cogens* is 'a peremptory norm of general international law' which is 'accepted and recognized 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.'

established under human rights instruments such as the Slavery Convention,<sup>50</sup> the ICCPR,<sup>51</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>52</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers' Convention).<sup>53</sup> Similar to torture, the prohibition of slavery is also part of customary international law and constitutes *jus cogens*.<sup>54</sup> Thus, the obligation of States to prohibit trafficking and related acts is clearly established under international human rights law.

#### 4.2.2. *Obligation to Investigate, Prosecute and Punish Traffickers*

Another legal obligation imposed upon States is to investigate, prosecute and punish non-State actors, including traffickers, with 'due diligence'. This obligation has been established under international human rights law. One important case which touches upon this obligation is that of *Velasquez Rodriguez vs Honduras*.<sup>55</sup> In this case, the Inter-American Court of Human Rights held that:

The State is obliged to investigate every situation involving a violation of rights under the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. *The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention.*<sup>56</sup>

In a similar vein, the European Court of Human Rights, in elaborating on a duty to investigate in *Ergi vs Turkey*, held that:

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<sup>50</sup> 1926, 60 *League of Nations Treaty Series* 253.

<sup>51</sup> Article 8.

<sup>52</sup> Article 10(3), 1966, 993 *United Nations Treaty Series* 3.

<sup>53</sup> Article 11, 1990, *International Legal Materials*, Vol. 30, p. 152.

<sup>54</sup> On the prohibition of slavery as *jus cogens*, see *Prosectuor vs Kumarac*, Case IT-96-23/1, Trial Judgment, 22 February 2001, para. 520; 'Restatement of the Law (Third): Foreign Relations Law of the United States', *American Law Institute*, Vol. 2, 1987, at p. 167; Bassiouni, M.C., 'Enslavement as International Crime', *New York University Journal of International Law and Politics*, Vol. 23, 1991, p. 445; Rassam, A.Y., 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law', *Virginia Journal of International Law*, Vol. 39, 1999, p. 303, at p. 303; and General Comment No. 24, *op.cit.* (note 48), para. 8.

<sup>55</sup> Serie C, No. 1 (1988).

<sup>56</sup> *Ibidem*, para. 176 (emphasis added). This position has been affirmed in a more recent case before the Inter-American Court of Human Rights, *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Serie A, No. 18 (2003), paras 140-142. See also, *Case of 19 Comerciantes vs Colombia*, Serie C, No. 109 (2004); and *Case of the Mapiripán Massacre vs Colombia*, Serie C, No. 134 (2005) (both available only in Spanish).

This obligation is not confined to cases where it has been established that killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.<sup>57</sup>

This obligation has been endorsed by other human rights mechanisms including the Human Rights Committee,<sup>58</sup> and the Special Rapporteur on Violence against Women.<sup>59</sup> Some commentators go further to argue that this obligation to investigate constitutes customary international law.<sup>60</sup> The first step which must be taken to fulfil this obligation is to establish jurisdiction over trafficking.

Investigation, prosecution and punishment must be carried out in accordance with international human rights law. It was noted earlier that law enforcement practices can lead to violations of the human rights of victims. When these incidents occur, States have, at the very minimum, an obligation to investigate cases of such violations and to punish those responsible,<sup>61</sup> in addition to implementing some of the protection measures described below. This obligation extends to those against whom criminal charges are brought.<sup>62</sup> This means that States must also respect and protect the human rights of traffickers simultaneously.

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<sup>57</sup> *Ergi vs Turkey*, Application No. 23818/94, Judgement of 28 July 1998, para. 82. See also *Osman vs United Kingdom*, Application No. 23452/94, Judgement of 28 October 1998, paras 115-116; and *Z and Others vs United Kingdom*, Application No. 29392/95, Judgement of 10 May 2001, para. 109.

<sup>58</sup> General Comment No. 7 (Torture, Inhuman or Degrading Treatment and Punishment) (1982), paras 1 and 2; Compilation of General Comments, *op.cit.* (note 48); and *Herrera Rubio vs Colombia*, Communication No. 161/1983, para. 11.

<sup>59</sup> Special Rapporteur on Women, *op.cit.* (note 16), paras 51-53. See further, Cook, R., 'State Responsibility for Violation of Women's Human Rights', *Harvard Human Rights Journal*, Vol. 7, 1994, p. 125.

<sup>60</sup> Orentlicher, D., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, Vol. 100, 1991, p. 2537; and Roht-Arriaza, N., 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', *California Law Review*, Vol. 78, 1990, p. 449.

<sup>61</sup> *Velasquez Rodriguez Case*, *op.cit.* (note 55), para. 176; General Comment No. 7, *op.cit.* (note 58), paras 1; and General Comment No. 20 (Replaces General Comment Concerning Prohibition of Torture and Cruel Treatment or Punishment) (1992) of the Human Rights Committee, paras 13 and 14, Compilation of General Comments, *op.cit.* (note 48).

<sup>62</sup> General Comments Nos 8 (Right to Liberty and Security of Persons) (1982), and 9 (Humane Treatment of Persons Deprived of Liberty) (1982) of the Human Rights Committee, Compilation of General Comments, *op.cit.* (note 48).

#### 4.2.3. *Obligation to Protect Victims of Trafficking*

The development of international human rights law reveals that States have an obligation to protect victims of trafficking of human beings. The human rights instruments specifically related to the practice, such as the 1949 Convention,<sup>63</sup> the Optional Protocol to the CRC,<sup>64</sup> the Inter-American Convention on Trafficking in Minors,<sup>65</sup> and the Council of Europe Convention against Trafficking<sup>66</sup> contain provisions on protection of victims. Such an obligation can also be implied from Article 16(2) of the Migrant Workers' Convention which provides:

Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

A migrant worker is 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'<sup>67</sup> An interesting aspect of this Convention is that it applies to both documented (legal) and undocumented (illegal) migrants.<sup>68</sup> This means that the scope of its application can be extended to include trafficked migrants.

In relation to other human rights instruments, the obligation to protect can be inferred from a general duty to secure, ensure, or restore rights, and to provide remedies.<sup>69</sup> Article 2(3)(a) of the ICCPR for instance, provides that States are under an obligation to ensure that 'any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'<sup>70</sup> Even though the wording may be different, a similar obligation is also established by such instruments as the CRC,<sup>71</sup> ECHR,<sup>72</sup> and ACHR.<sup>73</sup>

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<sup>63</sup> Articles 16, 17 and 19.

<sup>64</sup> Articles 8, 9 and 10.

<sup>65</sup> Articles 6 and 16.

<sup>66</sup> Chapter III.

<sup>67</sup> Migrant Workers' Convention, Article 2.

<sup>68</sup> *Ibidem*, Article 5.

<sup>69</sup> Moore, J., 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents', *Columbia Human Rights Law Review*, Vol. 31, 1999, p. 81, at pp. 92, 93 and 96.

<sup>70</sup> It is worth noting that the Human Rights Committee, in relation to prohibitions against torture, stated that 'it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity', General Comment No. 20, *op.cit.* (note 61), para. 2.

<sup>71</sup> Articles 2 and 3.

<sup>72</sup> Articles 1 and 13.

<sup>73</sup> Articles 1, 2 and 24.

The obligation to protect also arises when States fail to take positive steps to prevent non-State actors from committing illegal acts. A case which touched upon this is the *Case Concerning United States Diplomatic and Consular Staff in Tehran (Iran vs United States)*, in which the International Court of Justice held that although attacks of militants were not imputable to Iran, it was not ‘free of responsibility in regards to the attacks’, as Iran was placed under an obligation to ‘take appropriate steps to ensure the protection of the United States Embassy and Consulates’.<sup>74</sup> In the context of human rights, this duty to prevent violations committed by non-State actors was illustrated by the Inter-American Court in the *Velasquez Rodriguez Case*.<sup>75</sup>

There is no precise list of protection measures which States are required to provide or implement. However, some of the key measures are worth noting. One example is the observance of the principle of *non-refoulement* or non-return. This principle applies in particular to refugees.<sup>76</sup> It has been accepted that the obligation of States to respect this principle extends to cases where persecution is attributed to traffickers if States are unwilling or unable to punish them. In a case involving a Ukrainian woman who was trafficked into the United Kingdom for prostitution, it was held that the inability of the Government of the Ukraine to protect her made it more likely that she would be persecuted by traffickers if she was returned to Ukraine.<sup>77</sup> She was consequently granted asylum in the United Kingdom. The principle of *non-refoulement* also applies to cases where people are likely to face torture, inhuman or degrading treatment perpetrated by non-State actors.<sup>78</sup> Moreover, it has been held in the past that expulsion of a person to a State where he/she would be subjected to slavery or forced labour might raise issues under the obligation to prohibit torture.<sup>79</sup>

One measure which should be taken to secure the principle of *non-refoulement* is to issue temporary or permanent residence permits so that those trafficked can legally reside in a given State. This measure has already been implemented in States such as Belgium, Italy, the Netherlands,<sup>80</sup> and the United States.<sup>81</sup> In the United Kingdom,

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<sup>74</sup> ICJ Report 1980, paras 58, 59 and 61.

<sup>75</sup> *Op.cit.* (note 55), para. 172.

<sup>76</sup> Article 33 of the Convention relating to the Status of Refugees 1951, 189 *United Nations Treaty Series* 150, as revised by the Protocol Relating to the Status of Refugees, 1967, 606 *United Nations Treaty Series* 267. Under Article 1 of the Refugee Convention, a refugee is defined as someone who has well-founded fear of being persecuted on grounds of his/her race, religion, nationality, or membership of a particular social group or political opinion.

<sup>77</sup> *Secretary of State for the Home Department vs Lyudmyla Dzhygun*, (Immigration Appeals Tribunal), Appeal No. CC-50627-99 (00TH00728), 13 April 2000. The Immigration Appeals Tribunal recognised that the respondent belonged to a particular social group under the definition of a refugee.

<sup>78</sup> See *Bensaid vs United Kingdom*, Application No. 44599/98, Judgement of 6 February 2001, para. 34.

<sup>79</sup> Case of *Barar vs Sweden*, Application No. 42367/98 (unreported). Case Comment, *European Human Rights Law Review*, Vol. 3, 1999, p. 330.

<sup>80</sup> Pearson, *op.cit.* (note 31).

<sup>81</sup> Section 107 of the Victims of Trafficking and Violence Protection Act 2000, *op.cit.* (note 31).

although specific laws and regulations do not exist, temporary residence permits are provided on the basis that victims cooperate with law enforcement authorities to investigate, prosecute and punish traffickers.<sup>82</sup> At the regional level, the European Union recently adopted a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities.<sup>83</sup>

Nevertheless, an approach which provides residence permits on the basis that victims cooperate with law enforcement authorities should be re-considered. Many victims are not willing to come forward to the authorities due to a fear of reprisal by traffickers or of enforcement actions. A desirable approach is to provide a certain period of time to all victims (commonly known as 'a reflection period') so that they can decide whether or not they wish to cooperate. This is constructive in building a sense of trust between victims and the authorities, and may well facilitate cooperation in the long run. It is worth noting that this approach is taken by some States such as Belgium and the Netherlands.<sup>84</sup>

If victims wish to return to their States of origin, then voluntary repatriation must be facilitated. Instances of forced repatriation by States of destination<sup>85</sup> as well as a refusal to accept victims in States of origin<sup>86</sup> have been reported, and these practices can constitute violations of human rights. Voluntary repatriation is closely linked to one's right to freely return to his/her State of origin<sup>87</sup> and is enshrined in international human rights instruments such as the ICCPR,<sup>88</sup> the ACHR,<sup>89</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>90</sup> and the Migrant Workers' Convention.<sup>91</sup> These instruments serve as a legal basis to facilitate voluntary return. When States of destination decide to expel people in

<sup>82</sup> Pearson, *op.cit.* (note 31).

<sup>83</sup> OJ L 261/19, 6 August 2004. This instrument is binding on all member States except for Denmark, Ireland and the United Kingdom.

<sup>84</sup> Pearson, *op.cit.* (note 31).

<sup>85</sup> *Written Statements Submitted by Federation of Associations for Defense and Promotion of Human Rights*, UN Doc. E/CN.4/2003/NGO/43.

<sup>86</sup> *Written Statement Submitted by the Association of Refugees and Displaced Persons of the Republic of Bosnia-Herzegovina*, UN Doc. E/CN.4/1999/NGO/53; *Report of the Special Representative on Internally Displaced Persons: East Timor*, UN Doc. E/CN.4/2000/83/Add.3, para. 48; and *Situation of Human Rights in Cambodia: Note by the Secretary General*, UN Doc. A/57/230 (2003), paras 49-54.

<sup>87</sup> *The Return of Refugees' or Displaced Persons' Property: Working Paper*, UN Doc. E/CN.4/Sub.2/2002/17, paras 22-28.

<sup>88</sup> Article 12(4); and General Comment No. 27 (Freedom of Movement) (1999) of the Human Rights Committee, *Compilation of General Comments, op.cit.* (note 48).

<sup>89</sup> Article 22(5).

<sup>90</sup> Article 5(d)(ii), 1966, 660 *United Nations Treaty Series* 195; and General Recommendation No. 22 (Refugees and Displaced Persons) (1996) of the Committee on the Elimination of Racial Discrimination, *Compilation of General Comments, op.cit.* (note 48).

<sup>91</sup> Article 8.

accordance with domestic law, international human rights law also stipulates that they must provide an opportunity to appeal against the decision to expel,<sup>92</sup> and that collective expulsion is prohibited.<sup>93</sup> Once returned voluntarily and safely, States of origin should ensure that victims are re-integrated into society, by providing continuing physical and psychological support, education and training, and protection from retaliation by traffickers.<sup>94</sup>

In addition, effective investigations into cases of trafficking, leading to the prosecution and punishment of traffickers, is to be regarded as a form of redress available to victims.<sup>95</sup> This corresponds to the duty of States to investigate and punish as illustrated earlier. An integral part of this redress is the right of victims to participate in the investigation and judicial processes against traffickers. Participation of victims is important from a human rights perspective. It allows them to have their voice heard, and this has a therapeutic value.<sup>96</sup> It also assists them in handling their anger and trauma in a constructive way, and this can lead to the restoration of their sense of control, dignity, and self-worth.<sup>97</sup>

There are several steps which must be taken in order to secure this right of victims to participate. The first is to ensure that they can remain in a State at least while criminal investigations or proceedings are under way. Second, States should also secure effective witness protection to protect the identities of victims, coupled with such measures as free access to interpreters and legal advice. A right of all people to equal treatment before national tribunals is established under international human rights law,<sup>98</sup> and States must therefore take positive steps to secure 'an effective right of access to the courts'.<sup>99</sup>

In addition, for those trafficked who are foreign nationals, there is nothing more important than an opportunity to seek assistance from their own governments.<sup>100</sup> Therefore, access to consular assistance must be secured. States of destination have a

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<sup>92</sup> Article 13 of ICCPR; General Comment No. 15 (Position of Aliens under the Covenant) (1997) of the Human Rights Committee, Compilation of General Comments, *op.cit.* (note 48).

<sup>93</sup> Article 22(9) of ACHR; and Article 22(1) of the Migrant Workers' Convention.

<sup>94</sup> Hyland, K.E., 'Protecting Human Victims of Trafficking: An American Framework', *Berkeley Women's Law Journal*, Vol. 16, 2001, p. 29, at pp. 59-61. See also *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur*, UN Doc. E/CN.4/2000/62.

<sup>95</sup> Roht-Arriaza, *loc.cit.* (note 20), at p. 34.

<sup>96</sup> *Ibidem*, at p. 21.

<sup>97</sup> *Ibidem*, at p. 19.

<sup>98</sup> General Comment No. 13 (Equality before Courts) (1984) of the Human Rights Committee; and General Recommendation No. 20 (Non-Discriminatory Implementation of Rights and Freedom) (1996) in which the Committee on the Elimination of Racial Discrimination notes that the right to equal treatment applies to 'all persons living in a given State', Compilation of General Comments, *op.cit.* (note 48); and Article 18 of the Migrant Workers' Convention.

<sup>99</sup> *Airey vs Ireland*, Application No. 6289/73, Judgement of 9 September 1979, para. 25.

<sup>100</sup> Except for those who fear persecution by States of origin.

duty to provide access to consular assistance, while States of origin have the right to communicate with their own nationals to provide assistance in accordance with the Vienna Convention on Consular Relations.<sup>101</sup> It is worth noting in this respect that this Convention concerns both rights of States and individuals. Although the Vienna Convention is not a human rights instrument *per se*, the International Court of Justice (ICJ) in the *LaGrand Case (Germany vs United States)* stated that Article 36 of the Vienna Convention creates individual rights.<sup>102</sup> The Inter-American Court of Human Rights went further to state that consular assistance, as part of minimum due process guarantees, is recognised under Article 14 of the ICCPR.<sup>103</sup>

Finally, compensation is an important form of remedy, especially when States fail to fulfil the first two obligations described earlier. States of origin bear the primary responsibility in this regard, as the fact that people are trafficked illustrates their failure to prevent traffickers from abusing the human rights of those trafficked. However this obligation can also be imposed upon States of transit and destination, if they fail to fulfil pertinent human rights obligations illustrated above. The Committee on the Elimination of Racial Discrimination elaborates upon the general duty to provide compensation in the following terms:

(T)he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.<sup>104</sup>

The Inter-American Court of Human Rights adopted the same line of reasoning in the *Velasquez Rodriguez Case* by stating that the obligation to ensure the free and full exercise of the rights recognised by the ACHR includes provision of compensation.<sup>105</sup> In a similar vein, where the right to life or prohibition against torture is involved, the European Court of Human Rights has held that the payment of compensation maybe required.<sup>106</sup> These human rights norms are pertinent to trafficking of human beings as noted earlier.

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<sup>101</sup> Article 36, 1963, 596 *United Nations Treaty Series* 261.

<sup>102</sup> *ICJ Report* 2002, para. 77.

<sup>103</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Serie A, No. 16 (1999), paras 80, 83, 84, 87 and 122-124.

<sup>104</sup> General Recommendation No. 26 (Article 6 of the Convention) (2000), *Compilation of General Comments*, *op.cit.* (note 48).

<sup>105</sup> *Velasquez Rodriguez Case*, *op.cit.* (note 55), paras 166, 174 and 175.

<sup>106</sup> *Z and Others vs United Kingdom*, *op.cit.* (note 57), paras 108 and 109.

#### 4.2.4. *Obligation to Address the Causes and Consequences of Trafficking*

International human rights law imposes certain obligations in relation to the causes and consequences of trafficking. One example of this is the obligation to reduce poverty, which is one of the major causes as noted earlier. This may be termed as an obligation of result, as opposed to an obligation of conduct. This distinction was developed by the United Nations International Law Commission in the 1970s when it was considering issues of State responsibility.<sup>107</sup> Simply put, States are required 'to take or refrain from taking some specific action' under the obligations of conduct, while they are required 'to ensure a particular situation or result', and can choose whatever the means necessary to fulfil this aim under the obligations of result.<sup>108</sup> It was noted in the context of human rights that the obligations of conduct are of immediate effect, whereas the obligations of result refer to progressive realisation of human rights.<sup>109</sup> In general, the former relates to civil and political rights, and the latter applies to economic, social and cultural rights.<sup>110</sup> However, it was simultaneously noted that there are two obligations of conduct which are pertinent to economic, social and cultural rights: obligations to guarantee rights without discrimination and to take steps towards the full realisation of the relevant rights within a reasonable time.<sup>111</sup>

Several obligations of States in relation to poverty reduction can be identified by reference to obligations to *respect*, *protect* and *fulfil*. An obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights.<sup>112</sup> In the context of poverty reduction, States must respect 'the resources owned by the individual or groups seeking to make optimal use of their own knowledge and the freedom of individuals and groups to satisfy their own needs.'<sup>113</sup> An obligation to *protect* means preventing abuses of rights by third parties.<sup>114</sup> States, therefore, must take necessary steps to ensure that entities such as international financial institutions do not infringe the rights of their citizens. Finally, an obligation to *fulfil* requires States

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<sup>107</sup> *State Responsibility in Report of the Commission to the General Assembly on the Work of its Twenty-Ninth Session*. Yearbook of the International Law Commission Vol. II (1-2) (1977), at pp. 4-21 (1) and 11-30 (2).

<sup>108</sup> *Idem*. See also Rubenstein, P., 'State Responsibility for Failure to Control the Export of Weapons of Mass Destruction', *California Western International Law Journal*, Vol. 23, 1993, p. 319, at p. 351.

<sup>109</sup> General Comment No. 3 (Nature of States Parties Obligations) (1990) of the Committee on Economic, Social and Cultural Rights, para. 1, Compilation of General Comments, *op.cit.* (note 48).  
<sup>110</sup> *Ibidem*, paras 1 and 9.

<sup>111</sup> *Ibidem*, paras 1 and 2.

<sup>112</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), para. 6, reprinted in: *Human Rights Quarterly*, Vol. 20, No. 3, 1998, p. 691.

<sup>113</sup> *Report of the Independent Expert on Human Rights and Extreme Poverty*, UN Doc. E/CN.4/1999/48, para. 26.

<sup>114</sup> *Maastricht Guidelines*, *loc.cit.* (note 112), para. 6.

to take appropriate administrative and other measures towards the full realisation of economic, social and cultural rights.<sup>115</sup> In this connection, a failure to provide essential foodstuffs, primary healthcare, and basic housing,<sup>116</sup> and to take steps to devise or implement poverty reduction strategies<sup>117</sup> can incur accountability as violations.

Although the States of origin may be ultimately responsible for eliminating poverty, the obligations in relation to poverty reduction extend to other States simultaneously. This is evident in Article 2(1) of the ICESCR which provides for international cooperation,<sup>118</sup> and the Committee on Economic, Social and Cultural Rights recognises in this respect that international cooperation for realisation of economic, social and cultural rights is an obligation of all States, in accordance with the Charter of the United Nations and other recognised principles of international law.<sup>119</sup> It was also noted that the phrase ‘to the maximum of its available resources’ in Article 2(1) of the ICESCR was ‘intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.’<sup>120</sup> This suggests that all States, including those of transit as well as destination, have a duty to assist States of origin to eliminate poverty.

Another inter-linked obligation is the prohibition of discrimination, which is a central cause and often also a consequence of trafficking of human beings. At the very minimum, all States are obliged to enact legislation to eradicate discrimination on account of race, gender and other distinctions.<sup>121</sup> At a practical level, States are obliged to ensure the right of equal access to, among others things, health facilities,<sup>122</sup> food,<sup>123</sup>

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<sup>115</sup> *Idem*.

<sup>116</sup> General Comment No. 3, *op.cit.* (note 109), para. 10.

<sup>117</sup> On this, see OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, September 2001.

<sup>118</sup> Maastricht Guidelines, *loc.cit.* (note 112), para. 6.

<sup>119</sup> General Comment No. 3, *op.cit.* (note 109), para. 14.

<sup>120</sup> *Ibidem*, para. 13.

<sup>121</sup> Article 2 of ICESCR; General Comment No. 3, *op.cit.* (note 109), para. 3; Article 2 of ICCPR; Articles 2(d) and 4(a) of CERD; General Recommendation No. 7 (Legislation to Eradicate Racial Discrimination) (1985) of the Committee on the Elimination of Racial Discrimination, Compilation of General Comments, *op.cit.* (note 48); and Article 2(b) of CEDAW.

<sup>122</sup> General Comment No. 14 (The Right to the Highest Attainable Standard of Health) (2000) of the Committee on Economic, Social and Cultural Rights, Compilation of General Comments, *op.cit.* (note 48), para. 43.

<sup>123</sup> General Comment No. 12 (The Right to Adequate Food) (1999) of the Committee on Economic, Social and Cultural Rights, Compilation of General Comments, *op.cit.* (note 48), para. 18.

adequate housing,<sup>124</sup> and education.<sup>125</sup> In addition, when those trafficked are arrested and detained, they must be treated in a humane and non-discriminatory manner.<sup>126</sup> Moreover, when the principle of non-discrimination is violated, victims have the right to seek judicial remedies.<sup>127</sup>

Finally, all States have a duty to provide education to their citizens. In States of origin, a lack of education is one of the factors contributing to poverty. Therefore, States have an obligation to provide education<sup>128</sup> particularly to those at risk of being trafficked, so that they can engage in productive economic activities in the future. In all States, education should also be directed at promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.<sup>129</sup> This can facilitate the elimination of the causes and consequences of trafficking such as discrimination on account of race and gender, including racial and gender related violence, in the long run. Moreover, it should also be a duty of all States, regardless of their status as one of origin, transit, or destination, to educate people on the dangers inherent in trafficking of human beings. When the potential victims are empowered through education, it becomes less likely that they will fall into the hands of traffickers.

## 5. INTERACTION AMONG DIFFERENT BRANCHES OF INTERNATIONAL LAW

An examination of trafficking of human beings illustrates that the subject matter falls under different branches of international law simultaneously. In addition to international human rights law, it was illustrated above that international criminal law may come into play in prosecuting traffickers before the ICC. Further, trafficking of human beings falls under an emerging branch of international law known as

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<sup>124</sup> General Comment No. 7 (The Right to Adequate Housing) (1997) of the Committee on Economic, Social and Cultural Rights, *Compilation of General Comments, op.cit.* (note 48), para. 10.

<sup>125</sup> Article 10 of CEDAW; Article 28 of CRC; and General Comment No. 1 (Aims of Education) (2001) of the Committee on the Rights of the Child, para. 10, *Compilation of General Comments, op.cit.* (note 48); Article 5(e) of CERD; Article 13 of ICESCR; and General Comment No. 13 (The Right to Education) (1999) of the Committee on Economic, Social and Cultural Rights, *Compilation of General Comments, op.cit.* (note 48).

<sup>126</sup> Article 10 of ICCPR; and General Comment No. 21 (Replacing General Comment No. 9 Concerning Humane Treatment of Persons Deprived of Liberty) (1992) of the Human Rights Committee, para. 4, *Compilation of General Comments, op.cit.* (note 48); *Standard Minimum Rules for the Treatment of Prisoners* (1977), ECOSOC Resolution 2076 (LXII), para. 6.1; and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), UN Doc. A/RES/43/173, Principle 5.

<sup>127</sup> Article 5 of CERD; and General Comment No. 3, *op.cit.* (note 109), para. 5.

<sup>128</sup> General Comment No. 13, *op.cit.* (note 125), para. 10; and General Comment No. 1 of the Committee on the Rights of the Child, *op.cit.* (note 125), para. 10.

<sup>129</sup> Article 13(1) of ICESCR; and Article 29(1) of CRC.

transnational criminal law. Unlike international criminal law which gives rise to direct control of crimes by international tribunals, transnational criminal law promotes 'the indirect suppression by international law, through domestic penal law, of criminal activities that have actual or potential trans-boundary effects.'<sup>130</sup>

Another point to note is the exercise of jurisdiction. As noted above, international crimes give rise to universal jurisdiction. It permits any State to apply its laws to punish an offence even when the State has no links of territory with the offence, or of nationality with the offender.<sup>131</sup> Universal jurisdiction over offences such as piracy, slave trade, genocide, war crimes and crimes against humanity has been established as a matter of customary law.<sup>132</sup> However, it may not be exercised over other transnational crimes for two main reasons. First, the exercise of jurisdiction over transnational crimes depends on a terms of a particular treaty.<sup>133</sup> In other words, States cannot exercise universal jurisdiction unless it is provided for by the treaty in question. Second, States are generally not willing to exercise jurisdiction in the absence of a genuine link with the offence or offender.<sup>134</sup>

Seen in this light, it becomes apparent that the Trafficking Protocol belongs to transnational criminal law. Its main tactic is to suppress the practice at the national level, as it obliges States to prohibit the practice, and to prosecute and punish traffickers. To strengthen this indirect control, it also stipulates that States are under an obligation to coordinate information, provide sufficient training for law enforcement agencies, and cooperate in border control for the purpose of prevention.<sup>135</sup> Further, the exercise of universal jurisdiction is not prescribed in these instruments, as Article 15 of the Organised Crime Convention, the parent treaty to the Trafficking Protocol, provides for the territoriality or nationality principles as the basis for establishing jurisdiction over organised crime, including trafficking of human beings.<sup>136</sup>

An important point to be examined, then, is how these branches of international law interact with each other to articulate obligations which can be imposed upon States. To begin with, the common obligations imposed by all three branches of international law are prohibition of the offence and punishment of traffickers. The obligations jointly imposed by international human rights law and international

<sup>130</sup> Boister, N., 'Transnational Criminal Law?', *European Journal of International Law*, Vol. 14, 2003, p. 953, at p. 955.

<sup>131</sup> 'Restatement of the Law', *loc.cit.* (note 54), at p. 254.

<sup>132</sup> *R. vs Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 1)*, 4 All E.R. 897; and *Demjanjuk vs Petrovsky*, 612 F. Supp.544 (1985). See also Orentlicher, *loc.cit.* (note 60), at pp. 2555, 2593 and 2594; and Scharf, M.P., 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', *New England Law Review*, Vol. 35, 2001, p. 363, at pp. 372 and 373.

<sup>133</sup> Boister, *loc.cit.* (note 130), at p. 964.

<sup>134</sup> *Idem.*

<sup>135</sup> Trafficking Protocol, *op.cit.* (note 4), Articles 9-11.

<sup>136</sup> Organised Crime Convention, *op.cit.* (note 4).

criminal law include, but are not limited to, protection of the rights of the defendants,<sup>137</sup> while the obligation to address the causes and the consequences of trafficking is imposed by international human rights law and transnational criminal law as represented by the Trafficking Protocol.<sup>138</sup> Finally, an example of an obligation common to international criminal law and transnational criminal law is mutual legal assistance or international cooperation.<sup>139</sup>

The existence of overlapping obligations among these branches of international law does not necessarily mean that international human rights law, transnational criminal law and international criminal law are in conflict with one another. It is submitted that they are mutually reinforcing instead. As noted earlier, the main purpose of international human rights law is to protect the basic rights of individual human beings. Therefore, the obligations are imposed not in relation to other States, but towards all individuals within their jurisdiction.<sup>140</sup> This suggests that international human rights law is not necessarily suited to promote international cooperation and mutual assistance because these are examples of obligations towards other States rather than individual human beings.<sup>141</sup> This, however, can be compensated by transnational criminal law and international criminal law whose main aim is to facilitate and/or secure cooperation with other Parties.<sup>142</sup> A further benefit of utilising international criminal law is that it promotes direct control of international crimes through international tribunals, and therefore clearly spells out the contribution to be made not only by States, but also by the international community as a whole.

Another example in support of the above submission can be seen in some weaknesses inherent in transnational criminal law. While the Trafficking Protocol may be used to seek uniformity in the meaning of the offence itself and criminal liability among State parties, it is difficult to achieve harmonisation in reality. As noted by one scholar, all of this can affect the principle of legality, which demands that States use the same general principles, procedures and penalties in dealing with a particular offence.<sup>143</sup>

It has also been argued that transnational criminal law is not necessarily well equipped to promote and protect the human rights of defendants and victims, as

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<sup>137</sup> See for instance, Articles 9, 10 and 14 of ICCPR; and Articles 55, 66 and 67 of the Rome Statute.

<sup>138</sup> Article 9(4) of the Trafficking Protocol provides that 'States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking such as poverty, underdevelopment and lack of equal opportunity.'

