Casebook 1

LEADING STRATEGIC LITIGATION CASES AGAINST TORTURE

2024

REDRESS
Ending torture, seeking justice for survivors

PREFACE

REDRESS has a long track record of using strategic litigation against torture to deliver justice and reparation for survivors, adopting a holistic approach that supports and accompanies the torture survivor through the process. We also promote this concept and technique to partner NGOs through litigation workshops and publications.

The Torture Litigation Casebook series aims to showcase around 80 case studies of strategic litigation against torture to illustrate best practice and to help strengthen the capacity of human rights lawyers worldwide. Other Casebooks in the series cover UK Cases, Dissent Cases, and Discrimination Cases.

The Casebooks cover all regions, include cases brought before national, regional, and international jurisdictions, and seek to highlight different techniques of strategic litigation against torture, including national and international advocacy, collaborative partnerships, and effective media campaigns. The majority are cases brought by private parties or applicants, invoking human rights norms enshrined in national legislation or constitutions, or resorting to regional or international human rights bodies where national remedies prove ineffective. Some are criminal or inter-state actions. The Casebooks are published alongside our Practice Notes. They provide practical examples demonstrating strategies that lawyers have pursued to challenge torture.

The main criteria for deciding which cases to include was their strategic features. Rather than seeking to compile a legal casebook of the leading cases relating to the law of torture, the intention was to demonstrate the range of different ways in which strategic litigation can be deployed to challenge torture. In many instances, this has involved the use of multiple approaches and strategies on the part of civil society, including advocacy, activism, and use of the media. The Casebook presents a range of innovative legal claims or remedies, and efforts to bring about effective implementation.

The impetus for this series was a recognition that such a focus on strategic features of litigation is often not readily available to lawyers or activists preparing for litigation. Accordingly, we have chosen cases that may be well documented, and their legal outcomes widely known, but the approaches taken, and their strategic impact are less well known. In some cases, we have had conversations with those involved during the preparation of this Casebook.

The aims of the Casebook series are to serve as a reference for practitioners and for workshops that REDRESS delivers to other NGOs conducting strategic litigation relating to torture; to illustrate the main approaches or strategies that have proven most effective in the conduct of strategic litigation; and to create connections between the communities of lawyers engaged in this work.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
UNCAT	UN Convention against Torture

INTRODUCTION

Through strategic litigation, human rights lawyers seek to challenge both individual acts of torture and other ill-treatment, and the policies and practices that enable it to take place. Using this approach, survivors can pursue accountability and be part of campaigning for policy and legal reform to prevent such treatment from reoccurring in the future. In addition to pursuing legal cases, a holistic approach to strategic litigation uses other civil society techniques to bring about change, such as advocacy for structural reforms (national, regional, international), activism, community organising, capacity building and engaging the media, academia and public in general (for further information, see *Practice Note on Holistic Strategic Litigation against Torture*).

In many cases, civil society seeks to go beyond establishing individual responsibility and obtaining remedies for individual victims in strategic litigation against torture and aspires to ensure wider impact both during and beyond the legal decision – that there is a community behind the client and a cause beyond the case. But change can be slow, and in many cases, litigation that seeks to encourage social advances may take a generation or more to achieve (for further information, see *Practice Note on Evaluating the Impact of Strategic Litigation against Torture*).

This Casebook catalogues leading cases against torture across the globe that used strategic litigation and that serve as good examples of the potential of creative litigation to transform the law. It documents 23 cases brought before different jurisdictions: regional courts (the IACtHR, the ACHPR, and the ECtHR), the ICJ, communications to the UN Human Rights Committee, and national courts in North America, Africa and Europe. It should be noted that not all the cases included are primarily concerned with torture as distinct from other forms of ill-treatment, but all are significant in some way for the law on torture as a body of jurisprudence. While not an exhaustive list of leading cases, those included were chosen due to their strategic features which we hope are a good reflection of best practice, dealing with both the practice of torture itself and remedies for its commission.

Again, in compiling this Casebook we have not aimed to present a comprehensive overview of all strategic anti-torture cases, but to showcase those that we find ourselves referring to time and time again in our own work. Our aim was to produce a digest that will be useful for practitioners and activists alike, to help them quickly identify key cases and their relevance for their work. The Casebook, therefore, presents a distilled overview of each case, offering a breakdown of its individual impact as well as various strategic features.

This publication was prepared by a team at **REDRESS**, including **Rupert Skilbeck**, Director, **Alejandra Vicente**, Head of Law, **Natalie Lucas**, Legal Officer, **Blánaid Ní Chearnaigh**, Legal Assistant, **Eva Sanchis**, Head of Communications, **Joss Gillespie**, Communications Assistant, and **Jodie Chun**, Communications Assistant. We would like to also thank **Fiona McKay**, Consultant Legal Adviser, and **Amina Fahmy**, former Legal Fellow, for their contributions to preparing this Casebook. Finally, we are also grateful for the input offered by other NGOs conducting strategic litigation, particularly the **Open Society Justice Initiative**, and the **UCL Public International Law Pro Bono Project**.

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FILÁRTIGA V. PEÑA-IRALA (1980)

Link to the judgment

United States Court of Appeals, Second Circuit

EXTRATERRITORIALITY
PEREMPTORY NORMS
CIVIL LIABILITY

CASE SUMMARY

In 1979, Joel Filártiga and Dolly Filártiga, two citizens of Paraguay resident in the US, filed a civil claim under the Alien Tort Statute ('ATS') against former Paraguayan official Americo Peña-Irala for the torture and wrongful death of Joelito Filártiga which occurred in Paraguay. The ATS gives US Courts jurisdiction over civil actions brought by foreign nationals for torts in violation of US treaties or international law. The US Court of Appeals held that a violation of peremptory norms, such as the universal prohibition on torture, constituted an infringement of "the law of nations."

Until this case, US courts had been highly reluctant to exercise extraterritorial jurisdiction over violations committed abroad. The US Court of Appeals justified its acceptance of jurisdiction, under the otherwise underutilised ATS, on the basis that torture is clearly a violation of the law of nations and previous cases "did not involve such well-established, universally recognized norms of international law." The decision paved the way for subsequent tort claims focused on extraterritorial human rights violations, allowing victims to recover damages against perpetrators in US courts. *Filártiga* remained the established position until *Kiobel v. Royal Dutch Petroleum Co.* (2013) in which the Supreme Court held that the presumption against extraterritorial jurisdiction applies to claims under the ATS, thus restricting its application.

THE FACTS AND PROCEDURAL HISTORY

In March 1976, Joelito Filártiga (the 17-year-old son of Joel Filártiga) was kidnapped and tortured to death by the respondent, who was at that time the Inspector General of Police in Asuncion, the capital city of Paraguay. Dolly Filártiga was later brought to the respondent's home, where she was shown the mutilated body of her brother. It was alleged that the violations were motivated by Joel Filártiga's political activities criticising dictator General

Alfredo Stroessner's regime. The Filártiga family first brought criminal proceedings against the respondent in Paraguay. Before the proceedings were concluded, they had to leave Paraguay and sought political asylum in the US.

In 1979, after learning of Peña-Irala's presence in the US, the Filártigas initiated a civil claim against him under the ATS. The District Court allowed Peña-Irala's return to Paraguay, ruling that, although the proscription of torture had become "a norm of customary international law", the Court was bound to follow appellate precedents which narrowly limited the function of international law to only relations between States.

The case was appealed to the Court of Appeals, where the claimants argued that jurisdiction was conferred by the ATS, which provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States." As the action did not arise from a US treaty, the applicability of the ATS depended on whether the conduct of the respondent violated 'the law of nations.'

THE DECISION AND ITS SIGNIFICANCE

Violations

In a decision issued on 30 June 1980, the US Court of Appeals Second Circuit reversed the District Court's decision, recognising that foreign nationals who are victims of international human rights violations may sue perpetrators in a federal court for civil redress. Such a right extended to acts committed abroad, so long as the court has personal jurisdiction over the respondent. The Circuit Court also recognised that the prohibition against torture amounted to customary international law. It awarded the claimants over $10 million USD in damages. As at the time of publication of this report, it is believed these damages have still not been paid out.

Status of the Prohibition of Torture under International Law

In the leading judgment, Circuit Judge Kaufman considered the status of the prohibition against torture, recognising it as a fundamental norm of international law protected by a number of international instruments including, among others, the Universal Declaration of Human Rights, the American Convention on Human Rights and the ECHR, Judge Kaufman concluded that State torture of its citizens had been "universally renounced", and "there now exists an international consensus that recognises basic human rights and obligations owed by all governments to their citizens."

Widening the Interpretation of the 'Law of Nations'

The Court then turned to the precedent of *Dreyfus v. von Finck* (1976), in which the application of the ATS had been precluded through a narrow interpretation of 'the law of nations' to exclude any law governing a State's treatment of its own citizens. Judge Kaufman concluded that the precedent was "clearly out of tune with current usage" noting that "the treaties and accords cited above, as well as the express foreign policy of [the US] government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments." Accordingly, international law was recognised as capable of conferring fundamental rights on individuals. A violation of such could constitute a violation of 'the law of nations' under the ATS, conferring jurisdiction on US Courts for torts that take place extraterritorially.

WIDER IMPACT OF THE CASE

Created a Domestic Precedent for Civil Actions in US Courts for Human Rights Violations Committed Abroad

This case pioneered the application of the ATS to human rights violations committed abroad and provided a critical forum for victims to seek redress from perpetrators in US domestic courts. The decision did not limit claims under the ATS to acts of torture. Indeed, *Filártiga* has been used as precedent for bringing cases for other violations including arbitrary deprivation of freedom (*Fernandez v. Wilkinson* (1980)), genocide, slavery and summary execution which have also been construed as violating the 'laws of nations.'

Fears that the US would become a de facto international court have since led to limits being imposed on the applicability of the ATS for extraterritorial violations. In *Sosa v. Alvarez-Machain* (2004), the US Supreme Court held that claims under the ATS were only applicable for the most serious violations of international law. Its applicability was limited even further in *Kiobel v. Royal Dutch Petroleum Co.* (2013) in which the Supreme Court held that a presumption against extraterritorial applicability applies to claims under the ATS to safeguard against unwarranted judicial interference in foreign policy.

Creating a Domestic Precedent for the Prohibition Against Torture as Customary International Law and Justiciable in US Courts

The *Filártiga* decision is also remarkable for its recognition that customary international law, including the prohibition on torture, formed part of domestic law of the US. The court recognised that the law of nations is a dynamic concept which should be construed in accordance with the current customs and usages of civilised nations, as articulated by jurists and commentators. It held specifically that the prohibition of torture has now become part of customary international law, that US law directly incorporated the customary international law principle prohibiting deliberate government torture, and that the ATS created an implied right of action for violations of customary international law.

This opened the way for other cases to be brought under the ATS as well as the enactment, 11 years after the *Filártiga* decision, of the Torture Victims Protection Act 106 Stat. 73, creating a statutory cause of action against individuals who commit extrajudicial killings and torture while acting in an official capacity for a foreign state. The statute does not extend to acts committed by foreign corporate defendants or political associations.

STRATEGIC FEATURES OF THE CASE

Creative Invoking of an Ancient Statute

The Center for Constitutional Rights ('CCR') attorneys, working on behalf of the Filártiga family, had briefed the Circuit Court on the meaning of international law in view of the post-Nuremberg emergence of an international law of human rights applicable to individuals as well as States. The CCR explored the origin of the ATS, an ancient statute enacted in 1789, as a source of federal judicial power over matters of international dimension and its purpose in preventing the US becoming a sanctuary for international criminals who would otherwise be immune to civil suit. The CCR relied on previous ATS case law, drawing parallels to an 1820 case in which piracy was found to be a blanket violation of international law: today's torturers, the CCR successfully argued, are like eighteenth

century pirates — enemies of all humanity (*hostes humani generis*) — and should pay for their crimes wherever they are found.

Support from the US State Department

The *amicus* brief submitted by the State Department, arguably influenced by the Iran hostage crisis, supported the CCR's view of international law and the scope of the ATS's jurisdiction. The State Department's position was that torture was indeed a fundamental and universal violation of international law. Furthermore, it argued that international law was justiciable, and that, consequently, the court had a duty to hear the case.

Use of Moral Arguments

Throughout the case, there are numerous references to the justiciability of universal norms. A distinctly moral argument is present throughout, accompanying the legal one – an approach encouraged by the Court. One such example of this is the Court's decision to bring in Jacobo Timerman, a victim of torture in Argentina, to testify about torture and its consequences for those it is inflicted upon.

The Legal Representatives for the Plaintiffs were Peter Weiss, Rhonda Copelon, John W. Corwin, and Jose Antionio Lugo on behalf of the Center for Constitutional Rights, and Michael Maggio of Goren & Maggio.

ADDITIONAL RESOURCES

- For further information on the case, see 'Filártiga v. Peña-Irala' (Center for Constitutional Rights).
- William J. Aceves, *The Anatomy of Torture: A Documentary History of Filártiga v. Peña-Irala* (Brill 2007).
- Ralph G. Steinhardt, 'Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filártiga v. Peña-Irala' (1981) 22(1) Harvard International Law Journal 53.
- Karen E. Holt, 'Filártiga v. Peña-Irala After Ten Years: Major Breakthrough or Legal Oddity?' (1990) 20 (534) Georgia Journal of International and Comparative Law 543.
- B.A. Barenblat, 'Torture as a Violation of the Law of Nations: An Analysis of 28 USC 1350—Filártiga v. Peña-Irala' (1981) 16 Texas International Law Journal 117.
- See also *Kadic v. Karadžić,* 70 F.3d 232 (1995).

MARÍA DEL CARMEN ALMEIDA DE QUINTEROS ET AL. V. URUGUAY (1982)

Link to the judgment

UN Human Rights Committee

SECONDARY VICTIMS • PSYCHOLOGICAL TORTURE • ARBITRARY DETENTION • ICCPR • EFFECTIVE INVESTIGATIONS • ENFORCED DISAPPEARANCE • EFFECTIVE REMEDY • CORROBORATING TESTIMONY

CASE SUMMARY

Elena Quinteros and her mother María Quinteros were confirmed to have been primary and secondary victims of torture following the disappearance and ill-treatment of Elena by Uruguayan officials. The UN Human Rights Committee established that the secondary victim to a crime of torture, in this case a close family member, can also be a victim of torture. As a secondary victim, María Quinteros suffered psychological damage caused by the continuing uncertainty surrounding her daughter's enforced disappearance. The Committee further established that the corroborating testimonies of witnesses would be given substantial weight where the State refuses to investigate and refutes serious allegations of torture. This decision has been highly influential in enhancing the rights of primary and secondary victims of torture under international law.

THE FACTS AND PROCEDURAL HISTORY

Elena Quinteros, a member of the Uruguayan Anarchist Federation, was arrested on 24 June 1976 by the Montevideo Police Force. She had previously been imprisoned under the Uruguayan dictatorship for engaging in left-wing political activities. On 28 June, Elena escaped capture by Uruguayan officials and attempted to claim political asylum at the Venezuelan Embassy. She was forcibly abducted by Uruguayan authorities, removed by car, and taken to a military detention centre in August 1976. Elena died in custody later that year after being subjected to torture while in detention. María Quinteros was unaware of her daughter's location and was denied clear official information about her daughter's safety. Uruguay denied all responsibility for the treatment of Elena. She submitted a communication to the UN Human Rights Committee alleging violations of the ICCPR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 15 October 1982, the UN Human Rights Committee identified the following violations of ICCPR:

a) Article 7 (prohibition of torture and cruel, inhuman or degrading treatment of punishment);
b) Article 9 (right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention); and
c) Article 10(1) (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person).

Defining State Obligations

The Committee found a breach of the duty to investigate allegations in good faith and ordered that the State commence an investigation, prosecute those responsible, pay damages and "take steps to ensure that similar violations do not occur in the future." The case also confirmed that the State has the burden of disproving allegations.

Next-of-Kin Recognised as Secondary Victims

The decision confirmed that family members of victims of torture or enforced disappearance can be directly affected thus giving them the status of 'secondary victims.' This principle has since been confirmed in later cases. This case also helped to establish and develop the rights of next-of-kin to be automatically presumed victims of torture or ill-treatment where there is an enforced disappearance.

The case further clarified that the right to know the truth is a constitutive part of the right to an effective remedy. Later cases have confirmed the secondary victims' 'right to know' of the circumstances of death including the location of the primary victim's remains.

WIDER IMPACT OF THE CASE

Recognition of Secondary Victims and the Rights of Family Members

As a result of the Committee's decision, these rights of family members of victims were given formal recognition in a subsequent UN Declaration requiring redress for victims and their families. Namely, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985.

Helped Open the Way for Later Domestic Investigation and Groundbreaking Indictment

Years later, activists recruited labour lawyer Pablo Chargoñia to litigate the case. In December 1999, Chargoñia presented a *recurso de amparo* (a remedy for the legal protection of rights and freedoms) on behalf of Elena's

mother seeking to assert her right to access information regarding her daughter's fate. In May 2000, Judge Estela Jubette accepted the request and ordered an investigation into the case, which the appellate court later upheld. While the administrative investigation into Elena Quinteros' fate produced no significant findings, in November 2000, Chargoñia requested that the previously closed criminal investigation be reopened based on an innovative argument that the Expiry Law, which prevented the criminal prosecution of human rights abuses committed during the country's military dictatorship, did not apply to civilians. His argument was accepted, and, on 18 October 2002, former Foreign Minister Juan Carlos Blanco was charged with the aggravated deprivation of the liberty of Elena Quinteros and sentenced to 20-years imprisonment for the aggravated homicide of Elena Quinteros. This was the first time anyone had been indicted and detained for dictatorship-era crimes in Uruguay.

Helped Pave the Way for the Repeal of Amnesty Laws

This was the first of several cases that paved the way for the repeal of the amnesty law which, for the first seventeen years after the transition back to civilian rule in 1985, retributive justice through the courts was largely limited to owing to executive support for its strict interpretation. In *Quinteros,* the case was allowed to proceed in domestic courts because Blanco was a civilian and thus not protected by the amnesty law that only covered the military and police. More cases proceeded under President Tabaré Vázquez. Without violating the official letter of the Expiry Law, President Vásquez used executive privilege to work around it, proceeding with cases that occurred before the June 1973 coup, as well as crimes that took place in Argentina with the cooperation of Uruguayan and Argentine forces. These exceptions enabled a variety of cases to proceed, including two high-profile ones against former presidents Juan María Bordaberry, who was in power from 1972-1976, and General Gregorio Álvarez, who led the dictatorship from 1981-1985. Under President Vásquez, over a dozen cases proceeded through the courts with the support of a sympathetic executive and progressive judges willing to pursue them. The law was eventually repealed in 2011 under the presidency of José Mujica which resulted in a broader swathe of cases being filed.

STRATEGIC FEATURES OF THE CASE

Obtaining an International Decision Opened the Way for Action Domestically

Even though many years later, the findings of the UN Human Rights Committee helped reinvigorate efforts to address the issue in Uruguay and to pave the way for the opening of a domestic inquiry in 2000 and subsequent criminal prosecution of Juan Carlos Blanco for the killing of Elena Quinteros.

A Media Campaign Accompanied the Case

As stated by the UN Representative of Uruguay, "the disappearance of Elena Quinteros has caused us considerable problems." In breaking down the diplomatic relations between Uruguay and Venezuela, "it gave rise to a controversy in the Uruguayan newspapers, some of which asked whether or not the Uruguayan authorities were implicated." The effective media campaign calling out State impunity prompted the conviction of Juan Carlos Blanco in 2010.

Importance of Corroborating Testimony

The corroborating testimonies of Cristina Marquet Navarro and Alberto Grille Motta, including statements from the Venezuelan authorities and the UN Representative, were vital to the case. These testimonies allowed the

Committee to determine the factual sequence of events: that Grille Motta was at the Embassy and his friend, Enrique Baroni, witnessed Elena's abduction, while Navarro claimed to have witnessed Elena's torture in detention in August 1976. In the absence of any counter information or argument presented by Uruguay and given the fact that the State refuted the allegations in general terms, the Committee held that it "cannot but give appropriate weight" to these submissions.

ADDITIONAL RESOURCES

- UNHRC, 'Views: Communication No. 30/1978, *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*' (29 March 1982) UN Doc. CCPR/C/15/D/30/1978.
- *UNHRC, '*Views: Communication No. 1159/2003*, Mariam Sankara et al. v. Burkina Faso*' (28 March 2006) UN Doc. CCPR/C/86/D/1159/2003.
- Alexander Murray, 'Enforced Disappearances and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 International Human Rights Law Review 57.
- Jo-Marie Burt, Gabriela Fried Amilivia and Francesca Lessa, 'Civil Society and the Resurgent Struggle against Impunity in Uruguay (1986-2012)' (2013) 7 The International Journal of Transitional Justice 306.
- *'*Flood of rights lawsuits after Uruguay lifts amnesty' (Morocco Today, 1 November 2011).

VELÁSQUEZ-RODRÍGUEZ V. HONDURAS (1988)

Link to the judgment

Inter-American Court of Human Rights

ENFORCED DISAPPEARANCE • EFFECTIVE INVESTIGATIONS • CIVIL SOCIETY ENGAGEMENT • REGIONAL PRECEDENT • IACTHR • REMEDIES • COMPENSATION

CASE SUMMARY

The first contentious case litigated before the IACtHR concerned the enforced disappearance of individuals in Honduras in the 1980s. The case did not run smoothly — Honduras was an unwilling participant, and a number of witnesses were intimidated or killed. However, it resulted in a landmark judgment which confirmed that the Honduran government had violated numerous provisions of the American Convention on Human Rights and brought about a much-followed decision on the State's responsibilities for enforced disappearances, shifting the burden of proof on the State to explain what happened to the person. The petitioners were family members of persons who were subjected to enforced disappearances. The lead petitioner, Zenaida Velásquez-Rodríguez, is the sister of Manfredo Velásquez, who was abducted and disappeared by Honduran security forces.

THE FACTS AND PROCEDURAL HISTORY

In the 1980s, Honduras became the headquarters of the US' anti-communist efforts in Central America. Honduran military officers were trained by CIA and FBI officials in interrogation techniques involving psychological and physical mistreatment. Battalion 316 was formed and carried out the enforced disappearance of 184 individuals during that decade. One such person was Manfredo Velásquez, a well-known student activist who was kidnapped in the parking lot of a movie theatre in downtown Tegucigalpa in 1981. In 1981, his sister filed a petition with the IACtHR which also received three additional petitions reporting the similar disappearances of Saul Godínez Cruz, Francisco Fairén Garbi and Yolanda Solís Corrales, and joined the cases.

The case was the first time the IACtHR heard contentious hearings – the IACHR had never before submitted a case to the Court. Honduras' unwillingness to comply with the Commission's recommendations and requests for information on internal investigations into the disappearance led it to refer the case to the Court pursuant to

Article 50 and 51 of the American Convention on Human Rights, requesting that the Court determine whether the State had violated Articles 4, 5 and 7 of the Convention. In addition, the Commission asked the Court to rule that "the consequences of the situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party or parties."

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 29 July 1988, the IACtHR found that the Honduran government had violated Manfredo Velásquez's rights under the following provisions of the American Convention on Human Rights:

a) Article 1 (the obligation to respect rights);
b) Article 1(1) (the obligation of non-discrimination);
c) Article 4 (the right to life);
d) Article 5 (the right to humane treatment); and
e) Article 7 (the right to personal liberty).

Burden of Proof Shifted to the State

The IACtHR established, for the first time, a rule on shifting burdens in such cases: that a government can be held liable for the disappearance and unlawful killing once it is proved that the victim was last seen in the custody of government agents. Once this is established, the government has the burden of proving what happened to the victim. *Velásquez-Rodríguez* is also the first case to frame human rights law as imposing positive obligations on States, and to define elements of the obligation to protect individuals from violation of their rights.