<sup>139</sup> For international criminal law, see for example, Part 9 of the Rome Statute.

<sup>140</sup> Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75)* (1982), Advisory Opinion OC 2-82, Serie A, No. 2, para. 29.

<sup>141</sup> Except for ICESCR as noted above.

<sup>142</sup> Cassese, *op.cit.* (note 32), at pp. 15 and 16.

<sup>143</sup> Boister, *loc.cit.* (note 130), at p. 958.

its main aim is to promote effective prohibition, prosecution and punishment.<sup>144</sup> For instance, the only provisions in the Organised Crime Convention relating to the treatment of defendants are Articles 11(3) (prosecution) and 16(13) (extradition), which make a brief reference to rights of defence without elaboration,<sup>145</sup> and the Trafficking Protocol does not contain a single provision on the matter. In relation to protection of victims, there are some provisions in the Trafficking Protocol on the matter. Under Section II, for example, States are obliged to provide such measures as provision of psychological assistance, accommodation, educational and vocational training, and temporary or permanent residence permits.<sup>146</sup> However, obligations in relation to protection of victims are weak. Article 6 for instance, provides that States 'shall consider' implementing measures for physical, psychological and social recovery for victims of trafficking. In a similar vein, Article 7 obliges States to consider, but not to adopt, legal measures to allow victims to remain in their territories at least on a temporary basis.

Aside from obligations imposed upon States, another important point is the principle of State sovereignty. One limitation imposed upon transnational criminal law is that the implementation of obligations is left to States. In other words, the principle of State sovereignty dominates.<sup>147</sup> To illustrate this further, the Organised Crime Convention has a specific provision protecting sovereignty of Member States. Article 4 provides:

1. State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.<sup>148</sup>

This certainly can make it more difficult to seek effective cooperation and co-ordination among States.

These weaknesses inherent in transnational criminal law, however, may be compensated by international criminal law and international human rights law. The principle of legality has long been recognised as fundamental to the development of international criminal law.<sup>149</sup> Therefore, international criminal law could promote

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<sup>144</sup> *Ibidem*, at p. 959.

<sup>145</sup> Organised Crime Convention, *op.cit.* (note 4).

<sup>146</sup> Trafficking Protocol, *op.cit.* (note 4), Articles 6 and 7.

<sup>147</sup> Boister, *loc.cit.* (note 130), at p. 956.

<sup>148</sup> Organised Crime Convention, *op.cit.* (note 4).

<sup>149</sup> Cassese, *op.cit.* (note 32), at p. 31.

this principle so as to make sure that offences are clearly provided in written law (*nullum crimen sine lege scripta*), that criminal legislation abide by the rule of specificity (*nullum crimen sine lege stricta*), and that criminal rules are not retroactive (*nullum crimen sine proevia lege*).<sup>150</sup> Although the principle of legality is in effect designed to protect the rights of defendants, their protection can be strengthened with international human rights law, which provides detailed obligations. They include the right to liberty and security and procedural guarantees such as adequate time for preparation of criminal cases, trial without delay, and right to legal representation.<sup>151</sup>

In relation to the principle of State sovereignty, the recognition of trafficking as an international crime makes it clear that the practice is not merely a domestic crime, and therefore that effective international cooperation is necessary to suppress and prevent the practice. In addition, it has long been sustained that State sovereignty is no longer an absolute concept in relation to the promotion and protection of human rights. Javier Perez de Cueller, the former UN Secretary-General, made this point clear:

It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.<sup>152</sup>

Seen in this regard, international criminal law and international human rights law may be used to strengthen the argument that States can no longer hide behind the rubric of State sovereignty in relation to trafficking of human beings.

Finally, international criminal law represents a criminal justice response, in that the main emphasis is placed upon prohibition, prosecution and punishment. One drawback is that it is not designed to address the wider issues such as the causes and consequences of trafficking in depth. However, international human rights law and transnational criminal law can address this problem as noted above. What becomes apparent from all of this is that these three branches of international law can assist each other to alleviate some of the problems. Therefore, it seems reasonable to argue that they are mutually reinforcing, and not necessarily conflicting, with each other.

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<sup>150</sup> *Ibidem*, at pp. 141 and 142.

<sup>151</sup> *Op.cit.* (note 137).

<sup>152</sup> *Report of the Secretary-General on the Work of Organization*, UN Doc. A/46/1 (13/9/91), at p. 5. See further, Schreuer, C., 'The Waning of Sovereign State: Towards a New Paradigm for International Law?', *European Journal of International Law*, Vol. 4, 1993, p. 447, at pp. 468 and 469; and Henkin, L., 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', *Fordham Law Review*, Vol. 68, 1999, p. 1, at pp. 4 and 5.

## 6. CONCLUSION

The purpose of this article was to analyse trafficking with the application of a human rights framework by establishing obligations imposed upon States. It began with an examination of the definition of trafficking of human beings. It then highlighted the advantages of using a human rights framework. The article continued with an analysis of the human rights obligations. While recognising that non-State actors cannot be held directly accountable under international human rights law, the article identified four human rights obligations applicable to trafficking of human beings: obligations to: 1) prohibit trafficking; 2) investigate, prosecute, punish traffickers; 3) protect victims; and 4) address the causes and consequences of the practice. It has been shown that these obligations are established under international human rights law. Further, the article examined the interaction among different branches of international law and its impact on the obligations imposed upon States. The main conclusion reached is that a human rights framework can usefully supplement global action against the practice.

There are several steps which should be taken at the national, regional and international levels so as to facilitate a human rights framework. At the national level, States bear the primary responsibility to promote a human rights framework for trafficking. The role played by independent national human rights commissions is critical in this regard. They have the potential not only to monitor the implementation of relevant human rights obligations relating to trafficking, but also to address complaints arising from non-compliance. The appointment of a National Rapporteur on Trafficking within these commissions and/or other governmental bodies may be beneficial in this respect. This has already been done in Nepal,<sup>153</sup> Belgium, Sweden, and the Netherlands.<sup>154</sup> Other governments should follow such examples. They can not only coordinate activities with other governmental bodies, but also act as a national focal point and facilitate cooperation with other actors regionally and internationally.

At the regional and international levels, mechanisms charged with the promotion and the protection of human rights must move beyond merely reporting the cases of trafficking. They should be more proactive in addressing the act with the application of human rights norms and principles. The development of jurisprudence on trafficking may be a useful starting point. Such principles as the prohibition against torture and slavery/forced labour may reasonably be brought before regional bodies such as the European and Inter-American Courts of Human Rights and treaty monitoring mechanisms such as the Human Rights Committee and the Committee

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<sup>153</sup> National Human Rights Commission of Nepal at: [www.nhrcnepal.org/](http://www.nhrcnepal.org/) (accessed 23 June 2006).

<sup>154</sup> Smit, M., *Trafficking in Women: A Dutch Country Report*, Bureau of the Dutch National Rapporteur on Trafficking, April 2003.

Against Torture.<sup>155</sup> The potential of other bodies such as the ICJ and the International Law Commission should not be underestimated as they can also contribute to the development and elaboration of human rights norms and principles applicable to trafficking. Once clear obligations are established, this will put more pressure on States to adopt a human rights framework to address trafficking.

Will a human rights framework contribute to global action against trafficking of human beings? This is a rather difficult question to answer, given that it is not currently being widely promoted or implemented at the national, regional and international levels. Therefore, it will take some time to judge its potential. The inherent weakness in enforcement of human rights norms and principles must also be addressed in order to fully appreciate its value.<sup>156</sup> Nevertheless, the benefits of a human rights framework have clearly been illustrated throughout this article, and it is hoped that different actors will start using the framework to address this evil of the contemporary world.

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<sup>155</sup> In relation to European Court of Human Rights, see the recent case of *Siliadin vs France*, Application No. 73316/01, Judgement of 26 July 2005.

<sup>156</sup> On this point, see Lattimer, M., 'Enforcing Human Rights through International Criminal Law', in: Lattimer, M. and Sands, P. (eds), *Justice for Crimes against Humanity*, Hart Publishing, Oxford, 2003; and Alston, P. and Crawford, J. (eds), *The Future of the UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge, 2000.

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# Freedom of Association: A Neglected Human Right for Turkish Associations?

*Ateş düştüğü yeri yakar*

*An ember burns where it falls*

## Introduction

Freedom of association as a legal concept is based upon the premise that it is the right of adults to be able to mutually choose their associates for whatever purpose they see fit. In libertarian terms, freedom of association refers to the concept of an absolute freedom to live in a community or to be a part of an organisation whose values are closely related to what one wants. At its most basic level, it is a right to associate with any individual one chooses. In the confines of the labour market, it has developed to a level where it establishes a right, identified under international labour standards, for workers to organise and collectively bargain. In the political arena it is the core underpinning of political parties, namely the ability for people to join together with those who share their political ideals and use their collective efforts to advance their political aims.

Freedom of association embraces a complex of ideas. Harris, O’Boyle and Warbrick identify the freedom of association as involving:

*“... the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them. This ‘association’ is capable of enjoying fundamental rights against the state and will generally have rights against and owe duties to its members. An individual has no right to become a member of a particular association so that an association has no obligation to admit or continue the membership of an individual. Equally an individual cannot be compelled to become a member of an association nor*

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*disadvantaged if he chooses not to do so.*<sup>3</sup>

They further state that:

*“The first duty of a state is to interfere neither with individuals who seek to exercise their freedom of association nor with the essential activities of any established association. However, although it is conceivable that informal associations will satisfy the aspirations of individuals, the effective exercise of their freedom will be enhanced by the provision of a legal basis for the formation and recognition of associations, both so that individuals may be certain of what is required of them to set up an association and also so that the resulting body has legal personality and is able to act in an independent way to further the interests of its members. While an absolute, positive obligation on a state to institute a legal framework for every form of association that might be envisaged goes beyond what Article 11 [European Convention on Human Rights] demands, the Convention states invariably do provide some options for association which lead to legal personality. Individuals have a right to avail themselves of the power to form associations and to have these actions recognised by the state.”<sup>4</sup>*

### **The Development of the Right to Freedom of Association**

The concept of freedom of association has been held in recent times to be of such importance that it has been included in several national constitutions, including the United States Constitution and Canada’s Charter of Rights, and is also enshrined in Article 11 of the European Convention on Human Rights. It is recognised as a fundamental human right by a number of human rights documents including the Universal Declaration of Human Rights which states by way of Article 20 that:

- 1) *Everyone has the right to freedom of peaceful assembly and association, and*
- 2) *No one may be compelled to belong to an association.*

Though promoted as a human right, freedom of association is a concept which

3 DJ Harris, M O’Boyle and C Warbrick, “Law of the European Convention on Human Rights” 1995 ed., p. 421.

4 *Ibid.*, p 423.

exists by way of a conflict between two competing views: a “rights” orientated liberalism which decrees that a person’s inherent identity originates from individual choices and that a government ought to actively create laws that remove the barriers to choice, and “communitarianism” which holds that a person’s identity comes from the communities of which an individual is a part, such communities being an important safeguard for the individual from his or her government. These differing views are at one with the ideal of freedom of association but tensions exist in the approach to be taken to identifying the means of the freedom as they pull in their differing directions. One wishes a reduction in barriers, the other advocates that barriers be implemented to safeguard choice.

Such competing views can be seen in the approach of the United States’ Supreme Court, which has recognised that freedom of association is an essential element of freedom of speech; for people can often only engage in effective speech when they are able to join with others. Such recognition flowed from the constitutional liberty which secured the right of the people “peaceably to assemble”.<sup>5</sup> It was by way of the liberty to assemble that the Supreme Court considered the collective belief that underlies the manner in which such crowds speak and observed that the freedom of association stood at the junction of three intersecting strands of law concerned with group speech: freedom of expression, privacy of intimate bonds and the right of assembly. Such recognition led the Court to confirm in 1958 that:

*“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”*<sup>6</sup>

The Supreme Court has sought to protect the freedom of association in two distinct ways. The first recognises that a fundamental element of personal liberty is that an individual has the right to choose to enter into and maintain certain intimate human relationships. Such intimate human relationships are known as “intimate associations”. The second protected area concerns expressive associations which are groups that engage in activities protected by the First Amendment to the Constitution such as the freedoms of speech and assembly. These relationships are considered to be central to safeguarding individual freedoms and so are to receive protection from undue intrusion by the State.

5 First Amendment to the United States Constitution.

6 *N.A.A.C.P. v Alabama*, 357 U.S. 449 (1958).

Such protection was at the heart of the Supreme Court's judgment in *N.A.A.C.P. v Alabama*,<sup>7</sup> where it concluded that the State of Alabama could not compel the disclosure of the National Association for the Advancement of Colored People's membership list under a statute that required such information from out-of-state corporations. In the tumultuous civil rights era, the Court recognised that divulging the names of N.A.A.C.P. members would expose them to attack and so undermine the ability of the group to advocate its message. In delivering the opinion of the Court, Justice Harlan declared that

*"privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."*

A concept exists in its own intellectual surroundings. The difficulty for the concept of freedom of association is that it has to exist in the real world and, as it encompasses political and labour activity, it can be seen as a danger by governments unwilling to embrace democracy. Although major international and regional treaties on human rights guarantee the right to freedom of association, the precise parameters of the right continue to remain vague and ill-defined in the jurisprudence of the relevant supervisory bodies. This leads to the unfortunate position that a supreme court in one national state could uphold the freedom of association and protect those at risk from arbitrary government interference, whilst a neighbouring country could find the right undermined both by its government and the courts. The heart of the issue is identifying the meaning of freedom of association. At its minimum, few would dispute that it includes a right to form and join an association freely. However, if only this bare minimum is accepted and the communitarian view is granted no foothold, then it may well be open for governments to restrict the ability of groups to operate freely, on the grounds that other rights have a greater need for protection. Therefore, security grounds could be used as a justification for interference.

### **Threats to Freedom of Association – State Interference**

A recent example of such interference is the decision of the Russian President Vladimir Putin, to sign legislation on 10 January 2006 which introduced government restrictions on non-governmental organisations (NGOs) and expanded the grounds for closing or denying registration to NGOs. The amended

7 *N.A.A.C.P. v Alabama*, 357 U.S. 449 (1958).

law grants government officials an unprecedented level of discretion in deciding what projects or even parts of projects can be considered detrimental to Russia's national interests.<sup>8</sup> The legislation gives registration officials the broad power to close the offices of any foreign NGO that implements a project that does not have the aim of:

*“defending the constitutional system, morals, public health, rights and lawful interest of other people, guaranteeing the defence capacity and security of the state.”*

Further,

*“Statements by high-level Russian officials and other government actions over the past two years have fed the hostile atmosphere for NGOs in Russia, giving rise to concerns that the new NGO law does not merely impose benign administrative regulations but will be used to interfere with their work. In a speech on February 7 to the Federal Security Service (FSB, the successor to the KGB), President Putin called on the FSB to “protect society from any attempts by foreign states to use [NGOs] for interfering in Russia’s internal affairs.” This speech came several weeks after a program broadcast by a state-owned Russian television station attempted to link Russian NGOs to a spy scandal involving the British embassy.*

*The Russian government has also taken legal action against several NGOs that expose government abuses. On February 3, a court in Nizhny Novgorod convicted Stanislav Dmitrievsky, executive director of the Russian-Chechen Friendship Society and editor of the organization’s newspaper Pravozashchita, on politically motivated charges of “inciting racial hatred,” giving him a two-year suspended sentence and four years’ probation. The charges stem from the publication in Pravozashchita of two statements by Chechen rebel leaders.”<sup>9</sup>*

State interference can be recognised in a number of differing ways. The recent example in Russia is a heavy-handed one designed to frustrate the existence of independent NGOs. Another means can be by way of interfering with the ability of an association to use its voice. The United States provides an example of such interference.<sup>10</sup> During the time of the Civil Rights movement, a pastor called

8 <http://hrw.org/english/docs/2006/02/11/russia12656.htm> (last accessed 7 December 2006)

9 *Ibid*

10 *Shuttleworth v Birmingham*, 394 U.S. 147 (1969).

Fred Shuttleworth helped lead 52 African-Americans in an orderly civil rights march in Birmingham, Alabama. He was subsequently arrested and convicted for violating Section 1159 of the city's General Code, an ordinance which proscribed participating in any parade or procession on city streets or public ways without first obtaining a permit from the City Commission. The Supreme Court struck down the parade ordinance that:

*“conferred upon the City Commission virtually unbridled and absolute power to prohibit any ‘parade,’ ‘procession,’ or ‘demonstration’ on the city’s streets or public ways.”*

Mr Justice Stewart, giving the judgment of the Supreme Court, noted the argument of the City of Birmingham:

*“It is argued, however, that what was involved here was not “pure speech,” but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true.”*

Yet the issue at stake was greater than mere traffic regulation and this was confirmed by Mr Justice Stewart:

*“But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection ... Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.” Hague v. C. I. O., 307 U.S. 496”*

Consequently, American courts will strictly scrutinise regulations that attempt to limit assembly in places traditionally open to the public such as parks or sidewalks and the government is to show that any restrictive ordinance is narrowly tailored to achieve a compelling government interest.

## The Requirements for Freedom of Association

In response to the action taken by Russia in January 2006, NGOs might assert that they simply exist to protect and promote human rights in circumstances where they are not being protected and promoted. Local groups often work in difficult conditions to guarantee the rights of individuals within their own society. It is because they embrace such a role that they may encounter the hostility of their own governments, who regard debate and openness in society with significant concern. Such hostility can be advanced by way of open attacks, both physical and verbal, upon individuals who work for NGOs and also by the use of legislation to hamper or prevent their actions.

It is therefore important to establish the constituent parts which make up the core of the freedom of association. The starting point is the right to establish an association. What type of association can be established? This question identifies a potential friction between the proposed association and the government who may cite the nature of the group's activities as a reason to deny it formal status. Russia appears to be at one end of the spectrum, endeavouring to stymie any campaigning which it perceives to be political in nature. The European Convention on Human Rights places itself at the other end, as it recognises, by way of Article 17 of the Convention, only limited circumstances in which the establishment of an association can be prohibited. Article 17 details that nothing in the Convention permits an NGO to seek to:

*“...engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”*

Another key requirement for establishing the freedom of association is to permit the association to have a legal personality which confers the right to rent premises, have staff, seek funding and hold bank accounts. Without legal personality, the association would be deprived of the ability to have effective operation and its efforts would be undermined. Further, it is critical that the requirements of registration, required to attain legal personality, are not too burdensome. It is also important that governments are not be able to interfere with the internal governance of the association unless such interference is prescribed by law, is necessary in a democratic society and is in pursuit of a legitimate aim.

### Is it a Neglected Right?

The right to enjoy freedom of association was described in 1997 as being “the neglected right” by Human Rights First,<sup>11</sup> a US human rights NGO, which concluded that such neglect was visible as governments exercised increasingly sophisticated means to restrict the activities of human rights NGOs through a wide variety of legal and quasi-legal controls. Such neglect was further identified in the field of labour relations by two of Canada’s largest unions in 2005. A study entitled “Collective Bargaining in Canada: Human Right or Canadian Illusion” cited 170 pieces of legislation since 1982 that have denied or undermined the basic right to freedom of association in Canada. A culture of impunity was identified by which successive governments permitted the denial of the right to freedom of association by businesses, whose profit and expansion agendas were granted greater protection than workers rights.

### The European Court of Human Rights – a Revival in Europe?

Since 1998, the European Court of Human Rights has endeavoured to make up for the lengthy years of neglect in the political field. The right to freedom of association is contained within Article 11 of the European Convention on Human Rights, which provides that:

- 1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or the administration of the State.*

In *Sidiropoulos v Greece*<sup>12</sup> the Court observed that, although the right to form an association other than a trade union was not expressly provided for in Article 11,

11 The Neglected Right: Freedom of Association in International Human Rights Law (1997) Human Rights First.

12 (1998) 27 EHRR 633

the right to form such an association was an inherent part of the right set forth in Article 11. It declared that the right:

*“... that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned”*

### **Freedom of Association in Turkey**

The European Court of Human Rights has further addressed the need to protect the right of freedom of association in cases concerning Turkey, a country which has struggled to adopt a right which it feels threatened by; the threat being that it will enhance the rights of the political opposition and minorities which in turn are believed will endanger the status quo identified by Atatürk.

Turkey has proven itself willing to be a party to international declarations and conventions which promote the right, but its concept of the right is minimal in nature. It became a signatory to the Universal Declaration of Human Rights in 1949 and by so doing accepted the ideals so enshrined and committed itself to the implementation of its provisions, including the right to freedom of association. Unlike the Universal Declaration of Human Rights, the European Convention on Human Rights is a convention with teeth as it is binding upon its state parties and has an enforcement mechanism, namely the European Court of Human Rights and the supervision of the execution of such judgments by the Committee of Ministers. Turkey ratified the European Convention in 1954 and in 1987 the right for individual applications from Turkish citizens to the European Commission of Human Rights was recognised. The compulsory jurisdiction of the European Court of Human Rights was recognised in 1989. Such progress came to a halt in 1990, when Turkey filed reservations to numerous rights contained in the European Convention, including freedom of association. Turkey modified and reduced these reservations in 1991, 1992 and again in 1993. However, it was not until 2002 that Turkey removed its remaining reservations to the Convention.

The right to freedom of association is also to be found in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) which provides that:

- 1) *Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2) *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*
- 3) *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

The ICCPR was adopted and opened for signature in 1966 but it did not enter into force until 1976. Turkey signed the ICCPR in 2000 and ratified it in 2003. Significantly, while Turkey has ratified the ICCPR it has also lodged a reservation to the following provision:

*“[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess their own religion, or to use their own language.”*

Turkey’s reservation to this article states:

*The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.*

The consequence of this reservation is that Turkey is willing only to comply with its obligations under the Convention which concern minorities to the extent to which such obligations are compatible with Turkey’s own Constitution.

The Turkish approach to minimising the scope of the rights found itself subject to scrutiny by the European Court of Human Rights in *United Communist Party of Turkey v Turkey*.<sup>13</sup> The *Türkiye Birleşik Komünist Partisi* or United Communist Party of Turkey (TBKP) was formed in October 1988 through the unification of two banned political parties, the Communist Party of Turkey (TKP) and the Workers Party of Turkey (TIP). The TBKP wanted to register as a legal political party, but registration was denied and the party was banned on 16 July 1991 by the Constitutional Court. Further, Nihat Sargın, the chairman of the TBKP, and Nabi Yagcı, its general secretary, were banned from holding office in any other party. The Constitutional Court dissolved the TBKP on the basis that they used the word ‘communist’ in their name, which it held to be contrary to Law No 2820, and that the party’s constitution and programme contained statements likely to undermine the territorial integrity of the State and the unity of the nation in violation of the national Constitution. When the TBKP challenged this decision before the European Court of Human Rights, the Turkish government argued that Article 11 did not apply to political parties. It further argued:

*“... if the TBKP were able to achieve its political aims, Turkey’s territorial and national integrity would be seriously undermined. By drawing a distinction in its constitution and programme between Turks and Kurds, referring to the Kurds’ “national” identity, requesting constitutional recognition of “the existence of the Kurds”, describing the Kurds as a “nation” and asserting their right to self-determination, the TBKP had opened up a split that would destroy the basis of citizenship, which was independent of ethnic origin. As that was tantamount to challenging the very principles underpinning the State, the Constitutional Court had had to review the constitutionality of that political aim. In so doing, it had followed the line taken by the German Constitutional Court in its judgment of 31 October 1991 on the right of foreign nationals to vote in local elections and by the French Constitutional Council in its decision of 9 May 1991 on the status of Corsica”*

*“In the Government’s submission, the States Parties to the Convention had at no stage intended to submit their constitutional institutions, and in particular the principles they considered to be the essential conditions of their existence, to review by the Strasbourg institutions. For that reason, where a political party such as the TBKP had called those institutions or principles into question, it could not seek application of the Convention or its Protocols.”<sup>14</sup>*

13 (1998) 26 EHRR 121

14 Paragraph 21 of the judgment.

Both the European Commission and the European Court of Human Rights were unanimous in their findings that political parties came within the scope of Article 11. The Court observed:

*“However, even more persuasive than the wording of Article 11, in the Court’s view, is the fact that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system ... there can be no doubt that political parties come within the scope of Article 11.”*<sup>15</sup>

Democracy is without doubt a fundamental feature of the European public order and that is apparent from the Preamble to the European Convention, which establishes a very clear connection between the Convention and democracy, by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. It is this common heritage which underlies the values of the Convention,<sup>16</sup> and the European Court of Human Rights has confirmed on several occasions that the Convention was designed to maintain and promote the ideals and values of a democratic society.<sup>17</sup> With regard to political association, the Court held:

*“Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults ... Such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.”*<sup>18</sup>

15 Paragraph 25 of the judgment.

16 *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161.

17 See the *Kjeldsen, Busk Madsen and Pedersen v. Denmark* judgment of 7 December 1976, Series A no. 23.

18 Paragraph 46 of the judgment.

In *United Communist Party of Turkey v Turkey*,<sup>19</sup> the European Court of Human Rights confirmed that an association, including a political party, is not excluded from protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions. While it is in principle open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights, they must do so in a manner which is compatible with their obligations under the Convention.

The Court was therefore willing to broadly interpret the right to freedom of association so as to include political parties, since such an interpretation was believed to be required for democratic purposes. This was so even where the State was fearful that a specific political party may undermine the prevailing constitutional arrangements, for democracies ought to be strong enough to withstand such assaults. The Court accepted that a State could take action to protect its institutions from a party intent on attacking democratic ideals if its actions satisfied the conditions of Article 11(2). However, the Court was clear that the limitations contained within Article 11 are to be construed strictly when applied to political parties, because of the latter's fundamental role in the maintenance of democratic societies. Consequently, a State only possesses a limited margin of appreciation when determining if an interference with a political party's Article 11(1) rights was necessary under Article 11(2)<sup>20</sup>.

The judgment in *United Communist Party of Turkey v Turkey* is also notable for the Court's willingness to confirm that the right to freedom of association is not restricted to the initial right to form an association but that it continues throughout the life of the association.

The European Court of Human Rights was required to consider Turkey's approach to freedom of association in a number of other cases. In the *Socialist Party v Turkey*<sup>21</sup> the Grand Chamber reiterated that political parties were a form of association essential to the proper functioning of democracy and in the light of the importance of democracy in the Convention system there could be no doubt that political parties came within scope of Article 11. Further, an association was not to be excluded from the protection afforded by the Convention simply because its activities were regarded by national authorities as undermining

19 (1998) 26 EHRR 121

20 See: Mowbray, "Cases and Materials on the European Convention of Human Rights", 2001 ed., page 548.

21 (1998) 27 ECHR 51

constitutional structures of the State.

*The Court reiterates that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. “The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. As the Court has emphasised many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention. (See, among other authorities, the United Communist Party of Turkey and Others judgment).”<sup>22</sup>*

In *Freedom and Democracy Party (OZDEP) v Turkey*<sup>23</sup> an application was made to the Constitutional Court to dissolve the party on the grounds that its programme sought to undermine the territorial integrity and secular nature of the State and the unity of the nation. Whilst the proceedings were still pending, the founding members of the party resolved to dissolve it in order to protect themselves and the party leaders from the consequences of a dissolution order, namely a ban on their carrying out similar activities for other political parties. The Constitutional Court pronounced the dissolution. The European Court of Human Rights noted the radical nature of the interference in issue, namely that the party had been definitely dissolved with immediate effect, its assets had been liquidated and transferred *ipso jure* to the Treasury, and its leaders had been banned from carrying on certain similar political activities. The Court held that the Turkish government had failed to explain how, as they asserted, OZDEP could bear any part of the responsibility for the terrorism affecting Turkey when it had scarcely had time to take any significant action. The Court therefore held that the dissolution had been disproportionate to the aim pursued and was consequently unnecessary in a democratic society.<sup>24</sup>

22 Paragraph 41 of the judgment.

23 Application No 23885/94

24 *Freedom and Democracy Party (OZDEP) v Turkey* Case No. 23885/94 (8<sup>th</sup> December 1999).

### Limitations upon Freedom of Association – Necessary in a Democratic Society

Freedom of association in Turkey again fell to be considered by the European Court of Human Rights in the important judgment of *Refah Partisi (Welfare Party) v Turkey*<sup>25</sup>. The Refah Partisi was a political party founded on 19 July 1983. In the local elections in March 1989, Refah obtained about 10% of the votes and its candidates were elected mayor in a number of towns, including five large cities. In the general election of 1991, it obtained 16.88% of the votes. Refah obtained approximately 22% of the votes in the general election of 24 December 1995 and about 35% of the votes in the local elections of 3 November 1996. The results of the 1995 general election made Refah the largest political party in Turkey, with a total of 158 seats in the Grand National Assembly (which had 450 members at the material time). On 28 June 1996, Refah came to power by forming a coalition government with the centre-right True Path Party (Doğru Yol Partisi), led by Mrs Tansu Ciller.

On 21 May 1997, Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved on the grounds that it was a “centre” (*mihrak*) of activities contrary to the principles of secularism. In support of his application, he referred, *inter alia*, to the following acts and remarks by certain leaders and members of Refah.

- Whenever they spoke in public, Refah’s chairman and other leaders advocated the wearing of Islamic headscarves in state schools and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this infringed the principle of secularism enshrined in the Constitution;
- At a meeting on constitutional reform, Refah’s chairman, Mr Necmettin Erbakan, had made proposals tending towards the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey their own rules rather than the rules of Turkish law;
- At a seminar held in January 1991 in Sivas, Mr Necmettin Erbakan had called on Muslims to join Refah, saying that only his party could establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah rather than

25 (2003) 14 BHRC 1

distributing alms to third parties;

- Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic system. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. Refah, it was alleged, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed.

Refah was therefore the largest political party in the Turkish Parliament and the Principal State Counsel at the Court of Cassation was seeking to rely upon certain acts and remarks made by the party's members to have the party dissolved, contending that the party sought the destruction both of democracy and the rule of law. The Principal State Counsel claimed that by describing itself as an army engaged in a jihad and by openly declaring its intention to replace statute law by Shar'ia, the party had demonstrated that its objectives were incompatible with the requirements of a democratic society and that its aim to establish a plurality of legal systems constituted the first stage in a process designed to introduce a theocratic regime.

On 16 January 1998, the Constitutional Court dissolved Refah on the ground that it had become a "centre of activities contrary to the principle of secularism". It based its decision on sections 101(b) and 103(1) of Law no. 2820 on the regulation of political parties. It also noted the transfer of Refah's assets to the Treasury as an automatic consequence of dissolution, in accordance with section 107 of Law no. 2820.

The European Court of Human Rights was faced with deciding whether the dissolution of the largest political party in a member State fell within the European Convention on Human Rights. It confirmed that the party's dissolution and the measures that accompanied it amounted to an interference with the applicants' exercise of their right to freedom of association. Such an interference would constitute a breach unless it was "prescribed by law", pursued one or more legitimate aim and was "necessary in a democratic society" for the achievement of that aim. The Court held in this matter, that the applicants were reasonably able to foresee that they ran the risk of proceedings to dissolve the party if its leaders and members engaged in anti-secular activities. Consequently, the interference was "prescribed by law". Moreover, taking into account the importance of the principle of secularism for the democratic system in Turkey,

the party's dissolution pursued several legitimate aims, namely the protection of national security and public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others. The Court found that there were convincing and compelling reasons justifying the parties' dissolution and the temporary forfeiture of certain political rights imposed on the other applicants. The acts and speeches of the party's members and leaders cited by the Constitutional Court were imputable to the whole of the party and those acts and speeches revealed the party's long-term policy of setting up a regime based on Shar'ia within the framework of a plurality of legal systems and the party did not exclude recourse to force in order to implement its policy and to keep the system it envisaged in place. Such plans were incompatible with the concept of a "democratic society" and the real opportunities the party had to put them into practice made the danger to democracy more tangible and more immediate. The European Court of Human Rights therefore found that the penalty imposed by the Constitutional Court, even in the context of the restricted margin of appreciation left to contracting states, met a "pressing social need" and the party's dissolution was "proportionate to the aims pursued". Accordingly, the party's dissolution was "necessary in a democratic society".

The Court gave considerable attention to what "is necessary in a democratic society" and confirmed that the only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society,' since democracy was the only political model contemplated by the Convention and so the only one compatible with it. In its considerations, the Court detailed that it is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.<sup>26</sup> There can be no democracy without pluralism and it is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. However, there is not an all-encompassing protection of associations under the Convention.

The Court has also defined as follows the limits within which political

26 Paragraph 87 of the judgment.

organisations can continue to enjoy the protection of the Convention while conducting their activities:

*“... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.”*

*“On that point, the Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds (see *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II, and, *mutatis mutandis*, the following judgments: *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX, and *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, Reports 1998-III, pp. 1256-57, §§ 46-47).”<sup>27</sup>*

Drawing upon history and the realisation that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, the Court observed at paragraph 99 of its judgment:

*“The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see *Communist Party (KPD) v. Germany*, no. 250/57, Commission decision of 20 July 1957,*

27 Judgment, paragraphs 97 and 98

*Yearbook 1, p. 222). In view of the very clear link between the Convention and democracy (see paragraphs 86-89 above), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (see, mutatis mutandis, Petersen v. Germany (dec.), no. 39793/98, ECHR 2001-XII)."*

In such circumstances, the European Court of Human Rights found that the Constitutional Court of Turkey had acted lawfully in dissolving the largest party in the Turkish Parliament. This decision sits uncomfortably with the Court's own finding in its *United Communist Party of Turkey* judgment that democracy holds considerable importance within the Convention system. The Turkish electorate had clearly expressed its will in the clear knowledge that Refah had pro-Islamist policies and such policies had not been hidden from the electorate. Indeed, before the domestic court, the Principal State Counsel had relied upon comments made by party leaders long before Refah joined the Government in 1996. In *Informationsverein Lentia v Austria*<sup>28</sup> the Court strongly endorsed the view that free elections held at reasonable intervals and by way of secret ballot would ensure the free expression of the peoples' opinion in the choice of legislature and so ultimately would guarantee the principle of pluralism. This was so, held the Court, for such expression at free elections would be inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. In this matter, the pro-Islamist policies advanced by Refah clearly enjoyed electoral support, yet the Court was willing to sacrifice its stance on democratic plurality in the belief that the Turkish electorate was so unsophisticated as to be unable to identify the perceived dangers to democracy if it voted in a certain way. Having praised democracy, the Court was willing to adopt the mantle of "guardian" and step in to protect democracy from the electorate itself. This theme of having to protect the Convention from those political associations deemed willing to exploit the Convention for their own nefarious interests can again be identified in *WP v Poland*<sup>29</sup> where the Court dismissed as manifestly ill-founded the applicants' complaints that the prohibition on their association under domestic law due to their anti-semitic views and objectives contravened Article 11.

28 37093/97 [2002] ECHR 785 (28 November 2002)

29 Application No. 42264/98, Inadmissibility decision of 2 September 2004

The *Refah* judgment raises fundamental concerns as to when courts can interfere in the democratic process and leads to the question whether it can ever be correct for a court to override the results of a free and fair democratic election. Judge Kovler held in his concurring judgment that there had been no violation of Article 11 in the *Refah* case:

*“... for the simple reason that some of the applicant’s activities and statements were in contradiction with the principle of secularism, a pillar of Turkish democracy as conceived by Mustafa Kemal Atatürk and enshrined in the Constitution of the Republic of Turkey (particularly arts 2 and 24(4), to which the contradiction the state, as the guarantor of constitutional order, was obliged to react, taking account in particular of arts 9(2) and 11(2) of the convention”*

The scope of this reasoning potentially touches upon the ability of political parties to advocate Basque or Catalan independence. Are they inherently associations whose closure is necessary in a democratic society? In *Refah*, the Court appeared willing to act upon the words and statements of political party leaders, often made before joining the Government, rather than consider whether the views were put into action. In its haste to curtail the advancement of a theocratic regime, an anathema to liberal democracy, and in fear of a signatory State enjoying a plurality of legal systems involving the use of Shar’ia law, the Court can be said to have protected the Turkish Constitution as if it were fixed in stone rather than as an instrument capable of amendment following the exercise of democratic will. The acceptance that the dissolution of the party was necessary in a democratic society was made despite the fact that *Refah* had been in power from June 1996 to July 1997 and had made no attempt to table draft legislation to introduce a regime based on Islamic law. Indeed, the ease in which the Court found that “the acts and speeches of *Refah*’s members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed *Refah*’s long-term policy of setting up a regime based on Shar’ia within the framework of a plurality of legal systems and that *Refah* did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place” can be judged as extremely worrying in hindsight when the former *Refah* Mayor of Istanbul, Recep Tayyip Erdoğan is now Prime Minister of Turkey and leader of the Justice and Development Party (AKP), a political party formed by former supporters of *Refah*.

## The Effect of Turkish Reforms

Turkey has undertaken various legal reforms in recent years in relation to freedom of association. These reforms include changes to the Constitution, the institution of harmonisation laws and, in 2004, its reform to the Law on Association.<sup>30</sup> The broader question as whether and to what extent these reforms have altered the situation in relation to freedom of association in Turkey remains to be considered, although to some extent, such assessment can be based upon recent case law relating to freedom of association in Turkey.

Two major constitutional reforms occurred in Turkey in 2001 and 2004. These reforms represented efforts by Turkey to comply with the Copenhagen Criteria, the set of criteria for European Union accession member States, developed at the 1993 Copenhagen Summit. The first set of constitutional reforms in 2001 provided a significant change to the 1982 Constitution regarding Article 33 on Freedom of Association. The 1982 version of the Constitution required associations to obtain approval from the “competent authority” which directly contradicted an initial provision in the same Article that everyone has the right to form associations without prior permission. The amendments made in 2001 provided that everyone has the right to form associations, to become a member of an association, and withdraw from membership without permission. Requirements for submitting information and documents were also removed. Instead, restrictions “in order to protect national security and public order, prevention of the commitment of crime, protection of public morals and public health” were added. These restrictions are of course, very similar to those contained in Article 11 of the European Convention on Human Rights, although there was a risk that these provisions would be applied in a restrictive manner and this appears to have been borne out by the judgment in the *Eğitim Sen* case.<sup>31</sup>

In addition to constitutional reform, the Turkish government passed a series of harmonisation laws amending a broad spectrum of domestic legislation including legislation relating to freedom of association. The second of the harmonisation packages was approved in 2002 and amended the Act on Associations so as to remove the prohibition upon the establishment of associations whose purpose is:

30 For a full analysis of this see: “Freedom of Expression and of Association in Turkey” Camille Overson Hensler and Mark Muller, November 2005, the Kurdish Human Rights Project and the Bar Human Rights Committee of England and Wales”.

31 Supreme Court judgment, 25<sup>th</sup> May 2005, discussed further below

*“to protect, develop or expand languages or cultures other than the Turkish language or culture or to claim that they are minorities based on racial, religious, sectarian, cultural or linguistic differences”.*

Although, this is an important change, the “official business” of their organisations is still required to be conducted in Turkish, and thus a degree of governmental oversight was maintained in relation to the activities of associations.

The second of the harmonisation packages repealed Articles 7, 11 and 12 of the Act of Associations which had prohibited international activities, activities abroad of associations established in Turkey, and activities in Turkey of associations established abroad. Although welcome reforms, these amendments were almost immediately undermined by the third harmonisation package, which was adopted in 2002. Articles 11 and 12 were resurrected, and requirements were added that such international associations needed permission from the Council of Ministers, which was conditional upon the organisations engaging in practices, in Turkey and abroad, which conformed to the national interests of the state. The third harmonisation package also amended the Law on Associations by relaxing requirements on book-keeping and on inspections of associations. The fourth Harmonisation Law, adopted in 2003, required associations to use Turkish in their official correspondence with the Turkish republic, although they could use languages other than Turkish for correspondence with international contacts and in their unofficial correspondence.

The fifth Harmonisation Law, adopted in 2003 changed the punishments listed in the Law on Associations under Article 82. These amendments replaced prison terms with fines for offences relating to failure to obtain permission for contracts with foreign associations and organisations as stipulated in Article 43; failure to fulfil the obligations concerning audit of associations under Article 45; and a failure to declare real estate in possession of associations or failure to liquidate real estate assets determined by the Ministry of the Interior to be not necessary for the association. The move away from prison sentences can be seen to be an improvement in the situation for associations, although the substitution of financial penalties gives rise to its own concerns. Financial penalties can be used to significantly hinder the ability of an association to operate and so can be used as a tool of repression.

In 2004, the Turkish Parliament passed the new Law on Associations which made significant changes to the concept of freedom of association in Turkey. The 2004 Law represents further progress in this area by improving upon

constitutional reform and further liberalising provisions in the harmonisation packages. The following are the major changes brought about through the new Law on Associations:

- 1) Associations are no longer required to obtain prior authorisation for foreign funding, partnerships or activities;
- 2) Associations are no longer required to inform local government officials of the day/time/location of general assembly meetings and no longer required to invite a government official to general assembly meetings;
- 3) Audit officials must give 24 hours prior notice and just cause for random audits;
- 4) NGOs are permitted to open representative offices for federations and confederations internationally;
- 5) Security forces are no longer allowed on premises of associations without a court order;
- 6) Specific provisions and restrictions for student associations have been entirely removed;
- 7) Children from the age of 15 can form associations;
- 8) International audit standards have been increased to ensure accountability of members and management;
- 9) NGOs will be able to form temporary platforms/ initiatives to pursue common objectives;
- 10) Government funding for up to 50% of projects will be possible;
- 11) NGOs will be allowed to buy and sell necessary immovable assets.<sup>32</sup>

There have been significant legislative reforms in relation to freedom of association in Turkey over recent years, although it can be said that it is a case of

32 "Freedom of Expression and of Association in Turkey" Camille Overson Hensler and Mark Muller, November 2005, the Kurdish Human Rights Project and the Bar Human Rights Committee of England and Wales", page 57.

two steps forward and one step back. Even with the amendments, the law still forbids the establishment of associations that are in violation of the basic features of the Constitution and the provisions on the protection of national security and public order, general health and general morality are still in force.<sup>33</sup>

Furthermore, the potential use of fines, including heavy fines and also the retention of imprisonment for transgressions of provisions relating to associations remains of concern. These measures could have a significant deterrent or preventative effect in relation to some associations. Various provisions, including the prohibition of the use of language other than Turkish for official communications, combined with the prohibition of associations that are in violation of the basic feature of the Constitution indicates that there continues to be a significant degree of state control and leaves questions remaining as to the true degree of freedom of association in Turkey.

### **Continuing Targeting of Associations in Turkey**

Turkish prosecutors have continued to target associations whose activities are deemed to oppose the State. The action brought against the Turkish Teachers' Union (Eğitim Sen), is an important case in relation to freedom of association that has arisen subsequent to the 2004 Law of Associations. Eğitim Sen is a union affiliated to the Confederation of Public Sector Unions (KESK) and was established in 1995. It possesses a clause in its constitution which defends the right of every individual to be taught in their mother tongue. On 10 June 2004, it was sued by the Attorney General of Ankara and accused of breaching the Turkish Constitution because of its support for education in the mother tongue, since the Constitution states that education should be provided in the official language of Turkish. On 15 September 2004, the Ankara Second Labour Court ruled in favour of the union and acquitted it of all charges. It found that to follow the arguments of the Attorney General would contravene the rights to freedom of expression and association under the European Convention of Human Rights. The Attorney General requested a revocation of the case and it was brought before the Supreme Court. In November 2004, the Supreme Court rejected the ruling of the Ankara Second Labour Court and referred the case back for a second ruling. On 21 February 2005, the Ankara Second Labour Court confirmed its original ruling.<sup>34</sup> However, the Attorney General of Ankara again sought to bring the

33 *Ibid.*, page 43.

34 TIHV, 'Human Rights in Turkey: November – December 2004', <http://www.tihv.org.tr/eindex.html>.

matter before the Supreme Court.

On 25 May 2005, the Supreme Court held in favour of the Attorney General. It found that the union was in breach of Article 42 of the Turkish Constitution, which states that no one shall be deprived of the right of learning but restricts that right to teaching being in no language other than Turkish. The Supreme Court held that teaching in any language other than the mother tongue of Turkish was dangerous to national security under the Constitution.<sup>35</sup>

It is interesting to note that the Court explicitly stated that its ruling against Eğitim Sen accorded with the permissible limitations to freedom of expression and associations under Articles 10 and 11 of the European Convention. Eğitim Sen were required to remove the offending clause from their Constitution, which they consequently did, rather than face the alternative which would have been the closure of their union. However, the union expressed its concern by way of a statement dated June 2005 in which it observed:

*“The Teachers’ Union (Eğitim Sen), affiliated to the Confederation of Public Sector Unions (KESK) and established in 1995 is confronted with the challenge of being closed down by the decision taken by the Supreme Court. Eğitim Sen, with its 200.000 members, is the largest union in Turkey. The lawsuit against Eğitim Sen aiming to close down the union is due to the fact that Eğitim Sen has been defending for all individuals the right to education in their mother tongue as well as the right to develop their cultures in accordance with their basic human rights and freedoms.*

*This development is very meaningful, especially while the Turkish government has been propagandising [sic] the so-called democratisation process to achieve Turkey’s accession to the European Union. It is a well-known fact that Turkey is a multilingual and multicultural country and the prime responsibility of a government is not to create difficulties for the unions defending the secular, scientific, democratic education demands of its citizens but to protect the fundamental human rights of their citizens, to respect international law and to remove the obstacles on the road to democratisation.*

*Eğitim Sen defends the right to education in the mother tongue owing to the fact that it believes it is a basic human right. The union believes that this right is one of the basic principles of a democratic and scientific education. It is also*

35 Trade Union Movement, ‘The Supreme Court of Turkey has Decided to Close Down the Teachers’ Union’, June 2005, <http://www.emep.org/trade/Egitim-Sen.html>

*important to note that this challenge seems to be politically motivated rather than due to legal regulations. Since the day it has been established, Eğitim Sen has always been sensitive about the anti-democratic treatments across the country and has opposed all attempts aiming at commercializing education and oppressing democratic education initiatives.<sup>36</sup>*

This matter has now proceeded to be considered by the European Court of Human Rights. It represents the restrictive approach to freedom of association which continues to exist at the high levels of the Turkish judiciary.

Turkish prosecutors were again required to consider the right to freedom of association in a matter concerning “Kaos GL”, the Gay and Lesbian Cultural Research and Solidarity Association. Kaos GL is an organisation that operates a drop-in centre providing social and cultural support to lesbian, gay, bisexual and transgender people, and it also advocates for measures to end discrimination and violence. In September 2005, the organisation was informed that the deputy governor of Ankara had initiated proceedings to dissolve it, on the basis that its title and aims violated the Civil Code’s prohibition on ‘establishing any organisation that is against the laws and principles of morality’. Kaos GL subsequently applied to the Ministry of Interior for recognition as an NGO. This request was initially granted. The Deputy Governor of Ankara, Selahattin Ekremoğlu, responded by issuing a lawsuit against the organisation.<sup>37</sup> Fortunately, in this case the prosecutor rejected the governor’s demand on the grounds that homosexuality was not immoral.<sup>38</sup>

The difficulties for those associations working to advocate human rights in Turkey are highlighted by the government’s attitude to the “Torture Prevention Group”, which was established in 2001 by the Izmir Bar Association. Its aims were to provide legal aid to victims of torture and to campaign to remove all obstacles in Turkish law and practice that might prevent the successful prosecution of perpetrators. The group provided legal support for victims of torture and monitored prosecutions and it had a small core of professional staff and could call upon the aid of approximately 250 lawyers, who worked voluntarily.<sup>39</sup> In

36 See: [http://www.solidnet.org/cgi-bin/agent?URGENT\\_actions/046emep13jun051.doc](http://www.solidnet.org/cgi-bin/agent?URGENT_actions/046emep13jun051.doc).

37 Human Rights Watch, ‘Turkey: Officials Try to Shut Down Rights Group’, 26 September 2005.

38 Reuters, ‘Turkish gays win first legal victory on road to EU’, 12 October 2005 and <http://news.kaosgl.com/item/2005/10/13/request-to-ban-turkish-gay-rights-group-rejected> (accessed 8 December 2006).

39 Amnesty International, ‘Turkey: Closure of Prevention Group shocking’ <http://web.amnesty.org/library/Index/ENGEUR440012005?open&of=ENG-TUR> (accessed 8 December 2006).

December 2004, following the coming into force of the 2004 Law of Associations, the President of the Izmir Bar Association, Mr Nevzat Erdemir, decided to close the organisation. Following this decision, files and photographs were reportedly seized containing confidential testimony from victims of torture.<sup>40</sup> In December 2004 Mr Erdemir circulated a press statement giving his reasons for closing the Torture Prevention Group. One of the reasons he gave was that a project the Group was coordinating was receiving funds from the European Commission, which he said was on a mission to divide Turkey and its national interests through the creation of an independent “Kurdistan”. He further criticised the group’s cooperation with international organisations which was most likely a reference to its work with Amnesty International.<sup>41</sup>

## Conclusion

Although it appeared to respect the right to freedom of association from its signing of the Universal Declaration of Human Rights, Turkey has found such a freedom to be deeply troubling, perceiving it as a manner in which its cherished secularism and its assertion that all citizens of Turkey are Turks, can be challenged.

Over the years, human rights abuses by the Turkish government have included the incarceration of thousands charged with political crimes, hundreds of whom have been imprisoned only for the peaceful expression of their political views; restrictions on freedom of expression and association; and the continued mistreatment of the Kurdish minority. There have also been “credible allegations of torture and other mistreatment”; several specific cases of torture; the incommunicado detention of suspects; hunger strikes in prisons that resulted from “stringent new prison regulations”; the long-term detention of political prisoners; laws used to “harass newspapers”; restrictions on association and academic freedom; the expulsion of several foreign religious activists; the prohibition of political parties advocating a communist or a theocratic state; the “proscription of publication of any book, newspaper or other material in the Kurdish language”; the denial of materials dealing with Kurdish history, culture and ethnic identity; the banning of political activity by unions, university faculty or students; the denial of passports to thousands of Turks living abroad and the

40 Ibid.

41 Ibid.

detention of some expatriate Turks who have attempted to return to Turkey.<sup>42</sup>

It is apparent that as Turkey's political elite has turned towards the European Union in recent years, the economic ambitions of such a union have required considerable thought to be given to the political implications. As Turkey continued to cherish the prize of joining the European Union, it has had to address its approach to the freedom of association. Whilst the 2004 Act on Association can be viewed as a step in the right direction, there remains much tension between jurists as to whether or not a restrictive, and usually politically motivated, approach to such rights is appropriate.

The restrictive view within Turkey continues to look towards the 1982 Constitution rather than the European Convention on Human Rights. Holders of this view argue that the Constitution preserves a democratic, secular, parliamentary form of government which provides for an independent judiciary and safeguards internationally recognised human rights. However, they insist that the freedom of association cannot be used to violate the integrity of the secular state or to impose a system of government based upon religion, ethnicity, or the domination of one social class.

Under the Turkish constitution, secularism is a fundamental part of Turkish democracy though it does not attract such importance elsewhere in Europe. The European Court of Human Rights decisions in the judgments of *United Communist Party of Turkey v Turkey* and *Refah Partisi (Welfare Party) v Turkey* have helped to identify the lawful restrictions that may be placed upon the freedom of association and detail where such restrictions may be necessary in a democratic society. Turkey is still struggling to implement the underlying rationale of such case-law, particularly because the freedom of association is still so closely bound to the political issue of freedom of expression. Indeed, the recent failed prosecution of Orhan Pamuk for discussing the murder of hundreds of thousands of Armenians during World War I and thousands of Kurds in subsequent years showed the continued vehement opposition to persons or groups who take opposing views to issues deemed to be central to the Turkish State.<sup>43</sup>

Despite the possibilities of redress from the European Court of Human Rights and changing attitudes from a new breed of Turkish judge, who might be more influenced by a rights-based culture, it is difficult to say that such progress is

42 Human Rights Watch Country Report, Turkey, 1989

43 See <http://news.bbc.co.uk/1/hi/world/europe/4637886.htm>.

presently being made to the point that the right of freedom of association is no longer a neglected right in Turkey. However, being mindful of a Turkish proverb, we can but hope that any progress is an ember which will continue to burn.



Lucy Claridge<sup>1</sup>

## The EU, Turkey and the Kurds: Third International Conference

On 16 and 17 October 2006, the EU-Turkey Civic Commission (EUTCC) held its third international conference at the European Parliament in Brussels. As in previous years, 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. The conference heard from academics, politicians, human rights advocates and experts from around the world, discussing the varied aspects of the human and minority rights aspects of the Kurdish question in Turkey.

As explained in Legal Review 7, 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. A second international conference was held in September 2005 (see Legal Review 8). 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.

Among the topics discussed during the Conference were the situation of women and IDPs, Turkey's Anti-Terror law, the revised penal code and its influence on freedom of expression, association and press freedom, and the prospects for

<sup>1</sup> Legal Officer, KHRP

peace and reconciliation created by the EU accession process. The conference ended with the declaration of resolutions. These resolutions included a message of support for the then month-old ceasefire declared by the Kurdistan Workers' Party.

A fundamental aim of the Conference resolutions is to help to guarantee respect for human and minority rights and to promote a peaceful, democratic and long-term solution to the Kurdish situation as well as the accession of Turkey as a member of the EU. To this end, the Conference resolved to monitor and conduct regular audits of Turkey's compliance with its regional human rights obligations and other EU related accession criteria. The Conference further resolved to periodically make recommendations of measures that could advance the protection of the human rights of the Kurds and to act as a point of contact and exchange of information with the Turkish and European Governments, EU institutions and other governmental and non-governmental organisations involved in the Turkish EU accession process and the peaceful resolution of the Kurdish issue in Turkey. The full text of the resolution is set out below:

#### **FINAL RESOLUTIONS:**

Pursuant to the presentation of Conference papers and interventions made by delegates, this Conference unanimously resolves to adopt the following declarations and calls for action to be undertaken by relevant parties to the Kurdish conflict in Turkey.

#### **The Conference issues the following declarations:**

- 1) Recalling the resolutions from the First and Second International Conferences on Turkey, EU & the Kurds, the Third International Conference continues to give its qualified support to Turkey's EU accession process;
- 2) The Third International Conference calls upon European Governments to publicly express support for the EU accession process, including support of all EU requirements concerning democratic and legal reform within Turkey;
- 3) The Conference hereby continues to acknowledge the Turkish Government's progress on reform during 2002-4, but echoes the European Parliament Resolution of 27 September 2006 expressing regret at the 'slowing down of the

reform process' which can be seen in the 'persistent shortcomings or insufficient progress in particular in the areas of freedom of expression, religious and minority rights, civil-military relations, law enforcement on the ground, women's rights, trade union rights, cultural rights and the swift and correct enforcement of court rulings by State services' and joins with them in urging Turkey to 'reinvigorate the reform process';

4) The Conference notes with alarm the failure of certain State institutions to adhere to its obligations under the European Convention on Human Rights and humanitarian law in accordance with the spirit and terms of its own recent reform packages and commitments given under the accession process; in particular, it is dismayed that institutions of the State have continued their military activities;

5) The Conference welcomes the declaration of a ceasefire by the PKK on 1 October 2006 and hereby calls upon all relevant parties involved in the armed conflict in Turkey to forthwith stop all hostile military operations in the region and to henceforth pursue non-violent resolutions to the conflict;

6) In particular, the Conference calls upon all governments, to urge Turkey and other Member States of the EU 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;

### **Human Rights and Accession**

7) 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 EU Commission to continue to monitor the reform process; this should include a complete overhaul of the justice system including how judges are recruited and chosen;

8) The Conference reiterates the view expressed in the First and Second Conferences 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. It further underlines that there can 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;

- 9) 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 and ill treatment, the plight of internally displaced people, protection of women and children, minority rights, and freedoms of expression, association, language and religion;
- 10) The Conference also calls upon Turkey to ratify the European 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;
- 11) In reference to the above resolution, the Conference also calls on the EU to apply pressure on the Government of Turkey as a potential member of the EU to ratify said Framework;
- 12) Recalling Articles 10, and 14, and Article 2 of the first Protocol of the European Convention on Human Rights and Article 8 of the European Charter for Regional or Minority languages, and the Council of Europe's Parliamentary Assembly's resolution 1519 of October 2006 on the cultural situation of the Kurds, the Conference calls upon the State of Turkey and the European Union to develop and promote a strategic plan for mother tongue education;
- 13) With specific reference to the reports of the European Parliament in September 2006, the European Commission of November 2005, the UN Special Rapporteur on Violence Against Women's report in July 2006 and the concerns expressed in the 2005 CEDAW response to the Turkish Report to the Committee, the conference calls on EU to ensure that Turkey addresses the Status of all of its women and girls, and particularly its Kurdish women and girls in the context of international standards;
- 14) This Conference expresses regret the Turkish government's initiation of work on the ill-planned Ilisu Dam in August 2006 which threatens mass displacement and loss of livelihood of the area's inhabitants, the majority of whom are Kurds; endangers the historically important city of Hasankeyf, in an apparent attempt to further disassociate Kurds from their rich heritage and culture; and will, according to several environmental assessment reports, jeopardize access to water for Turkey's neighbours and cause irreversible environmental harm;
- 15) In reference to the above, the Conference calls upon the Turkish government to reassess its position vis-à-vis this project, as well as the bodies of the EU

monitoring the impact of internal displacement and what the potential effects of this project are on the already overpopulated urban centres of the Kurdish regions;

### **The Centrality of the Kurdish Question**

16) 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;

17) This Conference therefore asserts that the Kurdish people and their representatives should be given a genuine participatory role in the accession process and in any debate over Turkey's democratic constitutional future;

18) 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**

19) In particular, the Conference calls upon all political parties in Turkey to help foster the conditions within Turkey for a democratic platform for dialogue;

20) Based on the present ceasefire holding, the Conference calls upon the European Commission and Council to endeavour 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;

21) In this respect the Conference recalls the following declaration in the European 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';

22) The Conference further recalls that 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 chosen to abandon the use of arms.’

23) The Conference recognises the potential contribution to peace presented by the three newly appointed co-ordinators representing Iraq, Turkey and US, and calls on them to work together to find ways forward with the issue of the Kurdistan Workers’ Party (PKK). The EUTCC calls upon these representatives and all other relevant regional and national stakeholders and policy-makers to pursue a democratic solution through dialogue;

24) 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;

25) 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;

26) 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 Reports’ particular citation of the ECtHR case of Abdullah Öcalan v Turkey in this regard;

27) 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;

28) The Conference also urges all member states of the European Union to individually assist—including earmarking funds—in the creation of a democratic

platform for dialogue between Turkey and the Kurds and fully comply with their own freedom of expression obligations in respect of those Kurdish organisations and individuals who are concerned to promote the same;

29) The Conference endorses the recent recommendations of the Council of Europe's representative regarding the creation of a Committee for Reconciliation;

30) The Conference also urges Governments of the EU not to criminalise peaceful dissent of Turkey echoed by Kurdish organisations situated in Europe and to review its recent proscription of certain Kurdish organisations, especially in the light of recent ceasefire declarations and public commitments to the search for a peaceful solution of the Kurdish question within the present territorial integrity of a democratically reformed Turkey;

31) Finally, the Conference mandates, its Directors, Advisors 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 of this resolution.



## Section 3: Case Summaries and Commentaries



## A. ECHR Case News: Admissibility Decisions and Communicated Cases

### Right to life

#### *Goygova v Russia*

(74240/01)

**European Court of Human Rights:** Admissibility decision of 18 May 2006

*Right to life – Lack of an effective investigation – Prohibition of torture – Right to liberty and security – Right to a fair trial – Right to an effective remedy – Articles 2, 3, 5, 6 and 13*

#### Facts

The applicant, Petimat Kirimovna Goygova is a Russian national, who was born in 1966. She was a resident of Grozny, Chechnya, until she left for Ingushetia. Eventually she left Russia and currently lives in Belgium.

In October 1999, hostilities resumed in Chechnya between Russian forces and the Chechen fighters. Grozny and its suburbs came under heavy bombardment. In January 2000, the applicant and her four children were staying in Ingushetia, while her brother Magomed Goygov and her mother Maryam Goygova remained in Grozny. On 19 January 2000 the applicant went to Grozny to find her relatives. On the same day, the applicant found the body of her mother in a hand-cart. She had a shrapnel wound in the abdomen and a gunshot wound in the head.

On 10 February 2000, the body of the applicant's brother was found in a garage about 100 metres away from where the applicant's mother had been found. An examination of the body revealed that the applicant's brother had at least a dozen gunshot wounds to the head, body and limbs. The right ear had been cut off.

On 11 February 2000 the applicant requested the prosecutor's office to conduct an investigation into the killing of her brother. At the same time she informed the law enforcement bodies of the killing of her mother. Thereafter, the case was adjourned several times. The applicant made numerous requests about the progress of the criminal investigation; however, no information was forthcoming.

The Respondent Government stated that on 20 September 2004, the decision to adjourn the investigation in the criminal case was quashed and the case was forwarded for additional investigation.

### Complaints

The applicant complained under Article 2 of the Convention that the right to life of Mogamed Goygov and Maryam Goygova had been violated.

The applicant further complained under Article 2 of the Convention that the authorities failed to conduct an effective investigation into the circumstances surrounding the death of Mogamed Goygov and Maryam Goygova.

The applicant claimed that there was enough evidence to conclude, from the circumstances in which her mother and brother died and from the nature of their injuries, that they had been subjected to ill-treatment in violation of Article 3 of the Convention.

The applicant alleged that her mother and brother had been detained in violation of the provisions of Article 5 of the Convention.

The applicant further complained under Article 5 of the Convention that she had no effective access to a civil court, in the absence of any meaningful conclusions of the criminal investigation.

The applicant stated that she had been deprived of access to a court, contrary to the provisions of Article 6 of the Convention.

The applicant complained under Article 13 of the Convention that she there were no effective remedies available to her regarding the alleged violations.

### Held

The Court considered that the complaints under Articles 2, 3, 5, 6 and 13 raised serious issues of fact and law under the Convention, whose determination required an examination of the merits. Accordingly, the Court declared the application admissible.

***Muhyettin Osmanoğlu v Turkey***

(48804/99)

**European Court of Human Rights:** Admissibility decision of 15 June 2006

*Right to life – Prohibition of ill-treatment – Right to liberty and security – Right to private and family life – Right to an effective remedy – Freedom from discrimination – Articles 2, 3, 5, 8, 13 and 14*

The facts

This is a KHRP assisted case. The applicant, Muhyettin Osmanoğlu, is a Turkish national who was born in 1942, and lives in Diyarbakır, Turkey.