Finding of Inhumane Treatment

The Court also made a finding of inhumane treatment, holding that prolonged isolation and deprivation of communication is in itself cruel and inhumane treatment, and although it had not been directly shown that he had been physically tortured, his kidnapping and imprisonment by State authorities shown to subject detainees to indignities constituted a failure to ensure rights.

Reparations Ordered

By way of reparation, the Court ordered fair compensation to be provided to the next of kin. The parties failed to reach agreement, so they returned to the Court. In a subsequent judgment on Compensatory Damages of 21 July 1989, the IACtHR took as its basis public international law and the obligation to make full restitution to repair harm brought about by violation of an international obligation, as well as human rights treaties that called for indemnification for violations. It ordered compensation sufficient to remedy all the consequences of the violation that took place, including emotional harm, and ordered the government to pay a total of one and a half million lempiras to the family of Velásquez-Rodríguez (equivalent to around $60,000 USD in 2024).

The IACtHR declined to order non-pecuniary measures such as prosecutions or investigations, finding that the duty to investigate had already been established during the merits phase of the case.

WIDER IMPACT OF THE CASE

Global Precedent on State Obligations for Human Rights Violations

This is the leading case on enforced disappearances worldwide, followed in many other cases by the IACtHR and highly significant also for the evolution of the law on torture in establishing the relationship between State responsibility and human rights. Whilst not mentioned explicitly, it could be thought that this case influenced a corresponding judgment in the ECtHR in *McCann v. UK* (1995) (a right to life case). The case has also been referred to numerous subsequent times at the ECtHR.

Established the Framework for how the Court Deals with Reparations

Since this was the IACtHR's first contentious case, it established the basic principles and framework for how the Court would deal with reparations, based on principles of international law and human rights, that was followed in subsequent cases.

While the Court rejected both the Commission and the victim's lawyers request for symbolic forms of redress in *Velásquez-Rodríguez,* it did acknowledge that such measures could constitute reparation for the consequences of the violation, and in subsequent cases the Court has ordered States to make reparations that have symbolic significance, such as building monuments (*Barrios Altos v. Peru* (2001), publishing the Court's decision in a newspaper, or providing the resources for a proper burial (*The "Street Children" (Villagrán-Morales) v. Guatemala* (2001)).

STRATEGIC FEATURES OF THE CASE

Family Members Organised to Support Litigation and Collaborate with International Civil Society

The petitioners, who were all family members of the disappeared, founded an NGO in Honduras dedicated to support persons whose family members were subject to enforced disappearance. This support included litigation in Honduras, as well as collaboration with international NGOs that carry out litigation at the national level in foreign jurisdictions, as well as in regional and international forums.

For instance, some of the petitioners filed lawsuits in US federal courts against perpetrators who relocated to the US. At least one of these subsequent cases has led to the deportation of a Honduran ex-military official from the US (*Reyes v. Lopez Grijalba* (2006)).

Highlighting the Risks of Litigation

The case also highlighted one of the dangers with strategic litigation of this nature. The IACHR requested the government ensure witness protection, but witnesses received death threats and two were killed. One witness was killed following his testimony about the pattern of abuses perpetrated by security forces in Honduras, and a member of the security forces who was scheduled to testify was killed 13 days before his scheduled appearance. The absence of robust safeguards or meaningful consideration of a survivor-centred approach was exposed in this case, underscoring the need to have both.

The Legal Representatives for the Petitioners were the Center for Justice and Accountability ('CJA'), and Gilda M. C. M. de Russomano, Edmundo Vargas Carreño, Claudio Grossman, Juan Méndez, Hugo Muñoz, and José Miguel Vivanco on behalf of the Inter-American Commission of Human Rights.

Amicus Curiae Submissions were made by Amnesty International, the Association of the Bar of the City of New York, Lawyers Committee for Human Rights, and Minnesota Lawyers International Human Rights Committee.

ADDITIONAL RESOURCES

- Samuel M. Witten, 'Velásquez-Rodríguez Case' (1989) 83 American Journal of International Law 361.
- Juan E. Méndez and Javier Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection' (1999) 26(4) Shadows of State Terrorism: Impunity in Latin America 84.
- Ruti Teitel, 'Transitional Justice and Judicial Activism – A Right to Accountability' (2015) 48(2) Cornell International Law Journal 385.
- Claudio Grossman, 'The Inter-American System of Human Rights: Challenges for the Future' (2008) 83(1267) Indiana Law Journal 1267.

SIDERMAN DE BLAKE V. REPUBLIC OF ARGENTINA (1992)

Link to the judgment

United States Court of Appeals, Ninth Circuit

JUS COGENS • CUSTOMARY INTERNATIONAL LAW • JURISDICTION IMMUNITIES • US FOREIGN SOVEREIGN IMMUNITIES ACT

CASE SUMMARY

In a case brought in the US courts by an applicant alleging torture committed in Argentina, a US Court of Appeal held that the prohibition against torture had attained the status of a *jus cogens* norm under international law. However, the US Foreign Sovereign Immunities Act ('FSIA') does not provide for an exception to the general principle of foreign State immunity in cases of violations of *jus cogens* norms. Hence, no jurisdiction could be established for acts of torture perpetrated by Argentinian State agents against one of the plaintiffs based on the peremptory character of the prohibition against torture. However, by accepting an implied waived exception, the Court of Appeal finally decided that the district court had erred in dismissing Siderman's torture claims. The case has proven to be of global significance and consistently cited as authority for the finding that the international proscription of torture has reached the status of a peremptory norm of international law.

THE FACTS AND PROCEDURAL HISTORY

On 24 March 1976, the night of the military coup in Argentina, ten masked armed men forcibly entered the home of Jose and Lea Siderman and kidnapped Jose. They brought him to an unknown location where they tortured him for seven days before releasing him under the threat that if he did not leave the country with his family, they would kill them. In June of the same year, Jose, Lea, and their son Carlos left the country for the US where they reunited with their daughter Susana Siderman de Blake. While in exile, the Sidermans' properties in Argentina were expropriated and the military junta altered public records to fabricate a basis for criminal prosecution against Jose for fraud. Argentinian prosecutors served Siderman with a warrant with the assistance of US courts. Jose turned to the US courts for relief. A District Court dismissed his claims.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 22 May 1992, the Court of Appeal reversed the judgment of the District Court dismissing Jose Siderman's expropriation claims on State immunity grounds, holding that the claims fell within both the commercial activity and international takings exceptions to the FSIA. The Court also found that the District Court had erred in dismissing the expropriation claims on the basis of the act of State doctrine without first considering the threshold issue of subject-matter jurisdiction. Further, it had erred in dismissing the plaintiffs' torture claims.

In upholding the plaintiffs' arguments that Argentina was precluded from asserting the defence of sovereign immunity by the international law principle of *jus cogens*, and by the FSIA's existing treaty and implied waiver exceptions, the Court of Appeal determined the following:

a) The prohibition of torture was part of customary international law and had in fact attained *jus cogens* status;
b) The fact there has been a violation of a *jus cogens* norm does not confer jurisdiction under the FSIA;
c) The existing treaty exception in section 1604 of the FSIA does not apply to torture claims;
d) Nevertheless, evidence was presented to support a finding that in this particular case Argentina had implicitly waived its sovereign immunity under section 1605(a)(1) of the FSIA, thereby rendering the District Court's dismissal of Siderman's torture claims to have been made in error.

Implied Waiver of Immunity

While the Court in *Siderman de Blake* rejected the argument that a *jus cogens* violation constituted an exception to the immunity principle under the FSIA, it nonetheless concluded that Argentina would have impliedly waived its immunity under section 1605(a)(1) of the Act if it had deliberately involved US courts as part of its torture and prosecution of Siderman, the very course of action for which the plaintiff was seeking redress.

Reparations and Recognition

It was reported that Argentina agreed to an out-of-court settlement involving payment of compensation to the plaintiffs, though the terms were subject to a confidentiality agreement. For Jose Siderman, the Court's recognition that he had suffered torture in itself represented an acknowledgment of the truth of his claim. He stated: "I am so happy, and do you know why? Because now everyone will know what happened."

WIDER IMPACT OF THE CASE

Creating Positive and Negative Precedents in US Law

This case established the important precedent that the prohibition against torture has attained the status of a peremptory norm in international law.

However, the case also had a negative aspect, in that it established that the FSIA does not provide for an exception to foreign sovereign immunity based on the peremptory status of the international norm violated. Indeed, US courts have referred to *Siderman de Blake* in subsequent cases as establishing that the absence of an explicit

exception to the sovereign immunity principle in the FSIA for violation of a *jus cogens* norm indicated that the US Congress did not intend for such violations to constitute an exception to the principle (e.g. *Princz v. Federal Republic of Germany* (1994) and *Belhas v. Ya'alon* (2008)). In *Princz,* a District Court initially found for the plaintiff on the grounds a violation of a *jus cogens* norm amounts to an implied waiver of immunity under the FSIA, but this was reversed on appeal.

May have Contributed to Pressure for Legislative Amendment on State Immunity

Subsequently, section 221 of the Anti-Terrorism and Effective Death Penalty was enacted, amending section 1605(a) of title 28, US Code introduced by the FSIA, by adding an exception to the foreign State immunity principle when: "*money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, ... if such act or provision of material support is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency*." However, this exception only applied to cases of torture of individuals who were US citizens at the time of the event and only if the act of torture can be attributed to a so-called 'rogue' State – that is a State sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961. Some believe that this amendment was enacted in response to outrage in the US Congress at highly publicised decisions finding foreign States immune from civil liability for State-sponsored violations of the law of nations such as the case of *Siderman de Blake*. In any event, the State-sponsored terrorism exception provided for in section 1605(a)(7) was moved by the National Defense Authorization Act for Fiscal Year 2008 to a new section of the US Code (section 1605A). This had the effect of freeing claims brought under the terrorism exception from the FSIA's usual bar on punitive damages.

An International Precedent

The case has been cited as authority for the finding that the international proscription of torture has reached the status of a peremptory norm of international law or *jus cogens* (e.g. by the ICTY in *Prosecutor v. Furundžija* (1998), and the UK House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate*, *Ex P Pinochet Ugarte (No. 3)* [2000]).

STRATEGIC FEATURES OF THE CASE

Could have led to Landmark Conviction of a Foreign State in US Courts for Human Rights Violations Committed Abroad

The Republic of Argentina came close to being the first foreign government to face a civil trial before a US court for human rights violations committed on its own soil. Likely for reputational reasons, Argentina decided to settle the case out of court before trial, paying a reportedly sizeable sum of money to Siderman and his family.

Novel Legal Arguments that Helped Create Positive Legal Precedents

While the attempt by the plaintiff to argue that a violation of a *jus cogens* norm automatically amounted to an implied waiver of immunity under section 1605(a)(1) of the FSIA failed, the case did provide an opening for an implied waiver to be established where a State has deliberately used recourse to US courts as a way of violating rights.

Siderman's lawyer stated that the litigation strategy was successful insofar as a US court set in stone the principle that "if someone flees your country and comes to the United States, you had better not come after them."

The Legal Representatives for the Plaintiffs were Michael J. Bazyler of Whittier College School of Law, Paul L. Hoffman on behalf of the ACLU Foundation of Southern California, and Scott W. Wellman of Wellman Cane.

ADDITIONAL RESOURCES

- Scott A. Richman, '*Siderman de Blake v. Republic of Argentina:* Can FSIA Grant Immunity for Violations of Jus Cogens Norms?' (1993) 19(3) Brooklyn Journal of International Law 967.
- Graham Ogilvy, *'Belhas v. Ya'alon:* The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act' (2009) 8(1) Journal of International Business and Law 169.
- G. Michael Ziman, 'Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976' (1999) 21 Loyola of Los Angeles International and Comparative Law Review 185.
- William P. Hoye, 'Fighting Fire with…Mire? Civil Remedies and the New War on State-Sponsored Terrorism' (2002) 12 Duke Journal of Comparative and International Law 105.
- Erika M. Lopes, 'Seeking Accountability and Justice for Torture Victims: The Hurdle of the Foreign Sovereign Immunities Act in Suing Foreign Officials under the Torture Victims Protection Act' (2010) 6 Seton Hall Circuit Review 385.
- Tim Golden, 'Argentina Settles Lawsuit by a Victim of Torture' (The New York Times, 14 September 1996).
- Jim Lobe, 'U.S.-HUMAN RIGHTS: Argentine Torture Case Breaks Precedent' (Inter Press Service, 17 September 1996).
- UN General Assembly, 'Report of the International Law Commission on the work of its fifty-first session' (3 May – 23 July 1999) Official Records of the General Assembly, Supplement No. 10, UN Doc A/54/10 (1999) vol. II (2).

AKSOY V. TURKEY (1996)

Link to the judgment

European Court of Human Rights

EFFECTIVE INVESTIGATIONS • EFFECTIVE REMEDY • EXHAUSTION OF DOMESTIC REMEDIES • ILL-TREATMENT • REGIONAL PRECEDENT • DETENTION

CASE SUMMARY

This was the first time the ECtHR held that treatment endured by an applicant constituted torture (as opposed to inhuman or degrading treatment or punishment) following accusations that the applicant had been supporting the PKK (Worker's Party of Kurdistan). It also established a positive obligation on contracting States to investigate, on their own volition, any alleged instances of torture. Further, the case placed an upper time-limit for which detention could continue without judicial oversight. *Aksoy* has since been cited as an authority in dozens of cases. It led to significant changes in police practices in Turkey, though recent times have seen an unfortunate backsliding.

THE FACTS AND PROCEDURAL HISTORY

Turkey derogated from Article 5 ECHR in 1990 against a backdrop of emergency rule resulting from ongoing clashes between security forces and members of the PKK. Zeki Aksoy was detained for 14 days on suspicion of aiding and abetting PKK terrorists. While in detention, he was blindfolded, stripped naked, his hands tied behind his back and strung up by his arms (so-called 'Palestinian hanging'). He was released without charge after the public prosecutor decided there were insufficient grounds to initiate criminal proceedings.

Zeki Aksoy lodged an application with the ECtHR, but he was subsequently shot dead on 16 April 1994 whilst his application was pending before the Court. Aksoy's father subsequently continued the proceedings.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 18 December 1996, the ECtHR found violations of the following rights under the ECHR:

a) Article 3 (the prohibition of torture) in respect of the treatment suffered by Aksoy, which was deemed to be of "such a serious and cruel nature that it can only be described as torture";

b) Article 5(3) (the right to liberty and security) in respect of the 14-day incommunicado detention of Aksoy, notwithstanding Turkey's derogation; and

c) Article 13 (the right to an effective remedy) in respect of the lack of any investigation by the national authorities.

The Court declined to hold that Zeki Aksoy's death was in retaliation for taking the case to the ECtHR despite evidence of death threats and police harassment shortly before his death.

Reparations Ordered

The Court ordered the State to pay compensation for damage caused by the applicant's detention and torture as well as for the anxiety and distress suffered by his father.

Redefined the Scope of Article 3 Obligations

Aksoy represented a milestone in the ECtHR's case law related to the prohibition of torture for a number of reasons:

a) It was the first time the ECtHR held that treatment amounted to torture, as opposed to the other elements of Article 3 (inhuman or degrading treatment or punishment);

b) The Court put the burden of proof on the State: when an individual is taken into custody in good health and emerges with injuries, the State is required to investigate and provide an explanation;

c) It established general principles regarding what constitutes an effective remedy. In particular, it held that a remedy "must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State". In cases involving Article 3 violations, the remedy must include compensation where appropriate, as well as a thorough investigation "capable of leading to the identification and punishment of those responsible";

d) *Aksoy* established limits to incommunicado detention. The 14-day detention of the applicant without judicial oversight was "exceptionally long" and it left the applicant vulnerable to ill-treatment and arbitrary interference with his right to liberty; and

e) The ECtHR developed its approach to the requirement to exhaust domestic remedies. The Court drew on previously established general principles to find that it was necessary to have regard to the personal circumstances of the applicant, as well as the legal and political context in which remedies are made available. In linking this specifically to Article 3, the ECtHR noted that victims of torture are particularly vulnerable and

will often be reluctant to make a complaint to domestic authorities. It therefore concluded that there existed 'special circumstances' that absolved Aksoy from his obligation to exhaust domestic remedies.

Introduced a New Approach to Article 3

The finding of torture in Aksoy represented a development in what would become known as the ECtHR's 'vertical' approach to Article 3, in which "one moves progressively from forms of ill-treatment which are 'degrading' to those which are 'inhuman' and then to 'torture'" (so from those considered less serious to the most serious). Although the distinction between torture and inhuman or degrading treatment "derives principally from the intensity of the suffering inflicted", Aksoy also introduced the beginnings of a purposive interpretation into ECtHR jurisprudence (taking into account the purpose for which the pain or suffering was inflicted). It is worth noting that the UNCAT includes a purposive element in its definition of torture in Article 1, which later ECtHR judgments explicitly draw on. Aksoy introduced the element of purpose into the ECtHR's jurisprudence without reference to the UNCAT.

WIDER IMPACT OF THE CASE

A Precedent for the ECtHR

While *Aksoy* focused on Article 3 violations, its impact has extended beyond the prohibition against torture. The principles it established relating to the right to an effective remedy were applied in *Kaya v. Turkey* (2000). In *Kaya*, the applicant complained that Turkish security forces violated his brother's Article 2 right to life. The ECtHR applied *Aksoy* when assessing the investigation by State authorities, holding that there were serious deficiencies that amounted to a denial of the applicant's right to an effective remedy. These general principles have also been reaffirmed in several subsequent ECtHR cases.

The limit for detention periods established in *Aksoy* has since been applied in *Sakik and Others v. Turkey (1997)* and in *Demir and Others v. Turkey,* (2008). *Aksoy's* impact with respect to Article 5 has not been limited to cases in which States have made derogations under the ECHR. As *Pantea v. Romania* (2003) and *T.W. v. Malta* (1999) demonstrate, the most significant impact of *Aksoy* on Article 5 has arguably been the connection drawn between a lack of effective judicial control over detention and the potential for ill-treatment of detainees. Finally, the principle that there may be special circumstances that absolve an individual from their obligation to exhaust domestic remedies has also since been applied by the ECtHR in a series of subsequent cases.

An International Precedent

The findings in *Aksoy* have also had an impact at the international legal level. A number of complainants to the UN Committee against Torture have relied on the principles established in *Aksoy* with respect to an effective remedy. The complainants in *Bendib v. Algeria* (2013), *Ntikarehera v. Burundi* (2014) and *Niyonzima v. Burundi* (2014) all relied on *Aksoy* to highlight the deficiencies of the remedies available to them, namely the lack of a thorough investigation leading to the prosecution of perpetrators. In addition, in *Salem v. Tunisia* (2007) the complainant relied on *Aksoy* to argue that while sufficient remedies existed in theory, these were illusory in practice.

Brought About a Change of Government Policy (Albeit not Permanent)

Turkey implemented Act No. 4229 following the *Aksoy* judgment. Adopted on 6 March 1997, Act No. 4229 reduced the maximum length of time that a person may be held in police custody. Additionally, the extension of police custody beyond four days requires a court order. The legislation also provides for an extension of habeas corpus proceedings to offences falling under the State security courts, which have jurisdiction over crimes against the security of the State.

Notwithstanding the changes in stated government policy, Turkey was continually found to be non-compliant in investigating Aksoy's ill-treatment. As a result, Turkey was censured for years by the Committee of Ministers for failing to implement training and hold its security forces accountable. Aksoy's murderers remained at large.

In the early 2000s, in a series of legal changes, Turkey abolished incommunicado detention and use of blindfolds, introduced the right to be examined by a doctor without others present, and strengthened the rights of relatives to be notified. However, torture in Turkey remains a significant problem, with the government announcing a state of emergency and derogations from both the ICCPR and the ECHR, following the attempted coup of 2016. Turkey has since reintroduced 30-day pre-trial detention, blocked access to lawyers for up to five days in pre-trial detention and refused appointment of lawyers of the detainees' own choice. Credible reports have been made of significant ill-treatment with a failure to investigate by Turkish authorities.

STRATEGIC FEATURES OF THE CASE

Part of a Wider Strategic Litigation Project

The case was part of a broader strategy to push for accountability for Turkish human rights abuses. After Turkey ratified the right to individual petition (which was then optional), an informal coalition between Fevzi Veznendaroglu of the Diyarbakir Human Rights Association, Kevin Boyle of Essex University, and Kerim Yildiz of the Kurdish Human Rights Project, developed a strategy to take a series of cases to Strasbourg to enforce the rights of the Kurdish minority in Turkey. This was one of their first cases to reach judgment.

The Legal Representatives for the Applicant were Kevin Boyle and Françoise Hampson of the University of Essex.

ADDITIONAL RESOURCES

- Fionnuala Ní Aoláin, 'Transitional Emergency Jurisprudence: Derogation and Transition' in Antoine Buyse and Michael Hamilton (eds.) *Transitional Jurisprudence and the ECHR (Cambridge University Press 2011).*
- Malcolm D. Evans, 'Getting to Grips with Torture' (2002) 51(2) International and Comparative Law Quarterly 365.
- K.A. Kavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' (2006) 4 European Human Rights Law Review 422.
- Clare McGlynn, 'Rape, Torture, and the European Court of Human Rights' (2009) 58(3) International and Comparative Law Quarterly 565.
- Michael D. Goldhaber, 'The Tortures of Aksoy' in (ed.) A People's History of the European Court of Human Rights (Rutgers University Press 2007).
- 'Report on Turkey' (Amnesty International, 2021).

AYDIN V. TURKEY (1997)

Link to the judgment

European Court of Human Rights

INHUMAN AND DEGRADING TREATMENT • RAPE • EFFECTIVE REMEDY • EFFECTIVE INVESTIGATIONS • MEDICAL EXAMINATIONS CIVIL SOCIETY ENGAGEMENT • POLICE MISTREATMENT • TREATMENT WHILE IN DETENTION

CASE SUMMARY

The applicant alleged that she had been subject to inhuman and degrading treatment, including rape, while in police custody, and there were also allegations of torture made by other family members who had been detained at the same time as the applicant. According to government reports, she and the other members of her family were never detained. The applicant filed a complaint to the public prosecutor who sent her to the State hospital where she was examined by doctors inexperienced in dealing with rape cases. The public prosecutor also took other investigatory measures including taking statements from the applicant's family members and interviewing former PKK activists.

The ECtHR found violations of Articles 3 and 13 ECHR noting that the rape of a 17-year-old detainee, who had also been subjected to other forms of physical and mental suffering, by an official of the State is an especially grave and abhorrent form of ill-treatment and amounted to torture. The failure of the authorities to conduct an effective investigation into the applicant's alleged suffering while in detention resulted in her being denied access to a court to seek an effective remedy and compensation. The Court's findings on rape as torture proved instrumental to how the ECtHR dealt with subsequent cases.

THE FACTS AND PROCEDURAL HISTORY

A group of people made up of village guards and a gendarme arrived in the applicant's village in June 1993. The applicant, who was 17 at the time of the events, her father and her sister-in-law were questioned about recent visits to the house by PKK members. They were forcibly taken from their home and driven to the gendarmerie headquarters. The applicant was separated from her family and was brought to a room where she was stripped naked, beaten, sprayed with cold water from high-pressure jets while being spun in a tire, and subsequently

raped by a man in military clothing. She was released three days later. The applicant filed a complaint with the public prosecutor who sent her to the State hospital for a medical examination. The medical report focused on whether the applicant was a virgin rather than on whether she had in fact been raped.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 25 September 1997, the ECtHR found that the Turkish government had violated:

a) Article 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment); and
b) Article 13 (the right to an effective remedy).

Recognised Rape as Torture

The Court recognised that rape of a detainee by State officials "must be considered to be an especially grave and abhorrent form of ill-treatment." It found "that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention." This decision expanded the scope and meaning of Article 3 and its prohibition of torture.