On 25 March 1996, the applicant saw two armed men escorting his son, Atilla Osmanoğlu, out of his shop in Diyarbakır. The two men introduced themselves as police officers and told the applicant that they were taking his son to the Security Directorate to discuss some business deal and that his son would return in about half an hour. However, his son did not return that evening.

On 26 March 1996 and 16 May 1996 the applicant filed petitions with the Diyarbakır Governor's Office and requested information as to the whereabouts of his son. In the meantime, on 1 April 1996, the applicant filed a petition with the public prosecutor's office at the Diyarbakır State Security Court, requesting information as to his son's whereabouts. On 4 April 1996, the public prosecutor informed the applicant that his son's name did not appear in the custodial records.

On 4 July 2004 an article relating to the confessions of a former member of JITEM (the Gendarme Intelligent Service), published a report stating that Atilla Osmanoğlu was one of the persons who had been abducted and killed by the JITEM. The article explained that Mr Osmanoğlu's body had been thrown into a petrol tank.

The Government submitted that the public prosecutor concluded that it was unnecessary to initiate an investigation. They further submitted that Mr Osmanoğlu was registered as a missing person and that a search was carried out throughout the country to find him.

Complaints

The applicant alleged that the circumstances surrounding the abduction and

disappearance of his son gave rise to a violation of Article 2 of the Convention. He further maintained that the authorities failed to carry out an adequate and effective investigation into these matters.

The applicant complained that the anguish he had suffered due to his son's disappearance at the hands of the State authorities and his inability to discover what had happened to his son as a result of the authorities' failure to initiate a full investigation, amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

The applicant submitted that his son's detention was arbitrary and in breach of Article 5(1) of the Convention.

The applicant submitted under Article 8 of the Convention that there had been an unjustified interference with his family life on account of the fact that he and his family had suffered the loss of a family member.

The applicant maintained that he had been denied an effective domestic remedy in respect of his complaints, in breach of Article 13 of the Convention.

Finally, the applicant alleged under Article 14 in conjunction with Articles 2 and 5 of the Convention that his son was the victim of an enforced disappearance on account of his Kurdish ethnic origin.

### Held

The Court considered that the complaints under Articles 2, 3, 5, 8, 13 and 14 raised serious issues of fact and law under the Convention, whose determination requires an examination of the merits. The case was therefore declared admissible.

## **Right to fair trial**

*Association SOS Attentats and de Boëry v. France*  
(76642/01)

**European Court of Human Rights:** Inadmissibility decision of 24 October 2006

*Sovereign immunity – Right to a fair hearing – Right to an effective remedy – Articles*

6(1) and 13

### Facts

The case concerns an application brought by the association 'SOS Attentats, SOS Terrorisme', whose headquarters are in Paris, and by Béatrix de Boëry (married name Castelanu d'Essenault), a French national who lives in Paris.

The application concerns the fact that it was impossible for the applicants to bring proceedings against Colonel Gaddafi, the head of the Libyan State, in connection with a terrorist attack in 1989 against a DC 10 operated by UTA, and to obtain compensation by him for damage arising from the attack, as a result of the immunity from jurisdiction of foreign heads of State in office.

On 19 September 1989 an airliner operated by the French airline UTA exploded over the Ténéré desert following a bomb attack in which 170 people, including Mrs de Boëry's sister and a number of other French nationals, were killed.

In proceedings instituted in France, six Libyan nationals were committed for trial in the Paris Assize Court, sitting in a special composition. These were the head of the Libyan secret service (Colonel Gaddafi's brother-in-law), four members of the Libyan secret service and a civil servant from the Ministry of Foreign Affairs who worked at the Libyan Embassy in Brazzaville. On 10 March 1999, the six defendants were convicted and sentenced in their absence to life imprisonment and ordered to pay compensation to the victims' families. Mrs de Boëry and her family have thus received between EUR 15,244.90 and EUR 30,489.80.

In June 1999, the applicants lodged a civil-party complaint against Colonel Gaddafi. They alleged complicity in voluntary homicide, the destruction of property by an explosive device causing fatal injury, and conspiracy to undermine public order through intimidation and terror.

The investigating judges ruled that there was a case to answer. Although the Indictment Division of the Paris Court of Appeal noted that an international custom afforded foreign heads of state immunity from prosecution in the courts of another state, it went on to find that the immunity did not apply in the case before it owing to the nature and seriousness of the alleged offences. However, its judgment was quashed by the Court of Cassation in a decision of 13 March 2001 in which it held that the alleged offences did not come within the exceptions to the principle of immunity for foreign heads of state and that there was therefore no ground for investigating the applicants' complaints.

On 9 January 2004 the association 'Les familles du DC 10 UTA en colère!' and the applicant association, both representing families of the victims, concluded an agreement with the 'Gaddafi World Foundation for Charities' under the terms of which the families were each to receive one million US dollars (the equivalent of EUR 783,453) in consideration for waiving their right to bring 'civil or criminal proceedings in any French or international court on account of the explosion aboard the aircraft' and the applicant association agreed 'not to take any hostile action or to lodge any complaint against Libya or Libyan natural or legal persons in connection with the explosion aboard the aircraft'.

### The Complaint

Relying on Article 6(1) of the European Convention on Human Rights, the applicants submitted that the Court of Cassation's ruling that Colonel Gaddafi was entitled to sovereign immunity had infringed their right of access to a court. They also complained under Article 13 (right to an effective remedy) of the lack of an effective remedy in that connection.

After the application had been lodged, a new fact was brought to the Court's attention: on 9 January 2004 an agreement was signed between the Gaddafi International Foundation for Charity Associations, the families of the victims and the Bank for Official Deposits. This agreement provided for payment by the Foundation of one million US dollars to the families of each of the 170 victims. It stated that 'In exchange for the receipt of that compensation the members of the families will desist from any and all actions or claims against Libya or against Libyan citizens based on the explosion on board the aircraft which have not yet been settled by a court and will waive the right to bring any kind of civil or criminal proceedings before any French or international court based on the explosion on board the aircraft'. Meanwhile, the applicant association had undertaken 'not to conduct any hostile action or dispute against Libya, Libyan nationals or Libyan legal entities relating to the explosion on board the aircraft'.

The Court had therefore to determine whether, as the Government alleged, this new fact was such as to lead it to decide to strike the application out of its list of cases in application of Article 37(1) (striking out) of the Convention.

### Held

The Grand Chamber struck out the application.

The Court found that it was appropriate to strike the application out of the list in application of Article 37(1)(c). It noted that the conclusion of the agreement of 9

January 2004 was due in large part to France's diplomatic intervention and took note of the resources made available by the French Government to guarantee and facilitate payment of the sums due under that agreement to the family members of the victims of the 1989 attack. It was satisfied that this agreement was in line with the latter's interests, a view that was supported by the fact that the associations representing those interests – including the association SOS Attentats – were signatories to it. It pointed out in this respect that the agreement provided for the payment of substantial sums to the families of the victims. Some of those concerned, including members of Mrs de Boëry's family, had already received the amount due to them under the agreement; others had to date refused to sign the waiver on which payment was dependent. Although Mrs de Boëry was one of those individuals, it appeared from the statements made by her counsel at the hearing before the Grand Chamber that the amount payable to her under the agreement (EUR 70,000) remained available at the Bank for Official Deposits and that she would take her final decision in the light of the outcome of the present application.

The Court noted that in 1999 the French courts sentenced six Libyan officials, in their absence, to life imprisonment and ordered them to pay compensation for non-pecuniary damage to the victims' families, civil parties to those proceedings. At the hearing before the Grand Chamber the applicants' counsel stated for the first time that various sums had indeed been paid in this connection to the civil parties, including to Mrs de Boëry and her family.

In summary, the conclusion of the agreement of 9 January 2004, the latter's terms and the fact that Mrs de Boëry had obtained a judgment on the question of the responsibility of six Libyan officials were circumstances which, taken together, led the Court to consider that it was no longer justified to continue the examination of the application within the meaning of Article 37(1)(c) of the Convention. As no other element regarding respect for human rights as guaranteed by the Convention required that this application be examined further, the Court decided, unanimously, to strike it out of the list.

## Freedom of expression

*Meltex Ltd (Mesrop Movsesyan and Others) v. Armenia (2)*  
(32283/04)

**European Court of Human Rights:** Communicated on 15 June 2006

*Freedom of expression – Right to fair trial – Prohibition of discrimination – Articles 6, 10 and 14*

### Facts

This is a KHRP assisted case. The applicant, Mr Mesrop Movsesyan, is an Armenian national who was born in 1950 and lives in Yerevan, Armenia.

The applicant is the chairman of Meltex Ltd, an independent Armenian television company ('Meltex') set up in 1995, broadcasting outside state control.

On 25 August 1996, Meltex commenced independent broadcasting. In September 1999, Meltex established a nine member network of independent licensed TV companies. The television network was widely recognised as one of the only independent voices in television broadcasting in Armenia. Meltex broadcasted 24 hours a day until the withdrawal of its broadcasting licences in 2002. This withdrawal is the subject of a separate case before the ECtHR – see KHRP Legal Review, Volume 6, 2004 at page 101 for a summary.

In October 2000, the Armenian National Commission of Television and Radio (the 'Commission') was established to license and monitor private television and radio companies, including a system for broadcasting licensing competitions.

From the period of February 2002 to November 2003, following the licensing competitions, the applicant company submitted bids for television broadcasting licences for seven different frequencies. The applicant was refused licences in each of the respective competitions.

The applicant instituted proceedings against the Commission in the Commercial Court complaining that the Commission failed to provide its basis and reasons in writing for the refusal of a broadcasting licence in each of the competitions. The Commercial Court rejected the applicant company's respective claims. The applicant lodged a series of appeals against all those decisions but they were

consistently rejected by the Court of Cassation, finding that the competitions had been conducted and the resulting decision had been taken in compliance with the law.

### Complaints

The applicant submitted that all of the decisions to refuse licences to broadcast by the Commission were politically motivated since all its members are directly appointed by the President of Armenia. He further alleged that the rejections of all the company's bids were influenced by Government intentions to suppress the voice of independent media companies.

The applicant maintained that his right to a fair trial under Article 6 of the Convention was denied since the Commission failed to provide its legal basis and reasons in writing for their decision of refusal to grant broadcasting licences. In addition to this, the applicant submitted that neither the Economic Court nor the Court of Cassation had given reasoned judgments nor adequately addressed the assertions of the applicant that the Commission acted contrary to the law.

The applicant complained under Article 10 of the Convention that the refusal to grant broadcasting licences unlawfully interfered with his right to freedom of expression.

Finally, the applicant also complained under Article 14 - in conjunction with Articles 6 and 10 of the Convention - that the Commission's decisions in the licensing competitions were discriminatory because they were based upon the Government's distrust in the political content of the applicant's company's broadcast.

Communicated under Articles 6, 10 and 14 of the Convention.

## **Right to enjoyment of property**

*Chiragov and Others v. Armenia*  
(13216/05)

**European Court of Human Rights:** Communicated on 8 June 2006

*Forceful eviction from home – Right to respect for private and family life – Right to an*

*effective remedy - Prohibition of discrimination - Article 1 of Protocol No.1, 8 and 13 and 14*

### Facts

This is a KHRP assisted case. The applicants, Mr Elkhan Chiragov, Mr Adishirin Chiragov, Mr Qaraca Gabrayilov, Mr Ramiz Gebrayilov, Mr Akif Hasanof and Mr Fekhreiddin Pashayev, are Azherbajjani nationals who were born in 1950, 1947, 1957, 1960, 1959 and 1956 respectively. All the applicants live in Baku, Azerbaijan, except Mr Hasanof who lives in the town of Sumgait, Azerbaijan.

Under the Soviet system of territorial administration, Nagorno Karabakh was an autonomous region situated within the territory of the Republic of Azerbaijan. There was no common border between Nagorno Karabakh and the Republic of Armenia, which were separated by the province of Lachin. Nagorno Karabakh is a region to which both Azerbaijan and Armenia claim historical ties. The level of violence in Nagorno Karabakh and surrounding regions increased steadily and eventually culminated in military conflict.

The applicants are all Azerbaijani Kurds who previously lived in Lachin. The Armenian army attacked Lachin many times. In mid-May, Lachin was subjected to aerial bombardment during which many houses were destroyed. On 17 May 1992 the applicants realised that Lachin was being attacked from the directions of both Nagorno Karabakh and Armenia, and that the Armenian troops were advancing rapidly. On the same date, the applicants and their families fled to Baku and have been unable to return to their homes and properties due to the conflict. On 18 May 1992, the town of Lachin was captured by Armenian forces. It appears that the town was looted and burned in the days after the takeover.

The applicants allege that they were subjected to discrimination in their treatment by the Government by virtue of their ethnic and religious affiliation, since if they had been ethnic Armenian and Christian, they would not have been forcibly displaced from their homes by the Armenia-backed Karabakh forces.

### Complaints

The applicants complained that their right to enjoy or use their property was violated under Article 1 of Protocol No.1 to the Convention.

The applicants complained under Article 8 of the Convention that their right to respect for private and family life and home was violated.

The applicants further complained under Article 13 of the Convention that they were denied an effective remedy.

The applicants also argued under Article 14, in conjunction with Article 1 of Protocol 1, Article 8 and Article 13 of the Convention that the authorities' refusal to allow them to enjoy their property was discriminatory.

Communicated under Articles 8, 13 and 14 and Articles 1 of Protocol No. 1 of the Convention.

## **B. ECHR Substantive Cases**

### **Right to life**

#### *Halit Dinç and Others v. Turkey*

(32597/96)

**European Court of Human Rights:** Judgment of 19 September 2006

*Right to life – Lack of an effective investigation – Right to an effective remedy – Articles 2, 13 and 6*

#### Facts

The applicants, Mr Halit Dinç, Nezihe Dinç, Sacide Dinç and Turgay Dinç are Turkish nationals who were born in 1940, 1948, 1971 and 1974 respectively and live in Edirne, Turkey. They are the parents and brothers of Rıdvan Dinç, who died in 1994.

On the evening of 15 May 1994 Rıdvan Dinç, Staff Sergeant of the Kırıkhan fifth border company, and Sergeant A.A. kept watch on the border between Turkey and Syria with a view to arresting a band of smugglers.

As he suspected Rıdvan Dinç of conniving with the smugglers, Sergeant A.A. had asked some other soldiers to accompany him so that he would not be alone in the event of an attack by the smugglers and could catch his superior red-handed.

A.A. therefore took up position in a different place from the one indicated by

Rıdvan Dinç. When the smugglers started coming over the border, Sergeant A.A. and the three other soldiers opened fire. During the shoot-out, Rıdvan Dinç and a smuggler were killed.

On 16 May 1994, a criminal investigation was opened into the circumstances of Rıdvan Dinç's death. In the course of that investigation evidence was heard from the soldiers implicated in the shooting and an autopsy was performed on the body of the deceased. 60 cartridges were found at the scene.

Sergeant A.A. was charged with causing the death of his superior. After being convicted of fatally assaulting his superior, he was initially sentenced to five years' imprisonment and subsequently acquitted by Adana Military Court on 25 December 2001. The criminal proceedings are currently pending before the Turkish military courts.

The applicants sued the Ministry of Defence for damages. On 8 May 1996 the Supreme Military Administrative Court dismissed their claim on the ground that at the material time, Rıdvan Dinç, who had collaborated with the smugglers, had been committing an offence and, accordingly, had not been acting as a State official. Consequently, the authorities could not be held responsible for his death.

### Complaints

The applicants complained under Article 2 of the Convention that their relative had been killed by another soldier, either intentionally or through disproportionate use of lethal force.

The applicants further complained under Article 2 of the Convention that the authorities failed to conduct an effective investigation into the death of the applicants' relative.

The applicant complained under Articles 6 and 13 of the Convention that the proceedings for damages which they had brought in the Supreme Military Administrative Court had been unfairly conducted.

### Held

The Court held that there had been a violation of Article 2 on account of the death of the applicants' relative.

The Court decided to examine the complaint about the lack of an effective

investigation only under Article 13 taken in conjunction with Article 2. The Court held that there had been a violation of Article 13.

As the applicants had not submitted their just satisfaction claims within the time allowed, the Court considered that it was not necessary to award them a sum under Article 41 of the Convention.

#### Commentary

The Court noted that the regiment commander had given the soldiers orders to open fire without warning while on border watch duty during the night. Those orders, which had been deemed reasonable by a bench of the Court of Cassation, afforded no guarantee that death would not be inflicted arbitrarily. They formed a legal framework that fell far short of the level of protection provided by law, as set out within the right to life in the Convention.

The Court also noted that the soldiers had used their firearms without any regard for the right to life and that there was no evidence to suggest that the smugglers in question had been armed.

In these circumstances the Court held that, with regard to the positive obligation to put in place an adequate legal framework, the Turkish military authorities had not done all that could reasonably be expected of them to protect people from the use of potentially lethal force and to avoid the risk to life engendered by military operations in the border zone. Furthermore, manifestly excessive force had been used in the present case.

Concerning Article 13 taken in conjunction with Article 2, the Court reiterated that the judicial investigation, 12 years after it had been started, had not yet provided an adequate framework by which to identify the perpetrators. Moreover, basing itself on the first conclusions of the military criminal courts, the Supreme Military Administrative Court had dismissed the applicants' request for compensation for the authorities' responsibility regarding Rıdvan Dinç's death.

In those circumstances an effective investigation could not be said to have been carried out speedily in accordance with Article 13, whose requirements went further than the obligation to investigate imposed by Article 2.

***Bazorkina v Russia***

(69481/01)

**European Court of Human Rights:** Judgment of 27 July 2006

*Right to life – Lack of an effective investigation - Prohibition of torture – Right to liberty and security -- Right to a fair trial - Respect of private and family life – Right to an effective remedy – Articles 2, 3, 5, 6, 8, 13, 34 and 38*

Facts

The applicant, Fatima Sergejevna Bazorkina is a Russian national, who was born in 1938 and lives in the town of Karabulak, Ingushetia (Russia). She complains on her own behalf and on behalf of her son, Khadzhi-Murat Yandiyev, born on 27 August 1975.

In August 1999 the applicant's son went to Grozny, Chechnya. The applicant has not heard from him since.

On 2 February 2000, she saw her son being interrogated by a Russian officer in a television news programme about the capturing of the village of Alkhan-Kala (also called Yermolovka). At the end of the questioning the officer in charge gave instructions for the soldiers to 'finish off' and 'shoot' the applicant's son. The CNN journalists who filmed the interrogation later identified the interrogating officer as Colonel-General Alexander Baranov, the commander of the troops which captured Alkhan-Kala.

Immediately after 2 February 2000, the applicant began a search for her son, visiting detention centres, prisons and applying to various authorities. In August 2000 she was informed that her son was not being held in any prison in Russia.

In November 2000, a military prosecutor issued a decision not to open a criminal investigation into Mr Yandiyev's disappearance. A month later the same prosecutor stated that there were no reasons to conclude that military servicemen were responsible for the actions shown in the videotape.

In July 2001, a criminal investigation was opened by the Chechnya Prosecutor's Office into the abduction of Mr Yandiyev by unidentified persons. It later transpired that he had been placed on a missing persons list.

In November 2003, the applicant made an application to the European Court of

Human Rights. Following the Court's decision on admissibility, the Government submitted a copy of the criminal investigation. The investigation established that the applicant's son had been detained on 2 February 2000 in Alkhan-Kala. Immediately after arrest he was handed over to servicemen of the Ministry of Justice for transportation to a pre-trial detention centre. Mr Yandiyev did not arrive at any pre-trial detention centre and his subsequent whereabouts could not be established.

On 6 February 2004 the applicant was informed that the investigation had been adjourned as the culprits had not been identified.

### Complaints

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

The applicant further complained under Article 2 of the Convention that the authorities failed to conduct an effective investigation into the circumstances in which Mr Yandiyev disappeared.

The applicant complained under Article 3 of the Convention in respect of the failure to protect Mr Yandiyev from ill-treatment. The applicant also claimed under Article 3 of the Convention in respect of the suffering she herself had undergone as a result of her son's disappearance.

The applicant argued that the unacknowledged detention of her son had not been in compliance with the requirements of Article 5 of the Convention as a whole.

The applicant stated that she was deprived of access to a court, contrary to the provisions of Article 6 of the Convention.

The applicant argued that the distress and anguish caused by her son's disappearance had amounted to a violation of her right to family life under Article 8 of the Convention.

The applicant complained under Article 13 of the Convention that she had had no effective remedies in respect of the violations alleged under Article 2, 3 and 5 of the Convention.

The applicant invited the Court to conclude that the Government had failed in their obligations under Article 38 by their refusal to submit documents from

the investigation file upon the Court's requests. In the applicant's view, by their treatment of the Court's request for documents, the Government had additionally failed to comply with their obligation under Article 34.

#### Held

The Court held unanimously that there had been a violation of Article 2 in respect of the disappearance of the applicant's son.

The Court held unanimously that there had been a violation of Article 2 on account of the inadequacy of the investigation conducted into the circumstances in which Mr Yandiyev disappeared.

The Court held that there had been no violation of Article 3 in respect of the failure to protect the applicant's son from ill-treatment. However, it did find that there had been a breach of Article 3 in relation with the applicant's own suffering.

The Court found that Mr Yandiyev was held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 and that there had been a violation of the right to liberty and security of person guaranteed by that provision.

The Court decided that there has been a violation of Article 13 of the Convention in connection with Articles 2 and 3 of the Convention. However, in connection with Article 5 of the Convention, the Court considered that no separate issues arose in respect of Article 13.

The Court found that no separate issues arose under Articles 6 and 8, and that there had been no failure on behalf of the Russian Government to comply with Articles 34 and 38 (1) (a) of the Convention.

The Court considered that the finding of a potential breach of the Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage suffered by the applicant and awarded the applicant EUR 35,000 and EUR 12,241 for costs and expenses.

#### Commentary

In relation to Article 2 substantive, the Court recalled that it adopts the standard of proof 'beyond reasonable doubt'. Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar presumptions

of fact. In the instant case, the Court considered the circumstances surrounding the applicant's son's whereabouts and concluded that since no information had come to light concerning his whereabouts for more than six years, it was satisfied that he must be presumed dead following unacknowledged detention. Consequently, the responsibility of the respondent State was engaged. Noting that the authorities did not rely on any ground of justification in respect of use of lethal force by their agents, the Court concluded that liability was attributable to the respondent Government.

The Court reiterated that the obligation to protect the right to life under Article 2 requires an effective official investigation when individuals have been killed. The Court recalled that the investigations required under Article 2 must be able to lead to the identification and punishment of those responsible. In the instant case, the Court held that although an investigation was carried out between July 2001 and February 2006, it was adjourned and re-opened six times. The applicant, notwithstanding her procedural status as a victim, was not promptly informed of these steps and thus had no possibility of appealing to a higher prosecutor. The Court concluded that there had been a violation of Article 2.

In relation to the violation of Article 3, the Court considered that although Mr Yandiyev could be presumed dead and that the responsibility for his death lies with the State authorities, the exact way in which he died and whether he was subjected to ill-treatment while in detention were not entirely clear. The Court concluded that since the information before it did not enable it to find beyond all reasonable doubt that the applicant's son was subjected to treatment contrary to Article 3, there was insufficient evidence of a violation of Article 3 on this account. With regards to the suffering of the applicant, the Court reiterated that the question whether a family member of a 'disappeared person' is a victim of treatment contrary to Article 3 depends on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. In the instant case, the Court found that the applicant had suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and of her inability to find out what happened to him. Moreover, the manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.

***Bilgin v. Turkey***

(40073/98)

**European Court of Human Rights:** Judgment of 27 July 2006

*Right to life – Lack of an effective investigation – Articles 2 and 13*

Facts

The applicant, İhsan Bilgin, is a Turkish national who was born in 1965 and lives in Batman (Turkey). On 27 August 1994, his father, Mehmet Mihdi Bilgin, then aged 52, was killed by village guards.

Mihdi Bilgin was shot down by village guards in the area between the villages of Beşiri and Beşpınar. In all, 17 spent cartridges were found on the spot.

An investigation was immediately opened by the Beşiri Public Prosecutor. On the day after the incident, the doctor who examined the body noted that Mr Bilgin had been hit by two bullets which had damaged his liver, punctured his intestines and pancreas and left bullet wounds in his left arm and both ankles.

In April 1995, three of the village guards were questioned as witnesses. They explained that they had thought they were dealing with a terrorist, especially as on the day before the incident they had been informed of the threat of an attack by a group of PKK terrorists. Accordingly, after calling on the suspect to stop, they had opened fire on him, shooting to kill. They had later discovered that what they thought was a rifle was in fact only a stick.

In June 1995, ten village guards were charged with intentional homicide and committed for trial in the Assize Court. It transpired during the proceedings that among other irregularities some guards had picked up cartridge cases from the scene of the shooting and mixed them with other spent cartridges. As a result, six gendarmes and the commander of the village guards were prosecuted for submitting a false incident report, concealing evidence, abusing their office and obstructing the criminal investigation.

In September 1997, the Assize Court stayed the proceedings against the village guards on the ground that they had committed an offence in the performance of their duties and should therefore be tried under the law governing the prosecution of civil servants. In August 1998, the Beşiri administrative council decided that the guards had no case to answer. In addition, in October 1998,

the six gendarmes and the commander of the village guards were acquitted of obstructing the course of justice, for lack of evidence.

### Complaints

The applicant complained under Article 2 of the Convention that his father had been killed by village guards, who had resorted unnecessarily to the use of force.

The applicant further complained under Article 2 of the Convention that the authorities failed to conduct an effective investigation into the death of his father.

The applicant complained under Article 13 of the Convention that the investigation subsequently conducted had not been effective.

### Held

The Court held that there had been a violation of Article 2 on account of the death of the applicant's father.

The Court held that there had been a violation of Article 2 on account of the ineffectiveness of the investigation into the applicant's father's death.

The Court considered that the applicant had been deprived of an effective remedy, in that he had not been able to have the identity of those responsible for his father's death established, and could not therefore claim appropriate compensation. It accordingly held that there had been a violation of Article 13.

The Court awarded, for pecuniary and non-pecuniary damage arising from the violations found under Article 2 of the Convention, EUR 9,000 to the deceased's wife, EUR 6,000 to his daughter and EUR 4,000 to each of his other six adult children, including the applicant. It further awarded EUR 5,000 to the applicant, for his own non-pecuniary damage arising from the violation of Article 13 of the Convention, and EUR 3,000 for costs and expenses.

### Commentary

The Court noted that apart from the two bullets which struck the victim and one allegedly fired into the air, 14 bullets had been fired in a panic reflex. While the Court accepted that this had been a very human reaction, there had been none of the precaution in the use of firearms that could be legitimately be expected from those responsible for law enforcement in a democratic society, even when

they were engaged in the immobilisation of dangerous terrorists. The Court concluded that that the guards' conduct remained unjustifiable, given that there had been no shots in their direction or any other comparable threat from the suspect.

The Court considered that it was not required to dwell on the various shortcomings and unjustified delays in the investigation of the case, since for an investigation into the alleged unlawful killing by state agents to be effective, it was above all necessary for the persons in charge of the investigation to be independent of those implicated. In the present case, the Beşiri district commissioner's office investigator, who was a gendarmerie officer, was subordinate to the same local hierarchy as the guards whose conduct he was required to investigate. In addition, the Court noted that the Beşiri administrative council, when ruling on the report submitted by the investigating officer, endorsed the version of events it contained without expressing the slightest doubt about his findings or his conclusion.

### ***Kamer Demir and Others v. Turkey***

(41335/98)

**European Court of Human Rights:** Judgment of 19 October 2006

*Right to life – lack of investigation into death – lack of an effective remedy - Articles 2 and 13*

#### Facts

The nine applicants, Kamer Demir and his daughters Dilif Demir, Ani Demir, Elif Demir, Sultan Demir, Besime Demir, Saniye Demir, Gülfen Demir and Perihan Demir, are Turkish nationals who were born in 1934, 1953, 1959, 1962, 1963, 1965, 1967, 1971 and 1975 respectively and live in Tunceli, Turkey. Their wife and mother, Azimet Demir, died on 30 July 1997.

The applicants lived in the village of Karşılar in Tunceli province, which was then under the state of emergency decreed in south-east Turkey because of serious clashes between security forces and members of the PKK.

On 30 July 1997, at around 11 pm, troops from Geyiksuyu gendarmerie command fired mortar shells in the direction of Karşılar village. Around twenty houses, including those of the applicants, were damaged by the shells. Mrs Azimet Demir was fatally wounded close to her house while attempting to take shelter

in a neighbour's cellar.

The following day an investigation was launched by the public prosecutor, in the course of which, official reports were drawn up on the damage caused, photographs were taken, witness statements were gathered and an autopsy was performed on Azimet Demir's body. The autopsy revealed multiple injuries and established the cause of death as an abdominal wound caused by 'a high-velocity firearm'.

The investigation was subsequently referred to Tunceli Administrative Council in accordance with the Prosecution of Civil Servants Act. On 15 January 1998, the Administrative Council issued an order discontinuing the proceedings against 27 gendarmes who had been on duty at the Geyiksuyu base. According to the Administrative Council, the gendarmes in question had shelled the Iştrın region, where a former military base was located, in an attempt to ward off a terrorist attack from that direction which posed a threat to the village of Geyiksuyu; there was insufficient evidence to conclude that they had intentionally targeted the village of Karşılar.

The Supreme Administrative Court upheld the order discontinuing the proceedings, which had been automatically submitted to it for consideration.

### Complaints

Relying on Article 2 of the Convention, the applicants complained that the gendarmes had intentionally fired shells in the direction of their village and had caused the death of their relative. They further complained that, although those presumed responsible had been identified, they had not had to stand trial.

The applicants further claimed a violation of Article 13 in relation to the Respondent Government's failure to adequately investigate the incident.

### Held

The Court held unanimously that there had been a violation of Article 2 of the Convention rights on account of the death of the applicants' relative and on account of the lack of an investigation into the death, together with a violation of Article 13.

The Court considered that the finding of a potential breach of the Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage suffered by the applicants and awarded the applicant EUR 50,000 jointly and

EUR 5,000 for costs and expenses, less the EUR 739 they had already received from the Council of Europe in legal aid.

Commentary

The Court acknowledged that the situation in south-east Turkey at the relevant time had required Turkey to take exceptional measures in order to regain control of the region and put an end to acts of violence.

The Court's task was to ascertain whether the use of force had been justified in the applicant's case. It was clear, in the Court's view, that the gendarmes, in contemplation of the deployment of troops equipped with heavy weapons in a populated area, had a duty to weigh up the risks inherent in such a course of action. However, there was no indication that such considerations had played a significant part in the preparation of the operation.

As it was unable to find that the necessary precautions had been taken, in preparing and carrying out the operation, to protect the lives of civilians, the Court held that there had been a violation of Article 2 with regard to Turkey's obligation to protect the life of the applicants' relative.

With regard to the investigation into the events leading to the death of Mrs Azimet Demir, the Court noted that the investigation had been referred to the Tunceli Administrative Council in accordance with the Prosecution of Civil Servants Act. The Court observed that it had already ruled in several cases that investigations carried out by the administrative councils gave rise to serious concerns, given that the councils were not independent from the executive. Furthermore, the administrative council's examination had resulted in an order discontinuing the proceedings which had been upheld by the Supreme Administrative Court, thus bringing the investigation to a close.