Affirmed the Duty to Conduct Effective Investigations

The Court reiterated that the duty to conduct prompt impartial investigations when there are reasonable grounds to believe an act of torture has been committed is implicit in the notion of 'an effective remedy' under Article 13 ECHR.

Stressed the Importance of Independent Medical Examinations

The Court found that a thorough and effective investigation by State officials requires a medical examination which must be done by medical professionals "with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination."

WIDER IMPACT OF THE CASE

An International Precedent

The case was decided one year after the IACHR issued its decision in *Raquel Martin de Mejía v. Peru* (1996), in which the Commission established, for the first time, that rape amounted to torture when perpetrated in specific circumstances. Both decisions paved the way for subsequent cases brought before international criminal courts. In 1998, the ICTR found in *The Prosecutor v. Jean-Paul Ayakesu* (1998) that the rape of Tutsi women amounted to torture and recognised that rape and sexual violence had been used as a means of perpetrating genocide. In 2001, the ICTY concluded in *Prosecutor v. Dragoljub Kunarac* (2002) that rape and sexual slavery were crimes against humanity.

The Court's findings on rape as torture and establishing that a thorough and effective State investigation requires a medical examination conducted by competent professionals, comprised important precedents that were followed by the ECtHR in later cases.

STRATEGIC FEATURES OF THE CASE

Accompanied by an NGO Advocacy Campaign

Aydin was brought before the ECtHR as part of a broader campaign of the Kurdish Human Rights Project ('KHRP'), an NGO founded in London in 1992 to provide legal support to Kurdish victims of human rights violations and conduct research and advocacy about the situation of the Kurdish people. The project aimed to bring cases before international mechanisms to challenge the use of torture and other human rights violations in the Kurdish areas of Turkey, Iraq, Iran, and Syria. *Aydin* was one of the first cases to be heard by the ECtHR as part of this campaign.

Use of Third Party Intervention to Support Legal Arguments

The ECtHR received a written submission from Amnesty International who argued that the rape of a female detainee by an agent of the State was considered to be an act of torture under current interpretations of international human rights standards. Amnesty referred to the case of *Raquel Martin de Mejía v. Peru* (1996), as well as to reports published by the UN Special Rapporteur on Torture, and indictments issued by the ICTY against individuals for torture based on allegations that they had raped female detainees.

The Legal Representatives for the Applicant were Kevin Boyle and Françoise Hampson of the University of Essex.

ADDITIONAL RESOURCES

- Rachel Cichowski, 'Civil Society and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011).
- Clare McGlynn, 'Rape, Torture, and the European Convention on Human Rights' (2009) 58(3) The International and Comparative Law Quarterly 565.
- 'Aydin v. Turkey' (Centre for Women, Peace and Security LSE, June 2016).
- 'Turkey/European Commission of Human Rights: Admissibility Decisions' (Kurdish Human Rights Project).

ASSENOV AND OTHERS V. BULGARIA (1998)

Link to the judgment

European Court of Human Rights

POLICE MISTREATMENT • EFFECTIVE INVESTIGATIONS • RIGHT TO AN EFFECTIVE REMEDY • PRE-TRIAL DETENTION • RIGHT TO FREELY PETITION • RACIAL DISCRIMINATION

CASE SUMMARY

Assenov marked an expansion of Article 3 ECHR and was the first case before an international court where human rights violations against the Roma community were recognised. While the ECtHR found insufficient evidence to conclude that Assenov was ill-treated by the Bulgarian police, the Court determined that the failure to effectively investigate an allegation is in itself a violation of the right to be free from torture under Article 3, read in conjunction with Article 1 ECHR. It concluded that the required investigation must be capable of leading to the identification and punishment of the individual responsible. The case helped widen the duties imposed on the State to investigate alleged ill-treatment, particularly against public authorities facilitating or otherwise participating in its perpetration.

THE FACTS AND PROCEDURAL HISTORY

Anton Assenov was a 14-year-old boy when he was arrested for gambling in Shoumen, Bulgaria. His parents, who were working at the bus station, came and asked for their son's release. At the police station, Assenov alleged that he was beaten with truncheons by police officers. After being held for two hours and insulted for his Roma origins, he was released without charge. Two days later, Anton obtained medical certificates showing serious bruising, consistent with the alleged beatings. The family filed complaints with domestic criminal investigation agencies, including the District Directorate of Internal Affairs, the Regional Military Prosecution, and the Chief General Prosecutor's Office of Bulgaria, but all without success.

An application against the Republic of Bulgaria was initially lodged with the European Commission of Human Rights under Article 25 ECHR by Anton Assenov, alongside his parents, Fidanka Ivanov and Stefan Ivanov, before being referred to the ECtHR on 22 September 1997.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 28 October 1998, the ECtHR found the following violations:

a) Article 3 (prohibition of torture) based on the State's failure to effectively investigate the allegations of a substantive breach in connection with the applicant's arrest and detention in 1992, as opposed to his alleged ill-treatment by the police. *Assenov* expanded the application of Article 3 to encompass a procedural element by widening the scope of a State's obligations to conduct effective investigations of ill-treatment;
b) Article 13. (right to an effective remedy) in that the ECtHR held that for the procedural protections under Article 3 to apply, the applicant must demonstrate a 'reasonable suspicion' of police misconduct. In this case, the ECtHR pointed to the medical evidence and the lack of an alternative explanation for the injuries. While the State did carry out some investigations, there were glaring omissions which rendered it insufficiently 'thorough and effective' for the purposes of Article 3(2); and
c) Article 5 (right to liberty and security) and Article 25 (the right to freely petition) as it related to the applicant's pre-trial detention between 1995 and 1997.

Voluntary Recognition of Discrimination against the Roma Community

At the time this case was brought, race discrimination litigation was relatively novel. While no claim was raised under Article 14, the ERRC invited the Court to consider the broader context of discrimination and disadvantage which Roma face throughout Bulgaria and much of Europe. While the discrimination element did not feature in the Court's analysis, it was significant in setting the context for the ECtHR to establish a procedural right and to acknowledge, for the first time, breaches against the Roma community. In considering the right to petition under Article 25, the ECtHR noted that the Bulgarian authorities must have also been aware of negative comments in the press demonstrating hostility towards the case which promoted negative public attitudes towards the Roma community.

WIDER IMPACT OF THE CASE

Created a Regional and International Precedent

After *Assenov*, Article 3, like Article 2, has been understood to contain a procedural component (widen the duties imposed on the State to investigate alleged ill-treatment). This is highly significant given the challenges of demonstrating responsibility for torture and providing proof of police misconduct.

The series of cases following *Assenov*, including *Stoica v. Romania* (2008), have led to a gradual but significant expansion of legal protection against racial-related violence by the police, culminating in the finding of an Article 14 violation in *Nachova v. Bulgaria* (2005) surrounding the racially motivated murder of two Romani men.

Assenov has been applied by the ECtHR in other cases, such as *Kmetty v. Hungary* (2003), and in UN Committee against Torture communications surrounding Articles 12 and 13 UNCAT. The UK Supreme Court in *Commissioner of Police of the Metropolis v. DSD* [2018] extended *Assenov* to hold that the police have a positive duty to conduct effective investigations into serious crimes alleged to have been committed by private individuals.

Changed Government Policy

Following *Assenov* and subsequent rulings, Bulgaria attempted to address racial violence by the police. In 1999, a pilot project on police work with ethnic minorities was launched in the Roma neighbourhood of the city of Plovdiv and, in 2000, a specialised human rights committee was established in the police department. In 2003, the European Commission against Racism and Intolerance ('ECRI') recommended an independent body be set up to investigate discriminatory acts committed by the police, which Bulgaria failed to do. In October 2022, the European Roma Rights Centre ('ERRC') noted that targeting of the Roma community persisted, criticising the ECRI's June 2022 report for omitting the continued disproportionate police violence against Roma and structural racism.

STRATEGIC FEATURES OF THE CASE

Use of Comparative Law Arguments

The applicants relied on a process-based argument, drawing on the decision in *McCann v. UK* (1995) and analogous provisions in the UNCAT which impose investigative requirements on national authorities. The ERRC submitted that a procedural requirement under Article 3 represents a logical extension of Article 2 case law which requires the effective investigation of the use of lethal force. Emphasis was placed on the status of Article 3 as a 'living instrument' in ECtHR jurisprudence which necessitates a procedural requirement in line with relevant legal principles.

Strong Partners and Accompanying Advocacy

The reports and surrounding advocacy by the ERRC and Amnesty International were vital to the case, showing that the facts in *Assenov* typified the racial violence that Roma have long suffered at the hands of the police throughout the European region. The ERRC also referred to Assenov's race and age, data on the ill-treatment of Roma, and the limited extent to which remedies existed for these cases, highlighting the fact that between 1993 and 1997, fourteen Roma men had died in police custody or through unlawful use of firearms by the police.

The Legal Representative for the Applicants was Zdravka Kalaydjieva (affiliated with Bulgarian Lawyers for Human Rights).

Third Party Interventions were submitted by the ERRC, Amnesty International assisted by Ben Emmerson, and the Bulgarian Human Rights Project.

ADDITIONAL RESOURCES

- Council of Europe, '*Ensuring Access to Rights for Roma Travelers: A Handbook for Lawyers Defending Roma and Travelers*' (3rd edn, COE 2014).
- 'Profession: Prisoner – Roma in Detention in Bulgaria' Country Reports Series, No. 6 (European Roma Rights Centre, December 1997).
- Dimitrina Petrova, 'Roma Rights Litigation' (European Roma Rights Centre, 5 January 1999).
- Amnesty International, 'Bulgaria: New Cases of Ill-Treatment of Roma' (18 August 1998) AI Index: EUR/15/11/98.

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- European Commission against Racism and Intolerance, 'Sixth Report on Bulgaria', adopted on 28 June 2022, 4 October 2022, CRI (2022).
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- James A. Goldston, 'Race Discrimination in Europe: Problems and Prospects' (1999) 5 European Human Rights Law Review 46.
- James A. Goldston, 'The Struggle for Roma Rights: Arguments that Have Worked' (2010) 32 Human Rights Quarterly 311.

TIMURTAŞ V. TURKEY (2000)

Link to the judgment

European Court of Human Rights

ENFORCED DISAPPEARANCE • RIGHT TO LIFE • STANDARD OF EVIDENCE • USE OF CIRCUMSTANTIAL EVIDENCE • STRONG PARTNERSHIPS • THIRD PARTY INTERVENTIONS

CASE SUMMARY

Abdulvahap Timurtaş was allegedly apprehended by soldiers on 14 August 1993 in south-eastern Turkey during the context of the state of emergency and the armed conflict between the State and the Kurdish guerrilla movement. Despite his relatives' efforts to locate him, his fate and whereabouts remained unknown, and the authorities denied having apprehended him.

In February 1994, his father brought proceedings before the European Commission of Human Rights alleging that the State was responsible for his son's disappearance, invoking Articles 2, 3, 5, 13, 14 and 18 of the ECHR. The Commission referred the case to the ECtHR in 1998, and the Court found that, although not decisive in itself, the period of time which has elapsed since a person was placed in detention is a relevant factors to be taken into account when determining whether a disappeared person may be presumed to have died while in State custody. It reiterated that Article 13 requires the State to undertake a thorough and effective investigation to ensure the identification and punishment of those responsible. The precedent set in *Timurtaş* was followed in the subsequent cases of enforced disappearance decided by the ECtHR where it used circumstantial evidence to find a substantive violation of Article 2 in other cases of disappearance.

THE FACTS AND PROCEDURAL HISTORY

According to witnesses, Abdulvahap Timurtaş was apprehended and taken into detention by soldiers attached to the gendarmerie headquarters on 14 August 1993, in Şırnak province in south-eastern Turkey. His relatives received no official confirmation of the apprehension, and the applicant was informed by the gendarmerie that his son was not in detention. Forty-five days later, his father was informed by some former detainees that he was in jail and still alive. This was the last information he could obtain. He filed a complaint with the Turkish authorities

and continued to make inquiries, but a decision not to instigate a prosecution was ordered on the grounds, *inter alia*, that the applicant's allegations were vague, and that it was likely that his son was a member of the PKK.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 13 June 2000, the ECtHR determined that Abdulvahap Timurtaş must be presumed dead following an unacknowledged detention by the security forces. Further, it decided that the actions of the Turkish government amounted to the following violations:

a) Articles 2 (the right to life) as it related to the substantive and procedural aspects of Article 2 on two counts. First, given the lack of explanation by Turkish authorities regarding the disappearance, the State was responsible for his death. Second, the Court also held that the investigation carried out into his disappearance was inadequate and ineffective, and on this basis found a breach of the State's procedural obligations to protect the right to life;
b) Article 3 (the prohibition of torture) as it was established that the anguish he suffered about the fate of his son meant that the victim's disappearance can be considered to amount to inhuman and degrading treatment of the applicant – the father of the victim himself;
c) Article 5 (the right to liberty and security) as a result of the lack of safeguards for his son's disappearance and Turkey's failure to acknowledge his detention; and
d) Article 13 (the right to an effective remedy) as the Turkish authorities failed in their obligation to carry out an effective investigation into the circumstances of his son's disappearance.

Revised Standards of Evidence

In this leading case, the Court revised its standards as regards the evidence required to establish a violation of Article 2 in cases of enforced disappearance. In a previous case of enforced disappearance, *Kurt v. Turkey* (1998), the Court had applied the 'beyond reasonable doubt' standard and found no violation of Article 2, as the applicant failed to prove, through direct evidence, what had concretely happened. This approach was criticised for not considering the specific nature of the crime of enforced disappearance, and for failing to apply the evidentiary criteria established by the IACtHR in *Velásquez-Rodríguez v. Honduras* (1988).

Acceptance of Circumstantial Evidence to Establish Disappearance

The Court departed from the *Kurt* precedent in permitting the use of circumstantial evidence to establish a violation of the right to life, no longer insisting on direct evidence, and finding that in the absence of a body, an issue arose under Article 2 depending on all the circumstances of the case. The period of time which had elapsed since the victim was detained – six and a half years in this case – was considered to be a relevant factor. In addition, the Court found that the involvement of State security forces in his arrest and detention, as well as the general context of the situation in south-east Turkey in 1993, constituted sufficient evidence to conclude that a substantive violation of Article 2 had occurred. The Court also found that the inadequacy of the State's investigation into the disappearance amounted to a procedural violation of Article 2.

Criticism of the Court's Approach

However, *Timurtaş* was criticised for not setting clear standards of evidence for cases of enforced disappearance. Legal scholars regretted that the Court did not explicitly depart from the 'beyond reasonable doubt' standard and failed to establish a coherent rule for what constituted sufficient circumstantial evidence. In addition, despite the precedent set by the IACtHR in *Velásquez-Rodríguez v. Honduras* (1988), the ECtHR did not shift the burden of proof to the State for violations of Article 2 ECHR until *Bazorkina v. Russia* (2006), a case of enforced disappearance in Chechnya.

WIDER IMPACT OF THE CASE

Created a Legal Precedent

The precedent set in *Timurtaş* was followed in the subsequent cases of enforced disappearance decided by the Court. The ECtHR used circumstantial evidence to find a substantive violation of Article 2 in other cases of disappearance in the Kurdish region of Turkey, such as *Taş v. Turkey* (2000) and *Çiçek v. Turkey* (2001), as well as in the later Chechnya cases. *Timurtaş* was considered by human rights organisations and legal scholars as an important step forward in the Court's understanding of the specific nature of the crime of enforced disappearance and the challenges it raises for the standard of evidence used in criminal law.

STRATEGIC FEATURES OF THE CASE

Strong Collaboration Between Civil Society Organisations and Lawyers

This is one of the earliest judgments of the ECtHR on enforced disappearance in the Kurdish region of Turkey. The litigation process was initiated by the KHRP, an NGO founded in London in 1992 to provide legal support to Kurdish victims of human rights violations and conduct research and advocacy about the situation of the Kurdish people. The KHRP used their networks of lawyers and civil society organisations in Turkey to identify victims. They acted as intermediaries between applicants and lawyers in Turkey, and barristers in the UK, to facilitate access to justice for clients who had limited financial resources and often lived in remote villages of eastern and south-eastern Turkey. The organisation relied extensively on pro bono lawyers to submit urgent action appeals and applications to international organisations.

Timurtaş was the result of a close collaboration between the KHRP and British lawyers. It was brought before the European Commission of Human Rights by Françoise Hampson and Kevin Boyle, both barristers and academics at the University of Essex. Françoise Hampson also represented the applicant before the ECtHR. The KHRP supervised the collection of evidence and identification of witnesses in Turkey and offered its expertise on Turkey and the Kurdish question to the British barristers, who brought their experience of human rights mechanisms.

Interventions Regarding Jurisprudence from Other Jurisdictions

In addition, the Center for Justice and International Law ('CEJIL'), a non-governmental human rights organisation in the Americas, submitted written comments presenting the jurisprudence of the IACtHR concerning enforced disappearances. CEJIL's report was quoted by the Court in its discussion of the standards of evidence required

to establish a violation of the right to life. Given the acknowledged expertise of the IACtHR in cases of enforced disappearance, this intervention was particularly relevant to support the applicant's claims.

Progressive Momentum and Use of International Courts in the Absence of Available Domestic Remedies

In the dozens of cases that followed, the KHRP itself started to act as a third party and to represent clients. *Timurtaş* and other successful cases represent an example of civil society turning to an international court, in this case the ECtHR as their preferred legal avenue for litigation, in the absence of accountability at the national level.

Limitations of Resorting to International Human Rights Courts

However, the implementation of decisions in enforced disappearance cases has been limited to the payment of compensation. Even when the perpetrators are known, impunity remains the rule and, in most cases, the bodies of the victims have not been found. The Saturday Mothers' vigils and the research and publications of the Truth Justice Memory Centre continue to demand that perpetrators be held accountable before domestic jurisdictions.

The Legal Representative for the Applicant was Françoise Hampson of the University of Essex.

Third Party Intervention was submitted by CEJIL.

ADDITIONAL RESOURCES

- Gökçen Alpkaya et al., 'Enforced Disappearance and the Conduct of the Judiciary' (Truth Justice Memory Center, 2013).
- Council of Europe Commissioner for Human Rights, 'Missing Persons, and Victims of Enforced Disappearance in Europe' *(COE, 2016).*
- Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Conventions* (Martinus Nijhoff 2007).
- Irum Taqi, 'Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach' (2000) 24(3) Fordham International Law Journal 938.
- Joanna Evans, *Ertak v. Turkey, Timurtaş v. Turkey: State Responsibility 'Disappearance' – A Case Report* (Kurdish Human Rights Project June 2001).

MARITZA URRUTIA V. GUATEMALA (2003)

Link to the judgment

Inter-American Court of Human Rights

THREATS OF PHYSICAL HARM AS PSYCHOLOGICAL TORTURE • JUS COGENS • ENFORCED DISAPPEARANCE • DUTY TO CONDUCT AN EFFECTIVE INVESTIGATION

CASE SUMMARY

In July 1992, Maritza Urrutia García was forcibly disappeared and tortured by Guatemalan State authorities. The IACtHR agreed that Guatemala had unlawfully deprived Urrutia García of her liberty, owing to her arbitrary detention for eight days without a court order, the absence of any judicial supervision, or notification of the reasons for her detention, and the fact that she was not offered any recourse to file an effective remedy against her detention. Further, the IACtHR resoundingly concluded that the conditions in which Urrutia García was arbitrarily and unlawfully detained amounted to cruel and inhumane treatment, and that the State had not prevented the violation of her rights given their failure to investigate or punish those responsible for torturing her during the 11 years following her detention, despite their duty to conduct an impartial and effective investigation, as well as to publish the result of the State investigation — a significant finding by the Court. This decision also marked the first acceptance of the prohibition of torture as a *jus cogens* norm of international law in the Inter-American system, and that torture could be both physical and psychological as well as secondary in its nature.

THE FACTS AND PROCEDURAL HISTORY

Maritza Urrutia Garcíá was abducted and arbitrarily detained due to her involvement with the Guerrilla Army of the Poor (Ejército Guerrillero de los Pobres), a political opposition organisation that was part of the Guatemalan National Revolutionary unit (Unidad Revolucionaria Nacional Guatemalteca). She was abducted by a group of unknown men who forced her into a white car after she had dropped off her four-year old at school. Held captive for eight days, she suffered psychological torture resulting from threats against herself and her family made by members of the Guatemalan army. She also suffered physical torture in the form of hooding, handcuffing and prolonged exposure to light and noise.

Further, Guatemalan officials employed psychologically coercive interrogation tactics during which Urrutia was forced to repudiate her political views. Whilst in captivity, Urrutia appeared in a video in which she was forced to read a prepared statement admitting that she had engaged with the guerrilla army. She later withdrew this statement. She was then released and signed a governmental amnesty agreement after which she fled the country, from where she filed a petition with the IACHR, who later referred the case to the IACtHR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 27 November 2003, the IACtHR found violations of the following Convention rights:

a) Article 7 (right to personal liberty) in relation to Article 1(1) (obligation to respect rights) of the American Convention;
b) Article 5 (right to humane treatment) in relation to Article 1(1) (obligation to respect rights) of the American Convention, and Article 1 (obligation to prevent and punish torture) and Article 6 (obligation to take effective measures and punish torture and cruel, inhuman, and degrading treatment) of the Inter-American Convention to Prevent and Punish Torture; and
c) Article 8 (right to a fair trial) and Article 25 (right to judicial protection) in relation to Article 1(1) (obligation to respect rights) of the American Convention, and the obligations enshrined in Article 8 (obligation to investigate and prosecute) of the Inter-American Convention to Prevent and Punish Torture.

Recognition of the Prohibition of Torture as a Jus Cogens Norm

This decision marked the first acceptance of the prohibition of torture as a *jus cogens* norm of international law in the Inter-American system. As a consequence, States in the region which are not bound by treaty to prevent and protect against torture are still required to adhere to this obligation. This principle was later reiterated in *Bayarri v. Argentina* (2008).

Extending the Definition of Torture to Include Psychological Suffering

The case also confirmed that torture could be both physical and psychological as well as secondary in its nature, drawing on what Urrutia García was forced to do by the authorities, and finding that these acts constituted mental anguish that were perpetrated for the purpose of obliterating her personality and morale. The Court's emphasis on the dimension of psychological torture outside the context of physical torture represents a significant legal landmark. The IACtHR recognised that Urrutia García "was deliberately subjected to psychological torture arising from the threat and continual possibility of being assassinated, psychically tortured, or raped", and decided that the threats levelled against the victim were constitutive of torture.

Duty to Conduct an Effective Investigation

The case also had a significant effect on how the Court defined the State's duty to conduct an effective investigation. The Court required the State to identify, prosecute and punish all individuals responsible as well as the obligation to publish the results of State investigations and trials into allegations of torture.

WIDER IMPACT OF THE CASE

Monitoring Mechanisms

The challenge to the Guatemalan regime contributed to the development of a State monitoring mechanism which advanced the international regime against torture.

STRATEGIC FEATURES OF THE CASE

Invoking Comparative Law Arguments

The IACtHR relied upon several ECtHR cases as well as the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment. The Court said it appreciated that the *jus cogens* norm is influenced by various international conventions, including the UNCAT, the Inter-American Convention to Prevent and Punish Torture, and the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment. These instruments were seen as compatible with the Inter-American system and informed the Court's conclusions.

Effective Advocacy and Media Campaign Surrounding the Case

The disappearance of Maritza garnered attention from international NGOs such as Amnesty International and Human Rights Watch who criticised the obstacles in relation to access to justice and the lack of State accountability. El Centro para la Acción Legal en Derechos Humanos (the Centre for Human Rights Legal Action) ('CALDH') was a significant partner in this case, providing legal advice and representation before the IACtHR. CALDH successfully argued that pecuniary and non-pecuniary damages should be awarded to the victim and her next-of-kin, whilst highlighting the systematic practices of enforced disappearances, abductions and extrajudicial killings by the Guatemalan State.

The Legal Representatives for the Petitioner were Fernando López and Frank La Rue on behalf of CALDH.

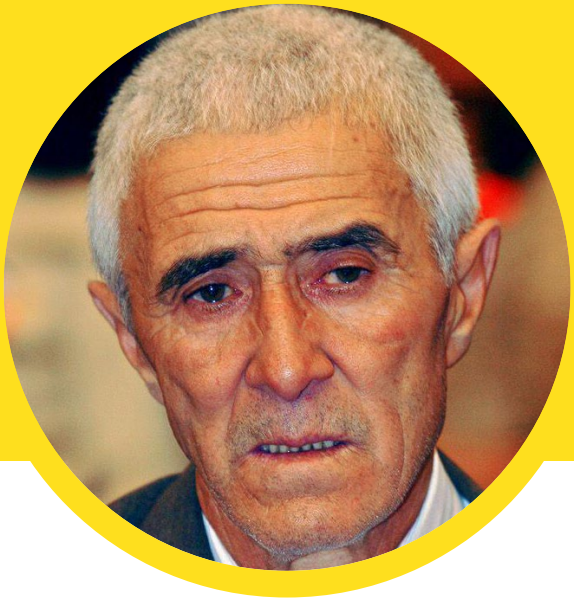
The Legal Representatives for the Inter-American Commission on Human Rights were Claudio Grossman and María Claudia Pulido.

ADDITIONAL RESOURCES

- Patricia Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights', LL.M. Long Paper, Harvard Law School 2007, 14-16.
- 'Maritzia Urrutia v. Guatemala' (Center for Progressive Security, 14 June 2021).
- Amnesty International, *Guatemala: Fear of "disappearance"/Harassment: Maritza Urrutia Ruiz, and other members of her family*, AI Index: AMR 34/35/92, 28 July 1992.
- Ramiro de León Carpio, Human Rights Ombudsman, "La verdad acerca del caso de Maritza Urrutia," final instalment of three articles published in *Prensa Libre*, October 17, 1992.

KHASHIYEV AND AKAYEVA V. RUSSIA (2005)

Link to the judgment



European Court of Human Rights

RIGHT TO LIFE • EFFECTIVE INVESTIGATION • DOMESTIC REMEDIES • ENFORCED DISAPPEARANCE • ILLEGAL DETENTION • DESTRUCTION OF PROPERTY

CASE SUMMARY

Over 200 cases have been litigated at the ECtHR concerning incidents that occurred between 1999 and 2006 during the second Chechen conflict. Known collectively as the "*Khashiyev* group" of cases, these cases show the power of long-term litigation and advocacy efforts by the European Human Rights Advocacy Centre ('EHRAC'), both during the litigation and implementation at the Committee of Ministers. *Khashiyev and Akayeva* concerned the killing of several relatives of the applicants during the Russian military operation to take control of Grozny, which the ECtHR found Russia had violated the right to life as well as other Convention rights. These cases set up the Court's basic approach to thousands of similar cases that followed in finding violations of the right to life and failures to conduct effective investigations as part of the procedural obligations contained in Article 2 ECHR.

THE FACTS AND PROCEDURAL HISTORY

In 1999, amid renewed hostilities between Russian authorities and Chechen fighters over the Chechen Republic's independence, Moscow sent troops to capture Grozny. In the ensuing years up to 2006, according to rulings of the Court, Russian troops kidnapped, tortured and killed civilians and indiscriminately bombed areas where they were known to be located. In *Khashiyev*, Russian servicemen killed Magomed Khashiyev's brother, sister, and the sister's two sons, as well as Roza Akayeva's brother during an identity check in the Staropromyslovskiy district which had been occupied by Russian forces. Khashiyev and Akayeva filed their petitions to the ECtHR and the Grand Chamber combined them into joint proceedings. Two other judgments handed down by the Court on the same day related to the indiscriminate bombardment of civilians attempting to escape Grozny by car (*Isayeva, Yusupova and Bazayeva v. Russia* (2005) known as '*Isayeva I*') and in the village of Katyr-Yurt (*Isayeva v. Russia* (2005) or '*Isayeva II*').

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision issued on 24 February 2005, the ECtHR in *Khashiyev and Akayeva* found that Russia had violated the following rights:

a) Article 2 (the right to life) in respect of the applicants' relatives' deaths, as well as the State's failure to carry out an adequate and effective investigation into those deaths;
b) Article 3 (the prohibition of torture) in respect of the failure to carry out an adequate and effective investigation into the allegations of torture); and
c) Article 13 (the right to an effective remedy).

In the "Khashiyev group" of cases, the ECtHR found the following violations of the Convention in many of the cases:

a) Article 2 (the right to life);
b) Article 3 (the prohibition of torture);
c) Article 5 (the right to liberty and security);
d) Article 8 (the right to respect for private and family life);
e) Article 13 (the right to an effective remedy); and
f) Article 1, Protocol 1 (the right to property).

Standard Setting for the Cases Dealing with the Chechen Conflict

Khashiyev, *Isayeva I*, and *Isayeva II* were the Court's first judgments scrutinising violations by the Russian State arising from the second Chechen conflict. These cases set up the Court's basic approach for thousands of similar cases that followed.

Wider Influence on the ECtHR's Jurisprudence

As a group, the *Khashiyev* cases propelled forward the Court's willingness to find violations of the right to life and failure to conduct effective investigations despite serious non-disclosure of information and a denial of the existence of a conflict by the State. Through these cases, the Court also developed its practice of applying, in relation to the right to life, the higher standard derived from human rights law, as opposed to that found in international humanitarian law, in non-international armed conflicts. The foundation established by ECtHR cases from south-eastern Turkey helped influence the Court's treatment of possible violations by the UK in the context of the Iraq War as it related to the procedural obligations of Article 2 in the context of difficult security conditions (*Al-Skeini and Others v. The United Kingdom* (2011)).

Challenges to Implementation

Comments by the Court and Committee of Ministers ('CoM') about cases in the *Khashiyev* group demonstrate their increasing willingness to criticise the Russian Government regarding its slow response to the ECtHR's rulings. In March 2015, the CoM adopted a resolution urging Russia to create a high-level body to search for missing persons and, in an October 2015 judgment, the ECtHR criticised Russia for "the sheer unwillingness to establish the truth and punish those responsible."

Domestic implementation of the judgment has been less successful. In response to the *Khashiyev* group of cases, the Russian government stated to the CoM that it had disseminated the judgments to judicial and governmental agencies, was revising a manual on humanitarian law for the armed forces and working on a procedure to compensate victims in cases where human rights investigations had been inadequate. Thereafter, the CoM published a memorandum calling for improvements, however, the Russian response has been limited. EHRAC and Memorial have made multiple submissions regarding the lack of progress and called for infringement proceedings. EHRAC noted the large number of judgments that were difficult to monitor. Amnesty International and Human Rights Watch also raised concerns about the lack of implementation regarding the *Khashiyev* group of cases.

Present challenges to implementation include Russia's departure from the Council of Europe on 16 March 2022. Despite their cessation of membership, the CoM determined that Russia would still be bound to comply with judgments issued in cases against it and that it should, with limited rights, continue to participate in the CoM's DH meetings when the Russian cases were on the agenda. This is consistent with Article 70 of the Vienna Convention on the Law of Treaties, which provides that a State's withdrawal from a multilateral treaty does not affect any right, obligation or legal situation created through the execution of that treaty prior to the withdrawal. However, since March 2022, Russia has stopped communicating with both the ECtHR and the CoM. It has also not provided information about the progress of execution of the ECtHR's judgments, which the States are expected to submit to the CoM on a regular basis. Furthermore, it adopted legislative changes, which *inter alia* prevent the execution of judgments of the ECtHR issued after 15 March 2022, the date on which Russia started its withdrawal from the CoE.

WIDER IMPACT OF THE CASE

Domestic Influence

Domestically, the *Khashiyev* group of cases has provided a legal precedent and judicial record of State behaviour that lawyers have used to pursue remedies in local courts. This experience has also enabled local NGOs to improve their skills in fact-gathering, which is particularly important given the weakness of the domestic authorities' standard procedures in investigations, and which has been key for the heavily fact-based Chechen cases.

STRATEGIC FEATURES OF THE CASE

Effective Partnerships

The group of cases represents an example of cross-fertilisation of skills between rights lawyers with experience in the ECtHR and a national NGO, with the former providing advice on strategic litigation and the latter building local relationships with and fielding appropriate representative petitioners.

Working with the Court

It was the Court registry that decided which of the *Khashiyev* cases would proceed to hearing. This group of cases therefore demonstrates that the Court and Registry lawyers can also be instrumental in determining which cases are finally chosen where there are a large number of similar applications before the Court.

Long-Term Lawyering

The success of these cases is, in many ways, due to the sustained efforts of NGOs such as EHRAC to ensure accountability for human rights violations by Russia in Chechnya. It demonstrates that impact can often only be achieved over time, and with significant post-judgment efforts. Despite the challenges faced in achieving implementation of these cases, the *Khashiyev* group of cases further show the value of strong advocacy and multiple applications in buttressing the force of positive judgments. Despite a continued reluctance to react on the part of the Russian government and some CoM representatives, the lawyers and NGOs kept the issue alive through advocacy, including EHRAC's call for infringement proceedings.

The Legal Representatives for the Applicants were William Bowring and Philip Leach on behalf of EHRAC, and Kirill Koroteev on behalf of the Russian NGO Memorial, and the Stichting Russian Justice Initiative.

ADDITIONAL RESOURCES

- Bill Bowring, 'How will the European Court of Human Rights deal with the UK in Iraq? Lessons from Turkey and Russia' in Phil Shiner and Andrew Williams, (eds.) *The Iraq War and International Law* (Bloomsbury 2008).
- William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) EJIL 741.
- Philip Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) EHRLR 732.
- Julia Lapitskaya, 'ECHR, Russia, and Chechnya: Two is not Company and Three is Definitely a Crowd' (2011) 43 International Law and Politics 479.
- 'Khashiyev Group' (EHRAC, 25 February 2015).

BAZORKINA V. RUSSIA (2006)

Link to the judgment

European Court of Human Rights

STATE OBLIGATIONS • BURDEN OF PROOF • CHECHEN ENFORCED DISAPPEARANCES • RIGHTS OF RELATIVES • CIVIL SOCIETY ENGAGEMENT

CASE SUMMARY

In early February 2000, Khadzhi-Murat Yandiyev, a young man from Chechnya, was arrested by Russian federal forces during the Russian military campaign to regain control over Grozny, the capital of Chechnya. A Russian general searched Yandiyev and then gave an order to execute him. Nobody has seen or heard from Yandiyev since. Yandiyev's mother, Fatima Bazorkina, learned about her son's detention from a televised news broadcast. A CNN reporter was at the time embedded with the military forces and taped the encounter between Yandieyev and the general. Bazorkina appealed to local and federal prosecutors and numerous other official institutions in Russia, but the Russian authorities refused to investigate the case properly. The Court confirmed numerous violations of the ECHR, specifically Articles 2, 3, 5 and 13, and the duty of the State to conduct effective investigations. This case was significant as it was the first Chechen case of enforced disappearance that was decided by the ECtHR and established the framework in which the Court would go on to decide other pending cases.

THE FACTS AND PROCEDURAL HISTORY

The applicant submitted that, in August 1999, her son went to Grozny, Chechnya, and that she had not heard from him since. On 2 February 2000, she saw her son being interrogated by a Russian officer on a television news programme about the capture of the village of Alkhan-Kala (also called Yermolovka). She later obtained a full copy of the recording, made by a reporter for NTV (Russian Independent TV) and CNN. At the end of the questioning the officer in charge is heard giving 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 who captured Alkhan-Kala.

Immediately after seeing the broadcast on 2 February 2000, the applicant began searching for her son, visiting detention centres and 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 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 Yandiyev by unidentified persons. It later transpired that he had been placed on a missing persons list.

Realising that her case would not be investigated effectively in Russia, Bazorkina, with the help of the British lawyer Gareth Peirce, lodged an application with the ECtHR. Bazorkina was subsequently represented by the Stichting Russian Justice Initiative.

In November 2003, Bazorkina's application to the ECtHR was communicated to the Russian government. Following the Court's decision that the case was admissible, the government submitted a copy of the criminal investigation file. That investigation had established that the applicant's son had been detained on 2 February 2000 in Alkhan-Kala. Immediately after his arrest, he was handed over to servicemen of the Ministry of Justice for transportation to a pre-trial detention centre. Yandiyev did not arrive at any pre-trial detention centre and his subsequent whereabouts could not be established. Between July 2001 and February 2006, the investigation was adjourned and reopened six times.

On 8 December 2005, the ECtHR conducted an oral hearing in the case at its seat in Strasbourg, France, with Bazorkina attending.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 27 July 2006, the Court held unanimously that the following rights had been violated:

a) Article 2 (the right to life) in respect of the disappearance of the applicant's son, Khadzhi-Murat Yandiyev;
b) The Article 2 procedural obligation in respect of the failure to conduct an effective investigation into the circumstances in which Yandiyev disappeared;
c) Article 3 (the prohibition of torture) in respect of the applicant, Bazorkina;
d) Article 5 (the right to liberty and security) with regard to Yandiyev's detention; and
e) Article 13 (the right to an effective remedy) in respect of the violations of the applicants' rights under Articles 2 and 3.

The Burden of Proof: The Difference between Article 2 and Article 3

As regards Article 2, the Court was prepared to shift the burden of proof to the State: where alleged violations of the Article 2 lie within the exclusive knowledge of authorities, "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation." For the burden to shift, the victim must have last been seen in life-threatening circumstances and the State must have failed to provide 'any plausible explanation' as to the victim's fate and whereabouts.

As regards Article 3, however, the Court did not find a basis to shift the burden of proof specifically in relation to the allegations of ill-treatment, and did not therefore consider the point here. It stood that the Court would require the claimants to provide *prima facie* proof, beyond a reasonable doubt, of any alleged Article 3 violations (torture or other form of ill-treatment) in enforced disappearance cases. In *Bazorkina*, the Court did not consider that there was sufficient evidence to support the allegation that Yandiyev had been subjected to ill-treatment in detention. However, it did consider that the distress and anguish suffered by Yanidyev's mother had been proved and constituted sufficient evidence to find a violation of Article 3 in relation to her suffering.

Affirmed the State's Duty to Investigate

The Court affirmed the government's obligations to take steps to properly and effectively investigate Yandiyev's disappearance. The absence of a record of the detention of Yandiyev constitutes a violation of Article 5 in itself. The failure to investigate the case after the applicant's mother complained is also a violation of Article 5.

Reparations Ordered

The Court ordered compensation to be paid to the applicant in the amount of €35,000 for non-pecuniary damage and €12,241 for costs and expenses.

WIDER IMPACT OF THE CASE

A Precedent for Chechen Enforced Disappearance Cases

Bazorkina is the first Chechen case of enforced disappearance that was decided by the ECtHR, while hundreds of other Chechen disappearance cases were pending before the Court. This decision established the framework on the basis of which the Court went on to deal with other cases.

Taking together the failures of the investigation and the indifferent response on the part of the government, the Court found that "the applicant 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. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3." The Court echoed this language in more than 70 subsequent judgments, such as *Imakayeva v. Russia* (2007).

STRATEGIC FEATURES OF THE CASE

Part of a Wider Civil Society Initiative

The case was initially brought to the Court on behalf of the applicant by British lawyer Gareth Peirce in conjunction with the Stichting Russian Justice Initiative, formerly the Chechnya Justice Initiative, following its establishment in 2001. The Initiative represented clients from Chechnya and other North Caucasus republics in over 500 cases regarding grave human rights violations submitted to the ECtHR. Russia was found responsible in 179 cases. The Initiative decided to prioritise the ECtHR as a legal venue and adopted a strategy of submitting a large number of cases with evidence to a high standard, providing a strong counter-narrative to the government version of events.

The Legal Representatives for the Claimants were Ole Solvang, Mr Nikolaev, Mrs Staisteanu, Mrs Ezhova on behalf of the Stichting Russian Justice Initiative. Gareth Peirce initially assisted the Stichting Russia Justice Initiative during proceedings as to the decision on the admissibility of Bazorkina's application in 2005.

ADDITIONAL RESOURCES

- '"Who Will Tell Me What Happened to My Son?": Russia's Implementation of European Court Human Rights Judgments on Chechnya' (Human Rights Watch, 27 September 2009).
- 'The "Dirty" War in Chechnya: Forced Disappearances, Torture, and Summary Executions' Vol. 13 No. 1(D) (Human Rights Watch, March 2001.
- 'Russian Federation: What Justice for Chechnya's Disappeared?' (Amnesty International, July 2007).
- Joseph Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights' (2009) 22 Harvard Human Rights Journal 133.
- Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 12 Human Rights Review 303.
- Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2(1) International Human Rights Law Review 57.

FRANCISCO JUAN LARRAÑAGA V. PHILIPPINES (2006)

Link to the judgment

UN Human Rights Committee

DEATH PENALTY • RIGHT TO A FAIR TRIAL • PRESUMPTION OF INNOCENCE • CIVIL SOCIETY INVOLVEMENT • EFFECTIVE ADVOCACY • MEDIA CAMPAIGN

CASE SUMMARY

Francisco Larrañaga was accused of the kidnapping, rape, illegal detention, and murder of two women. Following what was considered to be an unfair proceeding, he was sentenced to life imprisonment and then the death penalty by the Supreme Court of the Philippines. Larrañaga submitted a complaint to the UN Human Rights Committee, alleging violations of his right to life, his right not to be subjected to torture or inhuman and degrading treatment or punishment, and his right to liberty and to a fair trial. The Committee's involvement, along with the Spanish government, international NGOs, and the Philippines' Catholic Church, persuaded the government to abolish the death penalty almost three months before the Committee issued its decision. Larrañaga's sentence and those of about 1,200 inmates on death row were reduced to life in prison. The case was the subject of an internationally acclaimed documentary and the #FreePacoNow campaign, which was joined by various celebrities.

THE FACTS AND PROCEDURAL HISTORY

Larrañaga, along with six others, was accused of the kidnapping, rape, illegal detention, and murder of two women. It was later discovered that the key prosecution witness was promised immunity and was allegedly bribed. In response, Larrañaga's counsel asked the trial judge to recuse himself, but the counsel was himself found guilty of contempt of court and imprisoned. Lawyers from the Public Attorney's Office were assigned to Larrañaga's case and represented him during the testimony of twenty-five witnesses. Larrañaga then insisted on being represented by counsel of his choosing. The Court obstructed cross-examinations by this counsel and effectively denied any preparation for the defence of Larrañaga. Fourteen defence witnesses testified and confirmed Larrañaga's alibi of being in another city which was more than 500 kilometres away from the crime scene. The trial judge subsequently refused to hear other witnesses. Larrañaga himself was not allowed to testify and was found guilty of kidnapping and serious illegal detention of one of the women.

After he appealed his conviction to the Supreme Court, Larrañaga was found guilty of kidnapping, serious illegal detention, homicide, and rape of both women. He was sentenced to death by lethal injection. A motion for reconsideration was subsequently rejected.

Larrañaga submitted a communication to the UN Human Rights Committee, arguing, *inter alia,* a violation of Article 6 ICCPR in relation to the Philippines' reintroduction of the death penalty after abolishing it. Three months prior to the communication of the Committee's decision, the Philippines (re)abolished the death penalty. Larrañaga also alleged numerous other violations under Articles 6, 7, 9 and 14(1)(2)(3) and (5) of the ICCPR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its communication issued on 24 July 2006, the UN Human Rights Committee took note of the repeal of the death penalty by the Philippines and considered that the author of the communication's claim relating to the country's reintroduction of the death penalty to be moot. However, in respect of Larrañaga's case, the Committee found the following violations:

a) A violation of the presumption of innocence;
b) Violations of the ICCPR, including Article 14(3) (defence rights); Article 14(3)(e) (equality of arms); Article 14(1) (equality before the law) and 14(5) (the right of appeal) for the lack of possibility to have his death sentence reviewed; a violation of Article 14(1) regarding the involvement of the trial judge and two Supreme Court judges in the evaluation of the preliminary charges against Larrañaga; and the fact that the undue delay of proceedings could not be attributed to Larrañaga and was incompatible with Article 14(3)(c) (the right to be tried without undue delay); and
c) That the imposition of the death sentence after the conclusion of the unfair proceedings amounted to inhuman treatment, thereby amounting to a violation of Article 7 ICCPR (the prohibition of torture).

WIDER IMPACT OF THE CASE

Added Pressure to Abolish the Death Penalty in The Philippines

The Committee's decision put pressure on then-President Arroyo, who had continued a moratorium on executions introduced by her predecessor, not to fulfil her 2001 announcement to resume the death penalty for those sentenced for murder and kidnapping. The government of the Philippines decided to prohibit the death penalty almost three months before its decision, as the prospect of the Committee's imminent pronouncement on the death penalty put significant pressure on the government to commute sentences. As a result, the Philippines replaced the death penalty with life imprisonment. Shortly afterwards, the Philippines House of Representatives and Senate voted to completely abolish the death penalty. This reduced the sentence of Larragaña and eventually led to his transfer to a Spanish jail.

The Committee's decision not only helped to reduce the sentence of Larrañaga but also those of about 1,200 death row inmates. In 2006, the Philippines was believed to be the country with the largest death row population

in the world. Albeit symbolically, the *Larrañaga* decision helped to restore a milestone achievement against the death penalty in the region since the Philippines had been the first Asian country to abolish it in 1987.

Subsequent events, unfortunately, indicate a backslide. In March 2017, in response to President Rodrigo Duterte's calls to reinstate the death penalty, the House of Representatives of the Philippines approved a bill that would allow drug-related offenses to be punishable by death. On 2 March 2021, the House of Representatives adopted House Bill No. 7814, allowing the reintroduction of the death penalty under the Comprehensive Dangerous Drugs Act of 2002 – the second bill in five years proposing a return to capital punishment that passed to the Senate. Moreover, on 4 December 2023, Representative Rufus Rodriguez reiterated calls to pass House Bill No. 2459, which he initially introduced in 2022, stating "If they put our compatriots to death for violations connected to illegal drugs, let us do the same to their nationals, many of whom are caught manufacturing, peddling or smuggling drugs into the country." Representative Robert Ace Barbers, chairperson of the House Committee on Dangerous Drugs, further called for capital punishment for drug-related crimes, including reintroducing House Bill No. 1543 which would reinstate the death penalty. "While we condemn in no uncertain terms any and all illegal drug activities, we urge the two houses of Congress to take a serious look at the reimposition of the death penalty most especially on drug-related offenses," said Representative Barbers. "If other countries treat illegal drugs as a threat to their citizenry and the whole society, why are we so soft in treating this menace in our own territory?" he added.

Impact on Other Jurisdictions

Larrañaga has been cited with approval by other regional tribunals. In *Boyce and Others. v. Barbados (2007)* a case before the IACtHR, the decision was cited by the IACHR to assert that the death penalty constitutes an arbitrary deprivation of life when imposed without considering the defendant's personal circumstances or their particular offence.

STRATEGIC FEATURES OF THE CASE

Using Jurisprudence from Other Jurisdictions

The *Larrañaga* case demonstrates how principles developed in one jurisdiction can be used to affect policy changes in others. In this case, the UN Human Rights Committee applied principles developed by the ECtHR in *Őcalan v. Turkey* (2005) to assert that sentencing the accused to death after his rights to a fair trial and due process were violated constituted inhumane treatment.

Effective Advocacy and Involving International Partners, Including Foreign Governments

From an early stage, the case prompted the involvement of the Philippines' Catholic Church, which had historically lobbied against the death penalty. The timing of the case took advantage of a favourable opportunity arising from President Arroyo's low popularity and her need for support from the Catholic Church to overcome an impeachment process. Similarly, Larrañaga's Spanish citizenship led to the involvement of Amnesty International Spain and other organisations that pressured the Spanish Government to act. Influential legal associations in Spain, such as the Basque Bar Council, the Barcelona Bar Association, and the Bar Association of Madrid, submitted *amicus*

curiae briefs in his trial, thereby raising the case's profile and elevating the political costs for authorities in the Philippines and Spain.