The Court therefore concluded that the investigation had not been carried out by an independent body and held that there had been a violation of Article 2 (procedural).

The Court also held that there had been a violation of Article 13, as the lack of an effective investigation had deprived the applicants of access to other remedies theoretically available to them, such as filing a claim for damages.

***Diril v. Turkey***

(68188/01)

**European Court of Human Rights:** Judgment of 19 October 2006

*Disappearance from custody – right to life – lack of investigation – right to liberty and security – lack of an effective remedy – Articles 2; 5 and 13*

Facts

The applicants, Apro Diril, his wife, Meryem Diril, and their children, Süleyman, Can, Yakup and Dilber, are Turkish nationals who were born in 1960, 1956, 1982, 1983, 1985 and 1987 respectively and live in Istanbul.

Mr Diril maintains that his son Zeki and his son's cousin were arrested by gendarmes in May 1994. Since then, the applicants have had no news of Zeki's whereabouts.

Zeki Diril and his cousin İlyas Diril were allegedly arrested on 13 May 1994 at about 4 pm during an identity check. They were transferred to Uludere gendarmerie station, where Zeki was taken into police custody and İlyas was released on account of his young age. Two reports were drawn up on the subject and signed by the Uludere gendarmerie commander.

Following a petition by the missing persons' relatives, the authorities opened an inquiry. They obtained statements from relatives of the applicants and from other people named by them. The public prosecutor asked the gendarmerie units concerned to produce the custody records concerning the missing persons and, having noted certain contradictions, sought additional information on the matter. In view of the reluctance and failure of the gendarmes to produce the necessary documents and explanations, the public prosecutor was unable to shed light on the circumstances in which the applicants' relative had been held in police custody.

On 27 July 2000 the Ministry of Justice stated that Zeki and İlyas had been arrested in connection with an identity check; İlyas had been released the same day on account of his young age and Zeki had been released after checks had been carried out, although there was no mention of this in the records. Since the failure to draw up a report on the subject was not attributable to the gendarmerie commander in question, there was no reason to prosecute him.

The applicants have had no news of Zeki since his arrest more than 12 years ago.

### Complaints

The applicants complained under Article 2 (1) of the Convention that their relative was a victim of an extrajudicial execution.

They further complained that the authorities had failed to conduct a serious inquiry into their relative's disappearance in breach of Article 2 (2) of the Convention.

The applicants argued that the unexplained disappearance of their relative amounted to a serious breach of the right to liberty and security of person in breach of Article 5 of the Convention.

The applicants complained that their right to an effective remedy under Article 13 of the Convention was violated since the authorities had failed to adequately investigate the incident.

The applicants submitted that their relative was subjected to discriminatory treatment because of his origin and ethnicity in breach of Article 14, in conjunction with Articles 2 and 5, of the Convention.

### Held

The Court held unanimously that since no explanation had been provided as to what had occurred after the applicants' relative's detention, it considered that responsibility for his death was attributable to Turkey and held that there had been a violation of Article 2. Further, the Court concluded that the Turkish authorities had not conducted an adequate and effective investigation that would have shed light on the circumstances of the applicants' relative's disappearance. It therefore held that there had been a further violation of Article 2 on that account.

The Court considered that an unexplained disappearance of this kind amounted to a particularly serious breach of the right to liberty and security of person. It therefore held that there had been a violation of Article 5.

The Court considered that the authorities had been required to conduct an effective investigation into the disappearance of the applicants' relatives. It found that Turkey had fallen short of its obligation to conduct such an investigation

and held that there had been a violation of Article 13 on that account.

The Court considered that the applicants' allegation under Article 14 is unfounded and that the evidence in the file did not disclose any breach of that provision. It therefore held that there had been no violation of Article 14.

The Court awarded EUR 30,000 jointly to Apro and Meryem Diril and EUR 5,000 each to Süleyman, Can, Yakup and Dilber Diril for non-pecuniary damage, and EUR 5,000 to the six applicants jointly for costs and expenses.

#### Commentary

The court noted that it appeared from the evidence in the file that Zeki had been arrested by gendarmes from Uzungeçit and transferred on 14 May 1994 to Uludere gendarmerie station. Although the Government had maintained that Zeki had been released after being detained in police custody, they had not submitted any evidence to substantiate their account of events. The only evidence to that effect was the statement given by the Uludere gendarmerie commander some six years after the events. More than 12 years had passed without any information emerging as to Zeki's whereabouts and fate after his transfer to Uludere gendarmerie station. The Court therefore considered that there was sufficient evidence to conclude beyond reasonable doubt that the applicants' relative had not been released after his time in police custody.

In the general context of the situation in south-east Turkey at the material time, the Court found that it could not be ruled out that the detention of such a person might be life-threatening. The Court referred to its previous findings that defects undermining the effectiveness of criminal law protection in the south-east region during the period in question had fostered a lack of accountability of members of the security forces for their actions.

In those circumstances, the Court considered that Zeki had to be presumed to have died following his detention. Since no explanation had been provided as to what had occurred after his detention, it considered that responsibility for his death was attributable to Turkey and held that there had been a violation of Article 2.

The Court observed a number of deficiencies in the conduct of the investigation into Zeki's disappearance. First, the Public Prosecutor had not sought to obtain statements from the gendarmes in Uzungeçit who had arrested the applicants' relative or from the gendarmes in Uludere, where he had been transferred. An

examination of the gendarmes in question would have confirmed or refuted the Government's allegation that Zeki had been released on 14 May 1994. Furthermore, no criminal proceedings had been instituted to identify those responsible for Zeki's disappearance, despite the public prosecutor's request to that effect. The Criminal Affairs Department of the Ministry of Justice had not granted permission for criminal proceedings to be brought against the Uludere gendarmerie commander, although the fact that Zeki had been transferred to the Uludere gendarmerie station had been established in a report signed by the commander and Zeki had been reported missing ever since.

In those circumstances, the Court concluded that the Turkish authorities had not conducted an adequate and effective investigation that would have shed light on the circumstances of the applicants' relative's disappearance. It therefore held that there had been a further violation of Article 2.

The fact that Zeki had been detained was not disputed, although the parties differed as to the date of his arrest. The Court noted that there was no official trace of his release and that the Government had not provided any credible or substantiated explanation as to what had happened to him after his transfer to Uludere gendarmerie station. The Court considered that an unexplained disappearance of this kind amounted to a particularly serious breach of the right to liberty and security of person. It therefore held that there had been a violation of Article 5.

### ***Imakayeva v. Russia***

(7615/02)

**European Court of Human Rights:** Judgment of 9 November 2006

*Disappearances – right to life – failure to conduct effective investigation – prohibition on inhuman and degrading treatment – right to liberty and security – right to respect for family life – effective remedy – Articles 2; 3; 5; 8; 13; 38(1)*

#### Facts

The applicant, Marzet Imakayeva, is a Russian national who was born in 1951 and lived in Novye Atagi, Chechnya at the relevant time. In early 2004 she left for the United States of America, where she sought asylum.

The case concerned the disappearance of the applicant's husband, Said-Magomed

Imakayev, born in 1955, and one of their three children, Said-Khuseyn, born in 1977. The applicant is a school teacher by profession. Said-Khuseyn graduated from medical school in 1999 as a dentist and continued his studies in the Grozny Oil Institute.

The applicant alleged that her son disappeared after being detained by servicemen on 17 December 2000. She referred to eye-witnesses' statements describing the abductors as 'military personnel', asserting that they had used military vehicles and that the abduction had occurred at the entry to the village of Novye Atagi, in the immediate vicinity of a military roadblock. She had received no news of her son since.

On 18 December 2000, the applicant and her husband began applying to prosecutors at different levels for news of their son. They also visited detention centres and prisons in Chechnya and in the Northern Caucasus. On 5 January 2001 the applicant was informed that on 4 January 2001 criminal proceedings had been started in respect of the suspected kidnapping of her son.

In the early hours of 2 June 2002, the applicant alleged that about twenty men in military camouflage uniforms came and searched her house without a warrant, confiscated a number of items and forced her husband to leave with them. She relied on her own statements and the statements of thirty witnesses collected by her and stressed that, on the same night, four other men from Novye Atagi had been detained by the same group. The applicant and other witnesses submitted details of some of the servicemen who had conducted the operation and noted the registration numbers of the military vehicles (APCs and a UAZ) involved. They later saw one of those vehicles at the district military commander's office. The applicant has had no news of her husband since.

On 16 July 2002 the applicant was informed that, on 28 June 2002, criminal proceedings had been started concerning her husband and that the investigation established that he had not been detained by the law-enforcement agencies. She was also informed that day that the criminal investigation into her son's disappearance had failed to establish his whereabouts. On 24 July 2002, she was granted victim status regarding her son's abduction.

On 9 July 2004 the criminal investigation into the abduction of the applicant's husband was closed on the ground that no criminal offence had been committed. The applicant was informed at that stage that in fact her husband had been detained by military servicemen in accordance with the Federal Laws

on the Suppression of Terrorism and on the Federal Security Service and had been subsequently released. On 9 July 2004 her victim status was withdrawn. According to the Government, on 2 June 2002, military servicemen, acting in accordance with section 13 of the Suppression of Terrorism Act, had detained Said-Magomed Imakayev on suspicion of involvement in one of the bandit groups active in the district. His involvement was not established, however, and he was transferred to the head of the Shali administration (who later died) to be returned home. No abduction had been committed and the actions of the servicemen who had detained Mr Imakayev did not constitute an offence. Mr Imakayev's continued absence from his place of residence was not connected to his detention by military servicemen and so the applicant had suffered no pecuniary or non-pecuniary damage.

In October 2005, the Government submitted that the investigation into the kidnapping of the applicant's son established that, at about 3 pm on 17 December 2000, Said-Khuseyn Imakayev had been stopped by a group of armed persons near the village of Novye Atagi. His subsequent whereabouts could not be established. The Government also stated that a new criminal investigation was opened on 16 November 2004 into the abduction of the applicant's husband. It was adjourned on 16 February 2005.

### Complaints

The applicant alleged that first her son and then her husband 'disappeared' following their apprehension by Russian servicemen in Chechnya. She also submitted that the authorities failed to carry out an effective and adequate investigation into the circumstances of their disappearance. She therefore claimed violations of Article 2.

The applicant complained that the suffering inflicted upon her in relation to her close family members' disappearance constituted treatment proscribed by Article 3 of the Convention.

The applicant further alleged that her son and then her husband were victims of unacknowledged detention, in violation of the domestic legislation and the requirements of Article 5 as a whole.

The applicant stated that she was deprived of access to a court, contrary to the provisions of Article 6 of the Convention.

The applicant argued that the search carried out at her house on 2 June 2002

during her husband's apprehension was unlawful both under domestic legislation and under Article 8 of the Convention.

The applicant also complained that she had no effective remedies in respect of the violations alleged under Articles 2, 3, 5 and 8.

Finally, the applicant argued that the Government's failure to submit the documents requested by the Court, namely the criminal investigation files, disclosed a failure to comply with their obligations under Articles 34 and 38(1)(a) of the Convention. She also alleged that the Respondent Government were in breach of their obligation not to hinder the right of individual petition.

#### Held

The Court held unanimously that there had been a violation of Article 2 of the Convention with regards to the disappearance of the applicant's son and her husband. It also found a violation of Article 2 in respect of the failure to conduct an effective investigation into the disappearance of the applicant's son and husband

The Court further found a violation of Article 3 concerning the applicant's treatment by the authorities and a violation of Article 5 concerning the applicant's husband and son.

The Court also found a violation of Article 8 in respect of the applicant and a violation of Article 13.

Finally, the Court found unanimously that the Russian Government failed to comply with Article 38 (1)(a) (obligation to furnish necessary facilities for the examination of the case).

The applicant was awarded EUR 20,000 in respect of pecuniary damage and EUR 70,000 in respect of non-pecuniary damage. She was also awarded EUR 9,114 in respect of costs and expenses.

#### Commentary

The Court considered that the applicant had presented a coherent and convincing picture of her son's detention on 17 December 2000. Despite the Respondent Government's statement that the abduction could have been committed by members of illegal armed groups for the purpose of discrediting the federal forces, no evidence had been submitted to the Court to support such an allegation.

The Court found that the absence of any custody records concerning Said-Khuseyn Imakayev could not as such be regarded as conclusive evidence that he was not detained. In the similar situation concerning his father, Said-Magomed Imakayev, detention had initially also been denied by the authorities, but was acknowledged two years later without the production of any custody records.

Furthermore, the Court stated that it was particularly regrettable that there should have been no thorough investigation into the relevant facts by the domestic prosecutors or courts. The few documents submitted by the Respondent Government from the investigation file did not suggest any progress in more than five years and, if anything, showed the incomplete and inadequate nature of those proceedings.

Accordingly, the Court found that the evidence available enabled it to establish to the requisite standard of proof that Said-Khuseyn Imakayev was last seen in the hands of unknown military or security personnel during the afternoon of 17 December 2000. His subsequent fate and whereabouts could not be established with any degree of certainty.

Concerning the applicant's husband, the Respondent Government first denied that Said-Magomed Imakayev had been apprehended by law-enforcement or security bodies and that he had been abducted by members of a terrorist organisation with a view to discrediting the federal forces. However, in July 2004 the investigation established that the applicant's husband had indeed been detained on suspicion of involvement in a terrorist organisation. It also established that he had been released and transferred to the head of the district administration, who later died. The applicant's husband had then disappeared. The Respondent Government refused to produce any documents or to disclose any details of the investigation, referring to the Suppression of Terrorism Act and to the facts that the case file contained state secrets and that its disclosure would be in violation of the Code Criminal Procedure.

The Court concluded that the Respondent Government's explanations were wholly insufficient to justify the withholding of the key information specifically sought by the Court.

The Court noted that the mere acknowledgement of Said-Magomed Imakayev's detention took more than two years and that no significant information was given to any interested party at the conclusion of the investigation by the military prosecutor. As the Government admitted, despite a large number of persons

being questioned, none of them had any relevant information about the missing man. Those proceedings had to be suspended again three months later without any result.

The Court recalled that it had found it established that the applicant's son was last seen on 17 December 2000 in the hands of unidentified military or security personnel and that there had been no news of him since that date, more than five and a half years ago. The Court also noted that, in the context of the conflict in Chechnya, when a person was detained by unidentified servicemen without any subsequent acknowledgement of detention that could be regarded as life-threatening. Furthermore, the Government failed to provide any explanation of Said-Khuseyn Imakayev's disappearance and the official investigation into his kidnapping, dragging on for more than five years, had produced no known results. The Court therefore considered that Said-Khuseyn Imakayev had to be presumed dead following his unacknowledged detention. Consequently, liability for Said-Khuseyn Imakayev's presumed death was attributable to the Respondent Government.

In view of the above considerations, the Court found that there had been a violation of Article 2 (substantive) in relation to the disappearance of the applicant's son and husband.

### ***Luluyev and Others v. Russia***

(69480/01)

**European Court of Human Rights:** Judgment of 9 November 2006

*Disappearance – right to life – failure to conduct an effective investigation – prohibition on inhuman and degrading treatment – right to liberty and security – effective remedy – Articles 2, 3, 5, 13*

All ten applicants are relatives of Nura Said-Alviyevna Luluyeva. They are her husband, Saidalvi Saidalimovich Luliyev (born in 1954), her three sons – Turko Saidalviyevich Luluyev (born in 1979), A.L. (born in 1983) and S.L. (born in 1995) – her daughter Z.L. (born in 1989), her parents and her three brothers. The applicants all live in Gudermes, Chechnya.

Nura Luluyeva lived with her husband and their children in Gudermes. She worked as a nurse and a kindergarten teacher; at the time of her abduction she also traded fruit at the local market. Her husband worked for law-enforcement

bodies and subsequently as a judge; in 2002 he became the chairman of a district court in Chechnya. He has since ceased to work in the judiciary.

On 3 June 2000 Nura Luluyeva went with two cousins to the market place at Mozdokskaya Street in the northern part of Grozny. Between 7 and 9 am that morning an armoured personnel carrier (APC) appeared at the market. It was accompanied by two other vehicles, an Ural truck and an UAZ all-terrain vehicle. A group of servicemen, wearing camouflage uniforms and masks and armed with machine guns, disembarked from the vehicles. The servicemen detained several people, mostly women, put sacks over their heads and loaded them into the APC. Nura Luluyeva and her two cousins were among those detained.

The police from the Leninskiy temporary District Department of the Interior (Leninskiy VOVD) were called, which was situated nearby. When the police appeared and tried to interfere, the military started shooting in the air with a machine gun, and then drove away. The deputy chief of the district administration was also present at the scene and attempted to question the servicemen about their mission at the market, but was told only that they were 'lawfully carrying out a special operation'. Having received that explanation, the officials left the site.

The applicants, particularly Nura Luluyeva's husband, searched for her and her cousins until their bodies were found in February 2001, frequently contacting the authorities and prosecutors at various levels. They also personally visited detention centres and prisons in Chechnya and in the northern Caucasus.

On 20 June Nura Luluyeva's husband was called in for an interview about his wife's disappearance at the Chechnyan Republican Prosecutor's Office and, on 23 June 2000, criminal proceedings were started concerning the kidnapping. On 4 December 2000 he was granted victim status in those proceedings.

On 5 February 2001 the Grozny Town Prosecutor's office informed him that the investigation into the kidnapping of Nura Luluyeva had been adjourned. Between June 2000 and the beginning of 2006 the investigation was adjourned and reopened at least eight times.

On 24 February 2001, news came through that a mass grave had been uncovered in 'Zdorovye', an abandoned holiday village on the outskirts of Grozny, less than one kilometre from Khankala, the headquarters of the Russian military forces in Chechnya. 47 bodies, dumped in the village, had been collected and transferred

to a temporary location in Grozny belonging to the Ministry for Emergency Situations.

On 4 March 2001, Nura Luluyeva's relatives identified the three bodies as those of Nura Luluyeva and her two cousins. As the bodies were in an advanced stage of decomposition, they could only be identified by their earrings and clothes. A relative who saw the three women on 3 June 2000 confirmed that the clothes and the earrings were the same as those worn by the deceased on that day. The relatives who took part in the identification also noted that the individuals had been blindfolded.

The discovery of the mass grave was reported in the media and became a subject of two special reports by the human rights NGOs Memorial (March 2001) and Human Rights Watch (May 2001). Both NGO reports stated that, of the identified bodies in the mass grave, 16 or 17 belonged to people previously detained by the Russian forces, and specifically mentioned the case of Nura Luluyeva. The latter report also stated that the remaining bodies – over 30 – had been buried on 10 March 2001 without any further announcements, thus preventing their further identification and examination.

On 12 April 2001 an official medical death certificate was issued indicating that Nura Luluyeva was murdered on 3 June 2000, in Grozny. On 28 April 2001 a forensic report established that Nura Luluyeva's death had been caused by a multiple skull fracture, inflicted by a blunt solid object applied with strong impact. It stated that the death had occurred between three and ten months before the discovery of the corpse.

The investigation continues. It has not yet identified the people or the military detachment responsible for the abduction and murder of Nura Luluyeva and others, and no one has been charged with the crimes.

### The Complaint

The applicants submitted that Article 2 of the Convention had been violated in respect of their mother and close relative, Nura Luluyeva. They further submitted that there had been a violation of the procedural aspect of Article 2 since no effective investigation had been carried out into the circumstances of her detention and murder.

The applicants alleged that Nura Luluyeva had been subjected to inhuman and degrading treatment and that the authorities had failed to investigate this allegation. They also complained that the suffering inflicted upon them in relation

to her disappearance and death constituted treatment prohibited by Article 3 of the Convention.

The applicants complained that the provisions of Article 5 as a whole had been violated in respect of Nura Luluyeva.

The applicants further stated that they were deprived of access to a court, contrary to the provisions of Article 6.

The applicants complained that the abduction and murder of their mother and close relative constituted an unjustified interference with their right to respect for their family life, in breach of Article 8 of the Convention.

The applicants complained that they had had no effective remedies in respect of the violations alleged under Articles 2, 3 and 5 of the Convention.

Finally, the applicants relied on Article 14 and complained about discrimination, alleging that the above violations occurred because their family is of Chechen origin and they are residents of Chechnya.

#### Held

The Court held unanimously that there had been a violation of Article 2 concerning the disappearance and death of the applicants' relative, Nura Said-Alviyevna Luluyeva, whose body was found in a mass grave in February 2001. They also found a violation of Article 2 concerning the failure to conduct an effective investigation into Nura Luluyeva's disappearance

Although the Court did not find a violation of Article 3 concerning Nura Luluyeva, it did conclude that there had been a violation of Article 3 concerning the treatment of the applicants. Further the Court found a violation of Article 5 in relation to the detention of Nura Luluyeva and a violation of Article 13 in relation to the failure to carry out an effective investigation.

The Court awarded EUR 4,850 in respect of pecuniary damage, to the first applicant on behalf of the third, the fourth and the fifth applicants; EUR 12,000 to each of the first, third, fourth and fifth applicants in respect of non-pecuniary damage; EUR 10,000 to the sixth applicant in respect of non-pecuniary damage; EUR 2,000 to each of the eighth, ninth and tenth applicants in respect of non-pecuniary damage, and EUR 10,748 in respect of costs and expenses.

### Commentary

The Court noted that, although the Respondent Government denied that State servicemen were involved in killing Nura Luluyeva, they did not dispute as such any of the specific facts underlying the applicants' version of her disappearance and death. In particular, it was undisputed that Nura Luluyeva was abducted from the market place at Mozdokskaya Street by armed men dressed in camouflage and wearing masks. The Respondent Government also accepted that a military vehicle – an APC – was present at the scene at the time of her apprehension and that she was driven away in that vehicle on the last occasion she was seen alive. It was also acknowledged by and unequivocally established in the domestic proceedings that Nura Luluyeva died as a result of murder, and that her body was found at the same place as the bodies of the other people with whom she was detained.

The Court noted that neither the Respondent Government nor the evidence made available to the Court suggested that any armed individuals other than the State servicemen conducting the above security operation were present at the scene of Nura Luluyeva's apprehension. In particular, there was nothing in the witnesses' statements to imply the involvement of illegal paramilitaries. In those circumstances, the Court could not but conclude that Nura Luluyeva was apprehended and detained by State servicemen in the course of conducting a special security operation.

The Court noted that the link between her kidnapping and death had been assumed in all the domestic proceedings. The discovery of her body together with the bodies of the other people with whom she was detained also strongly suggested that her death belonged to the same sequence of events as her arrest. The fact that the bodies were wearing the same clothes as those worn by the individuals in question on the day of their detention provided further support for that conclusion.

Having regard to the above, the Court considered that there existed a body of evidence that attained the standard of proof 'beyond reasonable doubt', which made it possible to hold the State authorities responsible for Nura Luluyeva's death. It followed that there had been a violation of Article 2.

While it was undisputed that Nura Luluyeva died as a result of the use of force, the description of the injuries found on her body by the forensic experts did not permit the Court to conclude beyond reasonable doubt that she had been tortured or otherwise ill-treated prior to her death. It therefore saw no basis for

finding a violation of Article 3.

The Court noted that Nura Luluyeva's death had been preceded by a 10-month period when she was deemed disappeared and during which the investigation into her kidnapping was being conducted. There was therefore a distinct period during which the applicants sustained uncertainty, anguish and distress characteristic to the specific phenomenon of disappearances. The applicants' distress during that period was attested by their numerous efforts to prompt the authorities to act, as well as by their own attempts to search for her and her cousins.

As an additional element contributing to the applicant's sufferings, the Court noted the authorities' unjustified delay in granting victim status to the applicants, lack of access to the case file and the sparse information they received about the investigation throughout the proceedings. It followed that the applicants' uncertainty about the fate of Nura Luluyeva was aggravated by their exclusion from monitoring the progress of the investigation.

The Court therefore found that the applicants suffered distress and anguish as a result of the disappearance of Nura Luluyeva and of their inability to find out what had happened to her or to receive up-to-date and exhaustive information on the investigation. The manner in which their complaints had been dealt with by the authorities had to be considered to constitute inhuman treatment contrary to Article 3.

## **Prohibition of torture**

*Dilek Yilmaz v. Turkey*  
(58030/00).

**European Court of Human Rights:** Judgment of 31 October 2006

*Ill-treatment in police custody – prohibition on inhuman and degrading treatment – failure of effective investigation - right to an effective remedy – Articles 3; 13*

### Facts

The applicant, Dilek Yilmaz, is a Turkish national who was born in 1974 and lives in Istanbul.

The applicant was arrested on 7 October 1995, on suspicion of belonging to an illegal organisation, and taken into police custody. On 12 October 1995, when she was released from police custody, the applicant was examined by a doctor who noted a 3 cm area of bruising on the inside of her left elbow.

In January 1996, the applicant complained to Istanbul State Security Court that she had been subjected to ill-treatment. Subsequently, in November 1998, she contended that while in police custody she had been hung up by her arms, subjected to electric shocks, hosed down with cold water and sexually assaulted.

On 13 January 2000, the public prosecutor discontinued criminal proceedings against the 12 police officers in whose custody the applicant had been detained for insufficient evidence. That decision was upheld by the President of Kırklareli Assize Court.

In the meantime, on 11 March 1997, the applicant was sentenced to three years and nine months' imprisonment for aiding and abetting an illegal organisation.

#### The Complaint

The applicant submitted that she had been subjected to ill-treatment while in police custody and had not had an effective remedy in that regard. She relied on Articles 3, 6 and 13 of the Convention.

#### Held

The Court held unanimously that there had been a violation of Article 3 of the Convention on account of the ill-treatment inflicted on the applicant while she was in police custody.

It also found a violation of Article 13 in relation to the failure to adequately investigate the events and bring charges against the responsible individuals.

The Court did not consider it necessary to consider the complaint under Article 6 of the Convention.

The Court awarded the applicant EUR 4,000 in respect of non-pecuniary damage and EUR 1,500 in for costs and expenses.

#### Commentary

The Court observed that where a person was injured in police custody while entirely in the charge of police officers, any injury occurring during that period

gave rise to strong factual presumptions.

The Court stated that a strict application, right from the beginning of a deprivation of liberty, of fundamental safeguards – such as the right to request an examination by a doctor of one’s choice in addition to any examination required by the police authorities, and access to a lawyer and family member, backed up by the prompt intervention of a judge – could lead to the detection and prevention of ill-treatment which might be inflicted on prisoners, for whom the authorities were responsible.

In the light of all the information submitted to it, and in the absence of any plausible explanation by the Turkish Government, the Court considered that Turkey bore responsibility for the applicant’s injury.

Accordingly, it held that while in police custody Ms Yılmaz had suffered inhuman and degrading treatment which had constituted a breach of Article 3.

The Court decided to examine the applicant’s complaint about the lack of an effective remedy from the standpoint of Article 13 only. Following the applicant’s complaint, an investigation had been opened in the course of which statements were taken from the applicant and the police officers concerned, but not from the doctor who had examined her or from the inspector whose name she had given. That investigation, which had not explained the origin of the applicant’s injury and had not enabled those responsible to be identified and charged, had ended with a discontinuation order.

The Court accordingly held that there had been a violation of Article 13.

### ***Serifis v. Greece***

(27695/03)

**European Court of Human Rights:** Judgment of 2 November 2006

*Detention - absence of appropriate medical assistance – inhuman and degrading treatment - lawfulness of detention to be decided speedily by a court – Articles 3 and 5(4)*

#### Facts

Pavlos Serifis is a Greek national who was born in 1956 and lives in Athens.

The applicant's left hand has been paralysed since a road-traffic accident in 1980. In addition, he has suffered since 1996 from multiple sclerosis, a progressive inflammatory disease which affects the brain and spinal cord, resulting in a variety of problems affecting neurological, motor, balance and sight functions, and requiring multi-disciplinary care, such as therapeutic and symptomatic treatment and physiotherapy.

On 24 July 2002 the applicant was arrested by the police and placed in pre-trial detention; he was suspected of belonging to the terrorist organisation '17 November' which, between its foundation in 1975 and its disbanding in early summer 2002, was responsible for several criminal acts. He was detained with other presumed members of the organisation in Korydallos Prison in specially-designed cells which had been built in 2002. The applicant had a cell to himself, which measured 12 m<sup>2</sup> and contained a separate living area, toilet and shower.

In December 2002, the applicant applied for conditional release, alleging, among other things, that his illness meant that he ought to be cared for in a neurological hospital; he also asked to be allowed to appear before the Indictments Chamber in order to defend himself. His request was dismissed by the Indictments Chamber, which, in justifying his continued detention, referred to his dangerousness, the seriousness of the offence with which he was charged and the possibility of his absconding; it also considered that the applicant's condition could be treated in the prison hospital.

In June 2003 the applicant repeated his request to appear before the Indictment Chamber which was to rule on the extension of his detention, and referred to a medical report stating that his illness had worsened and recommending treatment in a hospital setting. However, the applicant's pre-trial detention was extended.

On 17 December 2003, Athens Assize Court convicted the applicant of belonging to a criminal organisation and sentenced him to eight years' imprisonment. The applicant lodged an appeal against that judgment and the case is currently pending before Athens Court of Appeal.

Referring to several medical reports, in January 2004 the applicant applied for release, arguing that if he continued to serve his sentence, he was likely to sustain irreparable damage to his health. At the prosecutor's request, the applicant was examined by two doctors, who concluded that his health was very poor: they asked that supplementary tests be carried out and recommended treatment in

a neurological clinic. The applicant's request was dismissed, but the prison's governing board suggested that he be transferred to Georgios Gennimatas Hospital for additional tests and so that decisions concerning his care could be taken in a hospital which specialised in treating patients with his disease.

Between 14 July 2004 and 30 January 2005, the applicant was transferred on seven occasions to Georgios Gennimatas Hospital for tests or treatment. During his last visit, the doctors noted that his health had deteriorated. During the same period he received physiotherapy in the hospital prison.

In December 2004, the applicant filed a new request for conditional release. His request was granted and on 8 February 2005 he was released, following payment of EUR 6,000 as security. He was placed under court supervision.

#### The Complaint

The applicant alleged that, given his state of health, his continued detention amounted to inhuman treatment under Article 3.

He also complained, in connection with the refusal of his request to appear before the Indictment Chamber of Athens Court of Appeal, of a breach of the principle of equality of arms. He relied on Article 5 (4).

#### Held

The Court held unanimously that there had been a violation of Article 3 of the Convention on account of the absence of appropriate medical assistance for the applicant during part of the period he spent in detention.

The Court also found a violation of Article 5(4) of the Convention in relation to the refusal of his request to appear before the Indictment Chamber of Athens Court of Appeal

The Court awarded 10,000 EUR in respect of pecuniary damage and 5,000 EUR for costs and expenses.

#### Commentary

The Court noted that it was clear from the case file that, despite the seriousness of the disease from which the applicant suffered, the Greek authorities had procrastinated in providing him with a form of medical assistance during his detention which would correspond to his actual needs.

Although the applicant had informed the relevant authorities about the state of his health shortly after his arrest, he was obliged to wait a considerable period before receiving regular care. During the first two years of his detention, he was required to make do with occasional checks and whatever treatment could be administered in the prison hospital. Thus, the applicant was unable to have regular testing of the development of his disease in a specialised hospital environment, or to deal with the numerous problems caused by multiple sclerosis by having suitable medication prescribed for his individual case. It was not until the summer of 2004 that a treatment plan adapted to his illness was put in place and physiotherapy sessions were organised in the prison hospital. Indeed, the applicant's need for regular medical care was the ground given for his conditional release.