The Spanish government was involved early on, both due to their consular responsibilities and domestic pressure. As a result, Spain and the European Union exerted pressure on the government of the Philippines to protect Larrañaga and to abolish the death penalty. This also contributed to the establishment of a prisoner transfer agreement between the countries, which allowed Larrañaga to be sent to Spain in 2009 to continue serving his sentence.

Strong Media Campaign

The case led to the production of the documentary 'Give Up Tomorrow', an internationally acclaimed film that won 18 international awards and further raised the case's profile. It was screened in more than 60 film festivals worldwide and was broadcast by several stations, including the Public Broadcasting Service ('PBS') in the US. As a result, Larrañaga's story was the subject of numerous articles, interviews and related documentaries produced by other large outlets, such as the BBC, The Guardian, and Television Española. Likewise, the case and documentary led to the launch of #FreePacoNow, a successful international campaign that collected more than 100,000 signatures to demand a fair trial for Larrañaga and engaged hundreds of actors and musicians. The campaign put significant pressure on the Spanish government to negotiate a prisoner transfer agreement with the Philippines and to advocate for the abolition of the death penalty.

The Legal Representatives for the Applicant were Sarah de Mas and Faisal Saiffee.

ADDITIONAL RESOURCES

- 'The Failure of the Philippines to Implement Views in Individual Communications', shadow report submitted by REDRESS to the UN Human Rights Committee, 106th Session (September 2012) pp. 16-18.
- For the aftermath of the decision, see Sarah Toms, 'Philippines Stops Death Penalty' (BBC News, 24 June 2006).
- 'A note from Sarah de Mas (Francisco Larrañaga's lawyer) about the case and the #FreePacoNow campaign'.
- Michael Collins, 'Give Up Tomorrow' (2011) (PBS' documentary about the case).
- For more context, see 'Give Up Tomorrow – In Context' (POV).

LA CANTUTA V. PERU (2006)

Link to the judgment

Inter-American Court of Human Rights

FREEDOM FROM TORTURE • RIGHT TO A FAIR TRIAL • RIGHT TO AN EFFECTIVE REMEDY • EXTRAJUDICIAL KILLINGS • STATE IMMUNITY • AMNESTY LAW

CASE SUMMARY

Following a series of protests against former President Fujimori by students of La Universidad Nacional de Educación Enrique Guzmán y Valle, the Peruvian military forces, including a paramilitary death squad known as the 'Colina Group', disappeared and extrajudicially executed a professor and nine students. Following lengthy proceedings, the Supreme Council of Military Justice convicted lower-level members of the armed forces of human rights violations, yet they were later pardoned by Peru as result of amnesty laws in place at the time. The case was filed before the IACtHR alleging the State's failure to hold the relevant individuals accountable and its responsibility for the disappearance and subsequent murder of the victims and asking for a decision that the State must prosecute those responsible. The case became emblematic in Latin America and beyond in the fight against impunity for cases of enforced disappearance, particularly on the inapplicability of amnesty laws to such cases.

THE FACTS AND PROCEDURAL HISTORY

A professor and a group of students from La Universidad Nacional de Educación, located in La Cantuta, Lima, were allegedly kidnapped and killed by members of the Peruvian army, and buried in unmarked graves in the early hours of 18 July 1992. Relatives, along with the chancellor of the university, filed *habeas corpus* petitions on behalf of the victims. The petitions were dismissed at first instance and affirmed on appeal. The Supreme Council of Military Justice was granted jurisdiction to oversee the proceedings against members of the armed forces for the disappearance and murder of the victims, despite the fact that jurisdiction was contested between military and civilian authorities. In its judgment, the military court acquitted several high-ranking army officials but convicted lower-level members of the armed forces for the disappearance and murder of the victims. It also ordered that the State and those convicted pay reparations to the victims' families.

A month later, Peru granted an amnesty to all members of the military, law enforcement personnel and civilians who were involved in human rights violations dating from May 1980, which resulted in those held responsible for crimes against the victims being released. As a consequence, no reparations were paid to the families of the victims. After the resignation of former President Fujimori, domestic criminal courts began to open new investigations. During this time, the IACtHR in *Barrios Altos v. Peru* (2001) declared that the amnesty laws were incompatible with the American Convention. The amnesty granted to the perpetrators was subsequently reversed and declared null and void by the military court, leading to the enforcement of their prior conviction. However, since there was no clear record of this being enforced, the IACHR referred the case to the IACtHR.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 29 November 2006, the IACtHR held the following rights had been violated:

a) Article 8(1) of the American Convention (the right to judicial guarantees) as the military courts failed to ensure due process and did not ensure that the victims' next of kin had access to a hearing by an impartial, independent, and competent court;
b) Both the military and domestic criminal proceedings deprived the victims' relatives of any effective judicial remedies as neither court identified the responsible parties; and
c) Article 25(1) of the American Convention (the right to judicial protection) had been violated by Peru in respect of its obligations and the right for the victims' families.

Repeal of Amnesty Laws and State Obligations

The judgment led to the overturning of Peruvian amnesty laws as it recognised their incompatibility with the American Convention, enhanced by the judgment already handed down in *Barrios Altos*. The Court also ordered Peru to take measures to effectively complete ongoing investigations and proceedings that were pending before domestic courts. In doing so, it placed an obligation on the State to adopt all judicial and diplomatic measures to prosecute the perpetrators of the La Cantuta massacre. Correspondingly, the Court recognised an *erga omnes* obligation to prosecute and extradite former President Fujimori to stand trial, thereby paving the way for transitional justice in Peru. This placed an implicit obligation on Chile to cooperate with the Peruvian authorities to facilitate the extradition request of Fujimori in accordance with international rules. Former President Fujimori was subsequently sentenced to prison as an indirect perpetrator of the La Cantuta and Barrios Altos massacres in 2009.

The case, alongside *Barrios Altos*, is considered to be one of the IACtHR's most significant decisions due to the prohibition it places on amnesties granted for crimes against humanity. The decision in *La Cantuta* crystallised the court's jurisprudence on the incompatibility of amnesty laws with the American Convention, which was relied on in several subsequent cases, including proceedings against Fujimori for the atrocities committed during the La Cantuta and Barrios Altos massacres. It was important as it "mark[ed] the first time an elected Head of State has been tried and convicted of a human rights crime after extradition back to his home country." The conviction of Fujimori followed the IACtHR's findings in *Barrios Altos* and *La Cantuta* that States have an obligation to "investigate, prosecute and punish those responsible for serious human rights violations."

Contribution to Transitional Justice Efforts

Commentators viewed the decision as a positive step towards starting a process of transitional justice in Peru after the downfall of President Fujimori. In particular, the case is noted for representing a shift in the IACtHR's approach to abuse of power by State officials, in particular its willingness to consider the wider context and the systematic nature of abuse. The findings of the Truth and Reconciliation Commission's final report in 2003 were relied upon in the proceedings. Additionally, the IACtHR's decision in *La Cantuta* consolidated the principle that States have an obligation to cooperate in bringing those responsible for *jus cogens* violations to justice under international law.

Encouraged New Approaches by the IACtHR

La Cantuta is also considered significant as it introduced a new approach by the IACtHR in engaging with domestic courts, setting the parameters within which domestic courts could review amnesty laws, without ordering specific remedies. The IACtHR's creative engagement with domestic laws was designed to illustrate the compatibility between the American Convention and national jurisdictions, which commentators say set a desirable precedent for future decisions taken by the Court.

WIDER IMPACT OF THE CASE

Legislative and Policy Impact

As a result of its recognition of an obligation to investigate, prosecute and punish gross human rights violations, the case had an impact beyond Peru. The case has also been significant in empowering individuals to fight against impunity in Peru itself by overturning amnesty laws and statutory instruments that facilitated impunity. Indeed, in the IACtHR proceedings concerning the medical pardon of Fujimori in 2017, the Court noted that Peru had already begun to adopt appropriate measures to limit amnesty laws from having effect as early as 2001.

STRATEGIC FEATURES OF THE CASE

Use of Case Law from Other Jurisdictions

In relation to the new investigations and domestic criminal proceedings which took place in Peru, the IACtHR drew upon case law from the ECtHR, such as *Wimmer v. Germany* (2005), *Panchenko v. Russia* (2005) and *Spas Todorov v. Bulgaria* (2005), to support the reasonable time principle set out in Article 8(1) of the American Convention. Further, the IACtHR cited Article 5 of the African Charter on Human and Peoples' Rights to add further weight to the interpretation of Article 3 of the American Convention to include the right to recognition of the juridical personality of disappeared persons.

Effective Advocacy and International Involvement

After the disappearance of the victims, their relatives and the organisations supporting them launched a national and international campaign seeking justice and the truth about the fate of their loved ones, involving communications, advocacy, demonstrations, and public events.

La Cantuta attracted commentary from several domestic and international NGOs. Organisations such as the Asociación Por Derechos Humanos, the Centre for the Study and Action for Peace, the Advocacy Project, Human Rights Watch, Lawyers Without Borders, and Amnesty International filed petitions, issued commentaries, and presented *amicus curiae* submissions. Furthermore, reports made by the Truth and Reconciliation Commission of Peru helped to highlight the widespread nature of State sponsored human rights violations, raising awareness of the devastating effects of the country's impunity laws.

Media Campaign Surrounding the Case

The media campaign surrounding the massacre was considerable, even before the case was submitted to the IACtHR in 2006. Various domestic media outlets, as well as several mainstream international news outlets, covered the case which helped to increase public awareness both domestically and internationally. These included the BBC, the New York Times, and the Washington Post. Several NGOs and human rights organisations, most notably the Association for Human Rights in Peru, Human Rights Watch and Amnesty International, were also heavily involved in media campaigns condemning the amnesty laws in Peru as a result of *Barrios Altos* and *La Cantuta*.

The Legal Representatives of the victims were APRODEH, CEAPAZ, and CEJIL.

The Inter-American Commission was represented by Víctor H. Madrigal-Borloz, Pedro E. Díaz, Elizabeth Abi-Mershed, Dominique Milá, and Lilly Ching.

Third Party Interventions were submitted by the Centre for the Study and Action for Peace, the Advocacy Project, Human Rights Watch, Lawyers Without Borders, and Amnesty International.

ADDITIONAL RESOURCES

- Jorge Contesse, 'Case of Barrios Altos and La Cantuta v. Peru' (2019) 113 American Journal of International Law 568.
- Jo-Marie Burt, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations' (2009) 3(3) The International Journal of Transitional Justice 384.
- Juan E. Méndez, 'Significance of the Fujimori Trial' (2010) 25(4) The American University International Law Review 649.
- Clara Sandoval, 'The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights' (2008) 5(1) Essex Human Rights Review 7.
- James Brooke, 'Army Officers' Trials to Test Democracy in Peru' (The New York Times, 12 January 1994).

KAFANTAYENI V. ATTORNEY GENERAL (2007)

Link to the judgment

High Court of Malawi

MANDATORY DEATH PENALTY • CRUEL, INHUMAN, AND DEGRADING TREATMENT • RIGHT TO A FAIR TRIAL • RIGHT OF ACCESS TO JUSTICE • SEPARATION OF POWERS

CASE SUMMARY

Malawi, like many former British colonies, inherited a British penal code that mandated the death penalty for murder. Following a wave of jurisprudence across the Commonwealth, the Malawi High Court struck down the mandatory sentence as unconstitutional and introduced judicial discretion to sentencing for the offence of murder. As a result, the penal code in Malawi was amended and an array of sentencing options were introduced for the offence of murder. Following the judgment in *Kafantayeni*, there has been a notable decline in the number of death sentences imposed in Malawi. This case demonstrates effective partnerships between domestic and foreign counsel, the strategic choice not to seek de facto abolition, and the creation of innovative remedies when the case file was lost.

THE FACTS AND PROCEDURAL HISTORY

In 2002, Kafantayeni was tried and convicted for the murder of his stepson, who he was found to have tied up and buried alive. He was mandatorily sentenced to capital punishment for this offence. On 21 September 2005, he submitted an originating summons to the High Court of Malawi, seeking a declaration that the mandatory death penalty was unconstitutional. He was joined by five others in this application, which was heard on 30 October 2006.

The plaintiffs challenged the constitutionality of the mandatory death penalty on four grounds:

a) That it amounted to the arbitrary deprivation of a person's life in violation of section 16 of the Malawi Constitution as it did not appreciate the circumstances of the crime and the constitutional right to life;

b) That it violated the constitutional prohibition against torture, cruel inhuman and degrading punishment contained in section 19(3) of the Constitution;
c) That it violated the constitutional right to a fair trial by denying judicial discretion on sentencing in section 42(2)(f); and
d) That it violated the constitutional principle of separation of powers.

THE DECISION AND ITS SIGNIFICANCE

Violations

On 27 April 2007, the High Court, sitting as a Constitutional Court, set aside the mandatory death penalty imposed on each of the complainants and ordered that each be brought once more before the High Court for individual re-sentencing. In reaching its unanimous decision, the High Court did not consider grounds (1) or (4) above. The High Court stated, citing passages from the judgment of the Privy Council in *Reyes v. The Queen* [2002] that all killings which satisfy the definition of murder are by no means equal, and that there is a constitutional duty to consider the individual circumstances of an offence and its offender. The High Court held that the proportionality of a sentence is a factor in deciding whether it is to be regarded as inhuman, and that the imposition of the mandatory death penalty, by not allowing for individualised consideration, amounted to inhuman treatment or punishment in its application.

Despite not being advanced by the plaintiffs as a ground for constitutional challenge, the High Court held that the principle of a fair trial extends to all stages of a trial, including sentencing. In going further to give consideration to this right under section 41(2), the constitutional right of everyone convicted of a crime to have their sentence reviewed by a higher tribunal was, therefore, denied by the mandatory death sentence as, by reason of its compulsory and automatic application, it could not be subject to a higher review. This was a violation of the right to a fair trial and so restricted the constitutional right of access to justice of individuals so convicted. The Court considered that this was not "reasonable or necessary in a democratic society or in accord with international human rights standards."

WIDER IMPACT OF THE CASE

Brought About Legislative Changes

The judgment had the effect of striking down the mandatory death penalty for murder in Malawi which led to amendment of the penal code, thereby removing the possibility for any such sentences to be automatically imposed in the future. This has, in turn, led to a general reduction in the number of death sentences pronounced in Malawi.

Re-Sentencing of All Prisoners in a Similar Position

Re-sentencing hearings for the 192 prisoners on death row who were sentenced prior to the decision in *Kafantayeni* did not commence until 11 February 2015. However, as of April 2015, 37 re-sentencing hearings had already taken place. Following these early re-sentencing hearings, 25 prisoners were immediately released, and

12 prisoners were given determinate sentences that will result in release in five years or less – taking into account time served and the remission of sentences.

By the time *Kafantayeni* was heard, all the complainants' court records from previous stages of the case had been lost. All records relating to the outcomes and evidence heard in prior proceedings, therefore, had to be presented in affidavit form. Missing court records in Malawi are not unique to this case and may be encountered also in other jurisdictions. The argument was successfully made in *Kafantayeni* that if no record of a crime exists, the assumption ought to be that the crime must not have been of the most heinous kind.

Cross-Jurisdictional Effects

The case has been cited in challenges to the mandatory death sentence for murder elsewhere in Africa, notably in the case of *Godfrey Ngotho Mutiso v. Republic of Kenya* [2010] which led to the abolition of the mandatory death penalty for murder in Kenya.

Individual Impact

The case, unfortunately, had little impact on the plaintiff. Prior to resentencing, he was released on compassionate grounds on the basis he was expected to die, and he was thereafter convicted of another murder. Prior to sentencing for that further crime, Kafantayeni died in prison after suffering numerous egregious procedural violations in this second murder trial.

STRATEGIC FEATURES OF THE CASE

Use of Precedents from Other Similar National Legal Systems

As is now almost standard in mandatory death penalty cases, the constitutional challenge in *Kafantayeni* was grounded on the principles of the rights to life, prohibition of torture, and the right to a fair trial. As the constitutions of former British colonies were and remain similar in wording and effect, it was argued that emerging jurisprudence from African and Caribbean courts, in particular the cases of *Reyes v. The Queen* [2002] and *Susan Kigula & 416 Ors v. Attorney General* [2005], as well as determinations by various international and regional human rights bodies, ought to be considered. In following those authorities, *Kafantayeni* illustrates how principles and arguments established elsewhere can be used to effect change globally, but it is also an example of precedent from other former colonies potentially proving to be more influential than UK jurisprudence.

Partnership Between National and Foreign Lawyers with Leadership by National Lawyers

The *Kafantayeni* case was led domestically by national lawyers with support in drafting written submissions by English barristers. Given the potential for proceedings brought by overseas organisations to be seen as interfering in domestic processes, building effective and genuine partnerships between domestic lawyers and NGOs and supporters from elsewhere is both critical and necessary. The fact the litigation was led by national counsel assisted the perception and reception of the case by both domestic judges and the public alike.

Strategic Approach to Avoid Negative Precedent

A strategic decision was made in *Kafantayeni* not to challenge the death penalty per se, but rather to limit the action to a challenge of the mandatory death penalty for murder. One factor in this decision was the lack of opportunities for appeal in the event of an adverse decision, as the case was before the country's highest court. Therefore, a decision was made to take a step-by-step approach, to bring a strong challenge that was grounded in established principles, and to wait for a more opportune moment to challenge the death penalty itself. Ultimately, it was considered too risky to bring a challenge that would potentially create a negative precedent from a senior court in support of the death penalty.

The Legal Representatives for the Plaintiffs were Ralph Kasambara, John-Gift Mwakhwawa, Noel Chalamanda, and Ms. Chibisa.

Third Party Interventions were submitted by Redson Kapindu who appeared on behalf of the Malawian Human Rights Commission, and Saul Lehrfreund MBE, Parvais Jabbar, Keir Starmer KC and Joseph Middleton who represented the Death Penalty Project.

ADDITIONAL RESOURCES

- Written statement submitted to the UN Human Rights Council by the Advocates for Human Rights and the World Coalition against the Death Penalty. See "Malawi, 22nd Session of the Working Group on the Universal Periodic Review", Death Penalty Worldwide (September 2014).
- For the process of resentencing, see 'Malawi Legal Fellows Report – Jan-Mar 2015' Sentence Re-Hearing Project (REPRIEVE, 2015).
- Sandra Babcock and Ellen Wright McLaughlin, 'Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of *Kafantayeni v. Attorney General*' in Peter Hodgkinson (ed.) *Capital Punishment: New Perspectives* (Routledge 2013).
- Andrew Novak, 'The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis' (2012) 22 Indiana International and Comparative Law Review 267.
- Saul Lehrfreund, 'Francis Kafantayeni et al. v. The Attorney General of Malawi Constitutional Case No. 12 of 2005 in the High Court of Malawi' (2007) 45 International Legal Materials 564.

GÄFGEN V. GERMANY (2010)

Link to the judgment

European Court of Human Rights (Grand Chamber)

PROHIBITION OF ILL-TREATMENT • THREAT OF TORTURE TO SAVE A LIFE • NATIONAL SECURITY • TICKING BOMB SCENARIO • RIGHT TO A FAIR TRIAL • THEORY OF THE FRUITS OF THE POISONOUS TREE

CASE SUMMARY

Magnus Gäfgen was a German national who lodged a complaint against the Federal Republic of Germany before the ECtHR on 15 June 2005. The applicant alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of an 11-year-old boy, J, on 1 October 2002, constituted torture as prohibited by Article 3 ECHR. He further alleged that his right to a fair trial as guaranteed by Article 6 had been violated in that the evidence which had been obtained in violation of Article 3 had been admitted into trial.

The Grand Chamber found a violation of Article 3 ECHR as it established that the applicant was threatened by the police with a method that was sufficiently serious to amount to inhuman treatment. However, the Chamber determined that his treatment did not reach the level of cruelty required to attain the threshold of torture. The Court also held that the failure to exclude the impugned evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence as the applicant's second confession at the trial was crucial and formed the basis of his conviction and sentence. His trial, as a whole, was therefore considered by the Court to have been fair. This case constitutes a leading judgment on the use of evidence obtained through inhuman treatment.

THE FACTS AND PROCEDURAL HISTORY

J was an 11-year-old boy, living with his family in Frankfurt. He got to know the applicant, who was an acquaintance of his sister. On 27 September 2002, the applicant lured J into his flat in Frankfurt and killed him by suffocating him. Subsequently, the applicant sent a ransom note to J's parents claiming a €1 million ransom if they wished to see their son again. The applicant then drove to a pond located on private property and hid J's corpse under a jetty. On 30 September 2002, after picking up the ransom, he was arrested at Frankfurt airport. He was then

questioned by the police on the 1 October 2002. It was then that the deputy chief of the Frankfurt police ordered another officer to threaten the applicant with considerable physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. The applicant disclosed the information to them after ten minutes.

On 28 July 2003, Gäfgen was convicted by the Regional Court to life imprisonment for murder and kidnapping with extortion, causing the death of the victim. On 20 December 2004, the Regional Court convicted the deputy chief of the Frankfurt police and his subordinate detective officer of using coercion in the course of their duties.

A Chamber of the ECtHR initially heard the case and found that although Gäfgen had been subjected to inhuman treatment prohibited by Article 3, he no longer held the status of victim because the domestic courts had afforded him sufficient redress. The Chamber also found that the admission of the evidence obtained through violation of Article 3 did not render his trial unfair under Article 6, since that evidence played only a minor or accessory role in the trial.

The applicant then requested that the case be referred to the Grand Chamber, which reached a different conclusion.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its judgment issued on 1 June 2010, the ECtHR Grand Chamber agreed with the first Chamber that Gäfgen had been subjected to inhuman treatment prohibited by Article 3 ECHR (the prohibition of torture) but did not accept that he had lost the status of victim because the redress he received was not sufficient.

The Grand Chamber held that the national courts had indeed acknowledged the breach, and an effective investigation did take place but, unlike the first Chamber, the Grand Chamber found that the sanction imposed on the police officers who threatened Gäfgen was "manifestly disproportionate to a breach of one of the core rights of the Convention" and did not have "the necessary deterrent effect", while the delay of the compensation proceedings raised doubts about their effectiveness. For these reasons, the Grand Chamber maintained that he retained victim status. As regards Article 6 (the right to a fair trial), it took the same view as the ECtHR and held that there was no violation.

As regards the scope of Article 3, the Chamber accepted the argument made by REDRESS as an intervener that mental harm and threats of conduct prohibited by Article 3 can constitute torture or ill-treatment.

Leading Judgment on the Absolute Nature of the Prohibition on Torture

This case constitutes a leading judgment on the use of evidence obtained through inhuman treatment. The Grand Chamber reiterated the absolute nature of Article 3 and the case law settling that both the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3, irrespective of the classification of that treatment (i.e. whether it constitutes torture or another form of ill-treatment), and the use of evidence obtained as a direct result of acts of torture, made the proceedings as a whole automatically unfair, in breach of Article 6.

Defined the Scope of the Rule Excluding Evidence Obtained Through Ill-Treatment

However, the Grand Chamber noted that there was no clear consensus about the consequences, for the fairness of a trial, of the admission of evidence obtained through an act that qualified as inhuman treatment but that fell short of torture. It stated that Article 6 does not enshrine an absolute right and that it must therefore be balanced with the different competing rights and interests at stake. These include the effective prosecution of crime on the one hand, and the preservation of the integrity of the judicial process, and thus the values of civilised societies founded upon the rule of law, on the other. The Chamber considered that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context are only at stake if it has been shown that the violation had a bearing on the conviction or sentence against the defendant. In the present case, the Grand Chamber concluded that the second confession of Gäfgen made during the trial amounted to a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned evidence.

WIDER IMPACT OF THE CASE

Reaffirmed the Absolute Nature of Article 3

Forcing the Court to confront the question of whether torture was ever justified, the case revealed the moral and legal dilemmas at stake and how divided judicial opinion was. According to the six partly dissenting judges and other commentators, the door to the absolute character of Article 3 can never open or become uncompromised. Nevertheless, according to some commentators, this judgment is unlikely to affect subsequent similar cases as the chances of the same facts happening again and at the same stage of the procedure are rare.

STRATEGIC FEATURES OF THE CASE

Third Party Intervention

The Grand Chamber took into account the submissions made by REDRESS which intervened in the proceedings and stressed that making a distinction between torture and other ill-treatment under Article 3 was unnecessary since the relevant provisions did not attach any legal consequences to torture compared to other forms of prohibited ill-treatment. REDRESS underlined that the prohibition under Article 3 is absolute and affords no exceptions, justifications, or limitations, irrespective of the circumstances of the case or the conduct of the victim.

The Legal Representatives for the Applicant were Michael Heuchemer, Dirk Schmitz, and Bernhard von Becker.

Third Party Interventions were submitted by Friedrich von Metzler and Sylvia von Metzler, the parents of J, represented by Eberhard Kempf and Hellen Schilling, and REDRESS, represented by Carla Ferstman and Lutz Oette.

ADDITIONAL RESOURCES

- 'Defusing the Ticking Bomb Scenario: Why we must say No to torture, always' (Association for the Prevention of Torture, 2007).
- Stephan Ast, 'The Gäfgen Judgment of the European Court of Human Rights: On the Consequences of the Threat of Torture for Criminal Proceedings' (2019) 11(2) German Law Journal 1393.
- Neil Graffin, '*Gäfgen v. Germany*, the Use of Threat and the Punishment of Those who Ill-treat During Police Questioning: A Reply to Steven Greer' (2017) 17(4) Human Rights Law Review 681.
- '*Gäfgen v. Germany*: Threat of Torture to Save a Life' (Strasbourg Observers, 6 July 2010).
- Antoine Buyse, 'Evidence Obtained Through Violation of Article 3 ECHR' (ECHR Blog, 1 July 2008).
- Natasha Simonsen, '"Is Torture Ever Justified?': The European Court of Human Rights Decision in Gäfgen v. Germany" (EJIL:Talk! 15 June 2010).
- A movie about the case and the criminal proceedings was released in 2012 in Germany entitled, *The Case of Jakob von Metzler*.

M.S.S. V. BELGIUM AND GREECE (2011)

Link to the judgment

European Court of Human Rights (Grand Chamber)

DEGRADING TREATMENT • CONDITIONS OF DETENTION • ASYLUM PROCEDURE • EFFECTIVE REMEDY • MINIMUM LIVING CONDITIONS • SOCIO-ECONOMIC RIGHTS

CASE SUMMARY

This was the first time that the Court held a Member State's failure to satisfy basic socio-economic needs constituted a violation of Article 3 ECHR. The ruling also clearly established the obligation of Member States to ensure compliance with EU asylum law and standards before returning asylum seekers to other Member States, confirming that the Dublin II Regulations' presumption that participating States respect their human rights obligations under the ECHR may be rebutted. Ultimately, the Grand Chamber held that the conditions of detention in Greece and the living conditions of the applicant in Greece violated Article 3. Likewise, the Chamber found a violation of the right to an effective remedy as a result of the deficiencies in the asylum application procedures in Greece. Also, regarding Belgium, it found a violation of Articles 3 and 13(3), considering that returning the applicant to Greece "exposed [him] to risks linked to the deficiencies in the asylum procedure in that State," such as the harsh living conditions he was exposed to in Greece. The case led to the change of services provided to asylum seekers, having an overall positive impact of the effectiveness of domestic asylum procedures in Greece.

THE FACTS AND PROCEDURAL HISTORY

M.S.S., an Afghan citizen, fled Kabul in 2008 and submitted an asylum application in Belgium after reaching the EU through Greece. However, the Belgian Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country. The reasons given for the order were that, according to the Dublin II Regulation, Belgium was not responsible for examining the asylum application; the Belgian authorities were under no obligation to apply the derogation clause and the applicant did not have any health problems that might prevent his transfer, nor did he have relatives in Belgium. The Greek authorities confirmed their responsibility to examine the applicant's asylum request, and he was transferred to Greece.

Upon his arrival in Greece, he was immediately placed in detention for four days and then released with an asylum-seeker's card and notice to report to the police headquarters. The applicant did not report to the police headquarters. Having no means of subsistence, he lived in poverty, with no food and nowhere to live or to wash. He also lived in constant fear of being attacked and robbed, with no prospect of his situation improving. As a consequence, he tried to leave Greece but was arrested and placed in detention for a week, during which he was allegedly beaten by the police. After his release, he continued to live in the same conditions. He brought claims against Greece and Belgium for violations of Articles 2 and 3 and noted the absence of remedies available to him under Article 13.

THE DECISION AND ITS SIGNIFICANCE

Violations

In a judgment issued by the Grand Chamber on 21 January 2011, the ECtHR held by a majority that the following violations had occurred:

a) **Article 3** (the prohibition of torture) due to both the applicant's detention conditions and his living conditions in Greece;
b) **Article 13** (the right to effective remedy) taken together with **Article 3** by Greece because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of him being returned to his country without serious examination of the merits and without having access to an effective remedy;
c) **Article 3** by Belgium both due to having exposed the applicant to risks (in sending him back to Greece under the Dublin II Regulation) linked to the deficiencies in the asylum procedure in Greece, and because of having exposed him to detention and living conditions in Greece that were in breach of **Article 3; and**
d) **Article 13** taken together with **Article 3** by Belgium due to the lack of an effective remedy as regards the applicant's expulsion order.

The Presumption of Human Rights Compliance by Receiving States can be Rebutted

The judgment marks a significant shift from the position previously upheld by the ECtHR in *K.R.S. v. United Kingdom* (2008), where the Chamber found manifestly ill-founded the complaint of an asylum seeker against his return to Greece pursuant to the Dublin II Regulation. The judgment, in the part against Belgium, means that Member States of the EU can no longer benefit from the presumption established by the Dublin II Regulation that absolves a 'sending state' of responsibility for the procedure applied to asylum seekers in the 'receiving state', nor for their living conditions, as membership of the Common European Asylum System requires that an asylum seeker will be safe from *refoulement* there. In this case Belgium, the Chamber found, knew or ought to have known the risks the applicant would face in Greece, which were real and individual enough to fall within the scope of Article 3.

Right to a Proper Hearing Upheld

The Grand Chamber reiterated that for the requirements for an effective remedy to be met, there must be an opportunity for the asylum seeker to have a proper hearing of their objection to the transfer, where Article 3 violations are anticipated. It concluded that the procedure available to the applicant in Belgium did not meet the requirements of Article 13.

Extended Application of Article 3 to Cover Inaction to Address Poor Living Conditions

The Chamber found, for the first time, that the lack of action to address extreme material poverty of an asylum seeker could amount to a violation of Article 3 ECHR. Normally, access to food and shelter falls within the scope of economic and social rights and, therefore, outside the scope of the ECHR. However, several reasons led the Chamber to find a breach of Article 3 by Greece. Firstly, that the obligation to provide accommodation and decent material living conditions to impoverished asylum seekers was part of Greek positive law as a result of the incorporation of the EC Reception Conditions Directive into national law. Secondly, the Chamber said it attached considerable importance to the applicant's status as an asylum seeker, a particularly underprivileged and vulnerable group in need of special protection. Such living conditions, combined with a state of prolonged uncertainty, had attained the level of severity required to breach Article 3, the Chamber found.

Standards of Treatment of Asylum Seekers can be a Basis for Non-Refoulement

Even if the Reception Conditions Directive does not apply because the State is not member of the EU, or because it is breached, allowing the absolute destitution of asylum seekers was found to be in breach of Article 3. By transferring the applicant to Greece knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment, Belgium had itself violated Article 3.

WIDER IMPACT OF THE CASE

Change of the Domestic Framework for Receiving Asylum Seekers in Greece

As a result of this case, Greece changed the services provided to asylum seekers. The CoM in its 1222nd meeting noted that the new asylum and first reception services introduced by the Greek authorities had a positive impact on the effectiveness of the asylum procedure in Greece.

STRATEGIC FEATURES OF THE CASE

Legal Strategy to Bring the Case against Both Greece and Belgium

M.S.S. brought his claim against both the sending and the receiving State, contrary to the previous case *K.R.S. v. United Kingdom* (2008). In fact, in the latter case, even if the ECtHR acknowledged that there was significant evidence of procedural deficiencies in the Greek asylum system and poor standards of detention, the Court lamented that these issues should have been raised by K.R.S. directly with the Greek authorities in Greece, and, by the same token, he should have accessed the ECtHR from Greece. Therefore, M.S.S. choice to file a submission against both States was key to find Greece and Belgium in violation of the ECHR.

Reliance on Reports by International Bodies

In this case, published reports, including materials published for advocacy purposes, were crucial in proving the violations. The Grand Chamber decision relied on several reports about the adverse treatment of asylum seekers

in Greece by, *inter alia,* the UNHCR, Human Rights Watch, the European Commissioner for Human Rights, the European Committee for the Prevention of Torture, Amnesty International and the European Council on Refugees and Exiles. In finding Belgium responsible for violating the Convention, the Chamber attached critical significance to a letter sent by UNHCR to the Belgian Minister of Migration and Asylum Policy in April 2009, which called for a suspension of transfers to Greece. Therefore, in this case, the activity of reporting and advocacy was essential for proving the violations.

Influence of Third Party Intervention

The Chamber invited the Council of Europe Commissioner for Human Rights to submit written observations on the case, relating to the transfer of asylum seekers from Belgium to Greece under the Dublin II Regulation.

The Legal Representative for the Applicant was Zouhaier Chihaoui.

Third Party Interventions were submitted by the AIRE Centre, Amnesty International, the UNHCR, the Greek Helsinki Monitor, the Commissioner for Human Rights of the Council of Europe, and both the Dutch and UK governments.

ADDITIONAL RESOURCES

- L. Peroni, 'M.S.S. v. Belgium and Greece: When is a Group Vulnerable?' (Strasbourg Observers, 10 February 2011).
- Laurens Lavrysen, 'M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law' (Strasbourg Observers, 24 February 2011).
- Gina Clayton, 'Asylum Seekers in Europe: M.S.S. v. Belgium and Greece' (2011) 11(4) Human Rights Law Review 758.
- Eleanour Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds.) *European Union Law* (Oxford University Press 2014).
- Patricia Mallia, 'The European Court of Human Rights: M.S.S. v. Belgium & Greece' (2011) 50 International Legal Materials 364.
- Ekaterina Yahyaoui Krivenko, 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR: The *M.S.S.* Case 10 Years On' (2022) 34(2) *International Journal of Refugee Law* 192.
- 'Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 2, of the European Convention on Human Rights' CommDH (2010) 22, Strasbourg, 31 May 2010.

DOE V. CHIQUITA BRANDS INTERNATIONAL (2011)

Link to the judgment

United States Court of Appeals, Eleventh Circuit

CORPORATE LIABILITY • ALIEN TORT STATUTE • TORTURE VICTIMS PROTECTION ACT • FUNDING AND ARMING KNOWN 'TERRORIST' ORGANISATIONS IN COLOMBIA

CASE SUMMARY

In 2007, EarthRights International ('ERI') filed a federal class-action lawsuit on behalf of Colombian families arguing that Chiquita Brands International Inc., the multi-national produce company, funded and armed known terrorist organisations in Colombia in order to maintain its profitable control of Colombia's banana growing regions, thereby facilitating these organisations' human rights violations. Subsequently reaching the US Court of Appeals for the Eleventh Circuit following the District Court's denial of Chiquita's motion to dismiss, the complainants sought damages under the Alien Tort Statute (ATS), a federal law that allows foreigners to sue for violations of international human rights law, and the Torture Victims Protection Act ('TVPA'). The debate in this case was whether indirectly financing a foreign terrorist organisation can lead to responsibility of a multinational corporation for abuses committed by such an organisation against non-US citizens outside of US territory. As of June 2024, a jury has found banana giant Chiquita Brands International liable for financing the United Self-Defense Forces of Colombia (Autodefensas Unidas de Colombia) ('AUC'), marking the first time that an American jury has held a major US corporation liable for complicity in serious human rights abuses in another country, a milestone for justice after 17 years of legal proceedings.

THE FACTS AND PROCEDURAL HISTORY

From 1997, the AUC exercised a reign of terror in Colombia in order to maintain control over the banana production region. The AUC tortured and killed thousands of villagers, labour leaders, and community organisers who were suspected of favouring leftist guerrillas or making trouble for the plantation owners. In 2001, the US designated the AUC as a terrorist organisation, which made payments by Chiquita Brands to the AUC illegal. It was alleged that the funds received from Chiquita were used by the AUC to purchase weapons. US government

agencies filed criminal charges against Chiquita. In 2007, Chiquita pleaded guilty to federal criminal charges, and paid a $25 million USD fine, for providing material support to the terrorist group, the only corporation ever convicted of this crime.

Later that year, ERI filed a federal class action lawsuit under the ATS on behalf of the complainants. US courts have been inconsistent in their application of the ATS and years of legal battle over admissibility ensued. Families of the victims filed a petition to the Supreme Court after the US Court of Appeals for the Eleventh Circuit dismissed their ATS claims. The Eleventh Circuit Court held that, despite the fact that Chiquita is a US company that made decisions in the US to finance paramilitary death squads in violation of US criminal law, the victims' claims under the ATS lacked sufficient connection to the United States to be heard in US courts. The Supreme Court declined to hear the case in 2015, but the case has now been returned to the Court of Appeal for the Eleventh Circuit after declaring that it could proceed towards a jury trial on the basis of the TVPA in September 2022. The trial was set for April 2024 and the jury delivered their verdict on 10 June 2024.

THE DECISION AND ITS SIGNIFICANCE

Violations

Despite the Supreme Court's decision not to hear the claims under the ATS, ruling that plaintiffs had not shown a direct link between the Colombian government and the AUC which the court ruled was necessary to meet the TVPA's "state action" requirement, parts of the case continued in a federal appellate court (Eleventh Circuit) based on the TVPA as of April 2024. A jury verdict was handed down on 10 June 2024.

Although the District Court denied Chiquita's motion to dismiss in 2011, finding that claims for extrajudicial killing, torture, crimes against humanity, and war crimes could proceed, the Court of Appeal for the Eleventh Circuit ruled that the victims' claims under the ATS lacked sufficient connection to be heard in US courts. The Supreme Court's refusal to hear the case in 2014 means that the decision of the appellate court as regards the ATS – namely that TVPA claims cannot proceed against corporations – remains in place. However, in November 2016, a Florida federal judge rejected Chiquita's argument that the case should be heard in Colombia rather than the US, clearing the way for the historic case to advance toward trial and the case moved forward with discovery with ERI filing cases on behalf of additional plaintiffs against individual former Chiquita executives in Ohio and Florida in 2017. Chiquita settled related claims under the ATS in 2018 before the District Court of Florida denied the motion to certify the case as a class action and granted summary judgment to Chiquita and individual defendants in 2019 on account of insufficient evidence. Then in 2021, the US Court of Appeal for the Eleventh Circuit heard arguments on the summary judgment appeal before subsequently ruling that several families suing Chiquita Brands International Inc. for its role in funding paramilitary torture and death squads in Colombia could proceed toward a jury trial on the basis of the TVPA on 6 September 2022.

After nearly 17 years, plaintiff family members of Colombian trade unionists, banana workers, activists, and others targeted by paramilitaries in the late 1990s and early 2000s, allegedly with Chiquita's knowing support, finally obtained justice after seeing their case go to trial on 24 April 2024. A jury was empanelled on 30 April, and concluded on 10 June that Chiquita knowingly financed the AUC in pursuit of profit, despite the AUC's egregious human rights abuses. By providing over $1.7 million in illegal funding to the AUC from 1997 to 2004, Chiquita contributed to untold suffering and loss in the Colombian regions of Urabá and Magdalena, including the brutal murders of innocent civilians. This historic verdict also means some of the victims and families who suffered as a direct result of Chiquita's actions will finally be compensated.

Strategic Potential of the TVPA

The US courts have ruled inconsistently on the applicability of the ATS. Ever since the ruling in *Kiobel*, the US court system has been hesitant to apply ATS jurisdiction to issues such as allegations of corporations abetting terrorist groups. *Doe v. Chiquita* illustrates this increasing difficulty.

Although the ATS was found not to be justiciable in this case, moving forward with the TVPA claim opens the possibility of pushing the boundaries and enabling the US courts to determine whether or not the TVPA covers a situation where the relevant violations were carried out by non-US citizens on foreign territory. If this turns out to be the case, it will set a precedent for victims of human rights violations to seek a remedy for indirect actions of US companies operating in foreign territory.

WIDER IMPACT OF THE CASE

Redefining the TVPA

The Supreme Court's decisions in *Mohamad v. Palestinian Authority* (2012) and *Kiobel v. Royal Dutch Petroleum Co.* (2013) significantly restricted the use of both the TVPA and the ATS to hold human rights perpetrators accountable in US courts. If successful, *Doe* could potentially redefine the scope of the TVPA and broaden the connection requirement to the US. Further, if the TVPA claim is successful it will open a new avenue for US judicial accountability mechanisms.

STRATEGIC FEATURES OF THE CASE

Filing of Multiple Cases

Multiple cases were filed in different locations before being consolidated into one complaint. Whilst the utilisation of just one case may have been effective from the start, filing multiple cases can strengthen the forums and the breadth of the arguments that can be made.

The Legal Representatives for the Plaintiffs were EarthRights International, and Cohen Milstein Sellers & Toll PLLC, Paul Hoffman, Arturo Carillo, Judith Brown Chomsky, and John DeLeon.

ADDITIONAL RESOURCES

- See further 'Doe v. Chiquita Brands International Inc.' (EarthRights International).
- See 'Colombian Victims Win Historic Verdict over Chiquita: Jury finds Banana Company Liable for Financing Death Squads' (EarthRights International, 10 June 2024).
- United States Department of Justice, 'Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay $25 Million Fine', March 19, 2007.
- See Amicus Brief, 'Kiobel v. Royal Dutch Petroleum/Shell' (EarthRights International, 17 May 2007).
- Corporate Accountability Lab, 'Brief for *Amici Curiae* Human Rights Organisations in support of Petitioners' Petition for a Writ of Certiorari', 8 July 2021.

A V. OFFICE OF THE ATTORNEY GENERAL OF SWITZERLAND (2012)

Link to the judgment

Swiss Federal Criminal Court

JUS COGENS CRIMES • CUSTOMARY INTERNATIONAL LAW • EXTRATERRITORIAL JURISDICTION • UNIVERSAL JURISDICTION • IMMUNITY FOR STATE OFFICIALS • IMMUNITY RATIONE MATERIAE • IMMUNITY RATIONE PERSONAE

CASE SUMMARY

Criminal proceedings were initiated in 2011 against Khaled Nezzar ('A') an Algerian national and former member of the Algerian Haute Comité d'Etat ('HCE') between 1992 and 1994 by Swiss courts for war crimes and torture allegedly perpetrated during this period. He appealed the decision of the Office of the Attorney General ('OAG') to prosecute him, arguing that they were not competent to do so. The Swiss Federal Criminal Court ruled *inter alia* that Nezzar could not claim personal immunity from prosecution, due to the *jus cogens* nature of the crime for which he was being prosecuted. This paved the way for an announcement in 2023 that the case would proceed to trial.

THE FACTS AND PROCEDURAL HISTORY

Khaled Nezzar, a former member of the HCE, former Major General in the Algerian army and former Minister of Defence, had allegedly perpetrated war crimes in Algeria after the military coup of 1992. In a private prosecution, an Algerian individual with refugee status in Switzerland further alleged that Nezzar had tortured him since 1993. Despite the position of the Swiss Directorate for International Law ('DDIP') that Nezzar enjoyed immunity from prosecution by Swiss authorities for acts performed as Minister of Defence in his official capacity, the OAG declared themselves competent to prosecute him given that genocide, crimes against humanity and war crimes were subject to the jurisdiction of Swiss courts since January 2011, and that anybody who perpetrates them abroad is liable to prosecution in Switzerland if they are present on Swiss territory and have not otherwise been extradited or brought before an international criminal court whose jurisdiction is recognised by Switzerland. Nezzar appealed against the decision of the OAG on several grounds.

THE DECISION AND ITS SIGNIFICANCE

Violations

In a decision issued on 25 July 2012, the Swiss Federal Criminal Court acknowledged that the presence of the accused on Swiss territory was an essential condition for conducting criminal proceedings in Switzerland for acts committed abroad. However, the Court argued against an overly strict interpretation of this condition of presence, which would "in practice amount to allowing the offender to decide whether or not the prosecution shall proceed." The Court held that the condition must be met at the time criminal proceedings were opened, and if the accused were to subsequently leave Switzerland, this would not hinder such proceedings.

The Court agreed that while serving as Algeria's Defence Minister and a member of the HCE, Khaled Nezzar benefitted from immunity *ratione personae* covering both his official acts and acts committed in his personal capacity, noting that this immunity was of a temporary nature.

However, the Court found that any residual immunity prevailing after departing from office cannot be considered to cover alleged serious violations of human rights committed while in office. The Court consequently rejected the existence of immunity *ratione materiae* as a defence against violations of peremptory norms of international law and thus cleared the way to continue the prosecution of Nezzar for war crimes.

No Immunity under Customary International Law for Jus Cogens Crimes

In so holding, the Court acknowledged that the prohibition of genocide, war crimes and crimes against humanity, including torture, has attained the status of customary international law and that, in light of the Swiss legislature's commitment to enforce this prohibition, it would be paradoxical to allow a claim of immunity to trump prosecution of such offences. The Court acknowledged that Nezzar had enjoyed immunity *ratione personae*, that is for any act performed while in office, whether in an official or personal capacity, during his tenure as member of the HCE. However, it held that such immunity was extinct at the time of the appeal. Hence, Nezzar could be prosecuted for any act performed in his private capacity during his tenure as a member of the HCE. Moreover, no residual functional immunity could be found for acts performed even in an official capacity during Nezzar's tenure as member of HCE if such acts constituted *jus cogens* crimes – that is genocide, war crimes and crimes against humanity, including torture.

While the case establishes an important legal principle – that neither personal nor functional immunity can be claimed for *jus cogens* crimes – in terms of justice for victims, the case has not yet reached a conclusion at the time this report is published. After the OAG dismissed the case based on the argument that Nezzar could not be charged with perpetrating war crimes because there was no armed conflict in Algeria, the Federal Criminal Court quashed this decision and ordered that the investigation be reopened by the OAG. On 28 August 2023, the OAG filed an indictment against Nezzar in the Federal Criminal Court. It was announced on 28 December 2023 that his trial was due to take place in Bellizona between 17 June and 19 June 2024, but he died just two days later. TRIAL International continue to monitor further developments and offer support to the plaintiffs for whom this was the last opportunity to obtain justice.

WIDER IMPACT OF THE CASE

First Attempt to Apply Universal Jurisdiction to Algeria's Dirty War

The case represented the first arrest and indictment of a senior African former official under the principle of universal jurisdiction. Moreover, it constitutes an attempt at providing justice for victims of the 'dirty war' in Algeria, whose laws prevent the prosecution of former army officers involved in the perpetration of crimes during this time. Since the successful establishment of Swiss jurisdiction over the case, other complainants have joined the proceedings.

First Case for the Swiss War Crimes Unit

The decision was hailed by NGOs in Switzerland as a ground-breaking precedent, marking an important start for the newly established War Crimes Unit within the Swiss OAG that had been established in 2012. However, subsequent developments in this case demonstrated that the Office's work has often fallen prey to political pressures.