In those circumstances, the Court considered that the manner in which the Greek authorities had dealt with the applicant's health during the first two years of his imprisonment had subjected him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. The Court therefore concluded that there had been a violation of Article 3.

The Court pointed out that it had already found a violation of Article 5(4) on account of the Indictment Chamber's refusal to authorise an individual's personal appearance before it during examination of his or her request for release in another case, *Kampanis v Greece*. In the applicant's case, the Court considered that, in dismissing the applicant's request to appear before it, the Indictment Chamber had deprived him of an opportunity to contest, in an appropriate manner, the reasons put forward to justify his continued detention. The Court therefore concluded that there had been a violation of Article 5 (4).

### ***Okkalı v. Turkey*** (52067/99)

**European Court of Human Rights:** Judgement of 17 October 2006

*Prohibition of inhuman treatment – Article 3*

#### Facts

The applicant, Halil İbrahim Okkalı, is a Turkish national who was born in 1983 and lives in Izmir, Turkey. At the material time he was 12 years old and worked as an apprentice in a garage.

On 27 November 1995, the applicant's employer accused him of stealing some money that he had been asked to take to the bank. The applicant claimed that he had been robbed. He was arrested and beaten by the police.

On 28 November 1995, the applicant's father lodged a complaint and asked for his son to be examined by a forensic medical examiner. The applicant was examined by two doctors on 30 November and 1 December 1995, and the final report indicated the following injuries on his body: haematomas and bruising around the edge of the abdominal wall, a 4 x 6 cm bruise on the left shin, a bruise behind the left knee, large bruises on the knees and right shin, and areas of bruising on the left wrist, right elbow, back of the right hand and on the thighs.

In February 1996, the prosecutor indicted the officers for the offence defined by Article 243 of the Criminal Code as the 'obtaining by a public official of a confession under torture'. The Assize Court acknowledged that the applicant had been beaten by police officers but decided to reclassify the offence as 'assault and ill-treatment'. It handed down the minimum sentence, which it mitigated on account of the defendants' good conduct during the trial, then commuted the prison sentence to a fine and ordered a stay of execution.

The applicant lodged an appeal on points of law and the Court of Cassation, reclassifying the offence as the obtaining of a confession under duress, referred the case back to the Assize Court. On 26 February 1998, the Assize Court once again handed down the minimum penalty, namely a one-year prison sentence, which it reduced to ten months on account of the defendants' good conduct during the trial, and then ordered a stay of execution. That judgment was upheld by the Court of Cassation on 24 March 1999.

The applicant brought an action for damages against the Ministry of the Interior. The administrative courts dismissed his action as being time-barred.

### Complaints

The applicant complained under Article 3 of the Convention in respect of the impunity afforded to the police officers who had ill-treated him.

### Held

The Court found that the impugned criminal proceedings, in view of their outcome, had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3. The Court therefore held that there had been a violation of Article 3.

The Court considered that the finding of a breach of the Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage suffered by the applicants and awarded the applicants EUR 10,000 non-pecuniary damage and 3,500 for costs and expenses, less the sum of EUR 630 he had received by way of legal aid from the Council of Europe.

#### Commentary

The Court regretted that neither the domestic judgments nor the Government's observations had contained any reference to the particular seriousness of the impugned act on account of the victim's age, or to any domestic legislation on the protection of minors.

The authorities could have been expected to regard the applicant's vulnerability as an aggravating factor. The Court thus noted that nothing in the proceedings had been indicative of a particular concern for the protection of a minor. Moreover, the fact that the proceedings had resulted in impunity left some doubt as to the dissuasive effect of the judicial system that was supposed to protect anyone, whether minors or adults, from acts in breach of the absolute prohibition laid down in Article 3.

In conclusion, the Court considered that the criminal-law system as applied in the applicant's case, had proved to be far from rigorous and had had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. The Court accordingly found that the impugned criminal proceedings, in view of their outcome, had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3.

### ***Göçmen v. Turkey***

(72000/01)

**European Court of Human Rights:** Judgment of 17 October 2006

*Prohibition on torture or inhuman or degrading treatment - right to a fair trial - independence and impartiality of the court - length of proceedings - right to an effective remedy - Articles 3, 6(1), 6(3), 13*

#### Facts

The applicant, Sabahattin Göçmen, is a Turkish national who was born in 1966.

He is currently in Bursa Prison serving a sentence of 18 years and 9 month's imprisonment passed in 1999.

On 29 December 1992, the applicant was arrested and taken into police custody on suspicion of being a member of an illegal organisation, the PKK (Workers' Party of Kurdistan). While in police custody the applicant admitted being a member of the PKK and confessed to having been involved in illegal activities. He acknowledged, among other things, possessing weapons and raising funds and disseminating propaganda on the organisation's behalf. In accordance with the legislation in force at the relevant time, he was not allowed access to a lawyer while in police custody.

On 12 January 1993, the applicant underwent a medical examination, which found no traces of violence on his body. The same day he was brought before a judge who ordered his detention pending trial.

On 13 January 1993 the applicant was examined by the Istanbul Prison doctor. According to the report drawn up following the examination, the applicant had reduced movement and pain in the shoulders, elbows and wrists; the report also noted bruising to the buttocks, scabs measuring between 1 and 3 cm to the front of the thighs, two parallel lines of bruising ranging in width from 0.5 to 2 cm on the front of the armpits, other bruising to the left femoral area, scratches of between 2 and 3 cm to the upper part of the right knee, below both knees and on the thighs. The applicant also had pains in his legs and substantially reduced mobility, to the point of being incapable of active movement, in both shoulders, arms, lower arms and wrists.

The applicant was prosecuted on the basis of Article 168 of the Criminal Code which makes it an offence to form an armed gang with a view to committing offences against the State and the authorities, and was committed for trial before Istanbul State Security Court. During the proceedings the applicant stated that he been subjected to ill-treatment while in police custody in an attempt to extract a confession from him.

On 20 October 1999 the state security court found the applicant guilty and sentenced him to 18 years and nine months imprisonment. The conviction was upheld by the Court of Cassation.

#### Complaints

The applicant complained that he had been tortured while in police custody

and complained of the unfairness and length of the proceedings leading to his conviction. He relied on Articles 3, 6 and 13 of the Convention.

#### Held

The Court held unanimously that there had been violations of Articles 3 and 13, Article 6(1) on account of the lack of independence and impartiality of the state security court, Article 6(1) and (3) on account of the unfairness of the proceedings and a violation of Article 6(1) on account of the excessive length of the proceedings.

The court awarded EUR 20,000 in respect of non-pecuniary damage and EUR 2,000 for costs and expenses.

#### Commentary

The Court noted that the medical examination which the applicant had undergone on 12 January 1993, at the end of his time in police custody, had not found any traces of violence on his body. However, according to the report drawn up on 13 January, immediately after he had been placed in detention pending trial, his body showed numerous traces of violence, such as reduced movement and pain in various parts of the body and a large number of bruises.

In view of all the evidence before it, the Court found that the injuries noted in the second medical report had resulted from treatment for which the Respondent State was responsible. It therefore held that there had been a violation of Article 3.

The applicant had repeatedly informed the authorities that he had been subjected to treatment contrary to Article 3 in connection with the proceedings against him, and had submitted a medical certificate in support of his allegations. That had not been taken into consideration even though, under Turkish law, a prosecutor informed of such accusations should have taken immediate action.

The lack of any investigation was sufficient for the Court to conclude that the applicant had not had an effective remedy within the meaning of Article 13. It therefore held that there had been a violation of Article 13.

The Court noted that the criminal proceedings against the applicant had been instituted before a state security court made up of two civilian judges and a military judge. Several hearings on the merit had already been held before the latter's replacement by a civilian judge, six years and seven months after the proceedings

had been initiated. Those steps, which had not been repeated subsequently, had all been validated by the replacement judge. In the circumstances, the Court could not accept that the replacement of the military judge before the end of the proceedings had sufficed to dispel the applicant's reasonable doubts as to the independence and impartiality of the court which had convicted him. Accordingly, there had been a violation of Article 6(1).

The Court took the view that the procedural guarantees offered in the present case had not prevented the use of evidence obtained in circumstances which amounted to a violation of Article 3 of the Convention, in the absence of a lawyer and in breach of the privilege against self-incrimination. It reiterated that it had consistently held that the use in criminal proceedings of evidence of that kind obtained in violation of Article 3 raised serious questions as to the fairness of the proceedings. Given that the Court of Cassation had not remedied the defects in question, the Court held that there had been a violation of Article 6(1) and 6(3).

In relation to the length of the proceedings, the Court observed that the proceedings at issue had lasted for approximately seven years and 11 months. Having regard to the circumstances of the case, it found that that period was excessive and failed to satisfy the 'reasonable-time' requirement. Accordingly, the Court held that there had been a breach of Article 6(1).

### ***Öktem v. Turkey***

(74306/01)

**European Court of Human Rights: Judgment of 19 October 2006**

*Prohibition of torture – treatment in custody – right to an effective remedy – Articles 3, 13*

#### Facts

The applicants, Mahmut Öktem and his wife, Memnune Öktem, are Turkish nationals who were born in 1956 and 1954 respectively and live in Istanbul.

On 26 February 1997 the applicants were arrested and taken into police custody in the course of an operation against an illegal organisation, the TKEP/L (Communist Labour Party of Turkey/Leninist).

On 3 March 1997 the applicants were examined by a doctor, who noted that their general state of health was good. He did not find any signs of blows or violence on Mrs Öktem's body but observed that Mr Öktem had reduced movement in his hands and bruises on his shins. Later that day the applicants were brought before a judge, who ordered their release.

After the applicants had lodged a complaint alleging torture, criminal proceedings were instituted against the officers in whose custody they had been held. Mr Öktem complained that he had been beaten and his wife alleged that she had been subjected to psychological pressure in that the police officers had made her husband pass by her cell before they had questioned her, with the aim of intimidating her.

On 14 November 2001, Istanbul Assize Court acquitted the four police officers on the charges concerning Mrs Öktem but found one of them guilty of torturing Mr Öktem and sentenced him to ten months' imprisonment; it also prohibited him from holding a post in the civil service for one year, on the basis of Articles 243 and 59 of the Criminal Code. However, it suspended the sentence. The Court of Cassation quashed the judgment and remitted the case to the Assize Court for fresh consideration.

On 9 February 2004 the Assize Court found all the police officers guilty of torture within the meaning of Article 243 of the Criminal Code in respect of Mr Öktem with a view to extracting a confession from him, and sentenced them to ten months' imprisonment, in addition prohibiting them from holding posts in the civil service for ten months. It nevertheless suspended their sentences.

The applicants again appealed to the Court of Cassation. However, on 17 March 2005 the Court of Cassation, while acknowledging that the offence of torture had been made out, discontinued the proceedings as the limitation period had expired.

### Complaints

Relying on Article 3, the applicants alleged that they had been tortured while in police custody. They also claimed violations of Article 13 in relation to the failure of the authorities to adequately investigate the allegations.

### Held

The Court declared the application inadmissible in respect of Mrs Öktem's several medical reports had found no evidence of torture or ill-treatment on her body.

In respect of Mr. Öktem the Court held unanimously that there had been a violation of Article 3 on account of the torture inflicted on the first applicant while in police custody and a violation of Article 13.

In respect of just satisfaction, the Court awarded EUR 15,000 for non-pecuniary damages and EUR 1,500 for costs and expenses.

#### Commentary

The Court observed that the medical certificates indicated that the first applicant had sustained significant injuries after his time in police custody, and the fact that they did not predate his detention had not been disputed. Furthermore, the evidence produced by the parties in the criminal proceedings in the Turkish courts and also before the Court corroborated the first applicant's version of events as to the severity of the violence inflicted by the police officers. Accordingly, in the light of the evidence before it the Court accepted that Mr Öktem had been ill-treated, as the Turkish courts had found.

Furthermore, the Court observed that Istanbul Assize Court had found that the acts of which Mr Öktem had been the victim amounted to torture, having regard to their intensity and to the fact that such treatment had been intentionally meted out to him by agents of the State in the performance of their duties, with the aim of extracting a confession or information about the offences of which he was suspected. The Court saw no reason to depart from those findings and therefore considered that the violence inflicted on the first applicant, taken as a whole, had been particularly serious and cruel and capable of causing 'acute' pain and suffering that amounted to torture.

Having regard to the total length of the proceedings, which had lasted more than eight years, the Court considered that the Turkish authorities had not acted with sufficient promptness and reasonable diligence. Consequently, the perpetrators of the acts of violence had enjoyed virtual impunity despite having been found guilty of torture. The Court found that this was sufficient to show that, on account of the expiry of the limitation period, the remedy had not satisfied the criterion of 'effectiveness' for the purposes of Article 13.

***Olaechea Cahuas v Spain***

(24668/03)

**European Court of Human Rights:** Judgment of 10 August 2006

*Prohibition of torture – Right to liberty and security – Right to a fair trial – Right of individual petition – Articles 3,5,6 and 34*

Facts

The applicant, Adolfo Hector Olaechea Cahuas, aged 62, is a Peruvian national, and lives in Peru.

In July 2003, suspected of being a member of a terrorist organisation, the applicant was arrested in Spain during a routine check. Peru requested his extradition on the basis of a terrorist offence.

The applicant was taken into custody pending a ruling on his extradition. He voiced his opinion about his extradition, in accordance with the Treaty concerning Extradition of 28 June 1989 between Peru and Spain, and agreed to 'simplified extradition' (to be returned immediately to the requesting country) and the benefit of the speciality rule (to be tried only in respect of the offence for which extradition is requested).

Noting that the Peruvian Government was bound by international standards in the field of the protection of fundamental rights, such as the American Convention on Human Rights, and that it undertook not to sentence the applicant to the death penalty or life imprisonment, the *Audiencia Nacional* granted the applicant's extradition on 18 July 2003.

The applicant lodged an application with the Court, which indicated to the Spanish Government on 6 August 2003, under Rule 39 (interim measures), not to extradite him to Peru before the examination of the case on 26 August 2003.

The following day, however, on 7 August 2003, the applicant was extradited to Peru. He was conditionally released in November 2003 on account of the lack of sufficient evidence that he was a member of the terrorist organisation. In February 2004 the *Audiencia Nacional* allowed the Peruvian authorities to extend the extradition charges so that the applicant could be tried in Peru on the charge of funding the terrorist group from abroad. An *amparo* appeal lodged by the applicant against that decision is pending before the Constitutional Court.

### Complaints

The applicant complained under Article 3 of the Convention that his extradition to Peru ran the risk of him being subjected to ill-treatment.

The applicant further complained that his arrest with a view to his extradition had been contrary to Article 5.

The applicant complained about the unfairness of the proceedings under Article 6 of the Convention.

The applicant invited the Court to conclude that the Government had failed in their obligations under Article 34 on account of the failure to comply with the interim measure indicated by the Court.

### Held

The Court held that there had been no violation of Article 3 on account of the applicant's extradition to Peru.

The Court concluded that there has been no violation of Article 5(1). The Court found that the entire period of the applicant's detention had been covered by the exception provided for in Article (5)(1)(f).

The Court further held that there had been no violation of Article 6 of the Convention, since there was insufficient evidence that the possible flaws in the trial would amount to a 'flagrant denial of justice'.

The Court found a violation of Article 34 since, having regard to the evidence in its possession, it concluded that by failing to comply with the interim measures indicated under Rule 39, Spain had not fulfilled its obligations under Article 34.

The Court considered that, in the circumstances of the case, the finding of a violation constituted in itself sufficient justification for non-pecuniary damage and awarded the applicant EUR 5000 and EUR 3000 for costs and expenses.

### Commentary

The Court noted that the applicant had been extradited after guarantees had been obtained from the Peruvian Government that he would not be sentenced to death or life imprisonment. Moreover, it had been specified that the guarantees provided by the Peruvian Government reflected the fact that they were bound by international standards in the field of the protection of fundamental rights, one

of which was the scrutiny of the Inter-American Court of Human Rights.

In the light of the material in its possession, including in particular the information following the date of extradition to Peru, the Court concluded that there was insufficient evidence to make out the existence of treatment contrary to Article 3 in the applicant's case.

Concerning the alleged violation of Article 34, the Court stressed that an interim measure was inherently a temporary one, the necessity of which was assessed at a precise moment in time owing to the existence of a risk that might hinder the effective exercise of the right of application guaranteed by Article 34. If it did not comply with the interim measure, however, the risk of hindering the effective exercise of the right of application continued and it was the facts occurring after the Court's decision and the Government's non-compliance which determined whether the risk had materialised or not. Even if it did not, the force of the interim measure had to be regarded as binding.

Furthermore, a State's decision regarding compliance with the measure could not be adjourned pending confirmation as to whether a risk existed. Mere non-compliance with an interim measure decided by the Court on the basis of the existence of a risk was, in itself, a serious hindrance, at that precise point in time, of the effective exercise of the right of individual application. Accordingly, having regard to the evidence in its possession, the Court concluded that by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Spain had not fulfilled its obligations under Article 34.

### ***Esen v. Turkey***

(49048/99)

**European Court of Human Rights:** Judgment of 8 August 2006

*Prohibition of torture – Right to an effective remedy – Right to liberty and security – Lawfulness of detention – Right to a fair trial – Articles 3, 13, 5, and 6*

#### Facts

The applicant, Hüseyin Esen, is a Turkish national who was born in 1967 and lives in Ankara, Turkey.

The applicant alleged that in September 1996, while in police custody, he was ill-

treated by police officers attempting to extract a confession from him. He claimed that the officers struck him, hung him by the arms, hosed him with water, issued death threats to him and administered electric shocks. He had then, under duress, signed a statement confessing to membership of the illegal organisation (Marxist-Leninist Communist Party) and involvement in its activities.

On 18 September 1996 the applicant was examined by a doctor at the İstanbul Institute for Forensic Medicine, who noted red bruises on his chest and scab-covered lesions in his armpits. The marks in question were consistent with the allegations of ill-treatment made by the applicant.

The same day the applicant was brought before a judge, who ordered his detention pending trial. Criminal proceedings were instituted against the applicant, who was charged with involvement in armed action aimed at destroying the constitutional order and replacing it with a State based on Marxist-Leninist principles.

Thereafter, the applicant made several requests to be released. These were rejected by İstanbul State Security Court. However, the applicant was released on 30 January 2002.

On 31 January 2003 the State Security Court found the applicant guilty as charged and sentenced him to 12 years and six months' imprisonment. That decision was set aside, and the case is currently pending before the İstanbul Assize Court.

In the meantime, on 14 October 1996, the applicant and 16 co-defendants lodged complaints alleging ill-treatment on the part of the police officers who had questioned them in police custody. On 25 April 2002 the Assize Court characterised the acts as torture and sentenced the police officers to terms of imprisonment and ordered that they be temporarily suspended from their posts. On 5 May 2004, however, the Court of Cassation declared the criminal prosecution time-barred.

### Complaints

The applicant alleged that there had been a violation of Article 3 as a result of the ill-treatment he received from police officers whilst in detention.

The applicant also argued that the length of his detention pending trial exceeded the reasonable time requirement of Article 5(3) of the Convention.

The applicant further argued under Article 5(4) that he was not brought promptly before a judge or other officer authorised by law to challenge the lawfulness of his detention pending trial.

The applicant complained under Article 6(1) that he was deprived of the right to a fair trial within a reasonable time.

The applicant argued that there had been a violation of Article 13 in that he had been denied an effective remedy since the judicial authorities failed to ensure that criminal proceedings against the police officers were completed before the limitation period expired.

#### Held

The Court held that there had been a violation of Article 3 of the Convention. The Court considered that the violence inflicted on the applicant had been particularly cruel and capable of causing 'severe' pain and suffering.

The Court found a breach of Article 5 (3) with respect to the length of the detention. The Court further held that there had been a violation of Article 5 (4) since the applicant had not had an effective remedy by which to challenge the lawfulness of his detention pending trial.

The Court held that there had been a violation of Article 6 (1) of the Convention. It noted that the proceedings in issue had lasted more than nine-and-half-years and considered that such a period did not satisfy the 'reasonable-time' requirement.

The Court took the view that the Turkish authorities could not be considered to have acted promptly to ensure that the police officers implicated did not enjoy virtual impunity. It therefore held that there had been a violation of Article 13.

The Court considered that the finding of a potential breach of the Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage suffered by the applicant and awarded the applicant EUR 10,000 and EUR 1000 for costs and expenses.

#### Commentary

The Court recalled that the judicial authorities had a duty to do everything in their power to ensure that the criminal proceedings were completed before the limitation period expired. The Court also pointed out that a prompt response

by the authorities in cases involving allegations of ill-treatment could generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. In the present case, the Court observed that the police officers had been able to act with complete impunity in spite of the concrete evidence against them established by the court of first instance. In these circumstances, the Court took the view that the Turkish authorities could not be considered to have acted promptly to ensure that the police officers implicated did not enjoy virtual impunity. Therefore, the Court found a violation of Article 3.

Concerning Article 13, the Court observed that although an investigation had been launched in response to the complaint lodged by the applicant, the Assize Court had waited almost five years after the complaint was lodged before delivering its judgment convicting the police officers. The Respondent Government had not produced any evidence to justify the lack of headway made by the proceedings.

### ***D. and others v. Turkey***

(24245/03)

**European Court of Human Rights:** Judgment of 22 June 2006

*Prohibition of inhuman treatment – Right to an effective remedy – Prohibition of discrimination – Articles 3, 13, 14*

#### Facts

The applicants are Iranian nationals. A.D., a man of Kurdish origin, was born in 1969. His wife, P.S., of Azeri origin, was born in 1976. Their daughter, A.D., was born in 1997. A.D. is a Sunni Muslim and P.S. a Shia. All three are currently living in Kastamonu (Turkey), where they have been granted a temporary residence permit.

A.D. and P.S. married on 26 September 1996, at a Sunni ceremony, without the consent of the bride's father, and therefore in breach of Shia sharia law.

Two days after the wedding the couple were arrested. At the request of the Shia religious authorities P.S. was forced to undergo a virginity test and then released. On 30 September 1996, a judge of the Naghadeh Islamic Court declared the marriage null and void and fined each of the first two applicants. The couple

were subsequently informed that they had each been sentenced to 100 lashes for fornication, under Article 88 of the Criminal Code, the sentence falling into the category known as *haad*, meaning that it is irrevocable.

On 12 April 1997 A.D. was subjected to this punishment. However, as his wife was then pregnant, execution of her sentence was postponed, in the first instance until the birth of her daughter and then until 11 October 1999, on account of her fragile physical and mental health.

On the latter date it was nevertheless decided that there would be no further stays of execution and that the sentence of 100 lashes would be carried out in two sessions of 50 lashes each.

The applicants fled from Iran, entering Turkey on 22 November 1999. They immediately applied to the local office of the UNHCR (United Nations High Commissioner for Refugees) and obtained the temporary status of ‘asylum seekers’. However, UNHCR refused them permanent asylum seeker status. As a result, in November 2002, the Turkish immigration service refused to extend the validity of their residence permits.

On 22 April 2003, the applicants were served with a ministerial decree informing them that as unsuccessful applicants for asylum seeker status they were free to return to Iran or make their way to a third country of their choice, failing which they ran the risk of deportation. P.S. appealed. To date, no final deportation order has been issued against the applicants, who continue to live in Kastamonu by virtue of residence permits which have in the meantime been renewed, pending the outcome of the appeal proceedings.

#### Complaints

The applicants submitted that their deportation to Iran, where they ran the risk of undergoing ill-treatment, would breach Article 3 of the Convention.

The applicants complained that they had been denied an effective remedy in breach of Article 13 of the Convention.

The applicants also relied on Article 14 of the Convention, in conjunction of Article 3 and 13, for the same complaint.

#### Held

The Court decided that there would be a breach of Article 3 of the Convention

if the decision to deport P.S. to Iran were to be enforced. Further, the Court concluded that the decision would breach Article 3 of the Convention in respect of all three applicants.

The Court held that its finding under Article 3 made it unnecessary for it to examine the case under Articles 13 and 14 of the Convention.

The Court considered that the finding of a potential breach of the Convention constituted in itself sufficient just satisfaction for the non-pecuniary damage suffered by the applicants and awarded the applicants EUR 5,000 for costs and expenses.

#### Commentary

The Court noted that in Iran corporal punishment was the standard penalty for certain categories of offences regarded as immoral, such as adultery and fornication. They were prescribed by law, imposed by the judiciary and inflicted by agents of the State.

After noting the conditions under which sentences of flagellation were executed in Iran, about which there was no dispute, the Court considered that the mere fact of permitting a human being to commit such physical violence against a fellow human being, and in public moreover, was sufficient for it to classify the sentence imposed on P.S. as 'inhuman' and therefore within the ambit of Article 3.

The Respondent Government, like the UNHCR, asserted that the punishment would have been attenuated on health grounds, to such an extent that it was now a symbolic penalty inflicted by means of a special lash in which the number of tails was equal to the number of blows to be inflicted. Even supposing that that was the case, the Court observed that enforcement of the sentence through a single blow from a lash with one hundred tails did not make the punishment 'symbolic' or alter its 'inhuman' character. In such an event, although the applicant would be spared more grievous injury, her punishment, which still involved treating her in public as an object in the hands of the State power, would inflict harm on precisely those things which Article 3 was mainly designed to protect, namely her personal dignity and her physical and mental integrity.

## Right to liberty and security

### *Saadi v UK*

(13229/03)

**European Court of Human Rights:** Judgment of 11 July 2006

*Right to liberty and security – Freedom of discrimination – Articles 5, 14*

#### Facts

The applicant Mr Shayan Baram Saadi, is an Iraqi national who was born in 1976 and lives in London.

The applicant fled Iraq and arrived at London Heathrow Airport on 30 December 2000, where he immediately claimed asylum and was granted ‘temporary admission’. On 2 January 2001, on reporting to the immigration authorities, he was detained and transferred to Oakington Reception Centre, a centre which was used for those who were not likely to abscond and who could be dealt with by a ‘fast track’ procedure.

On 5 January 2001 the applicant’s representative telephoned the Chief Immigration Officer and was told that the reason for the detention was that the applicant was an Iraqi who met the criteria to be detained at Oakington.

The applicant’s asylum claim was initially refused on 8 January 2001 and he was formally refused leave to enter the UK. He was released the next day. He appealed against the Home Office decision and was subsequently granted asylum.

The applicant, together with three other Kurdish Iraqi detainees who had been held at Oakington, applied for permission for judicial review of their detention claiming that it was unlawful under domestic law and under Article 5 of the Convention. Both the Court of Appeal and the House of Lords held that the detention was lawful in domestic law. In connection with Article 5 they each held that the detention was for the purpose of deciding whether to authorise entry and that the detention did not have to be ‘necessary’ to be compatible with that provision. They further maintained that the detention was ‘to prevent unauthorised entry’ and that the measure was not disproportionate.

### Complaints

The applicant complained about his detention at Oakington under Article 5(1) of the Convention, claiming that he was being detained although he presented no threat to immigration control, but simply in order to accelerate a decision concerning his entry.

The applicant further complained that he was given no reasons for his detention under Article 5 (2) of the Convention.

The applicant also argued under Article 14 of the Convention that his detention at Oakington was discriminatory as the applicant was detained because of his Iraqi nationality.

### Held

The Court examined the applicant's allegation under Article 5(1) and held that the applicant's detention at Oakington lasted a total of seven days, which was not excessive in the circumstances. Therefore, the Court held that there had been no violation.

The Court found a violation of Article 5(2) of the Convention. It noted that the applicant's representative was informed of the reason for the applicant's detention by telephone on 5 January 2001. At that time, the applicant had been in detention for some 76 hours. The Court found that such a delay was not compatible with the requirement of Article 5 (2) that such reasons be given promptly.

The Court held that it was not necessary to consider the applicant's complaints separately under Article 14 since the substance of his complaint had been dealt with.

The Court considered that, in the circumstances of the case, the finding of a violation constituted in itself sufficient justification for non-pecuniary damage and awarded the applicant EUR 2000 and EUR 1500 for costs and expenses.

### Commentary

The Court recalled that detention of a person is a major interference with personal liberty and must always be subject to close scrutiny. In the present case, at the heart of the applicant's case was the claim that to detain a person who presented no threat to immigration control for the sole purpose of facilitating an early decision concerning his entry to the United Kingdom did not serve to 'prevent his effecting an unauthorised entry into the country' and thus was not

compatible with Article 5(1)(f).

The Court pointed out that there is no requirement under Article (5)(1)(f) that the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary. All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length. It further stated that, until a potential immigrant has been granted leave to remain in the country, he has not effected a lawful entry, and detention can reasonably be considered to be aimed at preventing unlawful entry. The Court was of the opinion that to interpret Article 5(1)(f) as only permitting detention of a person who is shown to be seeking to effect an unauthorised entry is to place too narrow a construction on the terms of the provision.

Finally, the Court found that although the detention in the present case lasting for a total of seven days, which the majority found not to be excessive, any period of detention significantly in excess of this period would not be compatible with the first limb of Article 5(1)(f).

### ***Vayiç vTurkey***

(Application No. 18078/02)

**European Court of Human Rights:** Judgment of 20 June 2006

Length of pre-trial detention - length of criminal proceedings - articles 5(3); 6  
European Convention on Human Rights

#### Facts

The applicant, İsrafil Vayiç, was a Turkish national born in 1963 who lived in İstanbul.

On 9 September 1996 the applicant was taken into police custody by police officers from the Anti-Terrorist Branch of the İstanbul Security Headquarters on suspicion of being a member of an illegal organisation. He was subsequently detained pending trial.

The İstanbul State Security Court dismissed the applicant lawyer's applications

for release and repeatedly ordered the applicant's continued detention having regard to 'the nature of the offence and the state of the evidence'. It later relied on the seriousness of the charges against him and the risk that he might abscond. The applicant was eventually released pending trial on 19 October 2001, five years, one month and ten days after he was arrested.

On 31 January 2003, after about thirty different hearings, the State Security Court convicted the applicant under Article 168 (2) of the Criminal Code and sentenced him to 12 years and six months' imprisonment. The Court of Cassation later quashed that decision and the case was remitted to the İstanbul Assize Court.

The proceedings resumed on 2 September 2004 and several warrants were issued for the applicant's arrest as he did not respond to summonses issued by the court. The proceedings are still pending.

#### The complaint

The applicant complained about the length of his detention pending trial and the length of the criminal proceedings against him. He relied on Articles 5(3) and 6(1) of the Convention.

#### Held

The Court found violations of Articles 5(3) and 6(1) in relation to the length of his detention and the criminal proceedings.

The Court awarded the applicant EUR 3,000 for non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

#### Commentary

The Court found that the reasons given by the İstanbul State Security Court, which were the same every time, could not justify holding the applicant in detention for over five years. The İstanbul State Security Court used identical, stereotyped terms, such as 'having regard to the nature of the offence and the state of the evidence'. The Court found that although, in general, the expression 'the state of the evidence' may be a relevant factor for the existence and persistence of serious indications of guilt, in the present case it could not, on its own, justify the length of the detention of which the applicant complained.