STRATEGIC FEATURES OF THE CASE

Perseverance by those Attempting to Secure Prosecution

Attempts to prosecute Nezzar had previously been initiated in France in 2001, following complaints filed by victims. However, at the time, he was promptly evacuated from the country.

Collaborative Advocacy Efforts

The efforts of the international NGO TRIAL International, along with two private prosecutions brought by Algerian citizens living in Switzerland, were fundamental in ensuring that Nezzar would be prosecuted in Switzerland. TRIAL International not only successfully brought the issue before a federal court for it to determine the fundamental principle that immunity cannot be granted to individuals alleged to have perpetrated *jus cogens* crimes, but it also successfully argued that the case would not be dropped when the OAG decided that the war crimes allegations were unfounded because there was no armed conflict in Algeria.

The Legal Representatives for the Respondent was Damien Chervaz. TRIAL International filed a criminal complaint against Khaled Nezzar in 2011 which subsequently led to his arrest and the instigation of formal proceedings against him.

ADDITIONAL RESOURCES

- Julia Crawford, 'International Crimes: Spotlight on Switzerland's War Crimes Unit' (Justiceinfo.net, 15 February 2019).
- Gabriella Citroni, 'Swiss Court Finds No Immunity for the Former Algerian Minister of Defence Accused of War Crimes: Another Brick in the Wall of the Fight Against Impunity' (EJIL: Talk! 15 August 2012).

- 'Khaled Nezzar' (TRIAL International, 13 September 2018).
- 'Khaled Nezzar Case, Federal Criminal Court' (ICRC, 25 July 2012).
- Julia Crawford, 'Pourquoi le bureau suisse des crimes de guerre traîne les pieds' (Swissinfo.ch, 5 February 2019).
- 'Décision historique : pas d'immunité pour un minister poursuivi pour crimes de guerre' (TRIAL International, 31 July 2012).
- Gintare Taluntyte, 'One Step Further: Limiting the Scope of Functional Immunity on the Basis of Universal Jurisdiction? The Khaled Nezzar Case' (2014) 13(1) Baltic Yearbook of International Law 1.

ANVIL MINING LTD. V. ASSOCIATION CANADIENNE CONTRE L'IMPUNITÉ (2012)

Link to the judgment

Québec Court of Appeal

FORUM NON CONVENIENS • EXTRATERRITORIAL OBLIGATIONS • ARMED CONFLICT • EVIDENTIARY RECORDS • TRANSNATIONAL LAWYERING AND ADVOCACY

CASE SUMMARY

In October 2004, Anvil Mining Ltd was allegedly involved in the killing of 70 people in Kilwa, a town in the Democratic Republic of Congo ('DRC') by providing vehicles and airplane transportation to the Congolese Armed Forces ('FRDC'), who carried out an attack on the village to regain control from rebels. Given Anvil's alleged knowledge or willing acceptance of the risk of complicity in these atrocities, and after the company failed to be held accountable before courts in the DRC and Australia, a class action was filed against Anvil in Montréal, Canada, by the Association Canadienne Contre l'Impunité ('ACCI'). Although unsuccessful at the Court of Appeal of Québec, this case, and other cases, developed domestic jurisprudence and best practice for holding Canadian corporations to account for extraterritorial human rights violations. The case also highlights new litigation and advocacy strategies, such as the importance of strong evidentiary records to achieving success in such cases, the importance of transnational civil society networks and of identifying strategies to overcome the legal arguments frequently argued by companies.

THE FACTS AND PROCEDURAL HISTORY

Anvil is a mining company constituted on 8 January 2004 in the Northwest Territories of Canada, with its head office in Perth, Australia. Anvil's sole activity is at the Dikulushi mine in the DRC.

On 13 October 2004, a group of individuals claiming to act on behalf of the Revolutionary Movement for the Liberation of Katanga entered the town of Kilwa and proclaimed Katanga's independence. On taking back control of Kilwa, the FARDC allegedly committed war crimes including extrajudicial executions, torture, rape, illegal

detentions, and looting. According to the UN Stabilisation Mission in the DRC, around 70 to 80 civilians were killed. Anvil, whose Dikulushi mine is located 50km from Kilwa, allegedly provided logistical support to the FARDC in the form of vehicles and airplane transportation that was used during the attack. Anvil claimed that the vehicles were compulsorily requisitioned by the military.

In 2007, the Congolese military court of Katanga convicted just two members of the FARDC for murder while all others charged were acquitted, and no compensation was awarded. On appeal, the Congolese Military High Court reduced the two individuals' sentences and upheld the acquittals. A class action was brought in Australia, where Anvil's head office is located. However, the process was fraught with difficulties, including the NGO representing the victims receiving death threats from the Congolese government, and the case never proceeded to trial.

On 8 November 2010, ACCI filed a petition for certification of a class action in Montreal, Canada against Anvil. Anvil brought a motion for declinatory exception–effectively a motion to dismiss the claim based on absence of jurisdiction of the court. On 27 April 2011, the Superior Court of Québec rejected Anvil's arguments, ruling that the case was properly brought in Québec and that neither the DRC nor Australia were more appropriate forums than Québec. Anvil appealed the judgment to the Québec Court of Appeal.

THE DECISION AND ITS SIGNIFICANCE

Violations

In a decision issued on 24 January 2012, the Court of Appeal of the Province of Québec found that the court did not have jurisdiction to hear the case, because Anvil's Montreal office was not involved in decisions that led to its alleged role in the massacre and, as such, lacked sufficient connection to Québec to establish jurisdiction. The transnational structure of the company, and the fact that its office in Canada was merely involved in investors' relations was, for the Court, a strong argument against Canadian jurisdiction. Given the Court's finding of an absence of jurisdiction, the Court did not consider the issue of *forum non conveniens*. Examining the issue of forum of necessity, the Court stated that the victims could have sought justice in either the DRC or Australia. ACCI applied for leave to appeal to the Supreme Court of Canada, but this application was refused on 1 November 2012.

Building up Case Law Over Time

Whilst the dismissal of the claim denied the immediate victims access to justice, this case raised the profile of transnational human rights cases in Canada involving the mining sector. This was, in part, due to the clear and egregious human rights violations that had occurred. The case represents the end of a first wave of similar cases that did not succeed past preliminary issues, such as *forum non conveniens*, to a second wave of more successful cases. It demonstrates that impact sometimes occurs only through an accumulation of similar cases, each building on the next.

WIDER IMPACT OF THE CASE

Generated Public Awareness and Contributed to the Development of Jurisprudence

While the case was unsuccessful on appeal, the lower court's positive decision was instrumental in overcoming what had become an entrenched attitude about the lack of prospects for transnational human rights cases in Canada. The case generated public exposure and greater acceptance of the idea that Canadian corporations can be involved in armed conflicts and can commit human rights abuses. Litigators built on the preliminary setbacks in *Anvil*, and subsequent cases of human rights abuses by Canadian mining companies. Notably, *Choc v. Hudbay Minerals Inc.* (2013), *Araya v. Nevsun Resources Ltd.* (2016), and *Garcia v. Tahoe Resources Inc.* (2017) were successful in overcoming the corporations' preliminary jurisdictional challenges.

Subsequent cases brought with the intention of holding Canadian mining companies to account learnt from and built upon ACCI's litigation strategy. A key focus of the litigators which was followed in later cases was to build a compelling evidence base to meet issues of jurisdiction and *forum non conveniens*. For example, on the latter issue, the litigators presented specific evidence of the inadequacies in the judiciary and legal systems in the other possible forum States concerned, in order to meet the burden of *forum non conveniens*, rather than only presenting broader issues of human rights violations. Thus, the arguments presented in this case served as a template for future cases.

STRATEGIC FEATURES OF THE CASE

The Importance of Networks

The case underscores the importance of civil society networks when conducting transnational litigation against corporations. The victims of the Kilwa massacre worked with civil society in the DRC, Australia, and Canada to bring claims in all three countries. The establishment of ACCI as an NGO provided a structured vehicle to channel and coordinate the different efforts of the organisations that comprised it.

The Need to Take into Account Security Considerations

The impact of threats towards the Australian arm of this litigation highlights the importance of a robust security protocol to protect victims and those involved in the case, and to avoid security issues impacting the work of the victims' representatives. While security considerations may influence decisions whether to bring a case in a jurisdiction that may put victims and their representatives in danger, evidence of security issues may also bolster arguments of *forum non conveniens*.

The Legal Representatives for the Petitioners were Trudel Johnston and Lespérance.

ADDITIONAL RESOURCES

- Roger P. Alford, 'Human Rights After *Kiobel: Choice of Law and the Rise of Transnational Tort Litigation'* (2014) 63(5) Emory Law Journal 1089.
- Ekaterina Aristova, 'Jurisdiction of the English Courts over Overseas Human Rights Violations' (2016) 75(3) Cambridge Law Journal 468.
- Benjamin Hoffman and Marissa Vahlsing, 'Collaborative Lawyering in Transnational Human Rights Advocacy' (2014) 21(1) Clinical Law Review 255.
- Julia Kapelańska-Pręgowska, 'Extraterritorial Jurisdiction of National Courts and Human Rights Enforcement: Quo vadis justitia?' (2015) 17(4/5) International Community Law Review 413.
- Rae Lindsay et al., 'Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles' (2013) 6(1) Journal of World Energy Law & Business 2.
- Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30(78) Utrecht Journal of International and European Law 24.
- Penelope Simons, 'Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses' (2014) 56(2) Canadian Business Law Journal 167.

GUATEMALAN GENOCIDE CASES (2013)

- **Link to the judgment by the Spanish Supreme Court**
- **Link to the judgment by the Spanish Constitutional Court**
- **Link to the judgment by a Guatemalan Criminal Court**

Spanish Constitutional Court & Domestic Guatemalan Courts

GENOCIDE • UNIVERSAL JURISDICTION IN SPANISH COURTS • NATIONAL PROCEEDINGS AGAINST FORMER HEAD OF STATE • GENDER VIOLENCE IN GENOCIDE CLAIMS • CJA

CASE SUMMARY

The application of universal jurisdiction by the Spanish Constitutional Court to cases relating to the Guatemalan genocide led to prosecutions by Guatemalan domestic courts in pursuit of accountability for the massacre of the Mayan Ixiles. In 2012 two senior officials, including General José Efraín Ríos Montt, Guatemala's dictator at the time the genocide took place, were indicted on accusations of genocide and other atrocities in Guatemala. In 2013, Ríos Montt was convicted by a Guatemalan Criminal Court. Although the Guatemalan proceedings were overturned less than two weeks later by the Guatemalan Constitutional Court, and a subsequent retrial was suspended indefinitely, the initial prosecution in Spain helped put pressure on Guatemala to start national proceedings and enabled many indigenous people of Guatemala to contribute to telling the stories of the atrocities committed between 1982 and 1983.

THE FACTS AND PROCEDURAL HISTORY

These cases arise from the genocide of Guatemala's indigenous Mayan population at the hands of Guatemalan military forces during the country's 36-year civil war. A UN sponsored commission found that the State was responsible for acts of genocide carried out between 1981 and 1983 against Mayans in four regions including Ixil. In late 1999, prosecutions were brought before the Spanish National Court charging eight high-ranking Guatemalan officials with international crimes under Spanish criminal laws, applying extraterritorial (universal) jurisdiction.

THE DECISIONS IN SPAIN AND GUATEMALA AND THEIR SIGNIFICANCE

The Spanish Decision

On 26 September 2005, following a legal challenge, the application of Spanish jurisdiction was upheld by the Spanish Constitutional Tribunal, noting that Spain observes universal jurisdiction for certain crimes of international importance prosecutable in any jurisdiction as prescribed by international treaties. In 2006, the Spanish judge seized with the case, Judge Santiago Pedraz, issued international arrest warrants for the eight defendants in 2006 with the Center for Justice and Accountability ('CJA') joining the case. At first, the Guatemalan Constitutional Court accepted the warrants and authorised extradition proceedings. However, the Guatemalan court reversed itself in 2007 and declared that the arrest warrants and extradition requests were invalid, barring Judge Pedraz from interviewing witnesses in Guatemala. Instead, Judge Pedraz invited witnesses, victims and experts to come to Spain to testify.

In 2008 more than forty indigenous Guatemalans, including people involved in the Center for Legal Action on Human Rights in Guatemala ('CALDH') cases, and Falla, testified in Madrid, including Rigoberta Menchú. In April 2011, Judge Pedraz issued an arrest warrant and an extradition request for Jorge Sosa Orantes for his participation in the Dos Erres massacre of 1982. Orantes was arrested by Canadian authorities after taking up residence in Alberta.

Despite the introduction of a bill by the Spanish government in 2014 to limit Spanish jurisdiction over international crimes, Judge Pedraz announced on 21 May 2014 that his investigation of genocide in Guatemala would proceed.

It is unclear whether the Spanish proceedings were subsequently discontinued given the renewed intent by Guatemala to prosecute grave crimes, but undoubtedly the Spanish proceedings helped form the case in Guatemala by creating pressure to pursue domestic prosecutions.

The Proceedings in Guatemala

In the meantime, in 2001, various human rights groups had also initiated a complaint with the Guatemalan Public Ministry. Inaction by the prosecutor's office meant little progress was made. However, in February 2008, following criticism of Guatemalan proceedings by the Spanish judge, and the increasingly high profile in Guatemala of the Spanish proceedings, the Guatemalan President announced that he would order the military to turn over its archives from the civil war period to the Human Rights Ombudsman. Domestic prosecutions were subsequently brought in Guatemala against General José Efraín Ríos Montt, the former Dictator of Guatemala, after he lost immunity as a member of Congress in 2012, and his head of military intelligence, Mauricio Rodríguez Sánchez.

On 10 May 2013, Ríos Montt and Rodríguez Sánchez were tried by a three-judge High-Risk tribunal (a specialist court created by the UN-sponsored International Commission against Impunity in Guatemala to provide specialist trained and vetted judges with extra security) for genocide and crimes against humanity. Rodríquez Sánchez was acquitted but Ríos Montt was convicted of responsibility for the killing of 1,771 Mayan Ixiles, between March 1982 and August 1983, by his military forces, and was sentenced to 80 years in prison. On 21 May 2013, just ten days later, Guatemala's Constitutional Court overturned Ríos Montt's conviction on a procedural technicality. In October 2013, the Guatemalan Constitutional Court asked the lower courts to reconsider Ríos Montt's right to protection under the amnesty that had been issued to pardon all those responsible for the relevant crimes

between 1982 and 1986, despite the fact that this amnesty had been repealed in 1997. A retrial was then announced to start in January 2015 but was first suspended for allegations of judicial bias, and thereafter because of a declaration of High-Risk Court "A" that Ríos Montt was unfit for trial due to irreversible vascular dementia.

On 25 August 2015, the High-Risk court overseeing the proceedings ruled that a joint retrial of both Ríos Montt and José Mauricio Rodríguez Sánchez was to commence on 11 January 2016, but Montt's trial could not result in a criminal sanction owing to his unfitness to stand for a regular trial, ordering that he instead be subject to special proceedings that do not allow for a guilty verdict. On 31 March 2017, in a separate case, a court ruled that Ríos Montt could stand trial for genocide in the Dos Erres Massacre, in which more than 200 civilians were killed, but his death in April 2018 extinguished that criminal prosecution against him.

The trial against the former Chief of Military Intelligence, Rodríguez Sanchez, continued but subsequently concluded with his acquittal by majority vote in a ruling handed down on 26 September 2018 and read and delivered on 18 October 2018. In this ruling, the court unanimously found that the Guatemalan army had carried out a systematic extermination plan thereby amounting to genocide against the Maya Ixil population but acquitted the sole defendant in that case of any wrongdoing.

As of March 2024, it has been confirmed that the trial of the former Chief of General Staff, Manuel Benedicto Lucas García, would commence on 25 March in High-Risk Court "A". Retired Colonel Manuel Antonio Callejas continues to be subject to criminal proceedings, however, in January 2024, the High-Risk Court "A" suspended the criminal prosecution against him as doctors from the National Institute of Forensic Sciences of Guatemala determined that he is unfit to stand trial. For this reason, he will be submitted to a trial for the exclusive application of security and correction measures which will be held without the presence of the defendant or the media.

WIDER IMPACT OF THE CASES

Impact of the Use of Universal Jurisdiction by Spain

The decision of the Spanish Constitutional Court to uphold the use of the 1985 Spanish law on universal jurisdiction, which had previously been applied to charge and order the detention of former Chilean president August Pinochet, was a ground-breaking decision which confirmed that Spanish courts were willing to continue to exert jurisdiction over crimes of international importance, regardless of the nationality of either the victims or the defendants. This enabled proceedings to commence and opened the way for witness and expert evidence and testimony to be gathered and collated.

However, the Spanish law on universal jurisdiction was drastically modified in 2014, narrowing its scope of application even in cases with Spanish victims.

Importance of Truth Telling for the Victims in the Spanish Proceedings

As a result of the proceedings in Spain, for the first time, victims and witnesses were able to spend two weeks in 2008 telling a Spanish judge what they had experienced and seen during the atrocities in Guatemala. This victim participation and truth-telling as part of formal court proceedings was considered to have some salutary and remedial effect for those affected by the genocide.

Impact of the Spanish Proceedings in Putting Pressure on Guatemala to Open Prosecutions

The Spanish proceedings also put civil, political, and international pressure on the Guatemalan government and prosecutors to take action domestically. The international and public pressure on the Guatemalan government increased significantly as a result of the Spanish proceedings, in particular because of the Spanish judge's ruling in January 2008. Following this, the Guatemalan President ordered the military to open its archives, and, in April 2008, a Guatemalan trial judge decided to cooperate with Judge Pedraz's investigation. Further steps forward were also made with the election of Claudia Paz y Paz as Attorney General in 2010.

Guatemala Created a Precedent for Including Gender Violence in Genocide Charges

In 2010/2011, CJA successfully applied to amend the complaint before the Guatemalan courts to include claims of gender violence, specifically that the Guatemalan army used rape and other sexual violence as part of a wider strategy to wipe out the Mayan people. This marked the first time that gender violence has formed part of a criminal genocide claim in a national human rights prosecution.

First Time a Former Head of State Prosecuted for Genocide in a National Court in Latin America

The national prosecutions that followed in Guatemala from 2013 marked the first time that a Head of State in Latin America was prosecuted for genocide in a national court.

STRATEGIC FEATURES OF THE CASES

Bringing Proceedings in Spain to Encourage Prosecutions in Guatemala

The plaintiffs opted to pursue redress in the Spanish courts in the face of the impediments to obtaining justice in Guatemala. These proceedings secured a landmark judgment from the Spanish Constitutional Court that the law of universal jurisdiction gave Spanish courts' jurisdiction over crimes of international importance. The Spanish proceedings enabled witness testimony and evidence to be gathered, including from survivors and other victims, which would subsequently be used in the national proceedings in Guatemala.

Key Role of the CJA

The CJA, a US-based NGO with particular experience in litigating transnational cases, was invited to join the project in 2004 and has since played a leading role in proceedings both in Spain and in Guatemala. In particular, the CJA coordinated the factual and expert evidence in the Spanish proceedings, including organising and sponsoring witnesses to testify in Spain, and the introduction of a military document which contained detailed plans from 1982 that implicated the army and commanders in the atrocities. The CJA was also instrumental in the case being widened in 2011 to include claims of gender violence. In 2011, Claudia Paz y Paz invited the CJA to use its experience to assist the development of the national prosecutions in Guatemala, including by sharing the factual and expert evidence from the Spanish case.

Active Role of Other Civil Society Organisations

Various civil human rights organisations in Guatemala have played a key role, in particular in the domestic proceedings, including CALDH and the Association for Justice and Reconciliation, an association of survivors from over twenty villages. These organisations were instrumental in bringing the initial domestic complaints and in assisting with the collation of witness evidence.

The Legal Representatives for the Claimants were prosecutors for the Guatemalan government assisted by CJA.

ADDITIONAL RESOURCES

- Jo-Marie Burt and Paulo Estrada, 'Court finds Guatemalan army committed genocide, but acquits military intelligence chief' (International Justice Monitor, 28 September 2018).
- Naomi Roht-Arriaza, 'Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition' Working Paper No. 2 (Center for Global Studies, Spring 2009).
- 'Justice in Guatemala' (The Center for Justice and Accountability).
- Naomi Roht-Arriaza, 'Guatemala Genocide Case: Judgment no. STC 237/2005' (2006) 100(1) The American Journal of International Law 207.
- Naomi Roht-Arriaza, 'Central America, the Inter-American System, and Accountability for International Crimes' (UC Hastings Research Paper, 2012, Vol. 6).
- Aisling Walsh, 'The indigenous people genocide case in Guatemala: Justice delayed, justice denied?' (Open Democracy, 11 October 2018).

ASHKER AND OTHERS V. GOVERNOR OF THE STATE OF CALIFORNIA AND OTHERS (2014)

Link to the judgment

United States District Court for the Northern District of California (Oakland Division)

SOLITARY CONFINEMENT • MASS INCARCERATION • SETTLEMENT • PRISONER ACTIVISM • PENAL REFORM

CASE SUMMARY

A federal class action lawsuit, filed in 2012, reached a landmark settlement in 2015 and put an end to indeterminate and cruel solitary confinement in California's prisons. Under the previous regime, thousands of prisoners were placed in Security Housing Units ('SHU') on the mere basis of their 'gang affiliation.' This settlement led to far-reaching reforms ending the status-based system for placing people in isolation, and created an innovative step-down programme designed to return those sent to the SHU to the general population in two years or less. This case is the result not merely of litigation, but of strong partnerships between the victim's representatives and lawyers, unity among the victims, the constant involvement of the victims and their families, and widespread public support.

THE FACTS AND PROCEDURAL HISTORY

On 9 December 2009, individual pro se (litigant without legal representation) civil-rights claims were filed by two complainant prisoners in the Northern District of California challenging the conditions of their confinement. On 31 May 2012, lawyers on their behalf filed an amended complaint, alleging that the conditions and policies at the Pelican Bay SHU violated the prohibition on cruel and unusual punishment and denied the prisoners' due process. In September 2012, the complainants were joined in the application by eight others, converting the claim into a putative class action. On 1 September 2015, the complainants and the State of California reach a settlement agreement that ended indeterminate solitary confinement in prisons throughout California. As of 2 February 2022, the Court found continued systemic constitutional violations in California Prisons as it related to the due process rights of imprisoned men despite the settlement agreement.

The complainants alleged that the policies and practices of the California Department of Corrections and Rehabilitation ('CDCR') for placing, housing, managing, and retaining inmates validated as prison gang members and associates, as well as the conditions of confinement at the Pelican Bay SHU, violated the Due Process Clause and the prohibition of cruel and unusual punishment established by the Fourteenth and the Eighth Amendments of the US Constitution.

THE SETTLEMENT AND ITS SIGNIFICANCE

The settlement reached as a result of the lawsuit had a material impact on California's correction system, ordering key reforms that transformed the use of solitary confinement in all State prisons from a system of indeterminate terms to one that focuses on determinate terms for behaviour-based violations. Under the previous regime, prisoners considered to be gang affiliates would face indefinite SHU confinement with a review for possible release to the general population only once every six years, and a single piece of evidence of alleged continued gang affiliation would lead to another six years of solitary confinement. SHU prisoners had to spend almost 24 hours every day in cramped, concrete, windowless cells, with no phone calls, contact visits, or vocational, recreational, or educational programming. Under the revised policy, only those inmates who have been found guilty, after a hearing, of committing a SHU-eligible offence and with a proven nexus to gang activities, would be transferred to a four-step program of 24 months duration.

In addition, the new step-programme incorporated rehabilitative programming and provided incremental increases in privileges and freedom of movement commensurate with placement in the programme.

The settlement required speedy review of all prisoners held in a California SHU under prior regulations. It was estimated that the overwhelming majority of prisoners did not have a recent SHU-eligible offence, and they could be released into the general population. As a further consequence, the CDCR's 2016-17 budget included a reduction of $28 million USD to account for these housing conversions.

WIDER IMPACT OF THE CASE

Strong Collaborative Efforts

The cooperation between civil society and the lawyers in leading the case has been considered a source of inspiration for other similar situations. Since the settlement was signed, the case has been referred to by the media to call for further action in other States in the United States with abusive prison policies.

STRATEGIC FEATURES OF THE CASE

Complainants Applied for Qualification of the Case as a Class Action

After two statewide hunger strikes and the respondent's attempt to have the case dismissed after inadequate improvements to prison conditions, in May 2013, the complainants filed a motion for certification as a class action. This was approved by the Court in June 2014, identifying one class of prisoners subjected to prolonged solitary confinement at the Pelican Bay SHU and another class of prisoners in the SHU challenging lack of due process based on their classification only due to an alleged affiliation to a gang. By certifying the case as class

action, the litigation strategy took a significant turn in that the complainants achieved a much greater impact as they were able to publicise the inhuman treatment endured by a whole class of prisoners, proving that the conditions of hundreds of prisoners at the Pelican Bay SHU violated the US Constitution.

Use of Expert Witnesses

Lawyers relied on expert reports to reveal the serious and irreversible effects of solitary confinement. Experts from the fields of psychology, neuroscience, medicine, prison classification, prison security, international law, and international corrections exposed a 'post-SHU syndrome', a condition known to cause psychological harm and loss of social sense and demonstrating that inmates placed in isolation were at risk of heightened levels of hypertension and other serious health consequences.

Activism by Prisoners with Civil Society Support

Prisoners were centrally involved in this case and their concerns were at the fore. Prisoners themselves began the activism through two hunger strikes which led to the opening of negotiations with the CDCR. These hunger strikes involved over 12,000 prisoners across California and were widely publicised in the media. Civil society organisations such as the California Families to Abolish Solitary Confinement organised protests and conferences to expose the conditions the prisoners were being subjected to. The UN Special Rapporteur on Torture also took part in several public events.

Survivor-Centred Approach

Prisoners then took an active role in the litigation and their representatives regularly discussed the terms of the settlement with the lawyers. They were also involved in the monitoring process for the settlement, which involved prisoner representatives having periodic meetings with the CDCR to review the progress of its implementation, to discuss the improvements to the 'step-down' programme, and to monitor prison conditions.

The Legal Representatives for the Plaintiffs were the Center for Constitutional Rights, California Prison Focus, Christensen O'Connor Johnson Kindness PLLC, Law Firm of Charles Carbone, Gregory Hull, Legal Services for Prisoners with Children, Siegel, Yee, Brunner & Mehta, and Weil, Gotshal & Manges LLP.

ADDITIONAL RESOURCES

- For further information, including press releases and experts' reports, see 'Ashker v. Governor of California' (Center for Constitutional Rights).
- Court finds continued systemic constitutional violations in California prisons (Center for Constitutional Rights, 3 February 2022).
- Summary of *Ashker v. Governor of California* – Settlement Terms (Center for Constitutional Rights).
- Information Re: Ashker v. California Settlement (Prison Law Office, 10 September 2015).
- A two-day conference was organised at the University of Pittsburgh School of Law by Professor Jules Lobel, lead attorney of the case. See The Impact of Prolonged Solitary Confinement (The University of Pittsburgh, 13 April 2016).
- Cyrus Ahalt et al., 'Reducing the Use and Impact of Solitary Confinement in Corrections' (2017) 13(1) International Journal of Prisoners Health 41.

MOHAMED ABDERRAHIM EL SHARKAWI V. ARAB REPUBLIC OF EGYPT (2020)

Link to the judgment

African Commission on Human and Peoples' Rights

TORTURE • ARBITRARY DETENTION • ACHPR • EMERGENCY LAWS • EFFECTIVE COLLABORATION

CASE SUMMARY

The complainants filed the communication before the ACHPR on behalf of Mohammed Abderrahim El Sharkawi. El Sharkawi, a Pakistani national of Egyptian origin, was detained by Egyptian authorities without charge or trial from 1995 to 2011 under the country's Emergency Law. Throughout his detention, El Sharkawi was subjected to torture by the Egyptian authorities including electric shocks, suspending him from the ceiling, and denying him adequate medical care. The complainants alleged a number of violations under the African (Banjul) Charter of Human and Peoples' Rights ('African Charter'), including torture, failure to prevent and investigate torture, and lack of access to an independent court. The Commission recognised all of the alleged violations in its 2021 ruling, and additionally ruled that neither Egypt's Emergency Law nor its definition of torture in the Penal Code was in compliance with the African Charter. The Commission requested that Egypt reform these laws, compensate El Sharkawi, issue an apology, and introduce safeguards to prevent recurrence. The decision demonstrates effective collaboration efforts between both domestic and international lawyers and NGOs.

THE FACTS AND PROCEDURAL HISTORY

On 29 July 1994, Pakistani officials arrested and detained El Sharkawi for approximately ten months before transferring him to Egypt on 26 May 1995. On 13 November 1996, the Public Prosecutor ordered El Sharkawi's release, but the order was ignored, and the Ministry of Interior placed him in administrative detention under the 1958 Emergency Law. The Emergency Law allows for the arrest and administrative detention of any individual who is deemed to be "dangerous to public security," and gives government officials the discretion to decide which individuals are arrested and held.

Egyptian officials continued to hold El Sharkawi without charge or trial until 2011. While in detention, El Sharkawi submitted numerous applications for his release before the Emergency State Security Courts, and obtained at least 15 orders for his release, all of which were ignored by the Ministry of Interior. El Sharkawi's case was reported as arbitrary detention by the UN Working Group on Arbitrary Detention in 2007 in contravention of Article 9 ICCPR.

Egyptian officials tortured and mistreated El Sharkawi in various ways, including beatings, electric shocks, and tying him to the ceiling from his wrists and ankles, throughout the entire period of his detention. El Sharkawi was also denied proper medical treatment, leaving him with lasting health problems that he did not suffer from before he was detained. El Sharkawi complained multiple times about his physical abuse, denial of medical assistance, and other concerns, but his complaints were never investigated. Rather, the complaints resulted in physical abuse and punishment, and when El Sharkawi attempted to follow up on the status of the complaints, officials told him they no longer had access to them. In July 2008, Egyptian prison authorities found a number of complaints in his cell, which he had written with the intention of sending the Prosecutor. As a punishment, he was transferred to a prison over 700 km from his family's home in Cairo and subjected to further torture.

In November 2010, the Open Society Justice Initiative ('OSJI') filed a letter of introduction with the African Commission. El Sharkawi was released on 17 March 2011, weeks after the Egyptian revolution and subsequent resignation of former president Hosni Mubarak. On 26 July 2014, El Sharkawi and OSJI filed submissions on the merits with the African Commission. They requested acknowledgement and publication of the violations and an apology; compensation and rehabilitation; investigation of those responsible; and legislative reforms to prevent future violations.

Finally, on 23 April 2021, the African Commission issued a decision stating that Egypt had violated El Sharkawi's rights under the African Charter.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its decision on the Merits and Reparations issued on 23 April 2021, the African Commission found that the following violations of the African Charter had occurred:

a) Article 5 (the prohibition of torture) in respect of Egypt's treatment of El Sharkawi which included being beaten, hung from the ceiling, electrocuted, and being held incommunicado, and therefore constituted torture;
b) Articles 1 and 5 (obligation to adopt legislative or other measures to give effect to the African Charter and the prohibition of torture) in respect of the Egyptian government's failure to provide adequate safeguards against torture, including by denying El Sharkawi adequate access to a lawyer and to medical assistance;
c) Articles 1 and 5 as it related to the Egyptian goverment's failure to conduct any meaningful investigation into the torture suffered by El Sharkawi;
d) Articles 7(1)(a) (the right of every individual to have their cause heard) and 26 (duty to guarantee the independence of the courts) in respect of the government's failure to comply with court orders to release El Sharkawi;
e) Article 7(1)(d) (the right to be tried within a reasonable time) in respect of the detention of El Sharkawi for 15 years without bringing him to trial, Article 7(1)(b) (the right to be presumed innocent), and Article 7(1)(c) (access to counsel) as, during that period, El Sharkawi had been denied adequate access to his lawyer to prepare his defence;

f) Article 6 (the right to liberty and security) in respect of the laws under which El Sharkawi was detained which were held to be arbitrary, despite repeated court rulings ordering his release; and
g) Article 1 in conjunction with each of the above articles as the government had failed to take any steps to give effect to El Sharkawi's rights, and to provide redress for the violations that he had suffered.

Reparations Ordered

The Commission requested that Egypt compensate El Sharkawi with 1 million EGP (the equivalent of $140,000 USD at the time of filing), issue an apology, investigate and prosecute the offending officers, and introduce all necessary measures to put in place protective safeguards to avoid the recurrence of similar violations. It also requested that Egypt reform the Emergency Law, and Articles 1256 and 129 of the Egyptian Penal Code, to bring them into conformity with the African Charter. Egypt was given 180 days in which to inform the Commission of the measures taken to implement its decision. Unfortunately, the Egyptian government neither implemented the Commission's decision nor issued a report to the Commission.

Recognised a Pattern of Violations

The ACHPR observed that the Egyptian State had ample notice of the allegations of torture based on the numerous human rights reports, decisions and communications from international and regional bodies. In particular, the Commission found that these reports and communications revealed a pattern of allegations that should have prompted the Egyptian government's attention for action.

The Commission decided that Egypt must take measures to prevent and prosecute allegations of torture and instructed the government to initiate a commission of inquiry and to report back to the Commission on its implementation. These measures include training prison and police officers and changing official and unofficial practices of accepting torture and arbitrary detention.

WIDER IMPACT OF THE CASE

Willingness by the ACHPR to Condemn Emergency Laws

Despite the fact that Egypt has failed to implement the decision, the case has significant potential impact. First, in this decision the African Commission acknowledges that the current regime of President Abdel Fattah Al-Sisi is perpetrating one of the worst human rights crises Egypt has ever experienced. Though the violations against El Sharkawi occurred decades ago, the case encapsulates the arbitrary detention, torture, and mistreatment of detainees that have become the norm in Egypt. By releasing its decision in 2021, even though El Sharkawi was no longer in prison, and even though the Egyptian government had actively engaged with the Commission in recent years, the ACHPR issued a rebuke regarding the impunity that was occurring at a time when few other human rights actors were willing to speak against it.

- Egypt's Emergency Law has been used by the executive for decades to justify the unlawful detention and torture of human rights defenders, journalists, academics, lawyers, and anyone, like El Sharkawi, who the government can claim is a national security risk. The ACHPR held that Egypt's Emergency Law contravenes the African Charter by pointing out that the Emergency Law had been in place for decades, thus contraven-

ing the very definition of an 'emergency'. Although El-Sisi's government has declined to implement the El Sharkawi ruling, the determination by the Commission that the Emergency Law does not comply with the ACHPR allows all future complainants to use arrest or detention based on the Emergency Law as the basis for a complaint.

STRATEGIC FEATURES OF THE CASE

Partnership between Egyptian and International NGOs and Lawyers

The case was brought to the ACHPR through an effective collaboration between Egyptian and international NGOs and lawyers to develop the complaint for submission to the ACHPR.

Using the Limited Avenues Available

The applicant's decision to submit a communication to the ACHPR resulted from the lack of other available remedies either at national or regional level. First, it was necessary to look to an external forum given the difficulties for survivors to access justice on a national level given absence of an independent judiciary in Egypt and the lack of other domestic avenues to combat impunity for torture in the country. However, external avenues for accountability are also limited. Egypt has declined to ratify the Optional Protocol to the UNCAT which would ensure an effective monitoring and complaints mechanisms and has demonstrated unwillingness to extend a standing invitation for country visits to the Special Procedures of the UN Human Rights Council, including the Special Rapporteur on Torture. While Egypt has ratified the Protocol to the African Charter on the Establishment of an ACtHPR, it has not made declarations under Article 34(6) meaning that individuals and NGOs cannot bring cases against the State before the Court itself and are consequently limited to utilising the communications procedure before the Commission. The legal effect of the ACHPR's decisions to hold States accountable and order them to take specific actions where violations of the Charter are identified are less clearly established than those of the Court. The ACHPR, however, remains the primary and most available avenue for pursuing remedies to hold Egypt responsible for human rights violations, and REDRESS and others argue that Egypt is legally obliged to implement its decisions

Success of Arguments to Shed Light on the Systematic Nature of Torture in Egypt

The ACHPR positively engaged with the arguments submitted by the Complainants in the case to conclude that the narrow definition of Article 126 of the Egyptian Penal Code falls foul of the definition of torture under Article 1 UNCAT, which Egypt has ratified, thereby recognising the individual and systematic issue of torture in Egypt and how the disparities between definitions created actual or potential loopholes for impunity. In its decision, the ACHPR highlighted how the Egyptian authorities violate basic rights and safeguards for people in detention through emergency and anti-terrorism frameworks and practices. In addition, the ACHPR found that reports and communications on torture and other human rights violations revealed a pattern of allegations that should have prompted the Egyptian government's attention for action.

Developing Strategies for Implementation

In the absence of implementation by the Egyptian government of the ACHPR decision, organisations such as REDRESS have used the decision to expose the State's inertia as regards torture, as well as the inherent difficulties associated with a lack of national implementation framework, through advocacy publications and lobbying initiatives aimed at shedding light on the failure by Egyptian authorities to promote accountability for the systematic and widespread commission of torture and other violations. For instance, REDRESS issued a report on 'Torture in Egypt: A Crime Against Humanity' and submitted written evidence to UK parliamentary committees.

The Legal Representatives for the Complainant were the Egyptian Initiative for Personal Rights and OSJI.

ADDITIONAL RESOURCES

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CANADA AND THE NETHERLANDS V. SYRIAN ARAB REPUBLIC (2023)

Link to the judgment

International Court of Justice

UNCAT • ICJ • PROVISIONAL MEASURES • JUS COGENS • INNOVATIVE LITIGATION • SCOPE OF OBLIGATIONS

CASE SUMMARY

The Netherlands and Canada filed a complaint before the ICJ alleging that Syria had violated its human rights obligations under the UNCAT. Syria is alleged to have carried out a widespread and systematic campaign of false imprisonment and torture against political dissidents and opposition fighters who began protesting President Bashar Al Assad during the Arab Spring in 2011. The Netherlands and Canada requested that the ICJ issue provisional measures to order Syria to end the use of torture and take steps to prevent future torture, alleging that thousands of people were at the imminent risk of torture. The ICJ granted this request in November 2023, and then moved to consider the case on the merits. The proceedings are ongoing at the time of publication of this casebook.

THE FACTS AND PROCEDURAL HISTORY

In 2011, thousands of Syrians began protesting against President Bashar Al Assad's decade-long and corrupt rule. Like other leaders contending with Arab Spring protests, Al Assad attempted to quell the dissidents with violence, but the crackdown soon escalated into a protracted armed conflict that claimed the lives of over 300,000 civilians. President Al Assad additionally imprisoned hundreds of thousands of protestors, human rights defenders, lawyers, academics, opposition fighters, and anyone he perceived to be acting contrary to his regime. Detained persons were subject to torture, poor prison conditions, and sexual violence. This pattern continued for the next decade, and the Office of the High Commissioner for Human Rights ('OHCHR') estimates that 100,000 people imprisoned between 2011 and 2021 remain in custody.

In September 2020, the Netherlands invoked Syria's responsibility for human rights violations under the UNCAT. Canada joined the Netherlands in March 2021. Specifically, Canada and the Netherlands assert widespread and systematic violations of torture and ill treatment, as well as failure to fulfil prevention, investigation, and other procedural obligations under the UNCAT.

Canada, the Netherlands, and Syria are all Parties to the UNCAT, and therefore accepted the jurisdiction of the ICJ under Article 30(1) for any disputes between States Parties concerning the interpretation or application of the UNCAT. For a case to reach the ICJ, there must be:

a) *A dispute in relation to the "interpretation" and "application" of UNCAT*: Canada and the Netherlands argued that a dispute existed because they alleged a violation of the UNCAT, and Syria denied it.
b) *If a dispute could not be settled through negotiations, that it must be submitted to arbitration. If after six months the parties cannot agree on an outcome, the dispute can be brought before the ICJ*: throughout the mandatory arbitration phase, the three countries failed to reach a negotiated settlement, with Syria refusing to participate in proposed arbitration proceedings within six months.

In June 2023, Canada and the Netherlands filed a joint application to begin proceedings at the ICJ against Syria for alleged violations the UNCAT for committing acts of torture, failing to take effective measures to prevent torture, failing to investigate and prosecute cases involving torture, and failing to provide redress to victims of torture. The application details torture and ill treatment as it relates to treatment of detainees; conditions of detention; the use of torture to interrogate, punish, intimidate, and coerce persons perceived to be political opponents; sexual and gender-based violence; children; and enforced disappearances.

The Request for Provisional Measures

In their June application, Canada and the Netherlands also requested provisional measures, asking for the Court to rule on urgent issues relevant to the case before ruling on evidence and testimony on the merits, a process which will take years. The request focused on halting existing practices of torture, taking steps to prevent future torture, releasing those who are arbitrarily detained, and preserving evidence relevant to the broader case.

Canada and the Netherlands relied heavily on information gathered by the Independent International Commission of Inquiry on the Syrian Arab Republic ('IICI'), established by the UN Human Rights Council in 2011. The IICI reports document "systemic gross violations and abuses of human rights and fundamental freedoms" in Syria including "torture, systematic and sexual and gender-based violence, including rape in detention, and ill treatment." Syria declined to participate in oral hearings before the ICJ but did submit written documentation denying allegations of torture.

THE DECISION AND ITS SIGNIFICANCE

Violations

In its order dated 16 November 2023, the ICJ granted the request by Canada and the Netherlands for provisional measures, ordering that Syria must:

a) Take all measures within its power to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment and ensure that its officials, as well as any organisations or persons which may be subject to its control, direction or influence, do not commit any acts of torture or other acts of cruel, inhuman or degrading treatment or punishment; and
b) Take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of the UNCAT, including medical and forensic reports or other records of injuries and deaths.

The Court will proceed with the case against Syria on the merits. Though this ruling on provisional measures will not prejudice the Court's ruling on the merits, it does give some indications as to how the Court considers the issue of torture in Syria.

WIDER IMPACT OF THE CASE

Consideration of the Merits Ongoing

At the time of publication of this casebook, only a few months have passed since the ICJ granted the request for provisional measures and ordered Syria to take steps to prevent, investigate, and prosecute torture, and the impact of this decision remains to be seen. Unfortunately, in February 2024 the Syrian Network for Human Rights released a report documenting continued torture within Syrian prisons.

STRATEGIC FEATURES OF THE CASE

Innovative Litigation and Scope of Obligations

The use of the UNCAT as a steppingstone to the ICJ is an innovative avenue to complement accountability efforts in a legal arena with few viable avenues at the international level in the absence of available domestic remedies: Syria is not a State Party to the Rome Statute, and there are no regional courts to bring complaints. The dispute covers a wide range of obligations under the UNCAT, including prevention of torture and addressing past instances of torture, and therefore goes beyond holding Syria accountable for past actions to also look to the future. Most other accountability efforts regarding Syria, including several universal jurisdiction proceedings against top officials for crimes against humanity and war crimes, and a failed attempt to have the ICC exercise jurisdiction over Syria, focus on individual criminal accountability. However, Canada and the Netherlands are seeking accountability through state responsibility, potentially paving the way for other States to utilize this method in the future. As States begin to restore relationships with Syria, this ICJ ruling continues to put pressure on the country to uphold its human rights obligations under the UNCAT.

Decision to Seek Provisional Measures to Address Immediate Concerns

Parties to a case before the ICJ can request provisional measures at any point during the proceedings. These are designed to compel parties to abstain from taking steps that are prejudicial to resolving the dispute. Provisional measures take priority over the other elements of the case, and the measures are binding. Syria and the Netherlands requested provisional measures immediately, citing concerns about "persons in Syria who are

currently, or are at imminent risk of, being subjected to torture." International justice mechanisms move slowly, but Canada and the Netherlands took advantage of one of the few avenues for a swift decision that addresses immediate human rights concerns.

Asking for a Ruling on the Legal Consequences of Breaches of Peremptory Norms

In their main application, Canada and the Netherlands allege similar violations as in their request for provisional measures, but also ask the Court:

> to adjudge and declare that Syria has committed a serious breach of a peremptory norm of international law, due to its gross or systematic failure to fulfil its obligation under Article 2 UNCAT not to commit torture as well as to prevent its officials and other persons acting in an official capacity from perpetrating acts of torture and determine the legal consequences thereof.

In other words, they have asked the ICJ to determine the legal consequences for a State violating a *jus cogens* norm. Articles 40 and 41 of the International Law Commission's Articles on State Responsibility prescribe an "international responsibility" for States to: a) bring an end to peremptory breaches of international law; b) not to recognise the peremptory breach as lawful; and c) not to render aid or assistance in maintaining the situation of a serious breach.

This marks the first time that a State has so explicitly asked the ICJ to rule on legal consequences for peremptory norms. This has the potential not only to hold Syria to account, but to set an international precedent for violations of *jus cogens* norms, not only for the perpetrating State, but for cooperating States.

The Legal Representatives for the Applicants were René J. M. Lefeber, Annemarieke Künzli, Teresa Crockett, and Alan H. Kessel.

ADDITIONAL RESOURCES

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María del Carmen Almeida de Quinteros et al. v. Uruguay (1982): © Reuters. The UN Human Rights Committee established that Elena Quinteros's mother Maria was a secondary victim of torture due to the psychological damage caused by Elena's enforced disappearance.

Velásquez-Rodríguez v. Honduras (1988): © Cofadeh Archive. After Manfredo Velásquez was kidnapped and forcibly disappeared by Battalion 316 in 1981, his sister filed a petition with the IACtHR.

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Aydin v. Turkey (1997): © Izzettin ekinci via Wikimedia Commons. Derik, Turkey, where the district gendarmerie headquarters were based, 10 miles from the victim's village.

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Timurtaş v. Turkey (2000): © Reuters. Abdulvahap Timurtaş was allegedly apprehended by soldiers in 1993 in south-eastern Turkey during the state of emergency and the armed conflict between the State and the Kurdish guerrilla movement.

Maritza Urrutia v. Guatemala (2003): © Shutterstock. In the Maritza Urrutia v Guatemala case, the IACtHR found that Guatemala had unlawfully deprived Maritza Urrutia García of her liberty and that the conditions of her detention amounted to cruel and inhumane treatment.

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Kafantayeni v. Attorney General (2007): © Associated Press/Alamy. Following the judgment in Kafantayeni, there has been a notable decline in the number of death sentences imposed in Malawi.

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Anvil mining ltd. v. Association Canadienne Contre L'Impunite (2012): © Fairphone at flickr.com. In October 2004, mining company Anvil Mining Ltd was allegedly involved in the killing of 70 people in Kilwa, a town in the Democratic Republic of Congo.

Guatemalan genocide cases (2013): © Elena Hermosa/Trocair via Wikimedia Commons. With the application of universal jurisdiction by the Spanish Constitutional Court to cases relating to the Guatemalan genocide, indigenous people of Guatemala had a platform to speak of the human rights abuses suffered in the early 1980s.

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Mohamed Abderrahim el Sharkawi v. Arab Republic of Egypt (2020): © Nasser Nuri/Reuters. Egypt's Emergency Law allows for the arrest and administrative detention of any individual who is deemed to be "dangerous to public security".

Canada and the Netherlands v. Syrian Arab Republic (2023): © Khaled Al Hariri/Reuters. Syrian detainees arrested over participation in protests against President Assad's regime wait to sign their release papers at a police building in Damascus.

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