The Court reiterated that in ensuring that the pre-trial detention of an accused person does not exceed a reasonable time, the judicial authorities must, paying due regard to the principle of the presumption of innocence, examine all the

facts arguing for or against the existence of a public interest justifying a departure from Article 5 of the Convention and must set them out in their decisions on the applications for release.

The Court further noted that there was lack of special diligence on the part of the authorities which further delayed the criminal proceedings. In the light of those considerations, the Court held unanimously that the length of the applicant's detention pending trial violated Article 5(3).

The Court considered that the length of the criminal proceedings was excessive and failed to satisfy the 'reasonable time' requirement. The Court stated that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case; in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation. The Court noted that the charge against the complainant concerned membership of a terrorist organisation and considered that the complexity of the proceedings in this case did not in itself justify the length of time taken. Coupled with the earlier finding that there had been a breach of Article 5(3) due to a lack of diligence on the part of the authorities, the Court concluded unanimously that there had been a violation of Article 6(1).

***Şuyur v Turkey***  
(13797/02)

**European Court of Human Rights:** Judgment of 23 May 2006

Facts

The applicant, Abdürrezzak Şuyur, is currently serving life imprisonment. He is a Turkish national.

Mr Şuyur was taken into custody on 26 April 1993 on suspicion of being a member of a terrorist organisation and was later detained on remand. In June 1993 he was also accused of aiding and abetting that organisation. The State Security Court ordered the applicant's continued detention fifty-eight times, basing their decision each time on the nature of the offence, the state of evidence and the content of the file. On 27 December 2001 he was sentenced to death by Diyarbakır State Security Court. The sentence was later commuted to life imprisonment. That judgment was upheld by the Court of Cassation on 10 July 2002.

### Complaints

The applicant complained about the length and fairness of the criminal proceedings. They both relied on Article 6(1).

The applicant also complained about the length of his detention on remand, relying on Article 5(3).

### Held

The Court found that there had been a violation of Article 5(3) and a violation of Article 6 (1) in respect of both complaints.

The Court awarded EUR 8,000 in respect of non-pecuniary damage and EUR 2,500 for costs and expenses.

### Commentary

The Court noted the lack of sufficient reasoning in the domestic court's decisions to prolong Mr Şuyur's remand in custody. It also found that the reasons that were given could not justify the entire duration of his detention. The Court concluded that the length of his pre-trial detention, which lasted more than eight and a half years, taken together with the stereotyped reasoning used by the court, was excessive, and held unanimously that there had been a violation of Article 5 (3).

The Court found that the applicant's concerns regarding the independence and impartiality of the State Security Court due to the presence on the bench of a military judge could be regarded as objectively justified. It therefore concluded, unanimously, that there had been a violation of Article 6 (1). The Court also noted that in no circumstances could a court whose lack of independence and impartiality had been established grant a fair trial to those within its jurisdiction; accordingly it found that it was not necessary to consider the applicants other complaints under Article 6(1).

The Court noted that the proceedings in question had lasted more than nine years and two months in Mr Şuyur's case. Having regard to the circumstances of each case, it considered that such a length of time was excessive and failed to satisfy the 'reasonable time' requirement. Accordingly, the Court concluded unanimously that there had been a violation of Article 6 (1).

## Right to a fair trial

### *Karaođlan v. Turkey*

(60161/00)

**European Court of Human Rights:** Judgment of 31 October 2006

*Right to a fair hearing – fairness of proceedings - independent judiciary –Article 6(1)*

#### Facts

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

On 20 March 1998 the applicant was arrested and taken into custody by police officers at the Diyarbakır Security Directorate on suspicion of his involvement in the activities of an illegal organisation. On 22 March 1998 the applicant was brought before a judge at the Diyarbakır State Security Court who ordered his release pending trial. On 15 September 1998 the İzmir State Security Court joined the trial of the applicant to the ongoing trial of four other accused. Throughout the proceedings the applicant was represented by a lawyer. On 15 December 1998 the İzmir State Security Court, relying on the applicant's statement to the police, the witness testimonies of other suspects as well as other evidence, convicted the applicant as charged and sentenced him to twelve years and six months' imprisonment. This judgment was upheld by the Court of Cassation on 1 July 1999.

Following the decision of the Court of Cassation the applicant fled to Belgium where he successfully applied for asylum.

#### The Complaint

The applicant complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the İzmir State Security Court which tried and convicted him. He alleged that his statement, taken under duress in police custody, was admitted in evidence and that the İzmir State Security Court relied heavily on the statements of the co-defendants without giving him an adequate opportunity to cross-examine them. Finally, he complained that he had been tried in absentia. The applicant relied on Articles 6(1) and 6(3)(d) of the Convention.

### Held

The Court held unanimously that there had been a violation of Article 6(1) as regards the lack of independence and impartiality of İzmir State Security Court.

The Court considered the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. However, the Court made an award of EUR 1,000 for costs and expenses.

### Commentary

With regard to the lack of independence and impartiality of the State Security Court, the Court considered that it has examined a large number of cases raising similar issues to those in the present case and the Court found no reason to reach a different conclusion in this case. Accordingly, the Court concludes that there has been a violation of Article 6(1).

Given its finding of a violation of the applicant's right to a fair hearing by an independent and impartial tribunal, the Court considered that it was not necessary to examine the other complaints under Article 6 of the Convention relating to the fairness of the proceedings.

### ***Düzgören v. Turkey***

(56827/00)

**European Court of Human Rights:** Judgment of 9 November 2006

*Conscientious objector - freedom of expression - right to a fair hearing - fairness of proceedings - independent judiciary - effective remedy - Articles 6(1), 10, 13*

### Facts

This is a KHRP assisted case. The applicant, Koray Düzgören, is a Turkish national who was born in 1947 and lives in London. He is a journalist.

In June 1998 he was indicted by the military public prosecutor at the General Staff Court in Ankara for inciting others to evade military service after he had been found distributing leaflets outside Ankara State Security Court. He had also handed the leaflet to the public prosecutor at the court together with a petition stating that he should be prosecuted for having committed a crime. The leaflet contained, in particular, the press statement of a conscientious objector, giving the reasons why he had refused to do his compulsory military service.

The applicant was subsequently sentenced to two month's imprisonment and fined, and this decision was upheld by the Military Court of Cassation.

#### The Complaint

The applicant complained, in particular, that the General Staff Court which tried him was not an independent and impartial tribunal due to the presence of two military judges and an officer on the bench. He further complained that his criminal conviction had infringed his right to freedom of expression. He relied on Articles 6(1), 10 and 13 of the Convention.

#### Held

The Court found that the applicant's concerns regarding the independence and impartiality of the General Staff Court could be regarded as objectively justified. It therefore held unanimously, that there had been a violation of Article 6 (1).

The Court further found a violation of Article 10 of the Convention.

The court declared the remainder of the applicant's complaint inadmissible.

The Court awarded the applicant EUR 2,000 in respect of non-pecuniary damage and EUR 1,500 for costs and expenses.

#### Commentary

The Court considered that, although the tone of the article was hostile to military service, it did not encourage violence, armed resistance or insurrection and did not constitute hate speech. Furthermore, the offending leaflet was distributed in a public place in Istanbul and it did not seek, either in its form or in its content, to precipitate immediate desertion. In the Court's view, those were the essential factors to be taken into account when assessing whether the measures taken by the authorities were strictly necessary. Furthermore, the Court also considered the applicant's sentencing; in particular the two months' imprisonment was a harsh penalty.

The Court concluded that the reasons given by the General Staff Court were not sufficient to justify the interference with the applicant's right to freedom of expression and that the interference was not 'necessary in a democratic society'. Accordingly it held, unanimously, that there had been a violation of Article 10.

In relation to Article 6, the Court noted that it had already examined the same grievance in the past and had found a violation of Article 6 (1) of the Convention

in its judgment *Ergin (no. 6) v Turkey* (application no 47533/99). In that judgment, the Court had held that it was understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Therefore, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about that court's independence and impartiality may be regarded as objectively justified. The Court found no particular circumstances which would require it to depart from its findings in the aforementioned case.

The Court reiterated that a remedy under Article 13 of the Convention does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of the complaint. The Court was satisfied that the domestic courts reviewed the admissibility of the applicant's complaints to a sufficient degree to provide him an effective remedy for the purposes of Article 13 of the Convention. It follows that this part of the application was manifestly ill-founded

### ***Hajiyev v. Azerbaijan***

(5548/03)

**European Court of Human Rights:** Judgment of 16 November 2006

*Right of access to a court - prohibition on discrimination - Articles 6(1), 14*

#### Facts

The applicant, Fehmin Ahmedpasha oglu Hajiyev, is an Azerbaijani national who was born in 1959 and lives in Baku, Azerbaijan.

The applicant was an activist in the National Front, an organisation which played a key role in the country's struggle for independence from the Soviet Union. In 1992, when the National Front came into power, he was appointed to a number of high-ranking military posts and in 1993 he became the Commander of the Special Police Force.

After the National Front lost political power in 1993, he was arrested and detained on remand. In August 1995, the Military Chamber of the Supreme

Court sentenced him to ten years' imprisonment for attempted murder, among other things. In June 1996 the same court convicted him for failing to resist the Armenian occupation of the town of Khojaly and sentenced him to 15 year's imprisonment, to run concurrently. Under the old criminal procedure law applicable at that time, both Supreme Court judgments were final and not subject to appeal.

In 2000, a new Code of Criminal Procedure was adopted. Before its entry into force Parliament passed a transitional law which allowed appeals to be lodged against final judgments delivered under the old criminal procedure. Two years after lodging an appeal, the Court of Appeal informed him in a letter dated 31 March 2004 that, due to the new Code of Criminal Procedure which had come into force, the court could not deal with his case and advised him to appeal to the Supreme Court. He was subsequently pardoned and released from prison.

### The Complaint

The applicant complained that he was denied a fair and public hearing because the Court of Appeal failed to examine his appeal. Furthermore, he complained that he had suffered discrimination because the Court of Appeal had examined the appeals of three other people who had been in a situation similar to his. He relied on Articles 6 and 14 of the Convention.

### Held

The Court concluded that the applicant's right of access to a court had been restricted. The Court held unanimously, therefore, that there had been a violation of Article 6(1). The Court considered that no separate examination was necessary of the applicant's complaint under Article 14.

The Court awarded the applicant EUR 3,000 in respect of non-pecuniary damage plus EUR 2,500 for costs and expenses.

### Commentary

The Court noted that the transitional law provided for a right to have a case re-examined by 'the appellate court or the Supreme Court'. Given that wording, the applicant could not reasonably be expected to understand that his appeal fell within the competence of the Supreme Court and not the Court of Appeal. Furthermore, the applicant was not informed of that fact for more than two years

after lodging his appeal. On the contrary, he was led to believe that his case was actually pending examination in the Court of Appeal.

The Court concluded that, given the ambiguity of the transitional law and the absence of a clear domestic judicial interpretation of its relevant provisions, as well as the existence of at least three domestic precedents, it was reasonable for the applicant to believe that it was for the Court of Appeal to examine his appellate complaint.

The Court considered that it was for the Court of Appeal to take steps to ensure that the applicant enjoyed the right to which he was entitled under the Transitional Law and that the applicant should not have been required to apply to the Supreme Court.

## **Right to respect of private and family life, home and correspondence**

### ***Üner v. the Netherlands*** (46410/99)

**European Court of Human Rights:** Decision of 18 October 2006

*Right to respect for private and family life – deportation – exclusion order – Article 8*

#### Facts

The case concerns an application brought by a Turkish national, Ziya Üner who was born in 1969 and lives in Eskişehir, Turkey.

The applicant came to the Netherlands at the age of 12 with his mother and two brothers to join his father and, in 1988, obtained a permanent residence permit.

In or around June 1991 he started living with a Netherlands national. The couple had a son, born on 4 February 1992. The applicant moved out in November 1992, but remained in close contact with both his partner and son.

On 16 May 1993, the applicant was involved in a dispute in a café. He had two loaded guns on him and shot and killed one man and shot another in the leg. His claims that he was acting in self-defence were rejected by the trial courts; he

was convicted of manslaughter and assault on 21 January 1994 and sentenced to seven years' imprisonment. He had previous convictions for violent offences and for a breach of the peace.

His partner, son and second son (born to the applicant and his partner on 26 June 1996) visited him in prison at least once a week. Both his sons have Netherlands nationality and have been recognised by him. Neither his partner nor his children speak Turkish.

On 30 January 1997, the Deputy Minister of Justice withdrew the applicant's permanent residence permit and imposed a ten-year exclusion order on him in view of his conviction of 21 January 1994. The applicant appealed unsuccessfully.

He was deported to Turkey on 11 February 1998. However, it appeared that he returned to the Netherlands soon afterwards and was once more deported to Turkey on 4 June 1998. He again appealed unsuccessfully.

#### Complaints

The applicant complained that, as a result of the withdrawal of his residence permit and the imposition of a ten-year exclusion order, he had been separated from his family. He relied on Article 8 of the Convention.

#### Held

The Court held, by 14 votes to three, that there had been no violation of Article 8.

Accordingly, no award for just satisfaction was made.

#### Commentary

The Court accepted that the measures imposed on him constituted an interference with the applicant's right to respect for his family life, that that interference was in accordance with the law and that it pursued legitimate aims, namely ensuring public safety and preventing disorder or crime. Those measures also amounted to interference with the applicant's right to respect for his private life.

The Court noted that the applicant had lived for a considerable length of time in the Netherlands where he had had permanent residence status and that he subsequently went on to found a family there. It could not, however, overlook the fact that the applicant lived with his partner and first-born son for a relatively

short period only and that he never lived together with his second son. Moreover, while it was true that the applicant came to the Netherlands at a relatively young age, the Court was not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural ties with Turkish society.

As to the criminal conviction which led to the measures being imposed, the Court was of the view that the offences of manslaughter and assault committed by the applicant were of a very serious nature. While the applicant claimed that he had acted in self-defence the fact remained that he had two loaded guns on his person. Taking his previous convictions into account, the Court found that the applicant might be said to have displayed criminal propensities.

The Court agreed with the Chamber in its finding that at the time the exclusion order became final, the applicant's children were still very young and therefore of an adaptable age. Given that they had Dutch nationality, if they followed their father to Turkey they would be able to return to the Netherlands regularly to visit other family members living there.

The Court considered that, in the particular circumstances of the case, the family's interests were outweighed by other considerations. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order was limited to ten years, the Court could not find that the Netherlands assigned too much weight to its own interests when it decided to impose that measure. In that context, the Court noted that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted.

The Court found that a fair balance had been struck in the case in that the applicant's expulsion and exclusion from the Netherlands were proportionate to the aims pursued and therefore necessary in a democratic society. Accordingly, there had been no violation of Article 8.

***Taner Kılıç v. Turkey***  
(70845/01)

**European Court of Human Rights:** Judgment of 24 October 2006

*Search warrant – seizure of property – right to respect for private and family life and*

*correspondence – effective remedy – protection of property – Articles 8, 13 and Article 1 of Protocol No. 1*

#### Facts

The applicant, Taner Kılıç, is a Turkish national who was born in 1969 and lives in İzmir, Turkey. He is a lawyer and a board member of the İzmir branch of the Human Rights Association for Oppressed People (Mazlum-Der).

In June 1999, Ankara State Security Court issued a warrant authorising the search of the headquarters and branches of the Mazlum-Der, in order to collect evidence concerning certain acts of the association, allegedly carried out against the ‘integrity of the country and the secular regime’. Maintaining that the situation was urgent, the Public Prosecutor extended the scope of the search warrant and ordered the search of the homes and offices of the association’s General Director and board members. Subsequently, when communicating the search orders of the State Security Court and the Public Prosecutor to the governors, the Under-Secretary of State of the Ministry of the Interior specified that not only the homes and offices of the General Director and board members should be searched, but also the premises of all branch board members.

During the search of the applicant’s home the police confiscated two videotapes and photocopied various documents taken from his office.

#### The Complaint

Relying on Articles 8 and Article 1 of Protocol No 1, the applicant complained about the search of his home and office and the seizure of his property.

He also alleged a violation of Article 13 in relation to the absence of effective domestic remedies for his Convention grievances.

#### Held

The Court found that there had been a violation of Article 8 of the Convention.

The Court further held that there was no need to examine separately the complaints under Article 13 of the Convention and Article 1 of Protocol No.1.

The Court awarded EUR 2,000 in respect of non-pecuniary damage and EUR 1,000 for costs and expenses.

### Commentary

The Court found that the search of the applicant's home and the seizure of videotapes constituted an interference with his rights under this provision. The Court likewise found that the search of his professional office and the photocopying of some documents found there amounted to an interference with his right to respect for his home. The question therefore remained whether this interference was justified under Article 8(2).

The Court found that the search warrant initially issued by the court and extended by the Public Prosecutor was interpreted in too broad a manner when including the home and office of the applicant. It observed that the search and seizures were extensive and that privileged professional materials were taken without special authorisation. Furthermore, the Court noted that the applicant's requests that criminal proceedings be initiated against the officials involved in the events of the present case were dismissed without any reasons being given, while his request for the return his videotapes, seized during the search of his home, was left unanswered.

The Court concluded that the search of the applicant's premises and the seizure of his property and documents were implemented without any proper procedure of safeguards and held unanimously that there had been a violation of Article 8.

In view of that finding the Court did not find it necessary to examine separately the applicant's complaints under Article 13 or Article 1 of Protocol No. 1.

## **Freedom of thought, conscience and religion**

### *Moscow Branch of the Salvation Army v Russia*

(72881/01)

**European Court of Human Rights:** Judgment of 5 October 2006

*Registration of religious organisation - Freedom of thought, conscience and religion - Freedom of Assembly and Association - Articles 9 and 11*

### Facts

The applicant, the Moscow branch of the Salvation Army, was present in Russia in 1913 to 1923 and then officially registered as a religious organisation in 1992.

In 1997, a new law on Freedom of Conscience and religious Associations was enacted (the Religions Act) which required that religious associations established before 1997 bring their articles of association in compliance with it and then re-submit them for State registration. Failure to submit an application for re-registration within the time-limit entailed the termination of the organisation's legal entity status.

In August 1999, the applicant branch was denied re-registration. The Moscow Justice Department based its argument for refusal on the fact that the number of founding members was insufficient and that there were no documents to prove that the members were lawfully resident in Russia. It also held that since it had the word 'branch' in its name and that the founders were foreign nationals, the organisation was ineligible for re-registration as a religious organisation under Russian law. The applicant challenged that refusal.

Before Presnenskiy District Court of Moscow the Department advanced a new argument. It maintained that the applicant branch should be denied registration as it was a 'paramilitary organisation'. In particular it noted that its members wore uniforms and served in the 'army'. It also contended that it was not legitimate to use the word 'army' in the name of a religious organisation. The District Court endorsed that argument and further held that the applicant branch's articles of association failed to describe adequately the organisation's faith and objectives. Furthermore, the court concluded that it was clear that the organisation's articles of association assumed that the organisation's activities would lead its members to break Russian law as it sought to limit the organisation's liability for the actions of its members. The Moscow City Court upheld that judgment on appeal. The applicant branch then lodged an application for supervisory review with the City Court and the Supreme Court.

In the meantime the time-limit for re-registration of religious organisations expired and, in September 2001, Taganskiy District Court of Moscow struck off the organisation from the State Register of Legal Entities.

The applicant branch's requests to lodge an application for supervisory review were refused.

### Complaints

The applicant branch complained that the loss of its legal status severely curtailed its ability to manifest its religion in worship and practice. It therefore claimed violations of Articles 9 and 11.

The applicant further alleged a breach of Article 14, read in conjunction with Articles 9 and 11, on the grounds that it had been discriminated against on account of its position as a religious minority in Russia.

Held

The Court found that there had been a violation of Article 11 of the Convention read in the light of Article 9.

The Court decided that no separate examination of the same issues under Article 14 of the Convention was required.

Commentary

The Court examined the two main arguments advanced by the domestic authorities for refusing the applicant's re-registration. They concerned the applicant branch's 'foreign origin' and its internal structure and religious activities.

As regards the 'foreign origin' of the applicant branch, the Court found no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities. It noted that the Religions Act expressly provided for registration of Russian religious organisations subordinate to the central governing body located abroad. Accordingly, it determined that that ground for refusal had no legal foundation.

As to the domestic courts' complaint regarding the lack of clarity about the applicant branch's faith and objectives, the Court emphasised that it was the national courts' task to elucidate the applicable legal requirements and give the applicant clear notice how to prepare the documents in order to be able to obtain re-registration. That had not, however, been done. Accordingly, the Court considered that the courts could not rely on that ground for refusing registration.

Referring to the claims that the applicant branch was a paramilitary organisation, the Court pointed out that, it was not for the State to determine whether religious beliefs or the means used to express them were legitimate. Furthermore, the Court held that, although the applicant branch was organised using ranks similar to those used in the army and their members wore uniforms, it could not seriously be maintained that the applicant branch advocated a violent change of constitutional foundations or undermined the integrity or security of the State. No evidence to that effect was produced before the domestic authorities or by the

Government. It therefore followed that the domestic findings on this point were devoid of factual basis.

As to the District Court's assertion that, according to the organisation's articles of association, the applicant branch would 'inevitably break Russian law', the Court noted that there was no evidence to show that in the seven years of its existence the applicant branch, its members or founders had contravened any Russian law or pursued objectives other than those listed in its articles of association, notably the advancement of the Christian faith and acts of charity. It followed that that finding also lacked evidentiary basis and was therefore arbitrary.

In view of the circumstances of the case, the Court concluded that, in denying registration to the Moscow Branch of The Salvation Army, the Moscow authorities did not act in good faith and neglected their duty of neutrality and impartiality vis-à-vis the applicant's religious community. It therefore considered that there had been an unjustified interference with the applicant's right to freedom of religion and association.

## Freedom of expression

### *Ergin v. Turkey*

(47533/99)

**European Court of Human Rights:** Judgment of 4 May 2006

*Freedom of expression – Right to a fair trial – Articles 6, 10*

#### Facts

The applicant, Ahmet Ergin, is a Turkish national who was born in 1973 and lives in Istanbul.

The applicant, who was the editor of a newspaper published an article which formed a critique of the now-traditional ceremony to mark the departure of soldiers leaving to perform their military service; in literary language the author explained that the enthusiasm surrounding those departures was a denial of the tragic end which awaited some of the conscripts concerned, namely death or mutilation.

On 20 October 1998 the General Staff Court found him guilty of incitement to evade military service and sentenced him to two months' imprisonment, which it commuted to a fine. An appeal by the applicant on points of law was dismissed on 10 February 1999.

### Complaints

The applicant complained under Article 10 that his conviction had infringed his freedom of expression.

The applicant further complained under Article 6, that the proceedings that had led to his conviction had been unfair, in particular on account of the General Staff Court's lack of independence and impartiality, since he stood trial before a court composed exclusively of military officers.

### Held

The Court held that there had been a violation of Article 10 of the Convention since it considered that the applicant's sentence was not necessary in a democratic society.

The Court further held that there had been a violation of Article 6(1). It noted that the applicant's doubts about the independence and impartiality of that court could be regarded as objectively justified.

As regards the other complaint about the unfairness of the proceedings, the Court reiterated that a court whose lack of independence and impartiality had been established could not, in any event, guarantee a fair trial to those subject to its jurisdiction; it therefore considered that there was no cause to examine the complaint concerned.

The Court awarded the applicant EUR 2,000 for non-pecuniary damage and EUR 1,500 for costs and expenses.

### Commentary

In the present case, the Court considered that the dispute concerned whether the interference was 'necessary in a democratic society'. The Court had examined the grounds given in the decisions of the domestic courts, which could not as they stand be regarded as sufficient to justify the interference with the applicant's right to freedom of expression. It observed, in particular, that although the words used in the offending article gave it a connotation hostile to military service, they did not exhort the use of violence or incite armed resistance, and they did not

constitute hate-speech, which, in the Court's view, was the essential element to be taken into consideration.

The Court reiterated that the adjective 'necessary', within the meaning of Article 10(2), implies the existence of a 'pressing social need'. The Court considered that the applicant's criminal conviction did not correspond to a pressing social need. The interference was accordingly not 'necessary in a democratic society'.

In relation to Article 6, the Court observes that it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated. However, the existence of such a jurisdiction should be subjected to particularly careful scrutiny. Furthermore, the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so, only on a clear and foreseeable legal basis. In the present case, the applicant is a civilian, a newspaper editor, who had no duty of loyalty to the army. The publication for which the applicant was prosecuted was classified as a 'military offence', and that was the only reason why he was tried in the General Staff Court. The Court considered that the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified.

## **Right of assembly and association**

### ***Demir and Baykara v. Turkey***

(34503/97)

**European Court of Human Rights:** Judgment of 21 November 2006

*Trade union – freedom of assembly and association – collective bargaining agreement – prohibition of discrimination – Articles 11, 14*

#### Facts

The applicants, Kemal Demir and Vicdan Baykara, are Turkish nationals who were born in 1951 in 1958 respectively. Mr. Demir lives in Gaziantep and Ms Baykara in İstanbul. At the material time, Ms Baykara was the general secretary of the Tüm Bel-Sen trade union and Mr Demir a member.

The case concerned a finding by the Court of Cassation that Tüm Bel-Sen had no separate legal personality and the consequent cancellation of a collective bargaining agreement it had entered into with the Gaziantep Town Council.

Tüm Bel-Sen was founded in 1990 by civil servants from various localities, with the object of promoting democratic trade unionism to serve the aspirations and needs of its members. In 1993 it entered into a collective bargaining agreement with Gaziantep Town Council regulating all aspects of working conditions at the council, including salaries, benefits and welfare services. It later sued the council on the ground that it had defaulted on its obligations, in particular, those of a financial nature. It won the case at first instance. However, on 6 December 1995 the Court of Cassation ruled that at the time Tüm Bel-Sen was founded, Turkish law did not permit civil servants to form unions and that it could not rely on the relevant international treaties as they were not yet applicable in Turkish law. It therefore concluded that Tüm Bel-Sen did not have legal personality or the capacity to enter into a collective bargaining agreement.

Following an audit of the town council's accounts by the Audit Court, the State asked the members of Tüm Bel-Sen to reimburse the additional revenue they had received under the defunct collective bargaining agreement.

#### The Complaint

The applicants complained under Articles 11 and 14 that the Turkish courts had denied them the right to form a trade union and to enter into a collective bargaining agreement.

#### Held

The Court held unanimously that there had been a violation of Article 11 of the Convention.

The Court did not consider it necessary to consider separately the complaints under Article 14.

The Court awarded Ms Baykara EUR 20,000 in respect of non-pecuniary damage, to be transferred to Tüm Bel-Sen. The Court made an award to Kemal Demir of EUR 500 in respect of all damage suffered.

#### Commentary

In the absence of any concrete evidence to show that Tüm Bel-Sen's activities constituted a threat to society or the State, the Court held that the refusal to

accord it legal personality violated Turkey's obligations under Article 11.

The Court noted that the collective bargaining agreement between the union and the town council was the principal or even the only means by which the union could promote and defend the interests of its members. Accordingly, the cancellation of that agreement, which had been in effect for two years, constituted an interference with the applicants' freedom of association. It further noted that the applicants had acted in good faith in choosing to enter into a collective bargaining agreement to defend their interests, as Turkey had previously ratified the UN Right to Organise and Collective Bargaining Convention 1949 (No. 98), which afforded all workers the right to engage in collective bargaining and to enter into collective agreements.

The Court held that the decision to cancel an operative collective bargaining agreement with retrospective effect almost three years after its conclusion constituted a violation of the rights of Tüm Bel-Sen and the applicants under Article 11.

In the light of its findings under Article 11, the Court held that no separate examination of the complaint under Article 14 was necessary.

***Öllinger v. Austria***  
(76900/01)

**European Court of Human Rights:** Judgment of 29 June 2006

*Prohibition of commemorative meeting – freedom of expression - freedom of assembly – balance of interests – discrimination – Articles 9, 10, 11, 14*

Facts

The applicant, Karl Öllinger, is an Austrian national who was born in 1951 and lives in Vienna. He is a member of parliament for the Green Party.

On 30 October 1998 the applicant notified Salzburg Federal Police Authority that, on All Saints' Day (1 November) 1998 from 9am until 1 pm, he would be holding a meeting at the Salzburg municipal cemetery in front of the war memorial in commemoration of the Salzburg Jews killed by the SS during the Second World War. He expected about six people to attend, carrying commemorative messages, and specified that there would be no chanting or banners. He noted that the

meeting would coincide with the gathering of Comradeship IV, in memory of the SS soldiers killed in the Second World War.

On 31 October 1998 Salzburg Federal Police Authority prohibited the meeting and, on 17 August 1999, Salzburg Public Security Authority dismissed an appeal against that decision by the applicant. The police authority and public security authority considered the prohibition of the applicant's assembly necessary in order to prevent disturbances of the Comradeship IV commemoration meeting, which was considered a popular ceremony not requiring authorisation. They had particular regard to the experience of previous protest campaigns by other organisers against the gathering of Comradeship IV, which had disturbed other visitors to the cemetery and had required police intervention.

On 13 December 2000, the Constitutional Court dismissed a complaint by the applicant. However the Constitutional Court also found the approach of the police authority and public security authority to have been too narrow. It observed that the prohibition of the intended meeting would not be justified if its sole purpose were the protection of the Comradeship IV ceremony. It went on to say that the prohibition was nevertheless justified or even required by the State's positive obligation under Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights to protect those practising their religion against deliberate disturbance by others. All Saints' Day was an important religious holiday on which the population traditionally went to cemeteries to commemorate the dead and disturbances caused by disputes between members of the assembly organised by the applicant and members of Comradeship IV were likely to occur in the light of the experience of previous years.

#### The Complaint

The applicant complained about the prohibition on the holding of his commemorative meeting, relying on Articles 9, 10, 11, and 14 of the Convention.

#### Held

The Court held by six votes to one that there had been a violation of Article 11 of the Convention.

The Court held unanimously that it is not necessary to examine separately the applicant's complaints under Articles 9, 10 and 14 of the Convention.

The Court made no award for damages but ordered the Respondent Government to pay the applicant EUR 5,878.88 in respect of costs and expenses.

### Commentary

The Court noted that the applicant's case concerned competing fundamental rights; his right to freedom of peaceful assembly and to freedom of expression had to be balanced against the other association's right to protection against disturbance of its assembly and the cemetery users' right to protection of their freedom to practice their religion. Noting that the domestic authorities had regard to the various competing Convention rights, the Court examined whether they had achieved a fair balance between them.

The applicant's assembly was clearly intended as a counter-demonstration to protest against the gathering of Comradeship IV, an association which consisted mainly of former members of the SS. The applicant emphasised that the main purpose of his assembly was to remind the public of the crimes committed by the SS and to commemorate the Salzburg Jews murdered by them. The coincidence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wished to convey.

In the Court's view, the unconditional prohibition of a counter-demonstration was a very far-reaching measure which would require particular justification, all the more so as the applicant, being a member of parliament, essentially wished to protest against the gathering of Comradeship IV and, thus, to express an opinion on an issue of public interest. The Court found it striking that the domestic authorities attached no weight to that aspect of the case.

It was undisputed that the aim of protecting the gathering of Comradeship IV did not provide sufficient justification for the contested prohibition, as had been clearly pointed out by the Constitutional Court. The Court fully agreed with that position.

Considering whether the prohibition was justified to protect the cemetery users' right to practise their religion, the Court noted a number of factors which indicated that the prohibition at issue was disproportionate to the aim pursued. First and foremost, the assembly was in no way directed against the cemetery users' beliefs or the manifestation of them. Moreover, the applicant expected only a small number of participants. They envisaged peaceful and silent means of expressing their opinion and had explicitly ruled out the use of chanting or banners. Thus, the intended assembly in itself could not have hurt the feelings

of visitors to the cemetery. Moreover, while the authorities feared that, as in previous years, heated debates might arise, it was not alleged that any incidents of violence had occurred on previous occasions.

In those circumstances, the Court was not convinced by the Respondent Government's argument that allowing both meetings while taking preventive measures, such as ensuring a police presence in order to keep the two assemblies apart, was not a viable alternative which would have preserved the applicant's right to freedom of assembly while at the same time offering a sufficient degree of protection as regards the rights of the cemetery's visitors. The Court found that the Austrian authorities gave too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of Comradeship IV, while giving too much weight to the interest of cemetery users in being protected against some rather limited disturbances. The Court therefore considered that the Austrian authorities had failed to strike a fair balance between the competing interests and that there had been a violation of Article 11.

The Court found that no separate examination of the applicant's complaints under Articles 9, 10 and 14 was necessary.

## **Right to enjoyment of property**

### *Süleymanoğlu and Yasul v. Turkey* (37951/97)

**European Court of Human Rights:** Judgment of 13 July 2006

*Forceful eviction from home – Right to respect for private and family life – Right to an effective remedy - Article 1 of Protocol No.1, Articles 8, 13*

#### The facts

This is a KHRP assisted case. The applicants Siddika Süleymanoğlu and Meliha Yasul are Turkish nationals who were born in 1941 and 1952, respectively, and live in Diyarbakır, Turkey. The facts of the case were disputed by the parties.

The applicants lived in the village of Ağartı in the district of Hazro (Diyarbakır province). This province was within the area of south-east Turkey covered by the

state of emergency which was decreed in 1987 following serious disturbances in the region between the security forces and the members of the PKK organisation. The events and clashes that took place in the region affected many villages, including some in Diyarbakır province. Houses were burnt or destroyed and some villages were abandoned by their inhabitants.

In November 1993 and May 1994, respectively, the applicants were forced by gendarmes to evacuate the village of Ağartı. The security forces had then proceeded to set their houses on fire.

The Government denied these allegations and maintained that the villagers had decided to evacuate the village themselves because of concerns over security following threats by the PKK; the houses had been destroyed as a result of the winter conditions and a lack of regular maintenance.

The Government subsequently submitted that Damage Assessment and Compensation Commissions were set up in 76 provinces under the Law on Compensation for Losses resulting from Terrorism and the Fight against Terrorism (the 'Compensation Law of 27 July 2004'). The Government claimed that those who had suffered damage as a result of terrorism or of measures taken by the authorities to combat terrorism could lodge an application with the relevant commission and claim compensation.

### Complaints

The applicants argued that their right to enjoyment of property was violated in breach of Article 1 of Protocol No.1 to the Convention.

They further complained under Article 8 of the Convention that their right to respect for private and family life and home was violated.

Finally, the applicants complained under Article 13 of the Convention that they were denied an effective remedy since an effective domestic remedy did not exist.

### Held

The case was declared inadmissible.

### Commentary

In reaching its judgment, the Court relied on its earlier inadmissibility decision in the case of *İçyer v Turkey* (Application No 18888/02; summarised in KHRP

Legal Review Volume 9 at page 115-118).

The Court observed that it was possible under the Compensation Act of 27 July 2004 for persons such as the applicants to apply up until 3 January 2007 to compensation boards for reparation for damage sustained as a result of forcible eviction, the destruction of their properties or their inability to regain access to them. The applicants had not, however, used that remedy.

Noting that there were no circumstances that would have exempted the applicants from the obligation to exhaust that remedy, the Court held that their complaints under Article 8 and Article 1 of Protocol No. 1 had to be rejected pursuant to Article 35 (conditions of admissibility).

Further, since the Compensation Act afforded the applicants an effective remedy which they could use to complain about the destruction of their properties and their inability to return to them, the Court found that the complaint under Article 13 was manifestly ill-founded and had to be dismissed under Article 35.

***Kadriye Yıldız and Others v. Turkey***  
(73016/01)

**European Court of Human Rights:** Judgment of 10 October 2006

*Protection of property - Article 1 of Protocol No.1*

The facts

The applicants Kadriye Yıldız, Süheyla Yıldız, Nevzat Yıldız, Seyithan Yıldız, Arslan Yıldız, Gültekin Yıldız, Aziz Yıldız and Ferhan Yıldız are Turkish nationals who were born in 1929, 1948, 1952, 1950, 1933, 1954, 1939 and 1916 respectively and live in Mardin (Turkey). Their names appeared in the land registers as the owners of land situated in Alakuş, which had been mined by the public authorities since 1958.

On 17 July 1992, Mardin Court of First Instance ordered the Ministry of Defence to pay the applicants approximately 228,090 USD in compensation. It found that, despite the fact that the land had been occupied since 1958, it was registered in the land register in the names of the applicants in 1991 following proceedings that had started in 1969 and ended in 1987.

The Ministry of Defence appealed on points of law, arguing that – in accordance with section 38 of the Expropriation Act (Law no. 2942) – the applicants, who had not instituted legal proceedings within the statutory 20-year time-limit, had forfeited all their rights. The Court of Cassation quashed the judgment in question and remitted the case to the lower court, which revoked the applicants' property title and transferred ownership of the land to the authorities.

#### Complaints

The applicants alleged that the deprivation of the property in question, without the payment of compensation, amounted to a violation of Article 1 of Protocol No. 1.

They further complained that their rights under Article 13 had been breached in relation to Respondent Government's failure to provide an effective remedy for the violations suffered.

#### Held

The Court held unanimously that there had been a breach of Article 1 of Protocol No. 1.

Given the above finding, the Court did not consider it necessary to consider the complaints under Article 13 of the Convention.

The Court awarded the applicants EUR 250,000 jointly for non-pecuniary damage and EUR 4,000 for costs and expenses.

#### Commentary

The Court held that the application of section 38 of Law no. 2942, which makes provision for adverse possession in favour of the State without compensation, had had the effect of depriving the applicants of any possibility of obtaining compensation for the revocation of their property title. Such interference could only be regarded as arbitrary, in so far as there had been no procedure for compensation capable of maintaining the fair balance that should obtain between the demands of the general interest of the community and the requirements of the protection of the individual's rights.

Consequently, the Court found that there had been a violation of Article 1 Protocol No 1.

## ***Jeličić v. Bosnia and Herzegovina***

(41183/02)

**European Court of Human Rights:** Judgment of 31 October 2006

*Prevention of enforcement of court judgment – right of access to a court – protection of private property – Article 6(1) and Article 1 of Protocol No. 1*

### Facts

The applicant, Ruža Jeličić, is a citizen of Bosnia and Herzegovina who was born in 1953 and lives in Banja Luka, Bosnia and Herzegovina.

On 31 January 1983, she placed a sum of money in German marks in two foreign-currency savings accounts at the former Privredna banka Sarajevo Filijala Banja Luka. Foreign-currency savings which were deposited prior to the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) ('old' foreign-currency savings) fall under a special legal regime in Bosnia and Herzegovina.

The applicant attempted unsuccessfully to withdraw her savings from the bank on several occasions.

On 26 November 1998, she obtained a judgment ordering her bank to release all sums on her accounts plus default interest and legal costs. Since that judgment was not executed, on 12 January 2000 the Bosnia and Herzegovina Human Rights Chamber found that the Republika Srpska (the part of Bosnia and Herzegovina in which the bank is situated) had violated the applicant's rights under the European Convention on Human Rights and ordered the Republika Srpska to enforce the judgment without further delay. However, the judgment had not yet been enforced.

On 18 January 2002, according to domestic legislation and following the completion of the privatisation of the bank, the money in the applicant's foreign-currency accounts became a public debt attributable to the Republika Srpska.

On 15 April 2006 the State of Bosnia and Herzegovina took over that debt, under section 1 of the Old Foreign-Currency Savings Act 2006.

### The Complaint

The applicant complained about the statutory prevention of the enforcement of a final and enforceable judgment in her favour. Her complaint was examined by

the Court under Article 6 (1) of the Convention and Article 1 of Protocol No. 1.

Held

The Court held unanimously that there had been a violation of Article 6(1) and a violation of Article 1 of Protocol No. 1 to the Convention.

The Court awarded EUR 163,460 to the applicant in respect of pecuniary damage and EUR 4,000 in respect of non-pecuniary damage.

Commentary

The Court noted that the judgment of 26 November 1998, although final and enforceable, had not yet been executed. The impugned situation had thus already lasted more than four years since the ratification of the Convention by Bosnia and Herzegovina on 12 July 2002 (the period which fell within the Court's jurisdiction). The Court also noted that the judgment debt was the liability of the State.

The Respondent Government did not dispute that in ordinary circumstances a delay in the execution of a judgment of more than four years would not be consistent with the requirements of Article 6. However, they maintained that the present case was exceptional as the judgment in question concerned the release of the applicant's 'old' foreign-currency savings. It would be unacceptable to execute that judgment without reimbursing other 'old' foreign-currency savers at the same time (including those who had not obtained a final and enforceable judgment in their favour) and such a course of action was simply impossible due to the magnitude of the 'old' foreign-currency savings.

The Court disagreed, since it considered that the situation of the applicant was significantly different from that of the majority of 'old' foreign-currency savers who had not obtained any judgment ordering the release of their funds.

The Court did not consider that the payment of the award made by the domestic courts in the applicant's case, even with the accumulated default interest, would be a significant burden for the State let alone result in the collapse of its economy as suggested by the Government. In any event, the applicant should not be prevented from benefiting from the success of the litigation on the ground of alleged financial difficulties experienced by the State.

Further, the evidence was that judgments ordering the release of 'old' foreign-currency savings were the exception rather than the norm. That had been

corroborated by the case-law of the former Human Rights Chamber, the Human Rights Commission within the Constitutional Court and the Constitutional Court of Bosnia and Herzegovina: they had determined more than 1,000 'old' foreign-currency cases and a final and enforceable judgment ordering the release of savings had been made in only five cases. Similarly, of the 85 cases approximately pending before the European Court of Human Rights (submitted on behalf of more than 3,750 applicants) concerning 'old' foreign-currency savings, about ten applicants had a final and enforceable judgment ordering the release of their savings.

Whilst the Court appreciated that a major part of 'old' foreign-currency savings might have ceased to exist before or during the dissolution of the former SFRY and the disintegration of its banking and monetary systems, such circumstances fell to be invoked and examined prior to a final domestic determination of a case and where the courts have finally determined an issue, their ruling should not be called into question.

In the circumstances of the applicant's case, the Court considered that it was not justified to delay so long the execution of a final and enforceable judgment, or to intervene in the execution of the judgment in the manner foreseen by section 27 of the 2006 Act. The Court concluded that the essence of the applicant's right of access to court protected by Article 6 of the Convention was thereby impaired. There had accordingly been a breach of that Article.

The Court recalled that the impossibility of obtaining the execution of a final judgment in an applicant's favour constituted an interference with the right to the peaceful enjoyment of possessions. For the reasons detailed in the context of Article 6 above, the Court further considered that the interference with the applicant's possessions was not justified in the circumstances of the applicant's case. Therefore, there had also been a violation of Article 1 of Protocol No. 1.

## C. UN Cases

### Prohibition of torture and right to life

#### *Mehdi Zare v Sweden*

256/2004

**Committee Against Torture:** Decision of 17 May 2006

*Prohibition against torture - Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

#### Facts

The applicant is Mehdi Zare, an Iranian national, currently awaiting deportation from Sweden. He claims that his removal to Iran would constitute a violation of article 3 of the Convention against Torture by Sweden.

The complainant was an active member of the Socialist party of Iran (known as the PSI) and was its representative in Faza from 1999. He took part in political actions: distributing leaflets and other political material; gathering information; preparing meetings; and renting appropriate meeting places. His brother-in-law was an active politician with a leading position in the SPI in Mashad city. The complainant rented an apartment in Shiraz for his sister and brother-in-law, who were in hiding. The complainant visited them frequently.

The complainant's wife divorced him on 28 August 2001 on the suspicion that his visits to Shiraz were due to his having an affair. The complainant's ex-wife's family reported him to the authorities on the basis that he frequented a suspicious address in Shiraz, had a parabolic antenna, and frequently drank alcohol. On 1 September 2001, a policeman searched the complainant's home and confiscated the parabolic antenna and some alcohol. The complainant was arrested and brought to the 'General Court' in Faza, where he was detained.

He was interrogated for 24 hours and severely beaten. On 3 September 2001, he was charged with the crime of possessing a parabolic antenna and possessing and drinking alcohol. He stated that he believed the real reason for his arrest was to keep him detained, pending the investigation of his visits to the apartment

in Shiraz. On 12 September 2001, the General Court found him guilty as charged and sentenced him to 140 whiplashes (75 for the antenna, and 65 for the possession of alcohol).

On 14 September 2001, he appealed to the court with a request to have his punishment transformed into a fine, but his request was denied on 18 September 2001.

The verdict was to be enforced on 21 September 2001. On 18 September 2001, the complainant was released on bail. On the same day he left Faza and travelled to Shiraz, after having been informed by his lawyer that the authorities were searching for him for 'serious crimes'.

On 19 September 2001, the complainant called his neighbours in Faza and learned that the authorities had searched his home and closed his repair shop. He realized that his life was in danger and decided to flee from Iran.

He arrived in Sweden on 22 January 2002. On the same day, he requested political asylum and had a preliminary interview. On 18 December 2002, a complete interview took place. The complainant was represented by a lawyer. On 23 May 2003, he had a complementary interview, and his lawyer represented him by phone. During this third interview, upon being asked questions that he had already answered, the complainant got the impression that the translation during the earlier interviews had been inadequate. He complained to the authorities. On 4 June 2003, the authorities assessed the tape recordings and concluded that the interview was defective since the interpreter had left out and added in information.

On 17 June 2004, the Migration Board rejected the complainant's asylum request, on the grounds that his statements were not credible. It considered that he had altered his statements, from a fear of punishment for possessing a parabolic antenna and drinking and possessing alcohol, to a fear of punishment for aiding a person with an illicit political view. The Board considered that the complainant hadn't made out that the Iranian authorities were aware that he was helping his sister and brother-in-law; it found it unlikely that the complainant had been sentenced to 140 whiplashes, as the penalty in Iran for the charges against him was a monetary fine. As to the effectiveness of translation, the Board pointed out that the complainant had had the possibility of making corrections through counsel. The Board concluded that the complainant had failed to prove that he risked persecution if returned in Iran.

The complainant subsequently made a number of applications to the Aliens Appeal Board. On 21 June 2004, he submitted a document which purported to prove that his request to change the verdict to a monetary fine was denied by the Iranian authorities. The Board did not consider the documents trustworthy and rejected the application on 15 July 2004.

In a further application to the Board on 19 July 2004, the complainant provided clarification of his political activities for the previous five years. The Board found that there was no proof that he had been involved politically in Iran and rejected his application on 1 September 2004.

On 9 September 2004, in his final application, the complainant presented what he purported to be original summonses from the Iranian authorities inviting him to attend the general court in Shiraz. He requested the Board to postpone its decision pending the issuing of a medical certificate. On 13 September 2004, the Board denied the complainant's request and, on 17 September 2004, rejected his application.

#### The complaint

The complainant claimed that the State party would violate Article 3 of the Convention if he was returned to Iran as he had a real and personal fear of being tortured and ill-treated upon return, on account of his previous political activities. The sentence of 140 whiplashes would be imposed upon him. He submitted that the real reason behind this verdict was the authorities' desire to persecute him for his political activities.

#### Held

The Committee held that the complainant had failed to substantiate his claim that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Iran.

#### Commentary

The Committee stated that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country is not a sufficient ground on its own to determine that a person would be in danger of being subjected to torture upon his or her return to that country. In addition, the individual concerned must be shown to be personally at risk. Conversely, the Committee noted, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

The Committee recalled its General Comment No.1 on Article 3, which states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk need not be highly probable, but it must be personal and present.

The Committee noted his claim that the asylum procedure in Sweden was flawed, in particular, due to inadequate interpretation during the second interview. The Committee considered that the State party took appropriate remedial action by allowing him the opportunity to correct errors in the minutes of the interview.

The Committee noted that the complainant produced documents which purported to validate the existence of the sentence against him. On this point, the Committee recalled its jurisprudence that it is for the complainant to collect and present evidence in support of his or her account of events.

As to his alleged previous political involvement, the Committee noted the complainant's affirmation that he did not base his initial asylum request on such involvement. The Committee concluded that he failed to adduce evidence about the conduct of any political activity of such significance that would, in the language of the Committee's General Comment No. 1 on Article 3, make him 'particularly vulnerable' to the risk of being placed in danger of torture.

### ***AE v Switzerland***

(Communication No. 278/2005: Switzerland; CAT/C/36/D/278/2005)

**Committee Against Torture:** Communication of 17 May 2006

*Prohibition against torture – Asylum - Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

#### Facts

The complainant is Asim Elmansoub, a Sudanese national born in 1964, currently detained in Switzerland and awaiting deportation to Sudan. He claims that his deportation would constitute a violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention entered into force for Switzerland on 2 March 1987.

The complainant is a Sudanese citizen from Darfur belonging to the Borno tribe. From 1986 to 2004, he studied and worked in the former Yugoslavia, where

he was employed until 1 August 2004. The complainant contended that, from March 2002 to August 2004, he secretly provided distance assistance to refugees from Darfur, through a family aid committee. Since 2003, he had been an active member of the JEM (Sudanese Movement for Justice and Equality), a non-Arab rebel group contrary to the government and the *Janjaweed* militias.

On 20 August 2004, the complainant returned to Sudan. One month later, he was arrested in Khartoum, together with four other persons, by members of the Sudanese security agency, and accused of having supplied weapons to Darfur citizens. He contends that the real reason behind his arrest was his JEM membership. On the third day of his arrest, the author bribed the person that was guarding him and gained his freedom. Neither the complaint submitted to the Committee nor any further comments by the complainant contain any reference to any acts of torture having occurred during his arrest. However, in the hearings and complaints filed before the Swiss Federal Office for Refugees, the complainant stated that, during his three-day arrest, he was left without water for hours and kept in an unlit room, which allegedly amounted to acts of torture.

The complainant left Sudan for Switzerland through Egypt with a tourist visa. In Switzerland, he applied for asylum on 1 October 2004. By a decision of 1 November 2004, the Swiss Federal Office for Refugees rejected the application. In particular, it considered that the complainant was not able to explain the manner in which this assistance was provided and his particular role therein, as well as the exact period of his engagement. It further noted that it was unlikely that the complainant could have bribed the guard on the third day of his detention and free himself when he had declared that his money and passport had been seized by the security agents upon his detention.

The Appeal Commission rejected the complainant's appeal on 15 April 2005, on grounds of lack of substantiation and credibility. On 30 June 2005, the complainant filed a request for reconsideration based on the fact that his brother had been arrested in Sudan. This request was also dismissed by the Appeal Commission on 8 July 2005, which considered that this new element of proof did not alter the object of the complaint. A request for suspension of the deportation was declined on 3 August 2005, also based on lack of substantiation of the complainant's arguments.

### Complaints

The complainant maintained that the Justice and Equality Movement, to which he belongs, is opposed to the government of Sudan and that its members are

systematically arrested by Sudanese security forces and sometimes tortured during their detention. He added that torture and inhuman and degrading treatments is in the order of the day in Sudan. The complainant sustained that there are substantial grounds for believing that he would be subjected to torture if returned to Sudan, in violation of article 3 of the Convention.

The issue before the Committee was whether the complainant's removal to Sudan would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

#### Held

The Committee considered that the complainant had not demonstrated the existence of substantial grounds for believing that his return to Sudan would expose him to a real, specific and personal risk of torture, as required under Article 3 of the Convention.

#### Commentary

The Committee recalled its general comment on the implementation of article 3, that 'the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable' (A/53/44, annex IX, para. 6).

The Committee observed that the complainant's allegations that he would risk being tortured if returned to Sudan rely on the fact that members of JEM face a high risk of detention and torture and on the general human rights records of Sudan. The Committee also noted the State party's allegations that the complainant had failed to specify the nature of his political activities and the nature of the assistance provided to Darfur refugees. In this regard, the complainant had failed to explain his concrete role within JEM that would make him particularly vulnerable to the risk of being placed in danger of torture were he to be expelled. He had only invoked his condition of 'founding member' in his last submission to the Committee, without having justified or proved this condition and without having ever invoked it before the national authorities.

The Committee further noted the State party's submission that the complainant has not invoked or proved before the Committee that he was tortured or maltreated in the past. The Committee therefore considered that the complainant had not demonstrated the existence of substantial grounds for believing that his return to Sudan would expose him to a real, specific and personal risk of torture,

as required under Article 3 of the Convention.

Accordingly, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, held the view that the return of the complainant to Sudan does not reveal a breach of Article 3 of the Convention.

***Bazarov v Uzbekistan***

(Communication No. 959/2000: Uzbekistan; CCPR/C/87/D/959/2000)

**Human Rights Committee:** Communication of 8 August 2006

*Right to life – Fair trial – Prohibition of Torture - Articles 6, 7, 9, 10, 11, 14, 15 of the International Covenant on Civil and Political Rights*

The authors are Saimijon Bazarov (born in 1950) and his wife Malokhat, both Uzbek nationals, who submitted the communication on behalf of their son, Nayimizhon Bazarov, who was executed pursuant a sentence to death of 11 June 1999 pronounced by the Samarkand Regional Court.

On 14 June 1998, while driving, the authors' son was stopped in Urgut by a group of police officers. He was brought to the (Urgut) Regional Department of the Ministry of Internal Affairs, allegedly without any warrant. There, allegedly, while being interrogated, he was beaten and threatened with having his family put in prison. Later the same day, he was charged with drug trafficking. Investigators searched his home, in the presence of witnesses, and after having hidden a small quantity of drugs under a carpet, they 'discovered' it, which was duly recorded. The authors claim that their son could not request the review of the legality of his arrest and detention by a court, as no such possibility exists in the State party.

The case against the authors' son and eight other co-defendants was transmitted to the Samarkand Regional Court, and a court trial started on 12 April 1999. On 11 July 1999, the Court found the authors' son and one of his co-defendants guilty of murder, and other crimes, including drug trafficking, and sentenced them to death.

According to the authors, their son and his co-defendants claimed in court that they were beaten and tortured during the preliminary investigation to force them give false evidence, and all claimed to be innocent of the murder; their son also

claimed to be innocent of the drug-related charges. Allegedly, his co-defendants showed parts of their bodies 'burned with cigarettes, covered with bruises, haematoma, swellings on their heads, broken teeth' and asked the presiding judge to order a medical examination in this relation. The court did not order a medical examination, but called two of the investigators, who denied any use of unlawful methods of interrogation during the pre-trial investigation.

The authors claimed that their son's trial did not meet the requirements for a fair trial: the criminal case was 'fabricated' by the investigators, and the court based its conclusions mainly on the depositions of G.H. (which, according to the authors, should not have been taken into account because they were modified several times during the preliminary investigation) and on evidence extracted under torture from the defendants during the preliminary investigation. They asserted that the court failed to establish their son's guilt without any reasonable doubt, and to solve a number of contradictions. They also asserted that their son had an alibi - he was not in Urgut at the night of the crime, but was in Samarkand to meet them when they returned from holidays and their train arrived early in the morning - but allegedly it was not taken into account by the court.

On an unspecified date, Mr. N. Bazarov filed a cassation appeal against the Samarkand Regional Court judgment of 11 June 1999. On 24 December 1999, the Supreme Court upheld the judgment, thus confirming his death sentence.

### Complaints

The authors submitted that their son was a victim of violations by Uzbekistan of his rights under Articles 6, 7, 9, 10, 11, 14 and 15 of the Covenant. Although they did not invoke it specifically, the communication also appeared to raise issues under Article 7 in respect of the applicants.

### Held

The Committee noted the authors' allegation that their son's rights under Articles 11 and 15 of the Covenant were violated. In the absence of any information in this respect, the Committee decided that the authors had failed to sufficiently substantiate their claim, for purposes of admissibility. Accordingly, this part of the communication was declared inadmissible under Article 2, of the Optional Protocol.

In respect of the remainder of the complaints, the Committee found violations of Articles 9, paragraph 3, and Article 14, paragraph 1, read together with Article 6 of the Covenant in respect of the authors' son, and a violation of Article 7 in

respect of the authors themselves.

### Commentary

The authors claimed that their son was unable to have the decision to place him in pre-trial detention reviewed by a judge or other officer authorised by law to exercise judicial power, because Uzbek law does not provide, for such a possibility. The State party did not refute this allegation. The Committee observed that the State party's criminal procedure law provides that decisions for arrest/pre-trial detention are approved by a prosecutor, whose decisions are subject to appeal before a higher prosecutor only, and cannot be challenged in court. It noted that the author's son was arrested on 14 June 1998, placed on pre-trial detention on 18 June 1998, and that there was no subsequent judicial review of the lawfulness of detention until he was brought before a court, on 12 April 1999. The Committee recalled that Article 9, paragraph 3, is intended to bring the detention of a person charged with a criminal offence under judicial control and recalls that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the present case, the Committee was not satisfied that the public prosecutor may be characterised as having the institutional objectivity and impartiality necessary to be considered an 'officer authorised to exercise judicial power' within the meaning of Article 9, paragraph 3. The Committee therefore concluded that there has been a violation of this provision.

The Committee noted that from the material before it, the alleged victim and his lawyer have claimed that the co-defendants showed marks of torture in court and affirmed that their testimonies were obtained under torture, in response to which the presiding judge summoned two of the investigators in question, and asked them whether they used unlawful methods of investigation, and dismissed them after receiving a negative reply. The State party merely replied that the alleged victim's co-defendants or lawyers did not request the court to carry out any medical examination in this regard, and that unspecified 'internal safeguard procedures' of the law-enforcement agencies had not revealed any misconduct during the pre-trial detention. In this connection, the State party had not adduced any documentary evidence of any inquiry conducted in the context of the court trial or in the context of the present communication. The burden of proof (on the use of torture) cannot rest alone on the author of a communication. In the circumstances, the Committee considered that due weight must be given to the authors' allegations, as the State party had failed to refute the allegations that the alleged victim's co-defendants were tortured to make them give false evidence

against him. Accordingly, the Committee concluded that the facts as presented reveal a violation of the alleged victim's rights under article 14, paragraph 1, of the Covenant.

In light of the above conclusion, and bearing in mind its constant jurisprudence to the effect that that an imposition of a sentence of death rendered in a trial that did not meet the requirements of a fair trial amounts also to a violation of Article 6 of the Covenant, the Committee concludes that the alleged victim's rights under this provision have also been violated.

The Committee noted of the authors' claim that the authorities did not inform them about their son's situation for a long period of time, and learned about his execution a long time after his death. The State party's law does not allow for a family of an individual under sentence of death to be informed either of the date of execution or of the location of the burial site of an executed prisoner. The Committee understood the continued anguish and mental stress caused to the authors, as the mother and father of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. It recalled that the secrecy surrounding the date of execution, and the place of burial, as well as the refusal to hand over the body for burial, have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee therefore considered that the authorities' initial failure to notify the authors of the execution of their son and the failure to inform them of his burial place, amounts to inhuman treatment of the authors, in violation of Article 7 of the Covenant.

The Committee recalled that the State party is also under an obligation to prevent similar violations in the future.

## Section 4: Appendices



**Optional Protocol to the Convention against Torture and other Cruel,  
Inhuman or Degrading Treatment or Punishment**

**Adopted on 18 December 2002 at the fifty-seventh session of the  
General Assembly of the United Nations by resolution  
A/RES/57/199.**

**Protocol is available for signature, ratification and accession as from  
4 February 2003 (i.e. the date upon which the original of the Protocol  
was established) at United Nations Headquarters in New York.**

**PREAMBLE**

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention, Have agreed as follows:

**PART I**

**General principles**

**Article 1**

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

**Article 2**

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

**Article 3**

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

**Article 4**

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

**PART II**

**Subcommittee on Prevention**

**Article 5**

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

5. No two members of the Subcommittee on Prevention may be nationals of the same State.

6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

#### **Article 6**

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.

2.

(a) The nominees shall have the nationality of a State Party to the present Protocol;

(b) At least one of the two candidates shall have the nationality of the nominating State Party;

(c) No more than two nationals of a State Party shall be nominated;

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

#### **Article 7**

1. The members of the Subcommittee on Prevention shall be elected in the following manner:

(a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;

(b) The initial election shall be held no later than six months after the entry into force of the present Protocol;

(c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;

(d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:

(a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;

(b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

#### **Article 8**

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

#### **Article 9**

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 ( d).

#### **Article 10**

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:

(a) Half the members plus one shall constitute a quorum;

(b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;

(c) The Subcommittee on Prevention shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

### **PART III**

#### **Mandate of the Subcommittee on Prevention**

#### **Article 11**

1. The Subcommittee on Prevention shall:

- (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) In regard to the national preventive mechanisms:
  - (i) Advise and assist States Parties, when necessary, in their establishment;
  - (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
  - (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
  - (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;
- (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

#### **Article 12**

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

- (a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
- (b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
- (c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
- (d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

#### **Article 13**

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties

concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.

4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

#### **Article 14**

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:

(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

#### **Article 15**

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

#### **Article 16**

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.

2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.

4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at

the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

## **PART IV**

### **National preventive mechanisms**

#### **Article 17**

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

#### **Article 18**

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

#### **Article 19**

The national preventive mechanisms shall be granted at a minimum the power:

- (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
- (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
- (c) To submit proposals and observations concerning existing or draft legislation.

#### **Article 20**

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

- (c) Access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- (e) The liberty to choose the places they want to visit and the persons they want to interview;
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

**Article 21**

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

**Article 22**

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

**Article 23**

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

**PART V**

**Declaration**

**Article 24**

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

**PART VI**

**Financial provisions**

**Article 25**

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

**Article 26**

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

**PART VII**

**Final provisions**

**Article 27**

1. The present Protocol is open for signature by any State that has signed the Convention.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

**Article 28**

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

**Article 29**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

**Article 30**

No reservations shall be made to the present Protocol.

**Article 31**

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are

encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

**Article 32**

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

**Article 33**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.
3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

**Article 34**

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

**Article 35**

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

**Article 36**

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

- (a) Respect the laws and regulations of the visited State;
- (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

**Article 37**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.



## Publications List

*Other materials available from the Kurdish Human Rights Project include:*

- A Fearful Land: Fact-Finding Mission to Southeast Turkey (1996)
- A Delegation to Investigate the Alleged Used of Napalm or Other Chemical Weapons in Southeast Turkey (1993)
- Advocacy and the Rule of Law in Turkey (1995)
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- *Gündem v Turkey, Selcuk and Asker*: A Case Report (1998)
- Human Rights Defenders in Turkey by Kerim Yildiz and Claire Brigham (2006)
- Human Rights Violations against Kurdish People - Report to the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities 46<sup>th</sup> Session (1994)

- Human Rights Violations against Kurdish People in Turkey - Report to the Budapest Review Conference, of the Conference on Security and Co-operation in Europe (1994)
- Human Rights Violations against Kurds in Turkey, presentation in Warsaw (1995)
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